COTA WA
The Perron Centre
Suite 2, 61 Kitchener Ave
Victoria Park WA 6100
ABN 79 970 893 100

PO Box 923
Victoria Park WA 6979
www.cotawa.org.au

P: (08) 9472 0104
F: (08) 6161 8902
E: admin@cotawa.org.au

15 November 2017

Hon. Nicolas (Nick) Pierre Goiran MLC
Shadow Minister for Child Protection;
Prevention of Family and Domestic Violence
Select Committee into Elder Abuse
Parliament House, 4 Harvest Terrace
WEST PERTH WA 6005

Dear Mr Goiran

INQUIRY INTO ELDER ABUSE
By
SELECT COMMITTEE

INTRODUCTION

The Council on the Ageing Western Australia (COTA (WA)) welcomes the opportunity to contribute to the Select Committee's inquiry into elder abuse. All Western Australians have the fundamental right to live dignified lives free from harm.

While age in itself is not an indicator of vulnerability, for some Western Australians ageing can be a time of exploitation, violence and abuse. In our view, State, Local and Commonwealth Governments as well as individuals and the private sector have a shared responsibility to ensure systems and safeguards are established which minimise potential risks and eliminate harm to older people.

Central to this is our belief that elder abuse is fundamentally a human rights issue and therefore we must all work at ensuring that older people remain valued and visible within our community and socially connected to people of all generations. COTA recognises that pervasive ageism is a causal factor in elder abuse and that, combined with the dynamics of power and abuse, can thrive when people become socially isolated and totally dependent on the care provided by a small number people.

For many older people who are experiencing bullying or abusive behaviour, there is an enormous sense of shame about finding themselves in this situation especially when it is a family member responsible for the harm. Being engaged and connected with a broad cross section of the community creates an opportunity for older people to talk freely with trusted people about the joys in their life as well as the issues concerning them. Being engaged and connected also provides an opportunity for people regularly interacting with older people to notice any changes in outlook, confidence and behaviour which can sometimes be an indicator that an older person is experiencing stresses in their lives.

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CURRENT REPORTS AND INITIATIVES

COTA WA fully supports:

- the findings of the ALRC report *Elder Abuse - a National Legal Response* (ALRC Report 131, May 2017) as providing the basis for the legislative requirements of a national elder abuse strategy.
- COTA Australia's submission to the ALRC: *Response to Protecting the Rights of Older Australians from Abuse Inquiry, (*Elder Abuse Discussion Paper 83, COTA Australia March 2017).
- Senator The Hon George Brandis's media announcement on the International Day of Older Persons (*Supporting Older Australians:* 1 October 2017) in which he pledges a range of initiatives to better protect the rights of older Australians.

Some additional issues need to be addressed by the Select Committee, however, in order to safeguard older people against both the threat and the reality of elder abuse. Consequently we support the development of a comprehensive, national, evidence-based framework to include elder abuse prevention, detection and response.

ESTABLISHING THE PARAMETERS OF ELDER ABUSE

Through consultation with key stakeholders, it is essential to develop an encompassing definition of elder abuse to expand the WHO definition which focuses on the abuse that occurs within the relationship of trust. As the population ages it is becoming increasingly apparent that many older people are vulnerable in relation to issues such as being locked out of the housing market, suffering from mental health and substance abuse problems and being prone to financial or other scams. These and other prevailing forces are creating ideal conditions for an escalation in varied iterations of elder abuse.

Additionally, clarification of how elder abuse is conceptualised is essential. For example, is it a sub-set of family violence or does it call for a separate policy and service response?

COLLABORATION BETWEEN STATE AND NATIONAL JURISDICTIONS

It is generally recognised that fragmentation exists between key stakeholders responsible for dealing with elder abuse. Any initiatives involving elder abuse must clearly delineate areas of responsibility not only to avoid duplication but also to ensure that safeguards, processes and procedures are clearly identifiable and clearly aligned to the relevant jurisdiction: state government, local government, private organisation, not for profit sector or commonwealth government.

One way to deal with this complex issue may be to urge COAG to harmonise inconsistent rules and regulations across states and territories through the establishment of a national policy framework. Such a framework would lead to a number of wide-ranging reforms and much-needed clarification of roles and responsibilities.

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DATA COLLECTION AND ONGOING RESEARCH

Although much anecdotal evidence exists about elder abuse, there is little systematised data collection and consequently no base-line data exists on issues such as the nature, prevalence and perpetrators of elder abuse. This has ensured that we know very little about the nature of successful interventions and how best to educate the public in general and older people in particular about elder abuse. Addressing this lack of meaningful data is a major initiative in itself and requires close co-operation between all jurisdictions. Only through systematised data collection will the basis be established for meaningful and useful ongoing research in the area and only systematised data collection will enable us to develop and evaluate effective interventions and to target risk factors for abuse including the circumstances that lead to various kinds of elder abuse.

Much more research is also needed into the risks and needs of older LGBTIQ people, indigenous people and those from other diverse cultures.

LEGAL ISSUES

The ALRC paper alluded to above (*Elder Abuse - a National Legal Response* (ALRC Report 131, May 2017) clearly identifies the legal issues associated with elder abuse and consequently COTA WA has no further additions to this comprehensive document. Other organisations, such as the Office of the Australian Information Commissioner, have expressed some considerations about privacy issues with which COTA WA agrees (*Elder Abuse Discussion Paper: submission to the Australian Law Reform Commission, DP 83)*

EDUCATION/GUIDELINES/TRAINING FOR PROFESSIONALS AND THE PUBLIC

An identified gap exists in the knowledge of some people (including professionals) about elder abuse, particularly, but not exclusively in relation to financial planners, doctors, financial institutions (including bank tellers), police, allied health professionals, older people themselves and the public in general. One emerging risk factor is the growth of online financial transactions which seems to be making it easier for older people to be defrauded, especially by those who have access to their accounts. For people participating in the social security system through Centrelink, it would seem that Centrelink staff have an increasing role to play in monitoring and detecting indicators of suspected elder abuse in a service delivery system that is increasingly reliant on online transactions.

CONCLUSION

The Inquiry into Elder Abuse provides an opportunity for WA to take the lead in instigating initiatives to lessen if not eradicate, the incidence of what is largely a hidden scourge. As the population ages, it is essential to develop a rights-based state *and* national strategy to deal with this serious issue. Addressing elder abuse requires a comprehensive and co-ordinated multi-faceted approach involving all key stakeholders, including older people themselves. Consequently it may be appropriate either to await the findings of the Elder Abuse Working Group established by Senator The Hon George Brandis in October 2017 before commencing a WA State initiative or work in tandem with the Working Group to avoid duplication of resources and effort.

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COTA WA fully supports these state and national government initiatives in developing a cohesive strategy to address an increasingly complex and serious issue.

Yours faithfully

Mark Teale
Chief Executive

Australian Government
Australian Law Reform Commission

Elder Abuse—A National Legal Response

FINAL REPORT

ALRC Report 131

May 2017

This Final Report reflects the law as at 1 May 2017.

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).

The office of the ALRC is at Level 40, MLC Centre, 19 Martin Place, Sydney NSW 2000 Australia.

Postal Address:

GPO Box 3708

Sydney NSW 2001

Telephone: within Australia (02) 8238 6333

International: +61 2 8238 6333

Facsimile: within Australia (02) 8238 6363

International: +61 2 8238 6363

Email: info@alrc.gov.au

Website: www.alrc.gov.au

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

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Australian Government

Australian Law Reform Commission

Senator the Hon George Brandis QC

Attorney-General of Australia

Parliament House

Canberra ACT 2600

31 May 2017

Dear Attorney-General

Protecting the Rights of Older Australians from Abuse

On 24 February 2016, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into Protecting the Rights of Older Australians from Abuse. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act* 1996, I am pleased to present you with the Final Report on this reference, *Elder Abuse—A National Legal Response* (ALRC Report 131, 2017).

Yours sincerely,

Emeritus Professor Rosalind Croucher AM

President

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Terms of Reference

Protecting the Rights of Older Australians from Abuse

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

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

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

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

Scope of the reference

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

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

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

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

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

Collaboration and consultation

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

Timeframe

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

Participants

Australian Law Reform Commission

President

Emeritus Professor Rosalind Croucher AM

Part-time Commissioners

The Hon Justice John Middleton, Federal Court of Australia

The Hon Justice Nye Perram, Federal Court of Australia

Executive Director

Sabina Wynn

Principal Legal Officers

Bruce Alston (until end April 2016)

Jared Boorer

Matt Corrigan

Sallie McLean (until 12 December 2016)

Vanessa Viaggio (until 12 December 2016)

Senior Legal Officers

Justine Clarke (until end July 2016)

Dr Julie MacKenzie

Legal Officers

Robyn Gilbert (until end June 2016)

Shreeya Smith

Advisory Committee Members

Emeritus Professor Terry Carney AO, Sydney Law School, University of Sydney

Dr John Chesterman, Director of Strategy, Office of the Public Advocate (Vic)

Ms Sue Field, Adjunct Fellow in Elder Law, School of Law, Western Sydney University

Dr Rae Kaspiew, Senior Research Fellow, Australian Institute of Family Studies

Professor Wendy Lacey, Dean and Head of School, School of Law, University of South Australia

The Hon Dr Kay Patterson AO, Age Discrimination Commissioner, Australian Human Rights Commission

Professor Cameron Stewart, Sydney Law School, University of Sydney

Expert Readers

Associate Professor Fiona Burns, Sydney Law School, University of Sydney

Professor Gino Dal Pont, School of Law, University of Tasmania

Helen Davis, Chairperson, Superannuation Complaints Tribunal

Brian Herd, (TEP), Partner, CRH Law, Brisbane

Ragini Rajadurai, Deputy Chairperson, Superannuation Complaints Tribunal

Malcolm Schyvens, Deputy President, Division Head, Guardianship Division, NSW Civil and Administrative Tribunal

Professor Prue Vines, Faculty of Law, University of New South Wales

Legal Interns (one semester)

Christina Alkhamisi

Georgia Allen

Farah Al Majed

Courtney Lor

Taylah Mihell

Sharfah Mohamed

Angus Nicholas

Muirgen O'Seighin

Cassidy O'Sullivan

Tierneigh Parnell

Nishadee Perera

Scott Preswick

Michael Quach

Erin Ryan

Will de Waal

Recommendations

3. A National Plan to Combat Elder Abuse

Recommendation 3–1 The Australian Government, in cooperation with state and territory governments, should develop a National Plan to combat elder abuse. The Plan should:

(a) establish a national policy framework;

(b) outline strategies and actions by government and the community;

(c) set priorities for the implementation of agreed actions; and

(d) provide for further research and evaluation.

Recommendation 3–2 The National Plan to combat elder abuse should be led by a steering committee under the imprimatur of the Law, Crime and Community Safety Council of the Council of Australian Governments.

Recommendation 3–3 The National Plan to combat elder abuse should identify goals, including:

(a) promoting the autonomy and agency of older people;

(b) addressing ageism and promoting community understanding of elder abuse;

(c) achieving national consistency;

(d) safeguarding at-risk adults and improving responses; and

(e) building the evidence base.

Recommendation 3–4 The National Plan should take into account the different experiences and needs of older persons with respect to:

(a) gender;

(b) sexual orientation;

(c) disability; and

(d) cultural and linguistic diversity.

The Plan should also take into account the experiences and needs of:

(a) older Aboriginal and Torres Strait Islander people; and

(b) older people living in rural and remote communities.

Recommendation 3–5 There should be a national prevalence study of elder abuse to build the evidence base to inform policy responses.

4. Aged Care

Recommendation 4–1 Aged care legislation should provide for a new serious incident response scheme for aged care. The scheme should require approved providers to notify to an independent oversight body:

(a) an allegation or a suspicion on reasonable grounds of a serious incident; and

(b) the outcome of an investigation into a serious incident, including findings and action taken.

This scheme should replace the current responsibilities in relation to reportable assaults in s 63-1AA of the *Aged Care Act 1997* (Cth).

Recommendation 4–2 The independent oversight body should monitor and oversee the approved provider's investigation of, and response to, serious incidents, and be empowered to conduct investigations of such incidents.

Recommendation 4–3 In residential care, a 'serious incident' should mean, when committed against a care recipient:

(a) physical, sexual or financial abuse;

(b) seriously inappropriate, improper, inhumane or cruel treatment;

(c) unexplained serious injury;

(d) neglect;

unless committed by another care recipient, in which case it should mean:

(e) sexual abuse;

(f) physical abuse causing serious injury; or

(g) an incident that is part of a pattern of abuse.

Recommendation 4–4 In home care or flexible care, 'serious incident' should mean physical, sexual or financial abuse committed by a staff member against a care recipient.

Recommendation 4–5 An act or omission that, in all the circumstances, causes harm that is trivial or negligible should not be considered a 'serious incident'.

Recommendation 4–6 The serious incident response scheme should:

(a) define 'staff member' consistently with the definition in s 63-1AA(9) of the *Aged Care Act 1997* (Cth);

(b) require the approved provider to take reasonable measures to require staff members to report serious incidents;

(c) require the approved provider to ensure staff members are not victimised;

(d) protect informants' identities;

(e) not exempt serious incidents committed by a care recipient with a pre-diagnosed cognitive impairment against another care recipient; and

(f) authorise disclosure of personal information to police.

Recommendation 4–7 The Department of Health (Cth) should commission an independent evaluation of research on optimal staffing models and levels in aged care. The results of this evaluation should be made public and used to assess the adequacy of staffing in residential aged care against legislative standards.

Recommendation 4–8 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

Recommendation 4–9 There should be a national employment screening process for Commonwealth-regulated aged care. The screening process should determine whether a clearance should be granted to a person to work in aged care, based on an assessment of:

(a) a person's criminal history;

(b) relevant incidents under the recommended serious incident response scheme; and

(c) relevant disciplinary proceedings or complaints.

Recommendation 4–10 Aged care legislation should regulate the use of restrictive practices in residential aged care. Any restrictive practice should be the least restrictive and used only:

(a) as a last resort, after alternative strategies have been considered, to prevent serious physical harm;

(b) to the extent necessary and proportionate to the risk of harm;

(c) with the approval of a person authorised by statute to make this decision;

(d) as prescribed by a person's behaviour support plan; and

(e) when subject to regular review.

Recommendation 4–11 The Australian Government should consider further safeguards in relation to the use of restrictive practices in residential aged care, including:

(a) establishing an independent Senior Practitioner for aged care, to provide expert leadership on and oversight of the use of restrictive practices;

(b) requiring aged care providers to record and report the use of restrictive practices in residential aged care; and

(c) consistently regulating the use of restrictive practices in aged care and the National Disability Insurance Scheme.

Recommendation 4–12 The Australian Government should further consider Recommendation 6–2 of ALRC Report No 124 *Equality, Capacity and Disability in Commonwealth Laws*, that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles set out in that Report.

Recommendation 4–13 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

Recommendation 4–14 The Department of Health (Cth) should develop national guidelines for the community visitors scheme. The guidelines should include policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients.

5. Enduring Appointments

Recommendation 5–1 Safeguards against the misuse of an enduring document in state and territory legislation should:

(a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;

(b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;

(c) enhance witnessing requirements;

(d) restrict conflict transactions;

(e) restrict who may be an attorney;

(f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and

(g) mandate basic requirements for record keeping.

Recommendation 5–2 State and territory civil and administrative tribunals should have:

(a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and

(b) the power to order any remedy available to the Supreme Court.

Recommendation 5–3 A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

(a) agreement on nationally consistent laws governing:

  (i) enduring powers of attorney (including financial, medical and personal);

(ii) enduring guardianship; and

(iii) other personally appointed substitute decision makers; and

(b) the development of a national model enduring document.

6. Family Agreements

Recommendation 6–1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.

Recommendation 6–2 The *Social Security Act 1991* (Cth) should be amended to require that a 'granny flat interest' is expressed in writing for the purposes of calculating entitlement to the Age Pension.

7. Superannuation

Recommendation 7–1 The structure and drafting of the provisions relating to death benefit nominations in ss 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be reviewed. The review should consider:

(a) witnessing requirements for making, amending and revoking nominations;

(b) the authority of a person who holds an enduring power of attorney in relation to the making, alteration and revocation of a nomination;

(c) whether a procedure for the approval of a nomination on behalf of a member should be introduced; and

(d) the extent to which other aspects of wills law may be relevant.

Recommendation 7–2 The *Superannuation Industry (Supervision) Act 1993* (Cth) should be amended to include 'replaceable rules' for self-managed superannuation funds which provide a mechanism for an enduring attorney to become a trustee/director where this was provided for in the enduring document and notwithstanding the terms of the trust deed and constitution of the corporate trustee or the actions of the other trustees/directors.

Recommendation 7–3 The relevant operating standards for self-managed superannuation funds in cl 4.09 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), should be amended to add an additional standard that would require the trustee to consider the suitability of the investment plan where an individual trustee or director of the corporate trustee becomes 'under a legal disability'.

Recommendation 7–4 Section 104A of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the accompanying Australian Taxation Office Trustee Declaration form should be amended to require an individual to notify the Australian Taxation Office when they become a trustee (or director of a company which acts as trustee) of a self-managed superannuation fund as a consequence of being an attorney under an enduring document.

8. Wills

Recommendation 8–1 The Law Council of Australia, together with state and territory law societies, should develop national best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they provide thorough coverage of matters such as:

(a) elder abuse in probate matters;

(b) common risk factors associated with undue influence;

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

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

(e) the importance of ensuring that the person has 'testamentary capacity'—understanding the nature of the document and knowing and approving of its contents, particularly in circumstances where an unrelated person benefits.

9. Banking

Recommendation 9–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse.*

The guideline should set out examples of such reasonable steps, including in relation to:

(a) training staff to detect and appropriately respond to abuse;

(b) using software and other means to identify suspicious transactions;

(c) reporting abuse to the relevant authorities, when appropriate;

(d) guaranteeing mortgages and other loans; and

(e) measures to check that 'Authority to Operate' forms are not obtained fraudulently and that customers understand the risks of these arrangements.

10. Guardianship and Financial Administration

Recommendation 10–1 Newly-appointed private guardians and private financial administrators should be required to sign an undertaking with respect to their responsibilities and obligations.

Recommendation 10–2 The Australian Guardianship and Administration Council should develop best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible.

12. Social Security

Recommendation 12–1 The Department of Human Services (Cth) should develop an elder abuse strategy.

Recommendation 12–2 Payments to nominees should be held separately from the nominee's own funds in a dedicated account nominated and maintained by the nominee.

Recommendation 12–3 Centrelink staff should speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

14. Safeguarding Adults at Risk

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

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

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

(a) have care and support needs;

(b) are being abused or neglected, or are at risk of abuse or neglect; and

(c) are unable to protect themselves from abuse or neglect because of their care and support needs.

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

(a) in serious cases of physical abuse, sexual abuse, or neglect; or

(b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or

(c) if the adult lacks the legal capacity to give consent, in the circumstances.

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

(a) coordinate legal, medical and other services for the adult;

(b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;

(c) report the abuse to the police;

(d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or

(e) decide to take no further action.

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

Recommendation 14–7 Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of their report, be:

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

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

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

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

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

Executive Summary

Contents

Context

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

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

2 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) Foreword.

elder abuse may grow. In this context, this Report and the 43 recommendations it contains are timely.

1.2 Australia's population is ageing, as people live longer and have fewer children. Approximately 15% of the population was aged 65 or over in 2014–15, and this is expected to rise to 23% by 2055. A female child born in 1900 could expect to live to 59, but in 2017 can expect to live to 85. Australians are not only living longer, they are staying healthy for longer.[3]

1.3 That Australians are living longer and healthier lives is great cause for celebration. In her book, *In Praise of Ageing*, Patricia Edgar writes that for many,

> ageing is a liberating experience; we are consoled for any losses by a new sense of freedom and confidence—we don't fear the future and we don't worry so much about the opinions of others. But persistent assumptions about our incapacity undermine our well-being. The main mantra in the media is: 'Now that they are living longer we can't afford them; they are all going to get sick and be a drain on the rest of society.' While this myth is gathering momentum there is another side to the story. … [It] is about active, engaged older people who are enjoying their lives and continuing to contribute.[4]

1.4 While older people should not be considered vulnerable merely because of their age, some factors commonly associated with age can make certain older people more vulnerable to abuse. Disability, for example, is more common among older people. More than 80% of people aged 85 years or over have some disability. While fewer than one in 20 Australians under 55 years have 'severe or profound core activity limitations', almost one-third of people aged 75 years or over have such limitations.[5]

1.5 The prevalence of cognitive impairment also increases with age. From age 65, the prevalence of dementia doubles every 5 or 6 years. 30% of people aged over 85 have dementia, and over 1.1 million Australians are expected to have dementia by 2056. More generally, people aged 85 years and over need significantly more assistance and care than people aged 65–84.

1.6 Vulnerability does not only stem from intrinsic factors such as health, but also from social or structural factors, like isolation and community attitudes such as ageism. All of these factors contribute to elder abuse.

1.7 The Attorney-General of Australia, Senator the Hon George Brandis QC, asked the ALRC to conduct this Inquiry into elder abuse in February 2016. The Inquiry forms part of a range of initiatives at the Commonwealth level towards addressing elder abuse and builds on a number of other 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; the 2016 research report by the Australian Institute

3 See ch 2.
4 Patricia Edgar, *In Praise of Ageing* (Text Publishing, 2013) 8.
5 Australian Institute of Health and Welfare, *Australia's Welfare 2011, Cat No AUS 412* (2011) 11.

of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses*; and the ALRC's 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*.

What is elder abuse?

1.8 Elder abuse, as described by the WHO, is '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'.[6] It can take various forms, such as physical abuse, psychological or emotional abuse, financial abuse, sexual abuse, and neglect.

Types of abuse

1.9 Psychological or emotional abuse appears to be one of the most common types of elder abuse, and includes verbal abuse, name-calling, bullying and harassment. Other examples of psychological abuse include: treating an older person like a child; repeatedly telling them they have dementia; threatening to withdraw affection; and threatening to put them in a nursing home. Stopping an older person from seeing family and friends may also be psychological abuse or 'social abuse'.

1.10 Financial abuse is another common type of elder abuse, and includes: incurring bills for which an older person is responsible; stealing money or goods; and abusing power of attorney arrangements. Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone after agreeing to do so in exchange for money or property; and forcing someone to sign a will, contract or power of attorney document.

1.11 Physical abuse might include pushing, shoving and rough handling. Australian crime statistics suggest that older people are less likely to be murdered or physically assaulted than younger people, but some types of physical abuse of older people may not be caught by these statistics—for example, the improper use of 'restrictive practices' in hospitals and residential care facilities.

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

1.13 Neglect includes failing to provide someone with such things as food, shelter or medical care. Family members may be responsible for providing such 'necessities of life' and some may receive a social security payment for doing so. Staff in residential care facilities and others who provide in-home care may also be responsible for providing such care.

6 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

Risk factors

1.14 Further research is needed on risk factors for abuse, but there is evidence that people who suffer elder abuse are more likely to be dependent on others and have: significant disability; poor physical health; mental disorders, such as depression; low income or socioeconomic status; cognitive impairment; and social isolation. Other risk factors include living alone with the perpetrator; and being aged older than 74 years. There is also some evidence that women are more at risk of elder abuse than men.

1.15 Risk factors for people who commit elder abuse include depression, substance abuse and financial, emotional and relational dependence.

Relationship with family violence

1.16 Elder abuse is commonly defined to refer to abuse by people 'in a position of trust'. Although this will include paid carers, 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. Elder abuse will therefore often also be family or domestic violence. While not as 'gendered' as family violence, elder abuse is suffered more often by women than men, and not only because women live longer than men. The dynamics of the abuse tend to be somewhat different, but elder abuse policy may learn much from initiatives to prevent family violence.

Framing the response—dignity, autonomy and safeguarding

1.17 The recommendations in this Report seek to balance two framing principles: dignity and autonomy, on the one hand; and protection and safeguarding, on the other. The ALRC recognises that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.

1.18 Elder abuse undermines dignity and autonomy. Abuse and living in fear can inhibit a person's ability to make choices about their own lives, to pursue what they value. Protecting older people from abuse can therefore be seen to support them to live autonomous and dignified lives. The *UN Principles for Older Persons* state:

> Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
>
> Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status and be valued independently of their economic contribution.[7]

1.19 Sometimes, protective measures may conflict with a person's autonomy, such as where an older person refuses to accept support, or to report abuse to police. Where possible, the ALRC has sought to recommend changes to the law that both uphold

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

autonomy and provide protection from harm, but where this is not possible, greater weight is often given to the principle of autonomy. Older people, like most adults, prize their freedom and independence, and do not wish to be treated like children or sheltered from all risk. The autonomy of older people should not be afforded less respect than the autonomy of others. However, in limited cases, where there is particularly serious abuse of vulnerable people, protection should be given additional weight.

Overview of Report

1.20 As stakeholders observed, elder abuse is 'complex and multidimensional' and requires a 'multi-faceted response'. In this Report, the ALRC contributes to that response with a set of recommendations—traversing laws and legal frameworks across Commonwealth, state and territory laws—aimed at achieving a nationally consistent response to elder abuse. The ALRC has looked to the horizon and developed a conceptual template to guide future reform, and has identified immediate strategies and specific reforms to support older people's autonomy and to safeguard against abuse.

A National Plan to combat elder abuse

1.21 In **Chapter 3** the ALRC recommends that a National Plan be developed to combat elder abuse. It is a capstone recommendation of this Report and provides the basis for a longer term approach to the protection of older people from abuse. The Plan will provide the opportunity for integrated planning and policy development. In a practical sense, much work already undertaken and in train, both at the Commonwealth level and in states and territories, together with recommendations throughout this Report, may be seen to constitute strategies in implementation of a commitment to combat elder abuse.

1.22 A national planning process offers the opportunity to develop strategies beyond legal reforms, including: national awareness and community education campaigns; training for people working with older people; elder abuse helplines; and future research agendas.

1.23 Concerning research, the ALRC particularly recommends that a national prevalence study of elder abuse be conducted, to improve the evidence base and inform policy responses. The Australian Government has already committed to a prevalence study,[8] and steps have been taken in this direction with the completion of a scoping study by the Australian Institute of Family Studies in May 2017.

Aged care

1.24 Older people receiving aged care—whether in the home or in residential aged care—may experience abuse or neglect. Abuse may be committed by paid staff, other residents in residential care settings, family members or friends.

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8 *The Coalition's Policy to Protect the Rights of Older Australians* <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>; Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).

1.25 In **Chapter 4** the ALRC recommends reform to enhance safeguards against such abuse, including:

- establishing a serious incident response scheme in aged care legislation;
- reforms relating to the suitability of people working in aged care—enhanced employment screening processes, and ensuring that unregistered staff are subject to the proposed National Code of Conduct for Health Care Workers;
- regulating the use of restrictive practices in aged care; and
- national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.

1.26 The ALRC also addresses decision making in aged care and recommends that aged care laws be reformed consistently with the Commonwealth Decision-Making Model in the ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws* (2014). The ALRC also recommends that aged care agreements should not require that a person has formally appointed a substitute decision maker.

Enduring appointments

1.27 Enduring powers of attorney and enduring guardianship (together referred to as 'enduring documents') are important tools that allow people to choose who will make decisions for them, should they later lose decision-making ability. These decision-makers can play an important role in protecting people with impaired decision-making ability from abuse.

1.28 However, these arrangements may also facilitate abuse by the decision maker themselves. In **Chapter 5**, the ALRC recommends reforms to laws relating to enduring documents, including: adopting nationally consistent safeguards; giving tribunals jurisdiction to award compensation when duties are breached; and establishing a national online register

Family agreements

1.29 Some 'family agreements' involve an older person transferring the title to their home, or the proceeds from the sale of the home or other assets, to an adult child in exchange for ongoing care, support and housing. These 'assets for care' arrangements are typically made without legal advice and are often not put in writing. There can be serious consequences for the older person if the promise of ongoing care is not fulfilled, or the relationship breaks down. The older person may even be left without a place to live.

1.30 The ALRC recommends in **Chapter 6** that tribunals be given jurisdiction over disputes within families with respect to these arrangements. Tribunals provide a low cost and less formal forum for resolving such disputes. The ALRC also recommends that the *Social Security Act 1991* (Cth) be amended to require that assets for care agreements (which give what is described as a 'granny flat interest') be expressed in writing, for the purpose of calculating the Age Pension.

Superannuation

1.31 A significant proportion of the wealth of older people is held in superannuation funds. Elder abuse may include using deception, threats or violence to coerce someone to contribute, withdraw or transfer superannuation funds, for the benefit of the abuser. Improperly influencing superannuation investment decisions might also be abuse.

1.32 As discussed in **Chapter 7**, there is much uncertainty and ambiguity concerning 'binding death benefit nominations' (BDBNs), particularly regarding whether an enduring attorney may sign a BDBN on behalf of a member. The ALRC recommends that these uncertainties and ambiguities need to be resolved in a focused review of the provisions. The central legal issue concerns the ability of fund members to direct trustees with respect to the payment of funds on the member's death.

1.33 Self-managed superannuation funds (SMSFs) are subject to limited regulation. This may present problems when a fund comes under the control of someone with impaired decision-making ability. The ALRC's recommendations in relation to SMSFs are designed to:

- better facilitate the process for appointing a person's enduring attorney as trustee/director of their SMSF in the event of a legal disability;
- improve planning for a potential legal disability as part of the operating standards of an SMSF; and
- ensure the Australian Taxation Office is notified when an enduring attorney has taken over as trustee/director of the SMSF following the principal suffering a legal disability.

Wills

1.34 Pressuring someone to make or change their will may, in some cases, be financial abuse. To help combat elder abuse and to reduce undue influence in the making of wills, the ALRC recommends in **Chapter 8** that there be a national coordinated response to improving lawyers' understanding of the potential for elder abuse using wills, through national best practice guidelines. Other professionals, such as financial advisers, may also benefit from improved understanding.

1.35 The ALRC also recommends community education about the dangers and difficulties associated with 'do-it-yourself' wills and discusses other aspects of succession law that might benefit from further review.

Banking

1.36 Banks and other financial institutions are in a good position to detect and prevent the financial abuse of their older and at-risk customers. In **Chapter 9**, the ALRC recommends that the *Code of Banking Practice* be amended to require banks to take 'reasonable steps' to identify and prevent the financial abuse of vulnerable customers.

1.37 Steps include training staff in how to respond appropriately to elder abuse and setting up systems to detect unusual transactions and other avenues for abuse. Banks should also speak with vulnerable customers directly, or otherwise check arrangements, when a form purports to authorise another person to operate someone's bank account. They should also warn customers, train staff, and take other steps to ensure people are not being financially abused when they guarantee a loan.

Guardianship and administration

1.38 **Chapter 10** considers how guardianship and financial administration schemes can safeguard against elder abuse. The ALRC recommends that private guardians and private financial administrators be required to sign an undertaking about their obligations and responsibilities. The ALRC also recommends that state and territory tribunals take additional measures to help people who are the subject of an application for a guardianship or financial administration order to participate in the process to the greatest extent possible.

Health and National Disability Insurance Scheme

1.39 Health professionals play an important role in identifying and responding to elder abuse. While no recommendations are made in **Chapter 11**, the ALRC discusses how health professions might be encouraged to take advantage of the opportunity to respond to elder abuse, for example through: training health professionals about recognising elder abuse and relevant privacy considerations; improving referral pathways; and developing multidisciplinary responses to elder abuse.

1.40 The chapter also discusses the National Disability Insurance Scheme, but the ALRC considers that it is too early to determine whether the scheme is an avenue for elder abuse or to test the effectiveness of the safeguards.

Social security

1.41 Engaging with social security through Centrelink is a part of life for most older Australians. This gives Centrelink a distinct opportunity to assist with the detection and prevention of elder abuse—especially financial abuse through, for example, Carer Payments and payment nominee arrangements.

1.42 In **Chapter 12**, the ALRC recommends that monies paid to nominees should be required to be kept separately from the nominee's own funds and that Centrelink speak directly with people of Age Pension age when they enter into arrangements with others that concern their social security payments. More generally, the ALRC recommends that the Department of Human Services (Cth) develop an elder abuse strategy.

Criminal justice responses

1.43 **Chapter 13** discusses the criminal justice response to elder abuse, but makes no recommendations for reform. The ALRC concludes that existing criminal laws adequately cover conduct which constitutes elder abuse, and does not recommend the enactment of new offences for 'elder abuse', 'elder neglect' or 'misuse of powers of attorney'.

1.44 The chapter discusses other ways to improve the criminal justice response to elder abuse, including in relation to how police respond to such abuse, and helping witnesses who need support to participate in the criminal justice system.

Safeguarding adults at risk

1.45 In **Chapter 14**, the ALRC recommends the introduction of adult safeguarding laws in each state and territory. Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability, but there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse.

1.46 Safeguarding services should be available to 'at-risk adults', which should be defined to mean adults who: (a) need care and support; (b) are being abused or neglected, or are at risk of abuse or neglect; and (c) cannot protect themselves from the abuse. Some, but by no means all, older people will meet this definition.

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

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

1.49 The ALRC recommends that consent should be obtained from the at-risk adult, before safeguarding agencies investigate or take action about suspected abuse. This avoids unwanted paternalism and shows respect for people's autonomy. However, in particularly serious cases of physical abuse, sexual abuse or neglect, the safety of an at-risk person may sometimes need to be secured, even without their consent. Where there is serious abuse, safeguarding agencies should also have coercive information-gathering powers, such as the power to require people to answer questions and produce documents.

1.50 The chapter also recommends statutory protections from civil liability, workplace discrimination laws and other consequences that might follow from reporting suspected abuse to authorities. Protocols about reporting abuse should also be developed for certain professionals who routinely encounter elder abuse.

The law reform process

1.51 The scope of each ALRC inquiry is defined by the Terms of Reference. The recommendations for reform must sit within this scope and need to be built on an appropriate conceptual framework and evidence base.

1.52 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[9] Pursuant to s 38 of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.

1.53 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry, as set out in the Terms of Reference. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC's website.

Community consultation

1.54 Following ALRC established practice, two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry: an Issues Paper, *Elder Abuse* (IP 47), was released on 15 June 2016, to coincide with World Elder Abuse Awareness Day; and a Discussion Paper, *Elder Abuse* (DP 83), on 12 December 2016. Both consultation documents can be downloaded free of charge from the ALRC website, and hardcopies were provided if requested.

1.55 National stakeholder consultations were conducted following the release of each of the consultation documents amounting to 117 consultations. The list of those consulted is included as Appendix 3 to this Report.

1.56 The ALRC received 458 submissions,[10] from a wide range of people and organisations, including: individuals in their private capacity; academics; lawyers; law societies and representative groups; community legal centres; advocacy groups; peak bodies; and state and federal government agencies. Submissions from advocacy groups and community legal centres included many case studies, drawn from their experiences on the frontline, working with people who had been subjected to abuse. Such examples are included as illustrative case studies throughout this Report. The ALRC recognises that, particularly in small community-based organisations with limited resources, such involvement can have a significant impact and we thank all stakeholders for the important contribution they have made to our evidence base.

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9 Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202.

10 This includes 60 confidential, four anonymous, and nine oral submissions. The public submissions are published on the ALRC website.

1.57 Special mention must be made of the many submissions from individuals, who generously shared with the ALRC personal stories of heartache and frustration, of families torn apart by elder abuse and who live with the painful knowledge that their loved ones suffered at the end of their lives. One individual referred to their submission as an 'introduction to a nightmare'; another said, 'I am a broken person'. These stories present a devastating picture of ongoing grief, loss, anger and powerlessness. The ALRC is indebted to the many individuals who made the dynamics and experiences of elder abuse painfully clear to us and so powerfully put the need for action, for something to be done.

1.58 The ALRC acknowledges the contribution of all those who have participated in the Inquiry. It is invaluable to the work of the ALRC and greatly enriches the law reform process. The ALRC records its deep appreciation to all stakeholders for this contribution.

Appointed experts

1.59 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also received by the ALRC from members of its Advisory Committee and part-time Commissioners. The Advisory Committee for this Inquiry comprised seven members, who provided crucial input in relation to the consultative documents and final Report. Advisory Committee members also contributed to this Report by way of critical reading in the final stages. The ALRC was also able to call upon the expertise and experience, as part-time Commissioners, of the Hon Justice John Middleton and the Hon Nye Perram of the Federal Court of Australia. In addition, significant input was provided by a number of expert readers who commented on certain chapters of the Report. Their names appear in the list of participants for this Inquiry.

1.60 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, and the enlisting of other expert readers, are invaluable aspects of ALRC inquiry processes—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform recommendations. The ALRC acknowledges the considerable contribution made by the Advisory Committee, the part-time Commissioners and the expert readers and expresses its gratitude to them for voluntarily providing their time and expertise.

Implementation

1.61 Once tabled in the Australian Parliament, the Report becomes a public document.[11] ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2015–16 records that 60% of ALRC

11 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

reports are substantially implemented and 26% are partially implemented, representing an overall implementation rate of 86%.[12]

1.62 Quite apart from such statistics, an assessment of the contribution that law reform work makes must have a long view. Law reform inquiries have a far bigger impact than just the implementation of recommendations, some of which may occur shortly after a report is released, some many years later. But whether or not recommendations are implemented, ALRC reports provide enormous value. Each ALRC report provides not only a mapping of law as at a particular moment in time, but in reviewing the submissions and consultations, the reports also give a snapshot of opinion on the issues being considered—providing a considerable contribution to legal history and a rich resource for policy makers, locating the issues within their particular social and legal contexts at a given time.

1.63 In making a submission to the Senate Standing Committee on Legal and Constitutional Affairs, when the Committee conducted an inquiry into the ALRC over the summer of 2010–2011,[13] the Federal Court of Australia said that the Court benefits greatly from ALRC reports:

> More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented.[14]

Outcomes

1.64 The overall effect of the ALRC's recommendations in this Report, *Elder Abuse—A National Legal Response*, will be to safeguard older people from abuse and support their choices and wishes through:

- improved responses to elder abuse in aged care;
- enhanced employment screening of aged care workers;
- greater scrutiny regarding the use of restrictive practices in residential aged care;
- building trust and confidence in enduring documents as important advance planning tools;
- protecting older people when 'assets for care' arrangements go wrong;
- banks and financial institutions protecting vulnerable customers from abuse;
- better succession planning across the SMSF sector; and
- adult safeguarding regimes protecting and supporting at-risk adults.

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12 Australian Law Reform Commission, *Annual Report 2015–2016*, Report No 130 (2016) 17.

13 See the inquiry report: Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Law Reform Commission*, (8 April 2011).

14 Federal Court of Australia, Submission 22 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Law Reform Commission*, (2011).

1.65 These outcomes should be further pursued through a National Plan to combat elder abuse and new empirical research into the prevalence of elder abuse.

1.66 This Inquiry has acknowledged that elder abuse is indeed 'everybody's business'. It is also everybody's *responsibility*—a responsibility not only to recognise elder abuse, but most importantly, to respond to it effectively. The recommendations in this Report address what legal reform can do to prevent abuse from occurring and to provide clear responses and redress when abuse occurs.

1.67 Ageing eventually comes to all Australians and ensuring that all older people live dignified and autonomous lives free from the pain and degradation of elder abuse must be a priority.

2. Concepts and Context

Contents

Summary

2.1 This chapter frames and situates the issue of elder abuse, both demographically and conceptually. The first section provides a picture of the diversity of older people in Australia—who they are, where they live, and the fact that older people will make up an increasing proportion of all Australians in the coming years. Next, the chapter considers the issue of abuse of older Australians, and explores the concept of 'elder abuse', as well as setting out available evidence about the level of elder abuse in Australia. The chapter then considers how legal responses to elder abuse are framed by Australia's federal division of responsibilities for issues affecting older people, and human rights considerations.

2.2 Finally, the chapter sets out the interrelationship of the ALRC's framing principles for this Inquiry—dignity and autonomy and protection and safeguarding—and outlines the conceptual underpinnings of the terminology used in this Report.

Who are older Australians?

2.3 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 (ABS) groups people into population age cohorts, and differentiates between '15–64', '65 years and over' and '85 years and over'. People over 65 are generally classified as 'older' for ABS purposes.[1]

2.4 Australia's population is ageing as a result of the combination of increasing life expectancy and lower fertility levels.[2] The proportion of Australians aged 65 or over is increasing. By 2054–55, it is projected that 22.6% of the population will be aged 65 or over. This compares to 15% of the population in 2014–15.[3]

2.5 The life expectancy for Australians has increased significantly since the early 20th century. In 2013–2015, life expectancy at birth for males was 80.4 years and females 84.5 years.[4] Residual life expectancy (the average number of additional years that a person at a certain age can expect to live) for males aged 65 years was 19.5 years and females 22.3 years.[5] By comparison, in 1901–10, the life expectancy at birth for males was 55.2 years and for females 58.8 years. Residual life expectancy for males aged 65 years was 11.3 years and females 12.9 years.[6]

2.6 'Healthy life expectancy'—that is, the extent to which additional years are lived in good health—is also increasing.[7] According to the Australian Institute of Health and Welfare (AIHW):

> Men aged 65 in 2012 could expect to live 8.7 additional years disability-free and 6.7 further years with a disability, but without severe or profound core activity limitation. Women aged 65 in 2012 could expect 9.5 additional years disability-free and 6.7 years with a disability, but without severe or profound core activity limitation.[8]

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

2 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia's Older People? Cat No 2071.0* (2012). Population ageing is also a global phenomenon. In 1950, 8% of the world's population was 60 years or older. In 2011, this rose to 11%, and it is projected to rise to 22% by 2050: World Economic Forum, Global Agenda Council on Ageing Society, *Global Population Ageing: Peril or Promise?* (2011) 5.

3 Commonwealth of Australia, *2015 Intergenerational Report: Australia in 2055* (2015) table 1.3.

4 Australian Institute of Health and Welfare, *Life Expectancy* <www.aihw.gov.au/deaths/life-expectancy/>.

5 Ibid.

6 Australian Institute of Health and Welfare, *Australian Trends in Life Expectancy* (2012).

7 Ibid 82.

8 Australian Institute of Health and Welfare, *Australia's Welfare 2015* (2015) 237.

2.7 However, there are significant variations in life expectancy among different groups in the population. For example, Aboriginal and Torres Strait Islander persons have a significantly lower life expectancy than other Australians:

> For the Aboriginal and Torres Strait Islander population born in 2010–2012, life expectancy was estimated to be 10.6 years lower than that of the non-Indigenous population for males (69.1 years compared with 79.7) and 9.5 years for females (73.7 compared with 83.1).[9]

2.8 Older people aged 85 years and over need significantly more assistance and care than those aged 65–84. The AIHW summarises:

> - the need for assistance with cognitive and emotional tasks was four times greater for Australians aged 85 and over (28%) than Australians aged 65–84 (7%)
> - over one-half (59%) of Australians aged 85 years and over reported a need for assistance with health-care compared with one-fifth (20%) of Australians aged 65–84
> - a higher proportion of women aged 85 and over (69%) reported the need for assistance with personal activities than men in the same age group (56%); these figures compare with 38% and 41% of women and men aged 65–84 needing assistance, respectively
> - in terms of personal activities, the most common type of assistance required for both men and women in this age group was mobility assistance (39% and 54% respectively) followed by self-care (33% and 44%) and communication (14% and 19%). This was a similar pattern to that for Australians aged 65–84, although this younger group had less need for assistance overall.[10]

Diversity among older people

2.9 There is significant diversity among older people including in relation to gender, culture and language and disability.

Gender

2.10 Gender significantly affects experiences of ageing. Women have a longer life expectancy than men, but older women have relatively lower incomes and fewer assets than men.[11] Contributing factors to this include lower average weekly ordinary time earnings for women (a 17.3% 'gender pay gap' at November 2015), as well as career breaks to undertake unpaid care work.[12] Women tend to have lower superannuation balances and retirement payouts than men.[13] Approximately 60% of women aged 65–

9 Australian Institute of Health and Welfare, above n 4.
10 Australian Institute of Health and Welfare, above n 8, 234.
11 Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality Over the Lifecycle* (2009) 7.
12 Workplace Gender Equality Agency, *Gender Pay Gap Statistics—March 2016* (2016).
13 R Clare, 'Developments in the Level and Distribution of Retirement Savings' (Research Paper, Association of Superannuation Funds of Australia, 2011) 3. This is likely to continue to be the case for older women for some time into the future: Men aged 55–64 in 2013–14 had a much higher average superannuation balance than women the same age: $321,993 compared with $180,013: Australian Bureau of Statistics, *Gender Indicators, Australia, Feb 2016: Economic Security* (2016).

69 in 2009–10 had no superannuation.[14] Women also make up a greater proportion of Age Pension recipients. At June 2013, women comprised 55.6% of recipients. Of these, 60.8% received the full rate of Age Pension.[15]

Aboriginal and Torres Strait Islander people

2.11 In 2011, there were an estimated 76,300 Aboriginal and Torres Strait Islander people aged 50 years and over, making up 12% of the total population of Aboriginal and Torres Strait Islander people.[16] Older Aboriginal and Torres Strait Islander people occupy an important place in their communities, maintaining traditions and links to Aboriginal and Torres Strait Islander culture, and acting as 'role models, supporters and educators for the young'.[17]

2.12 However, Aboriginal and Torres Strait Islander people aged 50 years and older tend to have poorer health, higher levels of socioeconomic disadvantage and lower life expectancy than the broader Australian population.[18]

Culturally and linguistically diverse Australians

2.13 In 2011, over 1.34 million people aged 50 years and older in Australia were born in non-English speaking or culturally and linguistically diverse (CALD) countries, almost 20% of the total Australian population in this age group.[19] Of those aged 80 years and over, 18.5% were born in non-English speaking background countries.[20]

2.14 Some CALD groups in Australia have very high proportions of older people:

> For example, 88.4% of all Australians born in Italy and 87.9% of Australians born in Greece are now aged 50 years and over. Those aged 80 years and over account for more than 15% of all Australians born in Latvia, Estonia, Lithuania, Ukraine, Italy, Poland, Slovenia and Hungary compared to 3.9% aged 80+ years for the total Australian population.[21]

2.15 While there are differences among CALD populations, in general older people from CALD backgrounds have poorer socioeconomic status compared to the older Anglo-Australian population.[22]

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14 Clare, above n 13, 3.
15 Department of Social Services (Cth), *Income Support Customers: A Statistical Overview 2013. Statistical Paper No 12* (2014).
16 Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People* (2011) v, 1.
17 Ibid 1.
18 Ibid v.
19 Federation of Ethnic Communities' Council Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (2015) 6.
20 Ibid.
21 Ibid.
22 Ibid 10.

Disability

2.16 Older people with disability include both people who acquired their disability at an early age, as well as those who acquire disability with age. Rates of disability increase with age. The AIHW stated in 2011 that:

> After around 50 years of age the prevalence of disability rose considerably, from 20% in the 50–54 years age group to more than 80% among people aged 85 years or over. Rates of severe or profound core activity limitations were even more strongly associated with ageing. This degree of disability was reported for fewer than one in 20 Australians up to the age of 55 years (excluding the peak in boys aged 10–14 years), but almost one-third of people aged 75 years or over.[23]

2.17 The proportion of people with a disability who are over 65 is likely to increase, as the broader population ages:

> In addition to an increase in disability overall, population ageing changes the composition of the population with disability. In 1981, 10% of all Australians with disability were aged under 15 years and 31% were 65 years or older; in 2009, 7% of the population with disability were aged 0–14 years and 39% were 65 years or over. If this continues, the mix of services and support required by older people with disability will need to increase, relative to those required by younger people.[24]

Dementia

2.18 Dementia is a term that describes a number of different diseases characterised by 'impairment of brain functions, including language, memory, perception, personality and cognitive skills'.[25] The prevalence of dementia increases with age, and from age 65 prevalence doubles every 5 or 6 years.[26]

2.19 It is estimated that, in 2016, there were 400,833 adults living with dementia in Australia.[27] The rate of dementia in people aged 65 years and over was 10% and for those aged 85 and over, 30%.[28] The majority—approximately 75%—of people with dementia live in the community.[29] Approximately half of all residents in residential aged care have a diagnosis of dementia, and their level of dementia is more severe than those living in the community.[30] The number of people with dementia is projected to rise to approximately 1.1 million people by 2056.[31]

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23 Australian Institute of Health and Welfare, *Australia's Welfare 2011* (2011), 11.
24 Ibid 12.
25 Australian Institute of Health and Welfare, *Dementia in Australia* (2012) 2.
26 Ibid 5.
27 Laurie Brown, Erick Hansnata and Hai Anh La, 'Economic Cost of Dementia in Australia 2016–2056' (National Centre for Social and Economic Modelling for Alzheimer's Australia, 2017) 6.
28 Ibid. The AIHW has noted that '[d]ementia is emerging as a problem for Indigenous people at comparatively young ages (under 75 years), probably due to the high rates of chronic disease and other risk factors they experience': Australian Institute of Health and Welfare, *Older Aboriginal and Torres Strait Islander People* (2011) v.
29 Brown, Hansnata and La, above n 27, ix.
30 Australian Institute of Health and Welfare, above n 8, 273. See also Brown, Hansnata and La, above n 27, ix.
31 Australian Institute of Health and Welfare, above n 25, 11.

Where do older people live?

2.20 In 2015, most older people lived in households, and only 5.2% lived in care accommodation. Most older people lived with others; 26.8% lived alone.[32]

2.21 Within Australia, Tasmania and South Australia have relatively older populations. In 2015, Tasmania had the highest proportion of people aged 65 years and over (17.8%), followed by South Australia (16.7%). The Northern Territory had the lowest proportion of persons in this age group (7.6%).[33]

2.22 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 fewer than 1,000 people.[34] The age profile of those living in regions outside capital cities is projected to become increasingly older. According to the ABS:

> In the non-capital city areas of New South Wales, Victoria, South Australia and Tasmania, it is projected that by 2056 there will be less than two people of working age for every person aged 65 years and over. In contrast, capital cities such as Sydney, Melbourne, Brisbane and Perth are projected to have considerably younger populations with around three people of working age for every one aged 65 years and over.[35]

Who takes care of older people?

2.23 Some older people require additional care and support. The majority of this care and support is provided in the community by informal carers. Formal aged care is also provided in the home and in residential aged care facilities for those with higher care needs.[36] The Productivity Commission noted in 2011 that around 350,000 primary carers provided assistance to an older person aged 65 or over. The majority of primary carers for older people were their spouse or partner, and about one quarter of primary carers were the older person's son or daughter.[37]

2.24 People with dementia are one group who generally require additional care and support. The National Centre for Social and Economic Modelling (NATSEM) has estimated that '46% of those living in the community receive informal assistance only, 29% receive both informal and formal care, 16% receive formal assistance only and 9% no assistance at all'.[38] Those people with dementia living in residential aged care facilities tend to have much higher care needs than residents who do not have dementia.[39]

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32 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015, Cat No 4430.0* (2016).
33 Ibid.
34 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where and How Do Australia's Older People Live? Cat No 2071.0* (2013).
35 Australian Bureau of Statistics, *Australian Social Trends, March 2009, Cat No 4102.0* (2009).
36 See further ch 4.
37 Productivity Commission, *Caring for Older Australians* (Report No 53, 2011) 326–7.
38 Brown, Hansnata and La, above n 27, ix.
39 Ibid.

Abuse of older people

What is 'elder abuse'?

2.25 The most widely known definition of elder abuse is that provided by the World Health Organization (WHO). It defines elder abuse as:

> a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.[40]

2.26 This description is used across a range of government and non-government bodies in Australia.[41] Generally, five forms of elder abuse are distinguished: physical, psychological, financial, sexual abuse, and neglect.[42]

2.27 The definition of elder abuse does not include all abuse of older persons, but is limited by the relationship between the abuser and the older person—that is, when they are in a relationship where there is an expectation of trust. This will include an expectation of trust as a result of an 'affective relationship', such as family members, friends, and informal carers, and those in a 'functional position of trust', such as paid carers and some professionals.[43]

2.28 The Terms of Reference for this Inquiry refer to abuse by 'formal and informal carers, supporters, representatives and others'. The inclusion of 'formal' carers means that abuse by paid carers has been considered in the Inquiry, for example in relation to aged care.

2.29 There is limited evidence available about the extent of elder abuse in Australia. To assist in remedying this, the ALRC recommends in Chapter 3 that there be a national prevalence study of elder abuse.[44] In an Australian Institute of Family Studies research report into elder abuse (the AIFS Report), Dr Rae Kaspiew, Dr Rachel Carson and Professor Helen Rhoades summarise what can be drawn from the currently available information:

> The available evidence suggests that prevalence varies across abuse types, with psychological and financial abuse being the most common types of abuse reported, although one study suggests that neglect could be as high as 20% among women in the older age group. Older women are significantly more likely to be victims than older men, and most abuse is intergenerational (ie, involving abuse of parents by adult

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40 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

41 See, eg, My Aged Care, *Elder Abuse Concerns* (22 June 2015) <www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns>; Elder Abuse Prevention Unit, *Elder Abuse: Definition* <www.eapu.com.au/elder-abuse>.

42 J Lindenberg et al, 'Elder Abuse an International Perspective: Exploring the Context of Elder Abuse' (2013) 25(08) *International Psychogeriatrics* 1213, 1213.

43 Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(8) *International Psychogeriatrics* 1217, 1224. It will also exclude the exploitation of older people through, for example, consumer scams, an issue raised in some submissions to this Inquiry: see, eg, Protecting Seniors Wealth, *Submission 312*.

44 Rec 3–5. At the time of writing this Report, a scoping study for a survey of the prevalence of elder abuse had been completed: Lixia Qu et al, 'Elder Abuse Prevalence Scoping Study' (Australian Institute of Family Studies, unpublished).

> children), with sons being perpetrators to a greater extent than daughters. For some women, the experience in older age of family violence, including sexual assault, represents the continuation of a lifelong pattern of spousal abuse. Evidence on elder abuse occurring outside of a familial context (eg, in care settings) is particularly sparse.[45]

2.30 The WHO has noted that research in other predominantly high-income countries has found 'wide variation in rates of abuse in the preceding 12 months among adults aged over 60 years, ranging from 0.8% in Spain and 2.6% in the United Kingdom to upwards of 18% in Israel, 23.8% in Austria and 32% in Belgium'.[46]

2.31 The terminology of 'elder abuse' may not be appropriate to some communities. For example, the National Aboriginal and Torres Strait Islander Legal Services said that in the Aboriginal and Torres Strait Islander community, in addition to referring to the age of a person, 'elder' is also 'a title of respect'.[47] Similarly, in CALD communities there may be difficulties in 'translating the term "elder abuse" in different cultural contexts and languages'.[48]

Difficulties of definition

2.32 A number of complexities exist in describing elder abuse, particularly in relation to the concept of 'age', and the relationship of elder abuse with other forms of interpersonal violence.[49] The WHO definition captures a wide range of conduct ranging from intentional to unintentional abuse. As such, it may be said that the term elder abuse 'does not represent a single problem, but many different problems'.[50]

Age

2.33 Using chronological age as a marker for a distinct form of abuse carries with it some difficulties. As Professors Thomas Goergen and Marie Beaulieu have noted, 'it is hard to see how victimization and their consequences should change categorically by reaching a certain minimum age'.[51] Others have argued that the development of the

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45 Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 5.

46 World Health Organization, *Global Status Report on Violence Prevention* (2014) 78.

47 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.

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

49 However, it has been argued that 'definitional conformity' of elder abuse has developed: Lindenberg et al, above n 42, 1213. Stakeholders provided a number of comments on aspects of the definition of elder abuse, summarised in the Discussion Paper: Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) Ch 1. See also Seniors Rights Victoria, *Submission 383*; Disabled People's Organisations Australia, *Submission 360*; Eastern Community Legal Centre, *Submission 357*; COTA, *Submission 354*; Women's Legal Services Australia, *Submission 343*; SSSL Barristers and Solicitors, *Submission 323*; Protecting Seniors Wealth, *Submission 312*; Speech Pathology Australia, *Submission 309*; Australian Dispute Resolution Advisory Council Inc, *Submission 303*; FamilyVoice Australia, *Submission 300*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Mecwacare, *Submission 289*; T Ryan, *Submission 276*; W Bonython and B Arnold, *Submission 241*; S Biggs, *Submission 235*.

50 Joan Harbison et al, 'Understanding "Elder Abuse and Neglect": A Critique of Assumptions Underpinning Responses to the Mistreatment and Neglect of Older People' (2012) 24(2) *Journal of Elder Abuse & Neglect* 88, 89.

51 Goergen and Beaulieu, above n 43, 1220.

concept of 'elder abuse' should be seen in the context of broader understandings about ageing:

> the concept of 'elder abuse and neglect' was developed in an era when older people were identified as a homogenous group based on chronological age and were marginalized by an understanding of their declining capacities that was associated with their exclusion from the labor market and with a perception that their roles in society should be increasingly limited.[52]

2.34 Increasing diversity over the life course, particularly with regard to shifts in expectations about retirement from paid work, has implications for distinguishing 'elder' abuse as a specific form of abuse. Moreover, the abuse of older people shares some characteristics with the abuse of other groups of people who may be at heightened risk of abuse, such as people with disability. Such groups are often referred to as 'vulnerable', although the Law Commission of England and Wales has expressed a preference for the term 'adults at risk', because of

> concerns that the term vulnerable adult appears to locate the cause of abuse with the victim, rather than placing responsibility with the actions or omissions of others. It can also suggest that vulnerability is an inherent characteristic of a person and does not recognise that it might be the context, the setting or the place which makes a person vulnerable.[53]

2.35 However, there may be some factors that are associated with ageing, particularly entering into very old age, which mean that a person is more at risk of a specific kind of abuse. Locating these risks as being *intrinsic* to ageing, rather than the result of a more complex interplay between 'personal, interpersonal and systemic factors', is difficult.[54] Nonetheless, Goergen and Beaulieu have contended that it is important to maintain a distinction between elder abuse and the abuse of other groups of adults, arguing that

> [p]henomena of abuse, quantity and quality of risks, vulnerability indicators, coping resources and approaches to intervention are too distinct to synthesise all these fields under a heading of 'abuse of (vulnerable) adults'.[55]

2.36 As Goergen and Beaulieu have noted, the very old 'generally have a reduced exposure to risks of becoming a victim of violent acts in public spaces and by strangers', mirroring 'age-related changes in lifestyle, interpersonal contacts, mobility outside the home, and spatial environments often insufficiently adapted to older persons' needs'.[56] While risks of 'public sphere' victimisation may reduce, the increased prevalence of functional limitations, and the need for assistance with

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52 Harbison et al, above n 50, 90–91.

53 The Law Commission, *Adult Social Care*, Report No 326 (2011) 114. Others use 'vulnerable' more broadly to include both intrinsic and extrinsic factors. See further Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) ch 2.

54 Simon Biggs and Ariela Lowenstein, *Generational Intelligence: A Critical Approach to Age Relations* (Routledge, 2013) 100.

55 Goergen and Beaulieu, above n 43, 1226.

56 Ibid 1222.

activities of daily living, may heighten the risk of abuse by those in a relationship of trust with the older person.[57]

2.37 There are advantages to retaining a focus on elder abuse as a distinctive social problem that requires targeted research, prevention and response strategies. However, in this Inquiry, the ALRC has generally avoided making law reform recommendations that are targeted *solely* at 'older' people. Instead, it has recommended that a National Plan be developed to combat elder abuse, to provide national leadership and coordination of strategies (including legal reforms) to prevent and respond to elder abuse.

Relationship with family violence

2.38 Elder abuse is often committed by a family member of the older person—notably, by adult children, but also the older person's spouse or partner. The essence of elder abuse in the WHO definition is the harm or distress caused by a person in a position of trust. Family violence exhibits similar dynamics. It is defined in the *Family Law Act 1975* (Cth) as meaning 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful'.[58]

2.39 The approach reflected in the WHO definition is wider than the concept of 'family violence', in that the relationships of trust extend more widely than 'family'. However, elder abuse is closely related to family violence and, as Dr John Chesterman observed, 'elder abuse is often also an instance of family violence'.[59] The Victorian Royal Commission into Family Violence included specific coverage of violence against older people, noting that elder abuse and family violence are often used interchangeably in policy documents and statistics.[60]

2.40 Like family violence, elder abuse can be physical, sexual, psychological or financial in nature, and is usually committed by a family member; and available research also suggests that women are more likely to experience elder abuse than men.[61] 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, while the perpetrator may be a family member, and thus the abuse could also be described as 'family violence', ageism, cognitive impairment of the victim, social isolation or relationships of dependence as well as gender may be important factors in the abuse.[62]

2.41 There may be some differences in the dynamics of family violence and elder abuse.[63] Family violence is often characterised as a manifestation of power and

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57 Ibid.

58 *Family Law Act 1975* (Cth) s 4AB(1). This provision was introduced in 2011.

59 John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115, 117.

60 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 68.

61 Kaspiew, Carson and Rhoades, above n 45, 5.

62 Ibid ch 3. See also Women's Legal Services Australia, *Submission 343*.

63 See also Seniors Rights Victoria, *Submission 383*; Eastern Community Legal Centre, *Submission 357*; St Vincent's Health Australia, *Submission 345*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof

control.[64] There is less agreement about the dynamics of elder abuse.[65] The AIFS Report noted that

> [p]rogress towards understanding elder abuse and developing effective response and prevention measures, are recognised to be considerably less well developed than in other areas of interpersonal violence, including family violence and child abuse.[66]

2.42 A particular manifestation of elder abuse is financial abuse, which appears to be one of the most common forms of elder abuse. Changing social attitudes to intergenerational wealth transfer in families are important considerations in developing an understanding of elder financial abuse. As the AIFS Report noted:

> generational attitudes and expectations in relation to asset transfers before or after death, and the broader question of attitudes and expectations in relation to mutual or non-mutual intergenerational support in terms of material resources and care, form an important part of the backdrop to the social and economic dynamics that may influence the conditions in which elder abuse occurs.[67]

2.43 Whether abuse of an older person is described as elder abuse or family violence can have an impact on services available to the older person to respond to the abusive behaviour. For instance, family violence services, such as crisis accommodation, that largely cater for women and children may not be suitable for older victims.[68]

Definition and measurement

2.44 Consensus on a definition of elder abuse is important for developing an evidence base about it. As the AIFS Report 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'.[69] Commenting on previous international studies that sought to measure the prevalence of elder abuse, the authors of a 2007 report on a study of prevalence of elder abuse in the UK noted that '[v]ariation in prevalence estimates is heavily influenced by differences in methodology', including differences in definition.[70]

2.45 The A:RC considers that, to obtain a full picture of the abuse of older people, a broad description of elder abuse needs to be used, like the WHO definition. This can serve a range of purposes, including to gain a better understanding of the experiences of older Australians. The information obtained through using a wide definition can

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Karen Sullivan, *Submission 298*; Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*; FMC Mediation & Counselling, *Submission 284*; S Biggs, *Submission 235*; Caxton Legal Centre, *Submission 174*; Office of the Public Guardian (Qld), *Submission 173*; Protecting Seniors Wealth, *Submission 111*.

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

65 Women's Legal Services Australia Women's Legal Services Australia, *Submission 343*.

66 Kaspiew, Carson and Rhoades, above n 45, 4.

67 Ibid 19.

68 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 92.

69 Kaspiew, Carson and Rhoades, above n 45, 4. Definitional questions are also considered in Qu et al, above n 44.

70 Madeleine O'Keeffe et al, 'UK Study of Abuse and Neglect of Older People: Prevalence Survey Report' (Comic Relief and the Department of Health, 2007) 11.

inform the development of a wide range of policy responses, form community education to criminal offences.

Categories of elder abuse

2.46 Commonly recognised categories of elder abuse include psychological or emotional abuse, financial abuse, physical abuse, neglect, and sexual abuse. These types of abuse are considered throughout this Report. A short overview is set out below.

Psychological abuse

2.47 Psychological or emotional abuse appears to be one of the most common types of elder abuse,[71] and includes verbal abuse, name calling, bullying and harassment.

2.48 Over a third of calls that reported abuse to a Victorian elder abuse helpline over two years were related to emotional abuse.[72] Verbal abuse was the most common complaint,[73] followed by 'pressuring, intimidating or bullying/harassment',[74] and 'name calling, degrading, humiliating or treating the person like a child, in private or public'.[75]

2.49 Other examples of psychological abuse include: repeatedly telling an older person that they have dementia; threatening to withdraw affection; and threatening to put an older person into a nursing home.[76] Stopping an older person from seeing family and friends may also be psychological abuse or 'social abuse'.

2.50 A US national study found that being ignored, humiliated or verbally abused were commonly reported types of 'emotional mistreatment' of older people living in the community.[77]

Financial abuse

2.51 Financial abuse appears to be the other most common type of elder abuse, accounting for over a third of the calls that reported abuse to the Victorian helpline.[78] Common types of financial abuse were: someone incurring bills for which the older

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71 Kaspiew et al state that the available evidence suggests that psychological and financial abuse are the most common types of abuse reported: Kaspiew, Carson and Rhoades, above n 45, 5.

72 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria* (2015). Helpline data does not provide a complete picture of the incidence of elder abuse, but the data may be indicative of both the level and possible manifestations of different types of abuse. As discussed in Ch 3, Australia needs a national study of the prevalence of elder abuse.

73 36% of calls that reported abuse: Ibid.

74 25% of calls that reported abuse: Ibid.

75 19% of calls that reported abuse: Ibid.

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

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

78 National Ageing Research Institute and Seniors Rights Victoria, above n 72. After psychological and financial abuse, the next most commonly reported type of abuse, physical abuse, was reported in approximately 10% of calls that reported abuse.

person is responsible;[79] someone living in the older person's home for reasons other than for the benefit of the older person;[80] someone stealing the older person's goods;[81] 'threatening, coercing or forcing an older person into handing over an asset';[82] and abusing power of attorney arrangements.[83]

2.52 The US study found that spending money without permission, forging signatures, and forcing someone to sign something, were commonly reported types of financial elder abuse.[84]

2.53 Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone, after agreeing to do so, in exchange for money or property; and forcing someone to sign a will, contract or power of attorney instrument.[85] Many similar examples were provided by stakeholders, and are discussed throughout this Report.

Physical abuse

2.54 Calls to the Victorian helpline reported a range of physical abuse, including: pushing or shoving;[86] kicking, punching, slapping, biting or burning;[87] and rough handling.[88]

2.55 Australian crime statistics suggest that older people are less likely to be murdered, robbed or physically assaulted than younger people.[89] But some types of physical abuse of older people may not be caught by these statistics—for example, the improper use of 'restrictive practices' in hospitals and residential care facilities. Examples of restrictive practices include restraining a person with ropes or belts, locking someone in a room, or unnecessarily giving someone a sedative.

Neglect

2.56 The WHO definition considers that elder abuse can be the result of intentional or unintentional neglect.[90] Neglect includes failing to provide an older person with such things as food, shelter or medical care. Family members may be responsible for

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79 14% (64/455) of the calls that reported abuse: Ibid.
80 9% of calls that reported abuse: Ibid.
81 8% of calls that reported abuse: Ibid.
82 8% of calls that reported abuse: Ibid.
83 7% of calls that reported abuse: Ibid. Many examples were provided in submissions: see, eg, Seniors Rights Service, *Submission 169*.
84 Acierno et al, above n 77, 53–54.
85 Peteris Darzins, Georgia Lowndes and Jo Wainer, 'Financial Abuse of Elders: A Review of the Evidence' (Protecting Elders' Assets Study, Monash University, 2009) 9.
86 9% (39/455) of the calls that reported abuse: National Ageing Research Institute and Seniors Rights Victoria, above n 72.
87 6% of calls that reported abuse: Ibid.
88 4% of calls that reported abuse: Ibid.
89 For example, of the 413 reported victims of homicide and related offences in 2015, 60 victims were aged 0–19, 138 were 20–34, 145 were 35–54, and 62 were 55 or over: Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, Cat No 4510.0* (2015) Table 23. In relation to assault, see Australian Bureau of Statistics, *Crime Victimisation, Australia, 2014–15, Cat No 4530.0* (2016) Table 14.
90 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

providing such 'necessities of life'. Some may receive a social security payment for providing care to an older relative. Staff in residential care facilities and others who provide in-home care may also be responsible for providing such care.

2.57 Neglect was the subject of relatively few calls to the Victorian helpline: only four people complained of others failing to provide an older person with the necessities of life, and one person said that someone received the carer's allowance but did not provide care.[91]

2.58 Forms of neglect found by the US study included: failing to clean the house or yard; failing to obtain or cook food; failing to obtain medicine; failing to help the person get out of bed, dressed and showered; failing to make sure the bills are paid.[92]

Sexual abuse

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

2.60 Sexual abuse of older people may be uncommon compared to other types of elder abuse.[93] Australian crime statistics also suggest that older people are significantly less likely to be the victims of sexual assault than younger people, particularly younger females.[94] Sexual assault was also the smallest category of assault found in the US study. However, a 2014 research study stated that, while the 'idea of older women as victims of sexual assault is relatively recent and little understood … it is becoming increasingly evident that, despite the silence that surrounds the topic, such assaults occur in many settings and circumstances'.[95]

Risk factors for abuse

2.61 Risk factors for elder abuse may be said to arise out of the interaction of features relating to individuals, their relationships, and community and society.[96] As with other evidence about elder abuse, more research is needed on risk factors for abuse. However, the WHO has assessed that there is strong evidence for the following risk factors in elder abuse, in relation to the person experiencing the abuse:

- dependence;
- significant disability;
- poor physical health;
- mental disorders (such as depression);

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91 National Ageing Research Institute and Seniors Rights Victoria, above n 72.
92 Acierno et al, above n 77, 48–49.
93 Kaspiew, Carson and Rhoades, above n 45, 11.
94 Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, Cat No 4510.0* (2015).
95 Rosemary Mann et al, 'Norma's Project: A Research Study into the Sexual Assault of Older Women in Australia' (Monograph Series No 98, Australian Research Centre in Sex, Health and Society, La Trobe University, 2014) 1.
96 Etienne G Krug et al, 'World Report on Violence and Health' (World Health Organization, 2002) 131.

- low income or socioeconomic status;
- cognitive impairment; and
- social isolation.

2.62 For the perpetrator, there is strong evidence that the following are risk factors:

- depression;
- substance abuse: alcohol and drug misuse; and
- financial, emotional, relational dependence on the abused.[97]

2.63 There is strong evidence that living alone with the perpetrator is a risk factor for violence. Other risk factors for which there is some evidence are social isolation, and being aged older than 74 years. There is also some evidence that women are more at risk of elder abuse than men.[98]

Elder abuse in particular communities

2.64 The nature and dynamics of abuse experienced by older people may be influenced by their being part of one or more particular communities. However, limitations in available research about elder abuse also exist for research into the dynamics of abuse in particular communities. The AIFS Report noted:

> As the dynamics of elder abuse are context dependent, there remains much to be understood about the extent to which the dynamics of elder abuse are different or similar in varying contexts, and the extent to which different responses may be required.[99]

2.65 There has been limited research on elder abuse in Aboriginal and Torres Strait Islander communities. The AIFS Report 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'.[100]

2.66 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.[101]

2.67 For CALD groups, 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

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97 World Health Organization, *World Report on Ageing and Health* (2015) table 3.1.
98 Ibid.
99 Kaspiew, Carson and Rhoades, above n 45, 12–13.
100 Ibid 12.
101 Office of the Public Advocate (WA), *Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities* (2005) 25.

that adult children are responsible for decision making concerning their elderly parents.[102] Additionally, 'cultural expectations around family privacy may prevent older people from recognising, disclosing, and/or reporting abuse, particularly when it is perpetrated by family members'.[103]

2.68 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.[104]

2.69 For people living in rural areas there may be distinct dynamics at play, particularly in the context of farming families. The AIFS Report noted that there may be 'complex and potentially conflictual dynamics around farming properties with the multi-generational interests involved where the farm is the family business':

> These included complications about the treatment of farms as inheritance, and the balance between providing for children and maintaining the family business, placing one child in a different position from the others, and the treatment of labour and other contributions to the improvement of the farm in estates.[105]

2.70 In the context of family violence, it has been suggested that in rural and regional areas, issues such as social and geographic isolation, limited access to support and legal services, as well as complex financial arrangements and pressures, including limited employment opportunities, may heighten vulnerability and shape the experience of violence.[106]

2.71 Older lesbian, gay, bisexual, transgender and intersex (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 may be motivated by hostility towards a person's sexual orientation or gender identity. Additionally, 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.[107] Older LGBTI people may also be reluctant to disclose their sexual orientation or gender identity to services for fear of discrimination.

2.72 Additionally, older LGBTI people have a higher exposure to other risk factors for abuse: for example they have a higher likelihood of diagnosis of treatment for a

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

103 Lana Zannettino et al, 'The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People From Culturally and Linguistically Diverse Communities in Australia' (2015) 27(1) *Journal of Elder Abuse & Neglect* 74, 77.

104 Kaspiew, Carson and Rhoades, above n 45, 12.

105 Ibid 13. The complexity of family relationships over farms and farming assets is noted by Cheryl Tilse et al, 'Managing Older People's Assets: Does Rurality Make a Difference?' (2006) 16(2) *Rural Society* 169, 180.

106 Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Centre for Rural and Regional Law and Justice, 2014) 46–63.

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

'mental disorder' or major depression than the general population of older people.[108] They may also be at increased risk of social isolation, which may increase their vulnerability to abuse.

2.73 People with cognitive impairment or other forms of disability have been identified as being more vulnerable to experiencing elder abuse. Where a person has a disability, this will often be correlated with other risk factors: the need for support and assistance, as well as an increased likelihood of social isolation and lower socioeconomic resources.[109]

Framing legal responses to elder abuse

Elder abuse in the federal context

2.74 Issues surrounding elder abuse relate to areas of Commonwealth, state and territory and possibly local government responsibility. For example, the Commonwealth makes laws relating to financial institutions, social security, superannuation and aged care. Laws relating to substitute decision making, including guardianship and powers of attorney, and most criminal laws, are the province of the states and territories. In part this is because the Commonwealth's powers to legislate are limited, and do not extend to areas such as guardianship, powers of attorney, wills and estates, and general criminal law.[110] In the 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs described the legal landscape in this way:

> Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.[111]

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108 National LGBTI Health Alliance, *The Statistics At a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* <http://lgbtihealth.org.au/statistics/>.

109 *National Disability Strategy 2010–2020 Evidence Base* (2011) 14–7; Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Report to the Council of Australian Governments 2012: Laying the Groundwork 2011–2014* (2012) 96.

110 The Commonwealth's power to legislate is limited to those powers specifically listed in the *Australian Constitution.* It has no enumerated power to legislate with respect to the welfare of adults generally. In the context of this Inquiry, the Commonwealth's legislative power is generally understood to be limited to aged care, superannuation, banking, and social security. There is some suggestion that the external affairs power (s 51(xxix)) or the executive power of the Commonwealth (s 61) might support Commonwealth legislation on elder abuse generally. However, the extent to which these powers might support general elder abuse legislation is not settled: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99.

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

2.75 This makes responding to elder abuse a complex issue—both from the perspective of laws, but also in terms of practical responsibility. The AIFS Report commented that

> responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations.[112]

2.76 As Professor Wendy Lacey has noted, this has had the effect that, 'in the absence of a national framework, the states and territories have developed strategies for co-ordinated interagency approaches to responding to elder abuse, but these are presently contained in variable and relatively weak policy instruments if they exist at all'.[113]

2.77 The ALRC is well placed to consider reforms in this fragmented legal landscape, given that its legislative functions include considering proposals for uniformity between state and territory laws, as well as proposals for complementary Commonwealth, state and territory laws.[114] In the ALRC's 2010 Family Violence Inquiry, the ALRC considered the complex interactions across the federal landscape, particularly between the *Family Law Act 1976* (Cth) and state and territory family violence and child protection laws.[115] In that context the ALRC identified, as a key policy goal, the aspiration of 'seamlessness'. In this Report too, the ALRC has made recommendations directed at both Commonwealth and state and territory laws and legal frameworks, in order to comprehensively address the range of legal mechanisms available to safeguard older people from abuse.

Elder abuse as a human rights issue

2.78 In its 2016 report, *Elder Abuse in New South Wales*, the New South Wales Legislative Council set out as its first recommendation that the approach to elder abuse should include 'a rights based framework that empowers older people and upholds their autonomy, dignity and right to self-determination'.[116]

2.79 Professor Wendy Lacey urged that human rights should be the 'normative framework' for adult protection.[117] Similarly, the Law Council of Australia, for example, said that 'it is vital that all legal responses are based on a rights based approach in which the will and preference of the older person is given primacy'.[118]

2.80 Existing human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic*, Social and*

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112 Kaspiew, Carson and Rhoades, above n 45, 1.
113 Lacey, above n 109, 102.
114 *Australian Law Reform Commission Act 1996* (Cth) ss 21(1)(d)–(e).
115 Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).
116 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1.
117 Lacey, above n 109, 113.
118 Law Council of Australia, *Submission 61*.

Cultural Rights, protect the rights of older persons equally with other persons.[119] The *Universal Declaration of Human Rights* specifically protects the right to security in old age.[120] Some instruments, such as the *Convention on the Rights of Persons with Disabilities* (CRPD) may be particularly relevant to older persons, given that the rates of disability increase with age.[121]

2.81 There is no Convention specifically relating to the rights of older persons. However, the Open-Ended Working Group on Ageing is currently considering whether there should be new human rights instruments relating to older persons.[122] A number of non-binding international instruments, including the *United Nations Principles for Older Persons*[123] and the *Madrid International Plan of Action on Ageing*,[124] relate to the human rights of older persons.

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

> The challenge for lawyers, advocates and policymakers is that the human rights of older persons have not yet been well defined in international human rights law, and governments (national, regional and local) are presently developing law and policy in the absence of a specific treaty with binding obligations to respect and protect the rights of older people. … [t]he only instruments specifically concerned with older persons reflect non-binding, soft law. … While the UN Principles [for Older Persons] are implicitly human rights-based, they are also written in aspirational terms and speak to others (that is carers and policymakers) rather than older persons. Further, the UN Principles do not speak of 'rights' at all, although they are framed around five core themes reflective of a human rights-based approach: independence, participation, care, self-fulfilment and dignity.[125]

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

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

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

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

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

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

125 Lacey, above n 109, 114–115.

Framing principles for this Inquiry

2.83 The objective expressed in the Terms of Reference is to identify best practice laws and legal frameworks that: promote and support older people to participate equally in their community and access services and advice; protect against misuse or advantage taken of formal and informal supporter or representative roles; and to provide specific protections. To meet this objective, and to express a rights-based framework, the ALRC has utilised two key principles to frame the recommendations in this Report: dignity and autonomy; and protection and safeguarding.

Dignity and autonomy

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

> Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
>
> Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status and be valued independently of their economic contribution.[126]

2.85 Dignity is a key principle in a number of international human rights instruments.[127] In Australia, the National Disability Strategy prioritised the concept of dignity in its principles.[128] Similarly, the Productivity Commission identified human dignity as 'an inherent right' of persons with disability and suggested that dignity as a human being is linked to self-determination, decision making and choice.[129]

2.86 The UN Principles for Older Persons also expressly include dignity as a principle in the context of older persons 'in any shelter, care or treatment facility', combined with the right to be self-determining: 'full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives'.[130]

2.87 Dignity is a principle which acknowledges diversity. The preamble to the UN Principles for Older Persons acknowledges an appreciation of 'the tremendous

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

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

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

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

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

diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses'.[131]

2.88 Autonomy is a significant aspect of a number of the United Nations Principles for Older Persons that underlie the ability of persons to make decisions and choices in their lives: particularly the principles of 'independence', 'participation' and 'self-fulfilment'. For example, the principle of self-fulfilment includes that '[o]lder persons should be able to pursue opportunities for the full development of their potential'.[132] Autonomy is also enshrined in the general principles of the CRPD, to which Australia was one of the original signatories.[133] It is a key principle of the National Disability Strategy;[134] and is reflected in the objects and principles of the National Disability Insurance Scheme.[135]

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

Protection and safeguarding

2.90 This Inquiry requires a particular focus on safeguards and protections for the rights of older persons, reflected in the title of the Terms of Reference: 'Protecting the Rights of Older Australians from Abuse'. It is also the clear objective of the Inquiry. Safeguarding against elder abuse requires addressing a range of points of intervention, including those related to preventing abuse, and providing appropriate responses and redress where abuse has occurred.

2.91 Elder abuse undermines dignity and autonomy. Concerning autonomy and intimate partner violence, Professor Marilyn Friedman has written that 'abuse denies to the abused person ... the safety and security she needs to try to live her life as she thinks she ought to' or 'according to her values and commitments'.[136]

2.92 Autonomy and protection are sometimes seen as opposing considerations that need to be balanced or traded off against each other, particularly when issues of whether and how to intervene to protect a person from abuse arise. However, protecting older people from abuse can be seen to support and enable their ability to

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131 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991).
132 Ibid [15].
133 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).
134 Australian Government, *National Disability Strategy 2010–2020*, 22.
135 *National Disability Insurance Scheme Act 2013* (Cth) ss 3–4.
136 Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) 142.

live autonomous and dignified lives. UK health and social care researcher Angie Ash has argued that there are questions about how far the

> exercise of 'choice' and 'self-determination' is possible if an elder is frail, dependent on their abuser for care, has suffered domestic violence for most of their adult life, or is living in impoverished, isolated circumstances … choice is not an absolute concept, but is shaped by social and cultural factors, inequalities and contradictions.
>
> …
>
> A woolly pre-eminence of 'choice' over a human right to live free from abuse, can result in passive professional head-shaking about the mistaken options vulnerable people may 'choose', and the continuation of abuse for the older person.[137]

2.93 Ash has suggested instead that 'upholding the principle of self-determination may demand … making a judgement of how intervention might *both* uphold individual choice *and* provide protection from harm'.[138] Professor Jonathan Herring has put this in another way, suggesting that the aim of any 'intervention to protect is to restore or support autonomy'.[139]

2.94 Where possible, the ALRC has sought to recommend changes to the law that both uphold autonomy and provide protection from harm. Where this is not possible, greater weight is often given to the principle of autonomy. The autonomy of older people should not be afforded less respect than the autonomy of others. However, in limited cases, where there is serious abuse of vulnerable people, protection is given additional weight.

2.95 For example, in relation to aged care, the ALRC has considered how the move towards greater consumer control for older people must be buttressed by regulatory oversight to ensure accountability and transparency in the provision of quality care, including protections and safeguards against abuse or neglect.

2.96 Reforms related to enduring documents—variously, enduring powers of attorney, enduring guardianship and advance care directives—focus on improving safeguards against misuse of an appointment by a substitute decision maker, thereby promoting people's ability and confidence in planning for a future time at which they may require substantial decision-making support. Appropriate protections related to advance planning are also addressed in chapters concerning will making and superannuation.

2.97 In relation to court and tribunal appointed decision makers, the focus of recommendations has been on maximising the possibilities for involving the person who may be the subject of a guardianship and administration order in the application process, and ensuring that guardians and financial administrators understand their obligations to promote the autonomy and well being of a person who is subject to a guardianship and administration order.

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137 Angie Ash, *Safeguarding Older People from Abuse: Critical Contexts to Policy and Practice* (Policy Press, 2015) 71.

138 Ibid.

139 Herring, above n 53, 35.

2.98 The interrelationship of the principles of autonomy and dignity and protecting and safeguarding has particularly informed the ALRC's approach to adult safeguarding, discussed in Chapter 14. In that chapter, the ALRC recommends that adult safeguarding agencies have a role in safeguarding and supporting 'at-risk' adults. Protecting these people from abuse will serve to support their autonomy and show respect for their dignity, because living in fear of abuse can prevent a person from making free choices about their lives and pursuing what they value.

2.99 Placing further emphasis on the need to respect people's autonomy, the ALRC recommends that the consent of an at-risk adult should be obtained before adult safeguarding agencies investigate abuse or take other actions. Where someone subjected to abuse refuses help, in most cases this refusal should be respected. But the ALRC also concludes that safeguarding agencies should be able to act in particularly serious cases of physical abuse, sexual abuse and neglect of 'at-risk' adults. This may be seen as necessary action to secure people's long-term autonomy interests and their immediate dignity.

Terminology

2.100 Throughout this Report a number of terms are frequently used. These are discussed here.

Supported and substitute decision making

2.101 Assistance in decision making occurs in many different ways and for people with all levels of decision-making ability, usually involving family members, friends or other supporters. 'Supported' and 'substitute' decision making reflect different ideas; and a 'supporter' is different from a 'substitute' decision maker.

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

- pre-emptive arrangements—anticipating future loss of legal capacity or decision-making impairment through appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical);[140] and
- appointment—where a state or territory court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual's behalf (guardians and administrators).[141]

2.103 There has been a move to prefer the language and practice of supported rather than substitute decision making—described as a 'paradigm shift' in thinking about

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

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

people with disability.[142] Supported decision making emphasises the ability of a person to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. In the *Equality, Capacity and Disability* Report, the ALRC concluded that this preference was best expressed through developing a new lexicon for the roles of supporters and substitutes. The ALRC also considered the standard that should guide the actions of the person appointed to act on behalf of another, as well as the accountability mechanisms that were needed particularly for substitute decision makers. The ALRC considered that the crucial issue was how to advance, to the extent possible, supported decision making in a federal system, recognising that the policy pressure is clearly towards establishing and reinforcing frameworks of support in law and legal frameworks. The momentum is also towards building the ability of those who may require support so that they may become more effective and independent decision makers.

'Supporters' and 'representatives'

2.104 To encourage supported decision making at a Commonwealth level, the ALRC recommended a new model (the Commonwealth Decision-Making Model) based on the positions of 'supporter' and 'representative'. These terms are also part of building a new lexicon for supported decision making. The ALRC was asked to acknowledge the role of family members and carers in supporting people with disability to make decisions and therefore built this recognition into the model in the category of 'supporter'.[143] A supporter is an individual or organisation that provides a person with the necessary support to make a decision.[144] A representative's role is to provide full support in decision making,[145] by first seeking to support a person to express their will and preferences in relation to a decision, or where this is not possible, making a decision on that person's behalf based on their will, preferences and rights.[146] The role of both supporters and representatives is to assist persons who need decision-making support to make decisions in relevant areas of Commonwealth law.

2.105 A 'supporter' does not make decisions for a person who may need decision-making support; the decision remains that of the person. Some Commonwealth laws already make provision for support roles that are not decision-making ones, and the ALRC model would apply to these—such as the designation of a 'correspondence nominee' for Centrelink purposes.[147] Banks may provide facilities for co-signing, allowing designated others to conduct banking along with the account holder.

2.106 A 'representative' does make decisions on behalf of a person and is a 'substitute' decision maker. Examples of substitute decision makers under state and

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142 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 2.
143 Ibid Terms of Reference.
144 Ibid [4.36]–[4.37].
145 Ibid [4.38].
146 Ibid 94.
147 See, eg, *Aged Care Act 1997* (Cth); *Social Security (Administration) Act 1999* (Cth); *Personally Controlled Electronic Health Records Act 2012* (Cth). See, also, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 6.

territory law are donees of powers of attorney, guardians and financial administrators. In describing the donor of a power of attorney, this Report uses the term 'principal' for self-appointed substitute decision makers.[148]

'Will, preferences and rights' standard

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

> (a) The person's will and preferences must be given effect.
>
> (b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.
>
> (c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in a way least restrictive of those rights.
>
> (d) A representative may override the person's will and preferences only where necessary to prevent harm.[149]

2.108 'Best interests' language is still found in some laws considered in this Report. While the ALRC recommended that these laws should be amended in the light of the the *Equality, Capacity and Disability* Report, this will take time to implement. As the first recommendation in that Report, the ALRC recommended that reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision making should be guided by National Decision-Making Principles and Guidelines.[150] Where 'best interests' language is used in this Report it is by reference to particular legislative provisions as they stand at the time of writing.

National Decision-Making Principles

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

- everyone has an equal right to make decisions and to have their decisions respected;

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

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

150 Ibid rec 3–1.

- persons who need support should be given access to the support they need in decision making;
- a person's will and preferences must direct decisions that affect their lives; and
- there must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.[151]

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

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

Legal capacity

2.112 A recurrent theme in discussions of elder abuse is the issue of impairment or loss of 'capacity'. As explained in the *Equality, Capacity and Disability* Report, capacity in a general sense refers to decision-making ability, which may cover a wide range of choices in everyday life, such as personal matters, financial and property matters, and health and medical decisions.[152] 'Legal capacity' sets the threshold for individuals to take certain actions that have legal consequences and goes to the validity, in law, of choices and being accountable for the choices made. 'Those who make the choice', Emeritus Professor Terry Carney states, 'should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent'.[153]

2.113 'Capacity' questions arise in both the legal and medical contexts. Professors Carmelle Peisah and Nick O'Neill observed that

> [t]he field of capacity and decision-making is a truly 'medico-legal' field, representing an interface between the legal and medical (actually health professional) disciplines. Much major decision-making involves execution of legal documents and is regulated by the common law and legislation. It requires the involvement of legal professionals, while the relationship between decision-making and health and well-being often necessitates the involvement of health care professionals.[154]

2.114 At common law there is a presumption of legal capacity, which is also embodied in some guardianship legislation.[155] In the Commonwealth context, the *National Disability Insurance Scheme Act 2013* (Cth) states:

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151 Ibid.
152 See the discussion of legal capacity in Ibid [2.37]–[2.50].
153 Carney and Tait, above n 140, 3.
154 Carmelle Peisah and Nick O'Neill, *Capacity and the Law* (Australasian Legal Information Institute (Austlii) Communities, 2nd ed, 2017) [1.1].
155 See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3).

> People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.[156]

2.115 Tests of legal capacity—in terms of levels of understanding for particular legal transactions—have been developed through the common law, for example in relation to contracts and wills.[157] Where a lack of the required level of understanding is proved in the particular circumstances, the transaction may be set aside. The focus of such tests is on a transaction and the circumstances surrounding it. They are decision-specific and involve assessments of understanding relevant to the transaction being challenged.

2.116 The recommendations in the *Equality, Capacity and Disability* Report addressed the issue of legal capacity in two principal ways. The first was to move away from the 'presumption of capacity'; the second was to place the emphasis on support needs in decision making. The ALRC considered that it was not appropriate in the context of the CRPD to disqualify or limit the exercise of legal capacity because of a particular status, such as disability. As National Disability Services remarked in a submission to the Equality, Capacity and Disability Inquiry, '[t]he crux of the issue is seen in historic legal frameworks that place constraints on the exercise of legal capacity based solely on disability status'.[158] The approach should therefore be on the support needed to exercise legal agency, rather than an assumption or conclusion that legal agency is lacking because of an impairment of some kind. Laws should be 'disability neutral, yet disability responsive, with a firm focus on promoting, protecting and upholding the human rights of all older people', as Disabled People's Organisations Australia submitted.[159]

2.117 However, there are clearly times when assessments of decision-making ability are required. Capacity assessments are the trigger for formal arrangements for decision-making support through, for example, the appointment of guardians and administrators, or the commencement of some enduring powers of attorney. They are also made in a range of health care decisions. In the *Equality, Capacity and Disability* Report, the ALRC recommended that the emphasis of such assessments should be on the support needed to exercise legal agency, rather than an assessment of 'capacity'.[160] It is an approach that is a functional one (focused on the ability to make the particular decision in question); it is not outcomes-based (that is, it does not consider the result or wisdom of the decision), nor status-based (that is, it does not determine that a person has 'lost' capacity because of a condition). A functional approach of this kind 'seeks to

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

157 See, in relation to contracts: *Blomley v Ryan* (1954) 99 CLR 362. In relation to wills, see: *Banks v Goodfellow* (1870) LR 5 QB 549, and see ch 8. See also the common law approach to capacity in Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 7.

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

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

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

maximise the circumstances in which the right of autonomy is protected';[161] and has been supported in other law reform inquiries.[162]

2.118 As Peisah and O'Neill have explained, 'operational definitions of the cognitive elements of capacity usually comprise combinations of the following abilities':

1. To understand the specific situation, relevant facts or basic information about choices
2. To evaluate reasonable implications or consequences of making choices
3. To use reasoned processes to weigh the risks and benefits of the choices
4. To communicate relatively consistent or stable choices.[163]

2.119 In this Report there are threshold moments where a consideration of decision-making ability may arise, for example: where the appointment of a guardian or financial administrator is being considered by a tribunal; where a person is seeking to make a will or enter a range of financial transactions; where a person is in residential aged care and health and financial decisions may need to be made. The consideration of questions of decision-making ability continues the ALRC's emphasis on the importance of embedding the principles and practices of supported decision making from the *Equality, Capacity and Disability* Report. For example, this Elder Abuse Report considers the need for frontline staff and professionals to understand the dynamics of elder abuse and the pressures that might be brought to bear upon older people; as well as the need to ensure that those in the role of substitute decision makers understand their roles as 'representatives' of the person.

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

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

163 Peisah and O'Neill, above n 153, [1.3].

3. A National Plan to Combat Elder Abuse

Contents

Summary

3.1 The ALRC recommends that a national plan be developed to combat elder abuse. It builds upon significant Australian Government commitment to protecting the rights of older Australians.[1] It is a capstone recommendation of this Report and provides the basis for a longer-term approach to the protection of older people from abuse. The Plan will provide the opportunity for future planning and policy development in an integrated way. Much work already undertaken and in train, both at the Commonwealth level and in states and territories, together with recommendations in this Report, may be seen to constitute strategies in implementation of a national commitment to combat elder abuse.

3.2 This Report focuses on strategies for legal change and development that are important in protecting the rights of older Australians. However, the insights gathered through consultations and submissions demonstrate that a wider range of actions is also critical to addressing elder abuse. A national planning process offers the opportunity to develop strategies to combat elder abuse that complement, support and extend beyond legal reforms, such as: national awareness and community education campaigns; training for people working with older people; elder abuse helplines; and future research agendas.

1 Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).

3.3 Elder abuse involves complex social problems and needs to be addressed at an intergovernmental and community level over the long term. This chapter suggests a conceptual template for a National Plan and provides a wide range of examples from stakeholders, drawn from over 400 submissions—sharing ideas, illustrations, suggestions and urgings.

3.4 The recommendations in this Report should also form part of the National Plan described in this chapter, substantially addressing many of the legal questions in relation to elder abuse.

A National Plan to Combat Elder Abuse

Recommendation 3–1 The Australian Government, in cooperation with state and territory governments, should develop a National Plan to combat elder abuse. The Plan should:

(a) establish a national policy framework;

(b) outline strategies and actions by government and the community;

(c) set priorities for the implementation of agreed actions; and

(d) provide for further research and evaluation.

Why a national plan?

3.5 National plans to guide reform and action have facilitated long-term strategic and whole-of-government responses to a diverse range of issues in Australia, including in relation to family violence and child protection. The momentum for national approaches in these areas has led to frameworks and plans developed through the Council of Australian Government (COAG) processes.[2] A plan provides a framework for action, identifying priority reform areas against a set of goals or objectives. It also provides the opportunity to establish specific performance indicators and monitoring mechanisms to ensure accountability, as well as a basis for measuring progress. National plans also support the development of a common understanding of issues, priorities and strategies in areas where there are diverse stakeholders.

3.6 The ALRC uses the concept of a 'national plan' in a broad sense—to emphasise the need for a *national* approach to elder abuse and to provide a coordinating framework for state and territory initiatives as well as those at the Commonwealth level.

3.7 In the 2015 report of the Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses*, (the AIFS Report) Rae Kaspiew,

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

Rachel Carson and Helen Rhoades identified the importance of a national plan in relation to elder abuse.

> The WHO emphasised the importance of having comprehensive data-driven national action plans to ensure effective violence prevention. However, it noted that while many of the surveyed countries reported having national action plans for child maltreatment (71%) and intimate partner violence (68%), fewer than half (41%) had addressed elder abuse. The report noted that such plans are an important 'way for countries to articulate how violence impacts the health, economic viability and safety and security of a nation', and provides direction for policy makers about what needs to be done, including the identification of objectives, priorities, assigned responsibilities, a timetable and an evaluation mechanism.[3]

3.8 The development of a national action plan was widely supported by stakeholders in this Inquiry.[4] As one stakeholder commented, a national plan was imperative in the context of Australia's ageing population. Based on his experience in prosecuting elder abuse matters in California, he said that 'Australia can prepare for the avalanche of new cases that will inevitably arise by developing a national plan'.[5]

3.9 National plans or frameworks exist for issues related to or overlapping with elder abuse, notably, the *National Plan to Reduce Violence Against Women and Their Children, 2010–2022* (Family Violence National Plan). The Family Violence National Plan is described as a 'framework for action', over a 12-year horizon to be implemented through four three-year plans, called 'Action Plans': to bring together 'the efforts of governments across the nation to make a real and sustained reduction in the levels of violence against women'.[6] The background report, described as 'the Plan of Action'[7] set the framework by identifying seven 'core values'; six 'outcomes' to be delivered through 25 'strategies' and 117 'actions'.[8]

3.10 The significant attention already on issues concerning family violence has provided, as St Vincent's Health Australia observed, 'a climate of opportunity', for a national consideration of elder abuse.[9] Where child abuse and family violence are now 'firmly at the centre of public policy debates', said the Welfare Rights Centre (NSW),

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

4 See also the 2016 recommendation by the New South Wales Legislative Council, General Purpose Standing Committee No 2, that there be a 'comprehensive, coordinated and ambitious approach to elder abuse': Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

5 P Greenwood, *Submission 304*.

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

7 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children, 2009–2021* (2009) iv.

8 The core values are listed as: safety; community responsibility; equality and diversity; responsiveness; justice; durability; knowledge and accountability. The 'outcomes' are: communities are safe and free from violence; relationships are respectful; services meet the needs of women and their children; responses are just; perpetrators stop their violence; and systems work together effectively: Ibid 15.

9 St Vincent's Health Australia, *Submission 345*.

'[p]lacing elder abuse on the national agenda must also be a priority. Elder abuse is an issue that, finally, has come of age'.[10]

3.11 However, it was also recognised that elder abuse cannot simply be subsumed into family violence prevention strategies. Women's Domestic Violence Court Advocacy Services NSW Inc said that,

> whilst in a general sense elder abuse shares commonalities with other forms of domestic and family violence, it also has unique features that set it apart. As such, elder abuse requires a singular focus and dedicated, systematic response if it is to be effectively addressed.[11]

3.12 It was critical to 'fill the gaps' in existing frameworks and plans to include elder abuse, urged Disabled People's Organisations Australia (DPO Australia). The recommended National Plan 'must intersect and build on' the approaches not only in relation to family violence, but also in relation to disability: the National Disability Strategy; the National Disability Insurance Scheme (NDIS); and its Quality and Safeguarding Framework.[12] Carers NSW added the perspective of carers: a National Plan would provide 'a good opportunity to consider the convergence of issues and strategies regarding abuse, neglect and exploitation in ageing, disability and carer contexts'.[13]

3.13 COTA noted that this ALRC Inquiry would not only 'lay the ground for', but also 'give greater impetus to', 'an overdue national response to law reform, service delivery and cultural change to protect older people from elder abuse'.[14] Similarly, the Office of the Public Advocate (SA) said that the development of a national plan, in helping to raise public awareness of the prevalence of elder abuse, would 'create the conditions necessary to facilitate stronger safeguards against the abuse of older people':

> [a] national plan may also create a foundation for enhancing consistency amongst the States and Territories. The process of reporting and responding to elder abuse requires nationally consistent procedures and, ideally, the longer-term goal of national legislative reform.[15]

3.14 The ageing population in Australia creates a particular impetus for specific action. The Queensland Law Society urged that:

> [o]lder people as a group are deserving of special consideration, support and protection from abuse. Considering that the proportion of ageing residents in Australia is steadily increasing, substantial law reform is required to protect this growing demographic.[16]

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10 Welfare Rights Centre NSW, *Submission 184*.
11 Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*.
12 Disabled People's Organisations Australia, *Submission 360*. Citations omitted.
13 Carers NSW, *Submission 321*.
14 COTA, *Submission 354*.
15 Office of the Public Advocate (SA), *Submission 347*.
16 Queensland Law Society, *Submission 159*.

3.15 Plans to address elder abuse have been developed elsewhere. In 2014 the World Health Organization reported that 41% of the countries included in its *Global Status Report on Violence Prevention* had national plans on elder abuse, and 17% had conducted national surveys.[17]

3.16 For example, the Government of Québec released a *Governmental Action Plan to Counter Elder Abuse 2010–2015* (the Québec plan).[18] This plan followed other work directed towards countering violence against women, against youth and against children.

3.17 These plans are illustrative of approaches that can be used to inform the national planning process to combat elder abuse. They provide a structured and systematic way to build a plan.[19] Reflecting such approaches, in this Report the ALRC uses a taxonomy that distinguishes: guiding principles, goals, strategies and actions.[20]

Bringing together existing work

3.18 A commitment to combating elder abuse is already evident in a range of initiatives across the states and territories as well as the Commonwealth. A National Plan will capture and consolidate this work.[21] In doing so, Legal Aid NSW observed, a national plan would 'encourage a strategic, consistent response to elder abuse across Australian jurisdictions'.[22] The value of a national plan process would be to locate and frame these initiatives within a coherent national framework. It will also provide the opportunity for identifying short, medium and long-term priorities.

3.19 Stakeholders reiterated the importance of continuing the commitment to existing initiatives.[23] The Financial Planning Association, for example, supported the development of a national plan as a commitment by all governments 'to tackle this issue as a matter of urgency in the face of an ageing population', but also added that 'this will take time and money and should not distract from the implementation of steps to address elder abuse which must be done as a priority'.[24]

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17 World Health Organization, *Global Status Report on Violence Prevention* (2014) 78.

18 Government of Québec, *Governmental Action Plan to Counter Elder Abuse 2010–2015* (2010).

19 Other examples of analogous approaches, using the device of a 'framework', include: Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives* (September 2011); Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009). 'Strategy' is also used to describe plans: see, eg, Australian Securities & Investments Commission, *National Financial Literacy Strategy 2014–2017*.

20 The Family Violence national plan uses 'core values' for principles; and 'outcomes' for goals.

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

22 Legal Aid NSW, *Submission 352*.

23 See, eg, Aged Rights Advocacy Service Inc, *Submission 285*.

24 Financial Planning Association of Australia (FPA), *Submission 295*.

3.20 St Vincent's Health Australia noted that, notwithstanding the 'lack of a national policy', all jurisdictions have adopted 'a human rights approach to elder abuse, as opposed to a protective and mandatory reporting approach'.[25] This consistency of approach provides the basis for a shared understanding and complements the approach taken in this Inquiry.

3.21 The Office of the Public Advocate (Vic) considered that the 'coherent policy and action framework' of a national plan would be 'a crucial step towards enhancing rights protections for older Australians'.[26]

3.22 A national planning process would help to ameliorate the problems of the distribution of powers in a federal system in which many issues that arise in a consideration of 'elder abuse' sit across federal/state jurisdictional lines. The Darwin Community Legal Service Aged and Disability Advocacy Service said that a national approach would facilitate an appreciation of 'the complexities of addressing the issue of Elder Abuse across a range of jurisdictions'.[27]

3.23 The Benevolent Society submitted that a 'holistic national approach is a pressing priority' and a national plan would be 'a critical element of a broader national agenda on older Australians'.

> There is currently no national plan for older Australians which incorporates a broader agenda like tackling ageism, financial security and housing, work and training, mobility and transport, social inclusion and participation, preventing and responding to abuse, and fostering age friendly environments.[28]

3.24 Developing a National Plan will also provide the opportunity to continue and focus national conversation and engagement. Anglicare (SA) suggested that a national approach would 'promote improved governance through consistent practice' and would lead to 'increased awareness and improved response to elder abuse through the embedding of a consistent supportive framework'.[29] The ability of a national plan to create a nationally consistent framework was also emphasised by the Australian Nursing and Midwifery Federation:

> The essence of the issue is recognition that elder abuse does occur, and then the establishment of laws and policies which mitigate, and ultimately eradicate, such ill-treatment. A National Plan will ensure such recognition of elder abuse and provide a nationally consistent framework through which to establish credible reforms and actions for mitigation.[30]

3.25 The Office of the Public Advocate (Qld) stressed the importance of engaging with the issue of elder abuse in a 'multi-faceted' way:

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25 St Vincent's Health Australia, *Submission 345*.
26 Office of the Public Advocate (Vic), *Submission 246*.
27 Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*. Chapter 2 discusses the federal context for elder abuse law reform in more detail.
28 The Benevolent Society, *Submission 280*.
29 AnglicareSA, *Submission 299*.
30 Australian Nursing and Midwifery Federation, *Submission 319*.

> A national plan provides an opportunity to address and improve culture and community attitudes, federal and state government policy, and on-the-ground supports and responses. The plan should also encompass subsets of the Australian population such as people with disability or mental health issues, people with impaired decision-making capacity, Indigenous Australians and people with different cultural backgrounds.[31]

3.26 There is clear commitment and support for a National Plan to combat elder abuse in Australia. The next questions are how a national plan should be developed, and what shape it should take.

Leadership

Recommendation 3–2 The National Plan to combat elder abuse should be led by a steering committee under the imprimatur of the Law, Crime and Community Safety Council of the Council of Australian Governments.

3.27 The National Plan to combat elder abuse needs clear leadership. The ALRC recommends that the planning process should be led by a steering committee. The Law, Crime and Community Safety Council (LCCSC) of COAG has established a working group to discuss current activities to combat elder abuse in Australian jurisdictions, consider potential national approaches, and consider the findings of this Inquiry.[32] The LCCSC is well placed to take a lead role in coordinating a planning process. The important role that COAG can play, expressing a commitment of all governments at a senior level, was identified by stakeholders.[33] The Age Discrimination Commissioner is well placed to lead a number of strategies and actions of the Plan, involving key stakeholder groups.

3.28 The National Older Persons Legal Services Network emphasised that it was important for COAG to be responsible, because of:

- The need for national leadership to establish elder abuse as a national priority requiring both 'whole of government' and 'whole of community' responses;
- The limited sources of Commonwealth power to legislate elder abuse measures;
- The traditional role of COAG in developing model, uniform laws in areas of high public importance; and
- The particular need for uniformity of state and territory laws with respect to personal autonomy, including powers of attorney, guardianship and administration laws.[34]

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

32 Law, Crime and Community Safety Council, *Communiqué*, 19 May 2017. See also *The Coalition's Policy to Protect the Rights of Older Australians* <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>.

33 See, eg, Eastern Community Legal Centre, *Submission 357*; Financial Planning Association of Australia (FPA), *Submission 295*.

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

3.29 The need for coordination and leadership was identified as an important issue by stakeholders. As the Financial Services Council observed:

> We are cognisant that the nature of implementation and governance of these reforms will be paramount to their effectiveness given the complex nature and environment in which elder abuse manifests itself across different jurisdictions.[35]

3.30 The Combined Pensioners and Superannuants Association (CPSA) urged that the implementation of a National Plan be 'overseen by an appropriate body or department', emphasising that '[t]here is a strong need for leadership on policy issues affecting older Australians, particularly around elder abuse'.[36]

Implementation

3.31 Strategies for implementation, including accountability mechanisms,[37] are vital to the success of a National Plan. As Leading Age Services Australia observed, '[w]ithout implementation strategies, any Plan will stay just that—a plan'.[38]

3.32 The Law Council of Australia (Law Council) emphasised the need for 'independent scrutiny' of the Plan, 'informed by relevant human rights standards applicable to older persons'.[39] Responsibility for implementation must also be identified. DPO Australia said that the Plan requires that

> a designated body has responsibility for the implementation of the Framework, reporting directly to the Council of Australian Governments (COAG). Such an integrated and responsive approach is required to address elder abuse.[40]

3.33 Others suggested the need for a specific 'national body' to oversee implementation of the National Plan. [41] The Eastern Community Legal Centre argued that 'funding of an independent national peak body' was crucial to the development and implementation of the national plan.[42]

3.34 The issue of funding for the success of a National Plan was also raised. Legal Aid NSW, for example, urged that a plan 'should be properly resourced to ensure meaningful outcomes for older people'.[43] Similarly, the Office of the Public Advocate (Qld) observed that

> any law reform and policy proposals must offer genuine outcomes and be effective in addressing the elder abuse, exploitation and neglect. This requires careful policy and

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35 Financial Services Council, *Submission 359*.
36 Combined Pensioners and Superannuants Association, *Submission 281*.
37 Carers NSW, *Submission 321*.
38 Leading Age Services Australia, *Submission 377*. See also Legal Aid NSW, *Submission 352*; Disabled People's Organisations Australia, *Submission 360*.
39 Law Council of Australia, *Submission 351*.
40 Disabled People's Organisations Australia, *Submission 360*.
41 Aged Rights Advocacy Service Inc, *Submission 285*. Seniors Rights Victoria said that there needs to be a national body comprised of organisations already working in the elder abuse field to facilitate coordination, communication and sharing of best practice, citing the example of 'Elder Abuse Action Australia': Seniors Rights Victoria, *Submission 383*.
42 Eastern Community Legal Centre, *Submission 357*. See also Justice Connect Seniors Law, *Submission 362*.
43 Legal Aid NSW, *Submission 352*. See also Victorian Multicultural Commission, *Submission 364*.

> legislation development, appropriate funding and implementation and cooperation between Commonwealth and state governments.[44]

3.35 The ALRC recognises that recommendations in this Report may have funding and resourcing implications, particularly where expansion of existing roles, new roles, and additional training obligations are involved. The Australian Government commitments and funding are also acknowledged, in relation to developing a national elder abuse hotline; developing pilot training programmes; a study into the prevalence of elder abuse; and developing a national awareness campaign.[45]

Goals

Recommendation 3–3 The National Plan to combat elder abuse should identify goals, including:

(a) promoting the autonomy and agency of older people;

(b) addressing ageism and promoting community understanding of elder abuse;

(c) achieving national consistency;

(d) safeguarding at-risk adults and improving responses; and

(e) building the evidence base.

Recommendation 3–4 The National Plan should take into account the different experiences and needs of older persons with respect to:

(a) gender;

(b) sexual orientation;

(c) disability; and

(d) cultural and linguistic diversity.

The Plan should also take into account the experiences and needs of:

(a) older Aboriginal and Torres Strait Islander people; and

(b) older people living in rural and remote communities.

3.36 The ALRC identified two framing principles for this Inquiry: dignity and autonomy; and protection and safeguarding. These are discussed in Chapter 2. These framing principles underpin all the law reform recommendations in this Report. They start from a position of respecting and supporting individuals in their choices and in the

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44 Office of the Public Advocate (Qld), *Submission 361*. See also, eg, Eastern Community Legal Centre, *Submission 357*.

45 Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).

exercise of their rights, but also providing safeguards against elder abuse. The ALRC considers that the National Plan to combat elder abuse should be guided by similar principles and inform its goals.

3.37 A National Plan to combat elder abuse should address, among other matters, goals such as those identified in Recommendation 3–3. These goals are not completely discrete areas and they are suggested as indicative of key objectives of the National Plan. The National Plan should then identify a range of strategies and actions in pursuit of these goals. The ALRC's recommendations in this Report are situated within this framework. Throughout this Inquiry, stakeholders identified many initiatives that could reflect these goals, and these are mapped against them in the discussion below.

3.38 The National Plan should take into account the different experiences and needs of older people, including from Aboriginal and Torres Strait Islander communities, and across gender, sexual orientation, disability, cultural and linguistic diversity.

3.39 Seniors Rights Victoria emphasised the need to recognise that the term 'older people' is a wide one and 'encompasses a diverse group of people from various generations, cultural backgrounds, and gender and sexual identities':

> How these different groups approach and respond to elder abuse (including the terminology used) will be important aspects of a national plan, which must consider the unique needs of older people:[46]

3.40 Seniors Rights Victoria also noted that older people may belong to one or more of these groups and therefore may experience 'additional or compounded layers of disadvantage'.[47]

3.41 The difficulties for those who live in regional and remote communities also needs to be a specific focus of consultations. Maria Berry said that a problem in smaller country areas was that people 'don't voice up as the fear of repercussions and having to remain living in an area where everyone knows everyone' and that regional areas face problems of 'social isolation'.[48]

3.42 Peak bodies representing the interests of older people and/or who work with older people should be involved in consultations. These include, for example: seniors rights legal and advocacy services; elder abuse advocacy groups; aged care advocacy services; nurses and health practitioners; law societies and community legal centres; and banking and financial service groups.[49]

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46 Seniors Rights Victoria, *Submission 383*. See also Disabled People's Organisations Australia, *Submission 360*.

47 Seniors Rights Victoria, *Submission 383*.

48 M Berry, *Submission 355*.

49 Suggested, eg, by: Seniors Rights Victoria, *Submission 383*; Australian College of Nursing, *Submission 379*; National Legal Aid, *Submission 370*; National Older Persons Legal Services Network, *Submission 363*; Law Council of Australia, *Submission 351*; Speech Pathology Australia, *Submission 309*; Seniors Rights Service, *Submission 296*; Aged Rights Advocacy Service Inc, *Submission 285*.

Promoting autonomy and agency of older people

3.43 Autonomy and dignity are essential framing principles in the Inquiry and should be promoted in any plan to combat elder abuse. This goal is focused on the empowerment of older people and was endorsed by stakeholders. Seniors Rights Victoria emphasised the centrality of the principle of autonomy to any national plan:

> The autonomy, dignity and agency of all people of any age is of importance to a well-functioning society. In previous eras elder abuse has often been approached within a protectionist framework that considered older people, by virtue of their age, as vulnerable, dependent and unable to make suitable decisions regarding their own safety and care. In more recent times elder abuse has been approached with a rights-based and empowerment framework that focuses on supporting the older person's desires and needs.[50]

3.44 St Vincent's Health Australia explained that the 'empowerment model'

> assumes all adults are competent to make informed decisions, unless proven otherwise, and that they have a right to self-determination and informed choice. This approach empowers and encourages older people facing abuse to take action through information, education and advocacy, but does not compel the older person to take action.[51]

3.45 The Eastern Community Legal Centre similarly noted the importance of ensuring that empowerment and the right to self-determination were 'paramount to every recommendation'.[52] The New South Wales Ombudsman similarly welcomed the development of a National Plan, 'including its principal goal to promote the autonomy and agency of older people'.[53] Seniors Rights Victoria urged that 'a core goal' of a National Plan should be 'to promote the autonomy, dignity and agency of older people and this goal should be considered at every point including primary prevention, early intervention, and response'.[54]

3.46 Stakeholders strongly supported the focus on autonomy. The Combined Superannuants and Pensioners Association, for example, agreed with 'a focus on the agency and autonomy of older people as the key principle underpinning the National Plan, as well as the conceptualisation of elder abuse as a human rights issue'.[55] As one stakeholder, a social worker, observed, '[t]he voices of older people, and caregivers, need to be heard and be respected in matters pertaining to decisions that may impact on them':

> Preventative measures need to involve older people themselves as well as their caregivers. Older people are not a homogeneous group. They are as different as any other age group in society, with life-long differences in intellect, competence, and

50 Seniors Rights Victoria, *Submission 383*.
51 St Vincent's Health Australia, *Submission 345*.
52 Eastern Community Legal Centre, *Submission 357*.
53 NSW Ombudsman, *Submission 341*.
54 Seniors Rights Victoria, *Submission 383*.
55 Combined Pensioners and Superannuants Association, *Submission 281*. See also AnglicareSA, *Submission 299*.

> need for independence. Although generally appreciative of support, they want to maintain as much control as possible.[56]

Supporting older people's autonomy and agency

3.47 Stakeholders in this Inquiry provided many illustrations of ways that the goal of promoting the autonomy and agency of older people could be put into action. One strategy under this goal should be focused on supporting older people in understanding and exercising their rights. The ALRC considered such issues in detail in the *Equality, Capacity and Disability in Commonwealth Laws* Report, when developing National Decision-Making Principles.[57]

3.48 The Report included the Principle of Support with guidelines.[58] The guidelines provide an illustrative approach to the framing of 'support', particularly in the context of people who may have impaired decision-making ability. The Report also acknowledged the vital role played by informal supporters and support networks in the decision-making of people with disability.[59]

3.49 Carers also play a key role in supporting older people to participate in their communities and in exercising their rights.[60] As in the Disability Inquiry, stakeholders in this Inquiry drew attention to the vital and positive role that carers play—and stressed the importance of not viewing carers in too negative a light. As observed in one submission:

> I hope that any safeguards that are introduced to protect the elderly also respect the unpaid, time-consuming, thankless tasks many carers undertake out of love, duty or necessity. … I just hope that any changes which are introduced to protect the elderly do not hinder carers who are doing the right thing. It is hard not to be hurt by the current discussion in the broader community about how younger relatives exploit their elders, with no mention of the disinterested help many younger relatives do provide.[61]

3.50 Another suggested that making it harder may discourage people from taking on caring responsibilities: 'punishing those of us who are doing the right things for the sake of a few bad eggs makes a difficult situation that much more complicated and could prevent people from stepping up to care for the elderly'.[62]

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56 K Needs, *Submission 250*.

57 See ch 2.

58 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 67–75, rec 3–2.

59 Ibid [4.50]–[4.51].

60 Carers Victoria, *Submission 348*; Carers NSW, *Submission 321*; Name Withheld, *Submission 311*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*; Assets Ageing and Intergenerational Transfers Research Program, The University of Queensland, *Submission 243*; Carers Queensland, *Submission 236*. A statistical snapshot is included in ch 2.

61 S Dunlop, *Submission 220*.

62 Y Lawrence, *Submission* 202.

3.51 Similarly, a 'very experienced Director of Nursing', quoted by the Lutheran Church of Australia, said that

> most families or carers will go a long way to support and assist their frail elderly relative or friend. I am of the view that a goodly portion of alleged mistreatment of the elderly is a combination of ignorance of the ageing process combined with an extremely frail, needy and sometimes forgetful person who is struggling.[63]

3.52 The ACT Disability Aged and Carer Advocacy Service emphasised the need to ensure that support for decision making was available to older people experiencing or at risk of elder abuse, and that this was a 'viable and sustainable safeguard for older people'.

> Support can be provided by a range of people or organisations already known to the person, or through community organisations that specialize in this area, including advocacy services.[64]

3.53 A number of stakeholders made suggestions about how 'support', as a strategy, might work in action. FMC Mediation and Counselling Victoria (FMC) noted that 'support' when accessing elder abuse services contains a number of dimensions:

> At all points … the older person needs to be supported. Supported emotionally, supported with information about next steps and what is happening, supported with the provision of options and the opportunity to determine what they wish to happen next.[65]

3.54 Supporting older people to understand and protect their rights may require specific initiatives focused on communication. Speech pathologists said that specific consideration should be given to 'supporting older people with cognitive and/or communication difficulties', which 'may negatively impact on an individual's ability to voice their concerns, to self-advocate, and to disclose/report harm done to them by another':

> Speech Pathology Australia strongly supports the need for legal reform and a National Plan to address elder abuse that is equipped to protect older adults with communication, swallowing and mealtime related disabilities. Any Plan or framework developed must have adequate provisions and safeguards in place to address the barriers that people with communication difficulties face in navigating the aged care system and engaging with complaints processes.[66]

3.55 Older people from culturally and linguistically diverse (CALD) backgrounds may need targeted assistance to support their agency. This is particularly the case given that, as the Australian Research Network on Law and Ageing (ARNLA) noted, the ability to communicate in English 'may worsen due to natural ageing or more serious health issues such as dementia'. They emphasised the need for free National Interpreter Services for this group of older Australians.[67]

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63 Lutheran Church of Australia, *Submission 244*.
64 ACT Disability Aged and Carer Advocacy Service (ADACAS), *Submission 269*.
65 FMC Mediation & Counselling, *Submission 284*.
66 Speech Pathology Australia, *Submission 309*.
67 Australian Research Network on Law and Ageing, *Submission 262*.

3.56 The Victorian Multicultural Commission suggested that the following strategies would assist the effectiveness of community education:

- Availability of translated materials
- The use of terms (oral and written) which have meaning and context for culturally diverse seniors
- Use of pictorial literature in the form of CALD storyboards for people with low level literacy
- Use of qualified interpreters for all interactions.[68]

3.57 The Aged Rights Advocacy Service (ARAS) emphasised that it was 'extremely important' to understand 'the nuances, perspectives and language associated with elder abuse' when providing support to CALD communities, and gave the following example:

> An older gentleman from a CALD community was admitted to hospital due to being physically and verbally abused by his son. He broke down speaking to the Social Worker when he was told that he could be discharged to go home. The elderly gentleman was also concerned about his wife who was also living with the son. He did not want to go back home. Social Worker contacted ARAS and an Advocate visited the gentleman in the hospital with a professional interpreter and spoke about his rights and options and alternative accommodation, such as independent living. Safety strategies that included an Intervention Order were also discussed. The Advocate spoke about social support networks for him and his wife that are culturally appropriate.[69]

3.58 Darwin Community Legal Service Aged and Disability Advocacy Service said that language and 'cultural mores' are barriers to appropriate assistance in both CALD and Aboriginal and Torres Strait Islander communities. They urged that

> [w]here possible this should be provided by members of those communities. It is therefore important that adequate culturally appropriate resources are provided to effectively address Elder Abuse.[70]

3.59 The Federation of Ethnic Communities' Councils of Australia (FECCA) also stressed the importance of education targeted at CALD communities to support older people in understanding elder abuse and how they can exercise their rights. FECCA suggested that information should be provided in ethnic media about 'rights, different types of elder abuse, and how individuals can seek help and also endeavour to address stigma and shame in relation to elder abuse'.[71]

3.60 Other stakeholders referred to specific groups that may need targeted education to promote their autonomy and self-agency. ARNLA gave the example of lesbian, gay, bisexual, transgender and intersex (LGBTI) seniors:

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68 Victorian Multicultural Commission, *Submission 364*.

69 Aged Rights Advocacy Service Inc, *Submission 285*. ARAS referred to its report: Aged Rights Advocacy Service Inc, *Accessing the Aged Rights Advocacy Service to Prevent Elder Abuse—A Conversation with Members of Two Culturally and Linguistically Diverse Communities* (November 2013).

70 Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*.

71 FECCA, *Submission 292*.

> The rights of LGBTI+ people in Australia have been part of significant public debate in recent times, especially in regards to marriage equality. However, little attention has been paid to the experiences of older LGBTI+ people; particularly those entering or already in aged-care facilities. LGBTI+ seniors are far more vulnerable to interactions with care-givers than their heterosexual and cisgender counterparts. Lack of education and understanding of how the law operates has resulted in many LGBTI+ seniors being unaware of how the legal system can be used to protect themselves against elder abuse and discrimination. Furthermore, historical discrimination has also made many LGBTI+ seniors unwilling to engage with the legal system. Issues of concern regarding elder abuse include legal protection for older LGBTI+ people and their families of choice especially in times of crisis, rights of same-sex partners, wills, superannuation, supported and substitute decision making, and end of life issues.[72]

Promoting financial literacy

3.61 Support in developing older people's financial literacy was also seen as a key need. Given the high incidence of financial abuse of older people,[73] supporting older people through enhancing financial literacy was a strategy expressly identified by those working in the financial sectors.[74] For example, the Australian Bankers' Association (ABA) agreed with the ALRC that financial literacy was itself a safeguard from abuse, and suggested that

> a national awareness campaign, with a focus on improved information and education, will be vital to reducing the risks of abuse as well as the consequences. As part of the ABA's Financial Abuse Initiative, consumer fact sheets have been developed to help raise awareness of financial abuse and provide customers with some tips about how they can protect themselves.[75]

3.62 The Financial Services Council (FSC) said that the experience of FSC members suggested that a lack of awareness 'significantly contributes to the increased prevalence of elder financial abuse'. The Council recommended, therefore, that

> [t]he development of a long-term strategy on improving financial literacy and increasing awareness on how to manage personal wealth is integral to the alleviation of elder financial abuse.[76]

3.63 The FSC also emphasised that a lack of understanding by many older people regarding what constitutes elder abuse 'is a significant contributor to its increasing prevalence'. Referring to successful campaigns on issues such as family and domestic violence, and responsible drinking, the FSC suggested that strategies in the National Plan:

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72 Australian Research Network on Law and Ageing, *Submission 262*. Citations omitted.

73 See ch 2.

74 The 2007 House of Representatives Standing Committee on Legal and Constitutional Affairs also recommended that there be national initiatives to promote financial literacy particularly among older people: House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) rec 8.

75 Australian Bankers' Association (ABA), *Submission 365*.

76 Financial Services Council, *Submission 359*. 'Awareness is a key to prevention': Protecting Seniors Wealth, *Submission 312*.

> should address how public education campaigns target communication to the elderly, and ensure that education on elder abuse is simple and palatable allowing it to be easily understood and communicated.[77]

3.64 Financial literacy issues may be a particular problem in certain communities. ARNLA, for example, reported that

> CALD seniors may also suffer due to a lack of (or declining) community networks, computer illiteracy and transport related difficulties. The 'digital divide' in particular may enhance difficulties accessing services.[78]

3.65 Good examples of strategies for increasing financial literacy and advocacy for older Australians include the National Financial Literacy Strategy 2014–2017 and the National Financial Literacy Action Plan, led by the Australian Securities and Investments Commission (ASIC).[79] Acknowledging that improving financial literacy is 'a long-term behavioural change initiative', requiring 'a multi-faceted approach and sustained action over time to bring about gradual improvement', the strategy

> provides a practical framework for action to guide and encourage all those with a role to play in improving financial literacy for Australians.[80]

3.66 Such initiatives are informed by the work of the Organisation for Economic Co-operation and Development (OECD) and its International Network on Financial Education. Among other things, the OECD has developed principles on national strategies for financial education.[81]

3.67 The AIFS Report observed that measures like ASIC's National Financial Literacy Strategy and MoneySmart program,

> together with strong regulatory regimes and industry codes of conduct that are aimed at encouraging awareness of elder abuse among both financial institution professionals and clients, are in turn directed at putting safeguards in place to prevent elder financial abuse.[82]

Recommendations in this Report

3.68 In this Report, many recommendations are about promoting the autonomy and agency of older people. In a sense, all reforms aimed at reducing elder abuse will also support people's autonomy, because elder abuse undermines autonomy, making it more difficult for people to make choices about their own lives and to pursue what is important to them. Therefore, recommendations that safeguard against abuse may also be considered as promoting autonomy.

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77 Financial Services Council, *Submission 359*. See also SMSF Association, *Submission 382*.

78 Australian Research Network on Law and Ageing, *Submission 262*. See also Consumer Credit Legal Service (WA) Inc, *Submission 301*.

79 Australian Securities & Investments Commission, *National Financial Literacy Strategy 2014–2017*; Australian Securities & Investments Commission, *Financial Literacy Action Plan*.

80 Australian Securities & Investments Commission, *National Financial Literacy Strategy 2014–2017*; Australian Securities & Investments Commission, *ASIC's Role* <www.asic.gov.au>.

81 OECD, *National Strategies for Financial Education OECD/INFE Policy Handbook* (2015).

82 Kaspiew, Carson and Rhoades, above n 4, 38.

3.69 Some recommendations, however, are particularly targeted at empowering people to protect themselves from abuse and seeking to ensure that they are supported to make decisions that reflect their rights, will and preferences:

- **Chapter 4 (Aged Care)**—the incorporation into the *Aged Care Act 1997* (Cth) of provisions dealing with supporters and representatives as set out in the ALRC's National Decision-Making Principles;[83] and that an approved provider cannot require a care recipient to have appointed a decision maker for lifestyle, personal or financial matters;[84]
- **Chapter 5 (Enduring Appointments)**—emphasising that a person should be able to determine the scope and extent of their enduring appointments and not be required to give broader or unlimited powers to be able to effect certain transactions; and requiring that appointed decision makers support and represent the will, preferences and rights of the principal;[85]
- **Chapter 7 (Superannuation)**—reviewing the rules in relation to binding death benefit nominations in APRA-regulated superannuation funds;[86] and, in the context of self-managed superannuation funds, planning for the possibility of cognitive impairment;[87]
- **Chapter 8 (Wills)**—improving the understanding of legal practitioners of the dynamics of elder abuse and risk factors of undue influence and how to safeguard against them in the making of wills and other advance planning documents;[88]
- **Chapter 9 (Banking)**—considering how banks can provide information to older customers about financial abuse and discussing with customers how they might protect themselves;
- **Chapter 10 (Guardianship and Financial Administration)—**supporting those who are the subject of an application for guardianship or financial administration to participate in tribunal processes as far as possible;[89]
- **Chapter 12 (Social Security)**—a principle of direct contact by Centrelink staff with people of Age Pension age who are entering into arrangements with others that concern social security payments;[90] and

83 Rec 4–12.
84 Rec 4–13.
85 Rec 5–1.
86 Rec 7–1.
87 Rec 7–2.
88 Rec 8–1.
89 Rec 10–2.
90 Rec 10–3.

- **Chapter 14 (Safeguarding Adults at Risk)**—placing particular emphasis on the importance of adult safeguarding agencies working closely with the people they support, and only acting with their consent, except in limited circumstances.[91]

Addressing ageism and promoting community understanding of elder abuse

3.70 The National Plan should address ageist attitudes to older people. Stakeholders identified a range of attitudinal problems concerning older people. As the Law Council of Australia observed, 'changing attitudes to behaviour' was critical in combating elder abuse.[92] Part of this understanding is about what older people themselves understand, and strategies that promote autonomy and self-agency are directed to this goal. Another component concerns attitudes and understanding within the broader community. Many stakeholders identified 'ageism' as a problem: as a cause of, and exacerbating factor in, elder abuse; and in inhibiting effective responses to elder abuse.

Ageism and elder abuse

3.71 'Ageism' was identified as an underlying issue that contributes to abuse.[93] Seniors Rights Victoria, for example, said that

> [a]geism affects how older people are treated in all aspects of life, including the workforce, within family life, and as public figures. The promotion of respectful intergenerational relationships is a way of combating ageism and demonstrating that Australia does not condone elder abuse or the mistreatment of older people.[94]

3.72 Common manifestations of ageism include 'stereotyping, prejudice, discrimination, harassment and vilification as well as abuse, exploitation, neglect and violence and it is often intersectional'.[95] One submission referred to ageism as 'an habitualized acceptance of a double standard in society, when it comes to different levels of respect that are accepted as normal'.[96] A particular example was the labelling of older people as 'bed blockers' in hospitals, as though they were somehow less deserving of hospital resources.[97]

3.73 Townsville Community Legal Service Inc identified 'benevolent prejudice' as one of the most 'entrenched forms of ageism':

> It is the tendency to pity, seeing older people as friendly but incompetent. It is superficially positive but ultimately reinforces inferiority. It positions older persons as

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91 Rec 14–4.
92 Law Council of Australia, *Submission 61*.
93 See, eg, Seniors Rights Victoria, *Submission 383*; Australian Research Network on Law and Ageing, *Submission 262*; National Older Persons Legal Services Network, *Submission 180*; Seniors Rights Victoria, *Submission 171*; UnitingCare Australia, *Submission 162*; Office of the Public Advocate (Qld), *Submission 149*; Aged and Community Services Australia, *Submission 102*; Quality Aged Care Action Group Incorporated, *Submission 28*.
94 Seniors Rights Victoria, *Submission 383*.
95 National Older Persons Legal Services Network, *Submission 180*.
96 H MacGillivray, *Submission 272*.
97 Quality Aged Care Action Group Incorporated, *Submission 28*.

> frail, easily duped and needing protection rather than vital, active and independent. It keeps older persons in an inferior position. It is embedded in public policy.[98]

3.74 ARNLA suggested that

> ageism is a strong normative influence generally in society, and is also prevalent in health care settings, where older persons constitute the majority of the patient population. Unconscious attitudes about the worth of older persons, and judgments on lifestyle, are evident particularly when frailty is present.[99]

3.75 Seniors Rights Victoria submitted that ageism was the 'principal driver' and 'underlying condition of elder abuse', contributing to 'the marginalisation of older people and the way society condones certain behaviours towards older people (such as limiting decision-making and independence or controlling finances)'. They said, moreover, that the 'impact of ageism, and the consequential erosion of older people's rights, is far broader than personal repercussions endured by an older person'.[100]

3.76 Townsville Community Legal Service Inc urged that

> [l]aw reform must be driven by the need to combat ageism in all manifestations: Stereotyping (incompetence, illness, and irrelevance); Prejudice (benevolent or hostile); Discrimination, harassment and vilification; and Abuse, exploitation, neglect and violence.[101]

3.77 It also said that 'the impact of ageism is amplified where it also involves another "ism"': 'Much of the research on elder abuse validates that gender and race can exacerbate ageism as is common with intersectional discrimination'.[102]

3.78 Research undertaken by the Age Discrimination Commissioner in 2013 drew attention to the damaging effects of negative stereotypes or misconceptions about older people; and that ageist attitudes were deeply ingrained and evident in all aspects of Australian society.[103] 'We are invisible', said Adam Johnston, referring to the experience of older people with disability.[104] If ageism is not tackled, Dr Kelly Purser et al argued, 'the promotion of stereotypes of older people as being incompetent, slow and an economic burden becomes a self-fulfilling prophecy'.[105]

3.79 The experience in Australia is not unique. The Québec plan drew attention to the role that ageism plays in elder abuse:

> Similar to sexism and racism, ageism is defined as a set of negative or hostile attitudes towards a person or group of persons due to their age which gives rise to prejudicial acts and social disenfranchisement. Ageism includes all forms of discrimination and segregation based on age. Higher rates of elder abuse tend to be found in societies with a high prevalence of ageism. Since ageism occurs in all spheres of life, some

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98 Townsville Community Legal Service Inc, *Submission 141*.
99 Australian Research Network on Law and Ageing, *Submission 262*.
100 Seniors Rights Victoria, *Submission 383*.
101 Townsville Community Legal Service Inc, *Submission 141*.
102 Ibid.
103 Australian Human Rights Commission, *Fact or Fiction? Stereotypes of Older Australians, 2013* (Research Report, 2013).
104 A Johnston, *Submission 45*.
105 Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*.

> researchers have suggested that it could impact the proper implementation of adequate support services for seniors in situations of abuse. The unwillingness of seniors to denounce abuse may signal that they have internalized a form of ageism into their own behaviour.[106]

3.80 As ageism plays such a central role in elder abuse, strategies need to be directed towards counteracting it. Stakeholders suggested a range of ways in which ageism can be addressed, and ways to prevent elder abuse through community awareness and education campaigns, and training. Townsville Legal Community Service Inc noted, for example, prevention programs introduced in states and territories 'aimed at raising awareness, educating those at risk of abuse or offending and offering remedial and support services', but 'wider rollout', 'greater visibility' and improved resourcing were needed, supported by 'a national public awareness and education campaign'.[107]

Public awareness and education campaigns

3.81 The importance of developing a national awareness campaign to educate and change attitudes and values was identified as part of the Australian Government's policy in protecting the rights of older Australians and initiatives to address elder abuse.[108] One of the key elements in the themes underpinning approaches to prevention of elder abuse identified by the AIFS Report concerned 'changing the values and attitudes among the broader community'.[109]

3.82 Public awareness raising was also strongly emphasised by stakeholders. UnitingCare Australia, for example, suggested that, because ageism 'lies at the heart of elder abuse', 'effective elder abuse prevention can only be achieved with the support of education and awareness programs that deal with the negative perceptions and assumptions about ageing and older people'.[110] The focus needs to be both about addressing ageism in its various manifestations, and about improving understanding about what is elder abuse. Any awareness campaign needs to highlight discriminatory attitudes towards age that may contribute to trivialising, excusing or justifying elder abuse.

3.83 By way of comparison, the Québec plan included a focus on improving the understanding of elder abuse, through 'communication strategies, tools and training':

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106 Government of Québec, *Governmental Action Plan to Counter Elder Abuse 2010–2015* (2010) 30. Citations omitted.

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

108 *The Coalition's Policy to Protect the Rights of Older Australians*, above n 32; Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).

109 Kaspiew, Carson and Rhoades, above n 4, 38. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 153; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) recs 7, 18, 22, 40.

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

> In order to reduce the incidence of elder abuse, we must increase the level of vigilance and knowledge about the problem among seniors, caregivers and the population at large.[111]

3.84 The Québec plan included a public awareness campaign—'to demystify the problem of elder abuse by reporting its incidences and strip it of its taboo status'.[112]

3.85 The Northern Territory Anti-Discrimination Commission said that a campaign 'addressing societal attitudes to older people' was crucial:

> elevating the value we place on older people rather than seeing them as a burden, plus education to raise awareness of the signs of elder abuse and to suggest ways to prevent it including inclusion and support of older people in the day to day life of the community.[113]

3.86 The Law Council emphasised that any national plan should include 'a strong education component … with a view to combating any negative "ageist" attitudes—that is, stereotyping of and discriminating against individuals based on their age—towards older people'.[114] Similarly, the Eastern Community Legal Centre urged that addressing ageism should be acknowledged as a 'key priority' under a national plan.[115]

3.87 One social worker referred to disrespect of older people, 'as a consequence of spoken and unspoken expressions of ageism', and its silencing effect:

> Older people are aware of being vulnerable to abuse, although it may not be named as such. … Older people are unlikely to complain, as many are unsure of their rights, and are uneasy about 'making waves', due to apprehension over possible humiliation or retaliation if they speak up or complain within care situations, particularly residential aged care.[116]

3.88 Another observed that, not only was there a need for a greater awareness and understanding of 'what ageism and mutual respect look like in practice',

> [d]evelopment of protective factors against abuse, such as positive self-image, sense of identity, self-efficacy, self-respect, coping skills, a sense of personal control, resilience, assertive communication, conscious ageing, a sense of belonging, recognition of benevolent ageism, respectful relationships, lifelong learning, and what respectful behaviours look like, needs to be adequately addressed both in the community and in aged care facilities.[117]

3.89 The Office of the Public Guardian (Qld) said that 'a key element' of the public education strategy would be 'educating the community to see elder abuse as criminal behaviour that should be referred to the police and prosecuted, and where possible avoided through the use of early intervention strategies'.[118]

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111 Government of Québec, *Governmental Action Plan to Counter Elder Abuse 2010–2015* (2010) 45.
112 Ibid 51.
113 Northern Territory Anti-Discrimination Commission, *Submission 93*.
114 Law Council of Australia, *Submission 351*.
115 Eastern Community Legal Centre, *Submission 357*.
116 K Needs, *Submission 250*.
117 Ibid.
118 Office of the Public Guardian (Qld), *Submission 384*.

3.90 Protecting Seniors Wealth considered that a public awareness campaign 'would send a clear message to the general public, that elder abuse of any kind is simply not acceptable' and to 'remind people that elders have rights, and they should be revered and honoured and treated with respect'.[119]

Culturally appropriate information

3.91 Any public awareness campaigns should involve targeted material that considers the dynamics and experiences of particular groups, including older people from: Aboriginal and Torres Strait Islander communities; CALD communities; and LGBTI communities. ARAS provided the following example:

> ARAS experience with the Aboriginal Mentoring Camp suggests that opportunities for connection between generations should be fostered to combat ageism and encourage respect for older people. … a similar program to Our Watch 'the line' could be developed to combat ageism and abuse. ARAS has developed a number of resources in recent times that support positive messages about ageing but also how to prevent abuse as older people age.[120]

3.92 FECCA and the Ethnic Communities' Council of Victoria stressed the importance of culturally informed awareness campaigns, targeting CALD communities by using ethnic media.[121]

3.93 The Australian Association of Gerontology and the National Ageing Research Institute (AAG and NARI) agreed that there was a need for strategies 'directed towards understanding the specific experiences of older people from diverse groups' and provided the following examples:

> AAG is working with the National Aboriginal Community Controlled Health Organisation (NACCHO), Federation of Ethnic Communities' Councils of Australia (FECCA), and the National LGBTI Health Alliance (Alliance) to develop and implement a *Diversity Framework* that will address the high level principles and common issues that affect diverse groups, with the creation of specialist action plans for each of the CALD, ATSI and LGBTI communities. … The framework will make a valuable contribution to addressing the specific needs of older people from diverse groups.[122]

Public awareness raising in this Report

3.94 In this Report the ALRC also addresses the importance of public awareness raising about elder abuse in a number of specific contexts, including:

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119 Protecting Seniors Wealth, *Submission 312*.

120 Aged Rights Advocacy Service Inc, *Submission 285*. ARAS referred to: https://www.ourwatch.org.au/What-We-Do/The-Line.

121 Ethnic Communities Council of Victoria (ECCV), *Submission 306*; FECCA, *Submission 292*. See also Seniors Rights Service, *Submission 296*.

122 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*. The Eastern Community Legal Centre (ECLC) provided an example of an education project, 'Matter of Trust', aimed at assisting people from CALD backgrounds: Eastern Community Legal Centre, *Submission 357*.

- **Chapter 8 (Wills)**—discusses the importance of community education about the importance of seeking appropriate information and professional advice in relation to advance planning documents;
- **Chapter 9 (Banking)**—discusses the role banks might play in educating the community about the risks of elder financial abuse, including ensuring Australians make informed choices about guaranteeing loans and 'who they share their personal details with and the potential consequences of doing so';[123] and
- **Chapter 10 (Guardianship and Financial Administration)**—includes measures towards improving public awareness about the nature and seriousness of the roles of being a substitute decision maker appointed by someone to act on their behalf.

Training to recognise and respond to elder abuse

3.95 Stakeholders also stressed the importance of training, in addition to public awareness raising, and that it needs to be directed to many groups. For example, there should be efforts to ensure that insights are shared between family violence services who work with older people and dedicated elder abuse services, to promote best practice in services for older people in both areas of service provision.

3.96 The Victorian Royal Commission into Family Violence considered that 'building the capacity of Seniors Rights Victoria to provide expertise to support other service providers including family violence services … would facilitate better referrals, mutual learning and ultimately better outcomes for older people who are experiencing family violence'.[124] Family violence services, including women's legal services, will likewise have particular expertise in supporting older women experiencing family violence. For example, Women's Legal Services Australia offered insight into the possible correlation between intimate partner violence and elder abuse, noting that

> Anecdotally, our legal casework experience suggests there may be a link between intimate partner violence and elder abuse in cases where the perpetrator of intimate partner violence (the son), once excluded from the family home, will move in with his parents and commit elder abuse.[125]

3.97 Stakeholders also identified a number of specific groups of people who should receive elder abuse training.

3.98 ***Substitute decision makers***: ARNLA referred in particular to substitute decision makers:

> Research carried out by members of ARNLA has revealed the extent to which these decision-makers struggle with prioritising the will and preferences of persons for

123 Consumer Credit Legal Service (WA) Inc, *Submission 301*.

124 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 92. See also Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*. Women's Legal Services may have particular expertise in family violence used against older Aboriginal women: see, eg, Top End Women's Legal Service, *Submission 87*; Women's Legal Services NSW, *Submission 53*.

125 Women's Legal Services Australia, *Submission 343*.

> whom they have decisional responsibility. This challenge is well documented in the literature, and needs to be addressed to ensure that those who are in the position of taking decisions for older persons who have lost capacity are guided by clear, robust and understandable guidance which places presumptive weight on the will and preferences of the older person.[126]

3.99 ARNLA stressed the need for resources for supporters and substitute decision makers, noting

> the dearth of support and resources for 'supporters and representatives' required to bridge the gap between law and practice. ARNLA recommends that attention be given to sustainable resources to educate and support this population with their challenging role, especially at times of family or professional conflict; where community resources are unavailable to give effect to preferences; and for end of life decision-making.[127]

3.100 The ALRC makes specific recommendations directed towards training for substitute decision makers. **Chapter 5 (Enduring Appointments)** considers the appointment of people as substitute decision makers under advance planning instruments, including enduring powers of attorney and enduring guardianship appointments. **Chapter 10 (Guardianship and Financial Administration)** considers the appointment of substitute decision makers, as guardians or financial administrators, by tribunals. In both cases the ALRC discusses the need for substitute decision makers to understand fully their roles and responsibilities.

3.101 In relation to substitute decision makers chosen by a person for themselves, the ALRC recommends that a number of safeguards should be included in state and territory legislation, including restricting conflict transactions, setting out in simple terms the types of decisions that are outside the power of a person acting under an enduring document, and mandating basic requirements for record keeping.[128] This is also carried into a longer-term suggestion, in Chapter 5, for a model agreement for the appointment of substitute decision makers, including appropriate guidance on what conflicts are, and how they may be managed by the people in designing their enduring documents.

3.102 With respect to private guardians or administrators appointed by tribunals, stakeholders highlighted the importance of ensuring training was available through both online and face-to-face modes of delivery, particularly for guardians and financial administrators living in rural and remote regions. There was also an emphasis on the need for the available material to be developed in a culturally sensitive manner and available in a range of community languages. A specific way of reinforcing understanding is considered in **Chapter 10 (Guardianship and Financial Administration)**, which includes a recommendation that all newly appointed private guardians and financial administrators be required to sign an undertaking with respect to their responsibilities and obligations.[129]

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126 Australian Research Network on Law and Ageing, *Submission 262*.
127 Ibid. See also UnitingCare Australia, *Submission 216*.
128 Rec 5–1.
129 Rec 10–1.

3.103 In **Chapter 12 (Social Security)**, the ALRC suggests that one action under the recommended elder abuse strategy should be to identify opportunities for Centrelink to enhance understanding by making clear the roles and responsibilities of all participants to arrangements with people of Age Pension age that concern social security payments. This may be accompanied, in appropriate circumstances, by information on support and assistance that may be available. Specific matters that are also discussed include payment nominees. Here, it is recommended that payments to nominees should be held separately from the nominee's own funds, in a dedicated account nominated and maintained by the nominee.[130]

3.104 ***Frontline staff*:** The Australian Government has committed to developing pilot training programmes for frontline staff.[131] Stakeholders identified a number of important groups in frontline roles that should be the focus of training, health and aged care, banking, and social security.

3.105 The NSW Nurses and Midwives' Association, for example, emphasised the importance of considering the training needs of workers and community members in the development of the National Plan.[132] Speech Pathology Australia considered that training for all health professionals and workers who deal with older people should be mandatory, so that they can recognise and respond to elder abuse—particularly in relation to older people with cognitive or communication impairments.[133] Townsville Community Legal Service Inc suggested that training should be directed to 'key areas of industry, professions and the community'.[134]

3.106 Carers NSW included among those who should receive training: service providers, My Aged Care staff, Regional Assessment Services, Aged Care Assessment Teams, and other stakeholders.[135] Training for aged care staff was identified as an important issue by many stakeholders.[136]

3.107 How aged care training should emphasise self-agency was discussed by another stakeholder:

> aged care training appears to focus on doing 'to' and 'for' residents and community clients, rather than including strategies designed to develop older people's capacity, and to understand what they see as important for their wellbeing.[137]

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130 Rec 12–2.

131 Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016). See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 90.

132 NSW Nurses and Midwives' Association, *Submission 248*. See also Public Trustee of Queensland, *Submission 249*.

133 See also S Biggs, *Submission 235*; Aged and Community Services Association, *Submission 217*.

134 Townsville Community Legal Service Inc, *Submission 141*. See also Public Trustee of Queensland, *Submission 249*; Aged and Community Services Association, *Submission 217*.

135 Carers NSW, *Submission 321*. See also FMC Mediation & Counselling, *Submission 284*.

136 See, eg, Australian Dispute Resolution Advisory Council Inc, *Submission 303*; Seniors Rights Service, *Submission 296*; Aged and Community Services Association, *Submission 217*.

137 K Needs, *Submission 250*.

3.108 ARNLA noted that, in addition to training, organisational policies of health and aged care services also required attention, 'as they may underpin certain practices that could work against supported decision-making approaches, such as risk aversion rather than risk minimisation'.[138]

3.109 St Vincent's Health Australia gave an example of training and education for health professionals about elder abuse 'and the role they play in advocating for their patients to improve health and legal outcomes' as part of 'health justice partnerships' established in Melbourne and Sydney.[139]

3.110 Banking staff was another group of frontline workers identified by stakeholders. For example, the Consumer Credit Legal Service (WA) (CCLSWA) said that banks 'are at the forefront of most financial transactions, and as such are in the best position to detect elder financial abuse':

> This is particularly so in situations where the elderly person enters into a transaction without independent legal advice by trusting those close to them or where their signature is forced or forged in order for the perpetrator to receive a benefit. Training staff members can include the development of educational programs designed to reduce the risk and incidence of financial elder abuse. … Studies show that cyclical and repetitive training sessions are more effective in enhancing memory retention and individual knowledge.[140]

3.111 CCLSWA referred to the online training module for elder abuse prevention developed by the Victorian Government that had been 'widely accessed since its launch in March 2015', and although it was not specifically designed for bank staff, 'it can be accessed by anyone working with elderly people to identify and respond to elder abuse'.[141]

3.112 Another key frontline group of workers that required improved elder abuse awareness training are Centrelink staff. Women's Domestic Violence Court Advocacy Services Network Inc said, for example, that Centrelink staff should receive further training specific to:

> identifying the signs of elder abuse (including subtle signs of abuse); understanding the unique barriers to older people finding greater safety; understanding the different language that an older person may use to raise concerns or to minimise abuse that they are suffering and to conduct (or refer to a social worker within the department) to conduct an assessment to identify the older persons current needs and risks to safety.[142]

3.113 In **Chapter 4 (Aged Care)**, the ALRC considers the qualifications and skill mix of aged care workers, as well as the need for training and education for aged care workers, including personnel working in aged care assessment teams, in principles for

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138 Australian Research Network on Law and Ageing, *Submission 262*.
139 St Vincent's Health Australia, *Submission 345*.
140 Consumer Credit Legal Service (WA) Inc, *Submission 301*.
141 Ibid.
142 Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*. See also Carers NSW, *Submission 321*.

ensuring that decisions about a person's care give effect to that person's will preferences and rights.

3.114 Training to enable frontline staff in Centrelink to identify signs of elder abuse and to respond with appropriate referrals is discussed in **Chapter 12 (Social Security)**. The need for training for banking staff is considered in **Chapter 9 (Banking)**.

3.115 ***Professionals***: One of the key elements in the themes underpinning approaches to prevention of elder abuse identified by the AIFS Report concerned changing the values and attitudes 'among professionals and individuals who interact with elders'.[143] Similarly, in its *Global Status Report on Violence Prevention*, the World Health Organization identified strategies to prevent elder abuse as including:

> efforts to raise professional awareness and train practitioners; inform the public about how to identify the signs and symptoms of elder abuse and where help can be obtained; and improving policies and practices in residential care facilities for elderly people. There is, however, very little research on the effectiveness of any such programmes in preventing elder abuse, and this is a critical gap to fill.[144]

3.116 The Financial Planning Association suggested that training to identify and respond to elder abuse must not just be

> for people working with older people in traditional care-giver roles, but for professional service providers such as financial planners, lawyers, and accountants, and all Australians. It will take the Australian community as a whole to help identify and overcome distress and harm caused by all forms of elder abuse.[145]

3.117 The finance consulting firm, Aged Care Steps, emphasised the importance of training as a prevention strategy, and identified financial advisers as often 'in the front line of identifying potential cases of financial abuse'. The training for financial advisers should include: 'education of warning signs, red flags, how to report, who to report to and how to manage suspicious cases'.[146]

3.118 The Brotherhood of St Laurence said that training about elder mistreatment and protection should be made mandatory for relevant professions—'at professional and vocational level plus for continuing professional development (CPD)':

> Ageing and thereby elder abuse are often left to the end of the core training curriculum and are therefore poorly attended where these clash with exam preparation. Where CPD is provided this should, as far as possible be inter-professional in nature. Improved education and training needs to be supported by aged care systems that include place based training and support for workers in residential and community settings.[147]

3.119 The ALRC makes recommendations about the training of lawyers and financial planners to ensure that they understand the nature of elder abuse and how they can act

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143 Kaspiew, Carson and Rhoades, above n 4, 38.
144 World Health Organization, *Global Status Report on Violence Prevention* (2014) 78.
145 Financial Planning Association of Australia (FPA), *Submission 295*.
146 Aged Care Steps, *Submission 340*.
147 Brotherhood of St Laurence, *Submission 232*. See also Aged Care Steps, *Submission 340*; S Biggs, *Submission 235*.

to safeguard people in situations, especially where being subjected to pressure to make or change transactions in particular ways. **Chapter 8 (Wills)**, for example, identifies the importance of training for legal practitioners and other professionals involved in advance planning instruments, both as an aspect of supporting the autonomy of people in making such instruments and also as a protection against abuse. **Chapter 11 (Health and NDIS)** considers health professionals and how their ability to identify and respond to elder abuse may be addressed, for example through training that focuses on issues such as better recognising elder abuse, improved referral pathways, and the interaction between the role of health professionals and privacy laws.

3.120 The Ethnic Communities Council of Victoria (ECCV) indentified interpreters as another group of professionals needing training on elder abuse and prevention, including 'clarifying professional ethics and the relationship of duty of care and impartial interpreting'.[148]

3.121 ***Police***: Eastern Community Legal Centre supported 'enhanced police training' in relation to elder abuse as a particular strategy.[149] Many stakeholders supported increased police training as a mechanism to enhance the criminal justice response to elder abuse.[150]

3.122 Seniors Rights Victoria suggested that, as well as information 'specific to each profession', training should include:

- the rights, autonomy and dignity of older people
- the similarities and differences to other forms of family violence
- risk factors of elder abuse, and how to identify it
- how to support an older person where elder abuse is suspected
- the proper use of Enduring Powers of Attorney and supported decision-making
- referral pathways and access to support services.[151]

3.123 Seniors Rights Victoria also emphasised that significant commitments to resourcing 'existing and new' initiatives will be required 'from all levels of government'.[152]

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148 Ethnic Communities Council of Victoria (ECCV), *Submission 306*.

149 Eastern Community Legal Centre, *Submission 357*. The ECLC set out in detail what police training would involve.

150 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Women's Legal Services Australia, *Submission 343*; Speech Pathology Australia, *Submission 309*; Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; NSW Ombudsman, *Submission 160*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Macarthur Legal Centre, *Submission 110*; Australian Bankers' Association, *Submission 84*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

151 Seniors Rights Victoria, *Submission 383*.

152 Eastern Community Legal Centre, *Submission 357*.

3.124 In **Chapter 13 (Criminal Justice Response)**, the ALRC concludes that existing criminal laws generally adequately cover conduct which constitutes elder abuse, and does not recommend the enactment of specific offences. However, the chapter highlights other avenues for improving criminal justice responses, including: police responses and providing appropriate assistance for witnesses who require additional support to participate in the criminal justice system. In **Chapter 14 (Safeguarding Adults at Risk)**, the ALRC makes recommendations relating to adult safeguarding laws aimed at safeguarding and supporting adults 'at risk'. These laws would provide adult safeguarding agencies a role that is complementary to police, aimed at improving responses to elder abuse.

Achieving national consistency

3.125 To make systems work together effectively to combat elder abuse, a key element was identified as consistency: a consistent national approach, with consistent laws and coordinated responses. The national planning process itself will contribute towards fostering a consistent national approach. There are also many recommendations in this Report that reflect this goal—particularly in relation to state and territory laws.[153]

3.126 A need for consistent laws was a dominant theme among stakeholders.[154] As National Seniors observed:

> It makes little sense that the legal frameworks to protect older Australians from abuse differ across the various states and territories. National laws or at the least nationally consistent laws are required to reduce confusion and improve protections for older people.[155]

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

> the governing legal framework will remain a combination of inconsistent and disconnected Commonwealth and state or territory law, amounting to a piecemeal approach to the protection of the interests and rights of persons who are vulnerable to abuse, and will likely result in gaps in safeguards.[156]

3.128 The Law Council acknowledged the difficulty in developing national laws, in the context of the division of responsibility between the Commonwealth and states and territories.[157] However, it urged that 'national implementation of the ALRC's

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153 There are many ways national consistency may be achieved, including for example through state and territory cooperation, or by requiring states and territories to achieve national consistency as a condition of Commonwealth funding provided under s 96 of the *Australian Constitution*.

154 See, eg, Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Queensland Law Society, *Submission 159*; National LGBTI Health Alliance, *Submission 156*; National Seniors Australia, *Submission 154*; Townsville Community Legal Service Inc, *Submission 141*. National consistency was also a consistent theme of recommendations in *Older People and the Law*: see, eg, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) recs 16, 19, 25, 28.

155 National Seniors Australia, *Submission 154*.

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

157 See ch 2.

recommendations that promote greater harmony could significantly relieve the complexities that exist within discrete state and territory schemes'.[158]

3.129 The goal of consistency within and across states and territories 'should be a primary focus of the National Plan', said Seniors Rights Victoria, given that elder abuse and the mistreatment of older people 'is currently addressed through interventions and support delivered in different contexts including within the legal system, law enforcement, health care, aged care, family violence services, and a range of community services'.[159]

3.130 The AAG and NARI agreed that 'a national approach, with consistent laws and coordinated responses is a key element in addressing elder abuse' and noted that NARI had received a grant to develop an 'Action Plan on Elder Abuse' for Victoria.[160]

3.131 The ABA recommended that a nationally consistent approach should include the financial sector, and that this would 'assist banks, and other institutions to understand and meet the various laws, deal with the expectations of their customers and their agents across jurisdictions, improve collaboration between relevant agencies and provide greater certainty for customers'.[161]

3.132 Stakeholders provided examples of problems created by differences between states, and particularly in cross-border areas and that a National Plan 'must take into account all individual areas and incorporate issues relevant to these areas eg rural, remote and metropolitan'.[162]

3.133 State Trustees emphasised the importance of coordination:

> There will be a critical need for co-ordination between governments at all levels, particularly given that most of the activity to actually combat elder abuse will occur at a state or local level, through public advocates and guardians, tribunals, public trustees, health workers, geriatricians, advocates, and police.[163]

3.134 Similarly, Legal Aid ACT observed that an 'integrated framework is key to addressing elder abuse in a consistent and efficient manner'.[164]

3.135 Several chapters in this Report deal with state and territory laws and make recommendations that reflect the goal of achieving national consistency, including:

- **Chapter 5 (Enduring Appointments)**—state and territory laws regarding enduring powers of attorney and enduring guardianship and including a recommendation for a new national model form of appointment and online register;

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158 Law Council of Australia, *Submission 351*.
159 Seniors Rights Victoria, *Submission 383*.
160 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.
161 Australian Bankers' Association (ABA), *Submission 365*.
162 See, eg, M Berry, *Submission 355*. The submission referred to the Albury/Wodonga area.
163 State Trustees (Vic), *Submission 367*.
164 Legal Aid ACT, *Submission 223*.

- Chapter 5 (Enduring Appointments) and Chapter 10 (Guardianship and Financial Administration)—civil and administrative tribunal jurisdiction;
- **Chapter 6 (Family Agreements)**—arrangements broadly involving property and care;
- **Chapter 10 (Guardianship and Financial Administration)**—appointment of guardians and financial administrators by state and territory tribunals;
- Chapter 13 (Criminal Justice Response); and
- **Chapter 14 (Safeguarding Adults at Risk)**—new legislation for safeguarding adults at risk.

Safeguarding at-risk adults and improving responses

3.136 Improving the response to elder abuse is a key safeguarding goal. Stakeholders provided many examples of how responses to elder abuse could be improved: effective interagency responses; clear reporting and referral pathways; and accessible services. The ALRC's recommendations about redress pathways and new laws for safeguarding at-risk adults are also directed towards this goal.

Effective interagency responses

3.137 The idea that there should be 'no wrong door' was a theme in submissions with respect to improving the response to elder abuse. AAG and NARI said:

> consideration needs to be given to how to ensure that people experiencing elder abuse will be directed to the most appropriate service regardless of where they initially seek help (ie a *no wrong door* approach). This will require knowledge sharing and referral protocols between organisations that 'deal with older people' and organisations that deal with other relevant forms of abuse. For example, centres against sexual assault and family violence support organisations will have a range of responses and services that may be appropriate for older people in some circumstances.[165]

3.138 The New South Wales Ombudsman suggested that 'an effective interagency response to this issue can be relatively straightforward, provided that the body taking the lead role has access to the right information, adequate powers, and the cooperation and support of key government and non-government stakeholders'.[166]

3.139 The Older Women's Network (NSW) said that what was necessary was 'a national framework and protocols enabling interagency and collaborative work between older people, community based agencies and service providers': this would assist 'in ensuring consistent and constructive responses to older people experiencing violence and abuse across Australia'.[167]

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165 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*. See also People with Disability Australia, *Submission 167*.

166 NSW Ombudsman, *Submission 341*.

167 Older Women's Network NSW, *Submission 136*. The OWN said there were sound state-based frameworks, including, in NSW: Department of Family and Community Services (NSW), *Preventing and Responding to Abuse of Older People: NSW Interagency Policy* (2014). This document guides service

3.140 Seniors Rights Victoria noted that

> [e]vidence shows that the most effective responses are multidisciplinary interventions that empower the older person and support them in their decision-making. These usually involve legal services (where necessary) supported by advocacy or case management that can make referrals to health and other social support services. This is the most effective way of achieving positive long-term outcomes that the older person can maintain. An example of a successful multidisciplinary intervention program is health justice partnerships. It is important for the funding to support the continuation of existing services, and the funding of new ones where necessary.[168]

3.141 Professor Simon Biggs emphasised that collaboration among agencies was required:

> Any national plan should encourage inter-professional and interagency collaboration as elder abuse can include a complex of interdependent factors involving social work, the police, health care, financial institutions and NGOs.[169]

3.142 However, there also need to be 'clearly defined roles' for those who were the 'key agencies and sectors' responding to allegations of elder abuse: including 'law enforcement, health system, Public Advocates and Guardians'.[170]

3.143 COTA submitted that 'a small national secretariat' was required 'to facilitate communications between elder abuse services, enhance their capacity and service network activities'.[171]

3.144 **Chapter 14 (Safeguarding Adults at Risk)** emphasises the value of multi-agency and multidisciplinary cooperation in protecting and supporting at-risk adults.

Clear reporting and referral pathways

3.145 The Commissioner for Senior Victorians urged that there should be 'clear reporting pathways and responses to ensure abuse, when identified and reported, is addressed'.[172] The Office of the Public Advocate (Qld) stressed that 'complaints mechanisms are integral to a comprehensive system of safeguards for older people'.[173]

3.146 The value of helplines was emphasised.[174] COTA, for example, advocated setting up 'a national Hotline with a single phone number, through which older persons can access advice and obtain professional support and assistance on their own behalf or others'.[175]

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responses and provides the framework under which service providers can develop their own policies and guidelines, to ensure protection, support for care recipients.

168 Seniors Rights Victoria, *Submission 383*. See also Aged Rights Advocacy Service Inc, *Submission 285*.

169 S Biggs, *Submission 235*.

170 Carers NSW, *Submission 321*.

171 COTA, *Submission 354*.

172 Commissioner for Senior Victorians, *Submission 187*.

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

174 Financial Services Council, *Submission 359*; COTA, *Submission 354*; M Winterton, *Submission 336* (in relation to people under guardianship or administration orders); Aged and Community Services Association, *Submission 217*; UnitingCare Australia, *Submission 216*. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1.

175 COTA, *Submission 354*. See also Financial Services Council, *Submission 359*.

3.147 The Australian Government has identified the development of a national elder abuse hotline as an express commitment in its national plan.[176]

3.148 In **Chapter 12 (Social Security)**, the ALRC identifies the need for the Department of Human Services (Cth) to develop a specific elder abuse strategy to assist frontline staff to identify and escalate referrals of elder abuse.[177]

3.149 In **Chapter 4 (Aged Care)**, to improve responses to elder abuse and enhance safeguarding, the ALRC recommends a new scheme for reporting serious incidents in aged care and for independent oversight of an approved provider's investigation of and response to serious incidents. The chapter also includes recommendations in relation to a range of other safeguarding strategies, including reforms relating to: the suitability of people working in aged care—enhanced employment screening processes; ensuring that unregistered staff are subject to the proposed National Code of Conduct for Health Care Workers; regulating the use of restrictive practices in aged care; and national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.

3.150 **Chapter 14 (Safeguarding Adults at Risk)** recommends the introduction of adult safeguarding legislation in states and territories for the safeguarding and support of at-risk adults who are unable to protect themselves from abuse.

Accessible services

3.151 Improving the response to elder abuse requires making services and forums more accessible.[178] The advocacy group, TASC, observed that delivering best practice means 'ensuring accessibility to our and other legal services and facilitating opportunities for support'.[179] The Legal Services Commission of South Australia said that 'often there was confusion or misunderstanding about where an individual can seek recourse'.[180] The Housing for the Aged Action Group said that older people 'want services that are easy to access and engage with'.[181]

3.152 For CALD groups, accessing services is difficult because of the 'limited culturally proficient mainstream services and ethno-specific services with limited capacity that are accessible to provide assistance to seniors who experience elder abuse':

> Many mainstream services are not adequately funded or resourced to provide culturally appropriate or language specific services to culturally and linguistically diverse seniors.[182]

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176 Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).

177 Rec 11–1.

178 It was also pointed out that there may be a lack of understanding about what services are available that might be addressed through community education: Consumer Credit Legal Service (WA) Inc, *Submission 301*.

179 TASC National, *Submission 91*.

180 Legal Services Commission SA, *Submission 128*.

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

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

3.153 The ECCV advocated 'a culturally responsive elder abuse prevention framework in responding appropriately and sensitively to issues associated with culturally diverse traditions and expectations and to ensure high impact across Australian population groups and communities'. In particular, this would require 'optimal usage of interpreters and translation materials' and 'multicultural capacity building'.[183]

3.154 Particular challenges are presented in improving the response to abuse of older people in remote Aboriginal and Torres Strait Islander communities. The National Aboriginal and Torres Strait Islander Legal Services stressed the importance of 'culturally safe and joined up services'.[184]

3.155 Women's Legal Services NSW provided an example of a program for Aboriginal women that is a good illustration of an action within a national plan: the Aboriginal Women's Legal Program (IWLP):

> This program delivers a culturally sensitive legal service to Aboriginal women in NSW. It provides an Aboriginal legal advice line, participates in law reform and policy work, and provides community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women. An Aboriginal Women's Consultation Network guides the IWLP. It meets quarterly to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.[185]

3.156 The importance of a multidisciplinary approach, 'not limited simply to a legal approach', was also urged by ARAS:

> Elder Abuse presents a range of complex legal, jurisdictional, policy, professional and structural challenges which requires a cross sectoral approach between government agencies, private banking sector, advocacy services and non- government organizations providing services to older people.[186]

3.157 The adult safeguarding agencies recommended in **Chapter 14 (Safeguarding Adults at Risk)** would have a role in improving access to services. In most cases, safeguarding and support should involve working with the at-risk adult to arrange for health, medical, legal and other services. In some cases, it might also involve seeking court orders to prevent someone suspected of abuse from contacting the at-risk adult. Where necessary, adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect at-risk people from abuse.

Redress

3.158 The ALRC includes a number of recommendations that concern avenues for legal redress to improve responses to elder abuse. One group of recommendations

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183 Ethnic Communities' Council of Victoria (ECCV), *Submission 306*.

184 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*. A case study was included, supplied by the Central Australian Aboriginal Legal Aid Service. See also M Alexander, *Submission 64*.

185 Women's Legal Services Australia, *Submission 343*.

186 Aged Rights Advocacy Service Inc, *Submission 285*. Citations omitted.

concerns expanding the jurisdiction of state and territory civil and administrative tribunals, in relation to:

- any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties and the power to order any remedy that the Court could order in such cases—**Chapter 5 (Enduring Appointments)**;[187]
- resolving family disputes involving residential property under an 'assets for care' arrangement—**Chapter 6 (Family Agreements)**.[188]

3.159 In the area of family agreements, the ALRC discusses the problems generated by the often informal, and often verbal, nature of these arrangements, leading to problems of enforceability if the arrangements unravel. To encourage people to formalise these arrangements, the ALRC recommends that, for the purposes of calculating an entitlement to the Age Pension, the *Social Security Act 1991* (Cth) should be amended to require that a 'granny flat interest' be expressed in writing.[189]

Building the evidence base

Recommendation 3–5 There should be a national prevalence study of elder abuse to build the evidence base to inform policy responses.

3.160 Policy change to address elder abuse requires a sound evidence base. A key strategy is to undertake a study to provide reliable data about the prevalence of elder abuse. Other research is also needed to improve the evidence base. The Australian Government has committed to a study 'into the prevalence of elder abuse to better understand the problem'.[190]

3.161 At the time of completing this Report, in May 2017, the first step towards a prevalence study was presented to the Attorney-General's Department—the *Elder Abuse Prevalence Scoping Study* (Scoping Study).[191] The study set out to:

- provide options for achieving a nationally applicable definition of elder abuse;
- examine the potential of existing Australian studies for elder abuse research; and
- develop methodology options for research into the nature and prevalence study of elder abuse in Australia.[192]

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187 Rec 5–2.
188 Rec 6–1.
189 Rec 6–2.
190 Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016). See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1.
191 Lixia Qu et al, 'Elder Abuse Prevalence Scoping Study' (Australian Institute of Family Studies, unpublished).
192 Ibid 53.

3.162 The Scoping Study proposed a two-stage research program, the first stage of which 'aims to operationalise a nationally applicable definition of elder abuse for data collection by generating research evidence on the nature of elder abuse' to:

- develop standardised measures of elder abuse for consistent data collection;
- identify appropriate approaches directed at engaging with professionals and with various groups of older people who would not be adequately captured in prevalence research; and
- develop a research plan for studies based on secondary data analysis and to conduct this research accordingly.[193]

Limitations of existing data

3.163 As NARI and the AAG explained, most current data about elder abuse comes from phone lines, longitudinal studies (physical abuse of women) and individual research projects, 'which makes it impossible to extrapolate to the wider population'.[194] Moreover, a number of stakeholders suggested that elder abuse is underreported.[195] Western Australia Police noted the problem of determining the prevalence of elder abuse due to underreporting. They suggested that some of the reasons included:

> that the victim is dependent on the perpetrator for their daily care and is fearful that reporting may see them placed in a residential care facility, the shame associated with being a victim of elder abuse, fearful of jeopardising relationships with family, and fear of retaliation. There may also be the inability of the older person to access police services to be able to report crime, and the inability to be able to communicate what has been happening to a police officer due to the abuser being the primary carer, the presence of cognitive impairment, or language and cultural barriers. Due to the lack of awareness, individuals may not be aware that elder abuse is a crime. The presence of these factors will impact on the distortion of prevalence of elder abuse and the ability of policing organisations to adequately respond and implement strategic responses.[196]

Prevalence study

3.164 The ALRC commends the Australian Government's initiatives towards a national prevalence study of elder abuse in Australia and recognises that the Scoping Study is a significant first step. A prevalence study will assess the extent to which elder abuse occurs at a population level, to provide baseline information and support planning and projection about the future incidence of elder abuse. Without an appropriate evidence base to guide best practice models, there is the potential 'that strategies which lack evidence could cause more harm'.[197]

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193 Ibid 3.

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

195 See, eg, Australian Bankers' Association (ABA), *Submission 365*; Disabled People's Organisations Australia, *Submission 360*; Speech Pathology Australia, *Submission 309*; WA Police, *Submission 190*; L Barratt, *Submission 155*; State Trustees Victoria, *Submission 138*; Macarthur Legal Centre, *Submission 110*.

196 WA Police, *Submission 190*. See also, eg, Disabled People's Organisations Australia, *Submission 360*; Speech Pathology Australia, *Submission 309*; Macarthur Legal Centre, *Submission 110*.

197 Cochrane Public Health Group, *Submission 54*.

3.165 Stakeholders were strongly supportive of a prevalence study to improve the evidence base. As one stakeholder observed: 'This is vital. We always need data to show where resources can be best used.'[198] Moreover, as Seniors Rights Victoria urged, '[w]ithout proper understanding of the severity and frequency of each type of elder abuse it is impossible to measure the effectiveness of a National Plan to address it'.[199]

3.166 While supporting a prevalence study, Justice Connect Seniors Law also emphasised the importance of investment in the shorter term:

> we recommend an immediate investment in developing the evidence base to promote more robust identification and responses to elder abuse. This will, ultimately, improve the accuracy of a prevalence study.[200]

3.167 There are a number of important considerations to be addressed in designing a prevalence study. Data collection is assisted by a common definition of elder abuse. The WHO description of 'elder abuse' is a common reference point:

> Elder abuse can be defined as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'. Elder abuse can take various forms such as physical, psychological or emotional, sexual and financial abuse. It can also be the result of intentional or unintentional neglect.[201]

3.168 The AAG and NARI pointed to a number of other things to be considered in establishing a prevalence study:

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

198 P Greenwood, *Submission 304*.
199 Seniors Rights Victoria, *Submission 383*.
200 Justice Connect Seniors Law, *Submission 362*.
201 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002). See discussion in ch 2.

- The consequences of reporting abuse—the inherent power imbalance between individuals and institutions may discourage people from reporting abuse, making it difficult to accurately measure.
- Types of abuse—prevalence is likely to vary between different types of abuse.
- Any attempt to establish prevalence of various types of elder abuse should also try to gather as much information about perpetrators or potential perpetrators as possible.[202]

Mapping existing data

3.169 Mapping existing sources of data relating to abuse of older people, ensuring that these are consistently collected and collated, will be an important part of improving the evidence base.[203] For example, it will be important to ensure that elder abuse helplines have systems in place to collect data to support improvements in such services and provide knowledge about the characteristics and needs of the people who use them. It is also necessary that there is ongoing collection and reporting of relevant data by aged care providers, complaints bodies, financial institutions, law enforcement agencies and guardianship tribunals.[204]

3.170 St Vincent's Health Australia said that data collection 'is a fundamental driver in safeguarding vulnerable older people'.

> The availability of health service data on the prevalence of elder abuse cases is rare. Through monitoring and auditing St Vincent's Hospital Melbourne is able to guide improvements. Audits of Vulnerable Older Person notifications made as St Vincent's since the inception of its new policy, and related case information, have assisted in the review of the current model of care and informed further policy review, process and practice improvements, and training requirements based on data collected over a four year period.[205]

3.171 Inconsistencies in data collection across states and territories were identified as an issue by the Office of the Public Advocate (SA), saying that it was important 'to address the practical issues and barriers associated with undertaking this exercise'. Challenges identified were:

> arriving on definitional agreement and also research methodology which accounts for incidence of abuse which does not result in criminal conviction or other formal process of resolution.[206]

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202 National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*. Supported by, eg, Carers Victoria, *Submission 348*. See also Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; S Biggs, *Submission 235*; National Seniors Australia, *Submission 154*; Townsville Community Legal Service Inc, *Submission 141*; Northern Territory Anti-Discrimination Commission, *Submission 93*.

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

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

205 St Vincent's Health Australia, *Submission 345*.

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

3.172 Stakeholders were strongly supportive of building on existing initiatives—'tapping into the wheel already there'.[207] The FSC noted a range of informal information capture initiatives about financial abuse:

> a number of institutions and organisations keep informal data on elder financial abuse, however privacy laws and a lack of harmonized strategy between groups results in information that is incomparable or incomplete. Alongside a national prevalence study, clear guidelines on the kinds of data that can be collected by particular organisations in light of their responsibilities to the public, may contribute to the gathering of a wider set of empirical data for future policy decisions.[208]

3.173 The Eastern Community Legal Centre noted that existing family violence data could be mined for information about elder abuse:

> where data is already being collected in relation to family violence by relevant agencies including the police, local governments, hospitals, aged care and health services, incidents of elder abuse should be clearly and separately collected as a distinct subset of this data.[209]

3.174 A problem with existing data sets, however, according to DPO Australia, is the lack of disaggregation.

> Updated and reliable quantitative, disaggregated data around the violence, abuse and neglect of older people and people with disability is critical and urgently required. …
>
> Data should … be disaggregated by a number of categories, including disability, gender, ethnicity, race and age, to ensure thorough consideration of intersectional discrimination and violence. Recent research that shows that 75 percent of reported cases of elder abuse involve older people with cognitive impairment would likely indicate a higher prevalence if such inclusionary and accessible data collection methodologies were utilised.[210]

3.175 FECCA also pointed to the need for disaggregation—in relation to 'ethnic background, level of English language skills, visa status, financial situation and living situation (eg living with family)':

> The inclusion of these factors will assist to build an evidence base about the prevalence of elder abuse in CALD communities. Strategies would also need to be put in place to ensure that CALD communities are adequately and proportionally represented in the study. These strategies could include engaging older people and their families through community networks, ethno-specific community organisations, and provision of other supports such as language services and transport.[211]

3.176 ASIC drew attention to another kind of disaggregation, in relation to 'different cohorts of older Australians (variously categorised as seniors, retirees, 55+ or 65+), particularly in relation to financial decision-making'. In response, ASIC is undertaking a 'segmentation analysis' of the 55+ cohort, to assist its understanding of:

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207 M Berry, *Submission 355*.
208 Financial Services Council, *Submission 359*.
209 Eastern Community Legal Centre, *Submission 357*.
210 Disabled People's Organisations Australia, *Submission 360*.
211 FECCA, *Submission 292*.

- the financial needs and concerns of Australian seniors and the ways in which seniors currently approach financial decision making, including barriers and enablers;
- current sources of financial/money management information and key gaps in awareness and knowledge about where to go and how to access such information;
- communication approaches and key messages that will be most effective in targeting this segment;
- the broader engagement of family members/carers and significant others who may support senior Australians in their financial decision making; and
- key characteristics (including gender differences) within the seniors' segment, the relative size of key segments and implications for ASIC MoneySmart's offering to this market.[212]

3.177 The Scoping Study examined a number of existing and ongoing studies of elder abuse in Australia 'to assess their potential to augment the national prevalence study by providing access to their data, which will allow greater focus on particular issues and populations'.[213] The Scoping Study reported that existing datasets—for example, the Australian Bureau of Statistics (ABS) Personal Safety Survey and Survey of Disability, Ageing and Carers—were useful and could provide relevant information and insights through secondary data analysis. However, the study also noted that there was scope to add items that reflect the elder abuse definition to existing surveys in future data collections. The ALRC agrees that this is a constructive and timely suggestion, particularly for major data collections held and conducted by the ABS. As the authors of the Scoping Study conclude:

> The advantages of negotiating to include questions in existing studies relate not only to cost-effectiveness but also to relatively shorter lead times for implementation. There is also scope for this approach to provide opportunities for triangulation on key questions within the overall research program. More generally, studies involving other sensitive topics, including personal safety, may help to inform data collection methods, given the similarly sensitive nature of questions relating to elder abuse.[214]

Further research

3.178 Stakeholders also said that, while much excellent research had been undertaken, much further research was needed, not just a prevalence study.[215] Aged and Community Services Association, for example, observed that the National Plan must include 'a comprehensive research program linked to policy and practice outcomes'.[216] The AAG and NARI identified a range of their relevant work that assists in the

212 Australian Securities & Investments Commission, *Submission 143*.
213 Qu et al, above n 191, 11.
214 Ibid 23.
215 See, eg, Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; Seniors Rights Victoria, *Submission 383*; S Biggs, *Submission 235*.
216 Aged and Community Services Association, *Submission 217*.

identification of gaps in the evidence base.[217] National Legal Aid referred also to the Australia-wide survey (the LAW Survey) from the Law and Justice Foundation of NSW in 2012, which 'yielded both instructive data and a platform for future research, and the results of ongoing work continue to inform access to justice service delivery'.[218]

3.179 The ALRC agrees that there needs to be extensive research and evaluation in relation to elder abuse, including several distinct elements concerned with: identifying risk factors, identifying gaps, and assessing existing responses. The following are suggestions from stakeholders under these headings.

3.180 ***Risk***:

- the risk factors for elder abuse—for both people experiencing abuse and people perpetrating abuse;[219]
- the risk, protective factors and needs of particular groups in the community, including Aboriginal and Torres Strait Islander people, CALD people, LGBTI people, and those living in regional and remote areas;[220]
- analysis of the groups of people perpetrating elder abuse—including, for example, the percentage who are the older person's children, spouse/partner or a care worker.[221]

3.181 ***Identifying gaps***:

- identifying the barriers to obtaining criminal convictions;[222]
- analysing the prevalence and correlates (associations) of abuse to identify appropriate targets for intervention, particularly in areas where there is no data, such as the banking and financial sector;[223]
- assessing the economic costs of elder abuse, including through financial abuse and the costs to the health and support systems;[224]
- identifying the number of older males suffering from elder abuse, in particular emotional abuse, so that appropriate resources and assistance can be identified and further developed;[225]

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217 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.
218 National Legal Aid, *Submission 370*.
219 See, eg, Office of the Public Advocate (Vic), *Submission 95*.
220 National LGBTI Health Alliance, *Submission 156*; Office of the Public Advocate (Vic), *Submission 95*; Alice's Garage, *Submission 36*. The LGBTI Health Alliance pointed to the 'good starting point' provided in the report: GRAI (GLBTI Retirement Association Inc), *'We Don't Have Any of Those People Here' Retirement Accommodation and Aged Care Issues for Non-Heterosexual Populations* (2010). Targeted research in these particular contexts was also identified in the scoping study: Qu et al, above n 191, 51.
221 Carers Australia, *Submission 157*.
222 ARAS, *Submission 166*.
223 Capacity Australia, *Submission 134*.
224 ARAS, *Submission 166*.
225 TASC National, *Submission 91*.

- the ways in which family agreements are being used in Australia, their common problems and outcomes;[226]
- collation of data concerning the risks of injury or death to older people caring for adult children with a mental illness;[227]
- a focus on rural communities concerning the lack of avenues to report elder abuse and/or access to appropriate services for assistance;[228]
- research concerning informal arrangements to manage financial and personal affairs;[229]
- a multi-jurisdictional case review of matters that have been referred to various guardianship tribunals to identify emergent themes, characteristics and circumstances which have given rise to proven elder financial abuse or exploitation under substituted decision-making schemes, with a view to developing evidence-based risk reduction strategies;[230]
- information about elder abuse perpetrated against people with cognitive impairment and about people living in supported accommodation settings.[231]

3.182 ***Assessing existing responses*:**

- assessment of the effectiveness of existing prevention, intervention and remediation responses to address elder abuse—including in relation to health, justice, aged care, financial and other services;[232]
- assessment of intervention and prevention measures—that support older people and carers.[233]

3.183 The Scoping Study also suggested that research relating specifically to older people with impaired decision-making ability could be undertaken through surveying aged care providers, carers and professionals.[234]

Evaluating future initiatives

3.184 Finally, the ALRC considers that any actions implemented under the National Plan (and as a result of this Report) should be subject to evaluation, to provide a continuous loop of evidence-based practice and policy improvement.

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226 National Seniors Australia, *Submission 154*.
227 L Barratt, *Submission 155*. Barratt suggests that 'a useful study could be conducted by the Australian Institute of Criminology who could analyse court files and forensic psychiatric records as well as statistics, to marshal the determinants'.
228 TASC National, *Submission 91*.
229 Law Council of Australia, *Submission 61*.
230 Queensland Law Society, *Submission 159*. The QLS suggested that such strategies might include 'evidence-based legislative review of substituted decision-making and structured decision-making tools to guide decisions about the appointment of attorneys'.
231 Office of the Public Advocate (Vic), *Submission 95*.
232 Seniors Rights Victoria, *Submission 171*; National Seniors Australia, *Submission 154*.
233 ARAS, *Submission 166*; Public Trustee of Queensland, *Submission 98*.
234 Qu et al, above n 191, 52.

4. Aged Care

Contents

Summary

4.1 Older people receiving aged care—whether in the home or in residential aged care—may experience abuse or neglect. Abuse may be committed by paid staff, other residents in residential care settings, family members or friends.

4.2 There are a range of existing processes in aged care through which the quality and safety of aged care is monitored. This chapter identifies these, as well as making a number of recommendations for reform to aged care laws and legal frameworks to enhance safeguards against abuse of older people receiving aged care. The recommendations are in keeping with the broader direction of reform in aged care, which seeks to provide greater consumer control and a more flexible aged care system

for consumers of aged care, while focusing regulation on 'ensuring safety and quality [and] protecting the vulnerable'.[1]

4.3 In this chapter, the ALRC recommends:

- establishing a serious incident response scheme in aged care legislation;
- reforms relating to the suitability of people working in aged care—enhanced employment screening processes, and ensuring that unregistered staff are subject to the proposed National Code of Conduct for Health Care Workers;
- regulating the use of restrictive practices in aged care; and
- national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.

4.4 This chapter also addresses decision making in aged care. It highlights the recommendation made in the 2014 ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* Report) that aged care laws should be reformed consistently with the Commonwealth Decision-Making Model, and recommends that aged care agreements cannot require that a person has formally appointed a substitute decision maker.

The aged care system

4.5 The Commonwealth provides funding for aged care and regulates its provision through granting approvals for providers of aged care and prescribing responsibilities for approved providers. Home care, flexible care and residential care are all regulated under the *Aged Care Act 1997* (Cth). Additionally, entry-level home support services for older people[2] are provided through the Commonwealth Home Support Programme (CHSP) in all states and territories except Western Australia.[3]

4.6 A number of Principles made under the *Aged Care Act* also regulate the provision of aged care. Included among these Principles are Charters of Care Recipients' Rights and Responsibilities.[4] These include the right to be treated with dignity and to live without exploitation, abuse or neglect.[5] In residential care, they also

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1 Productivity Commission, *Caring for Older Australians: Overview* (Report No 53, 2011) xxv.

2 People aged 65 years and over, or 50 years and over for Aboriginal and Torres Strait Islander people: Department of Health (Cth), *Commonwealth Home Support Programme Manual 2017* (2017) ch 5.

3 Entry level home care services for older people in Western Australia will transition to the CHSP from 1 July 2018: Department of Health (Cth), *Commonwealth Home Support Programme* <www.agedcare.gov.au>. There are plans to integrate the two home-based aged care programmes—home care regulated under the *Aged Care Act*, and entry-level care provided under the CHSP—into a single care at home programme: Department of Health (Cth), *Home Care Packages—Reform* <www.agedcare.health.gov.au>. Recipients of grants to provide services under the CHSP must comply with a range of requirements, including in relation to quality and reporting: Department of Health (Cth), above n 2, 86.

4 *User Rights Principles 2014* (Cth) schs 1–3. Approved providers have a responsibility not to act in a way that is inconsistent with care recipients' rights and responsibilities: *Aged Care Act 1997* (Cth) ss 56-1(m), 56-2(k), 56-3(l).

5 *User Rights Principles 2014* (Cth) sch 1 cl 1(d), sch 2 cl 1(b), (g), sch 3 cl 2(d).

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.[6]

4.7 The majority of older people live at home without accessing Commonwealth-regulated aged care services.[7] However, the proportion of people receiving aged care increases with age. For example, in 2014–15, 8.9% of people aged 70 years and over, and 29.7% of people aged 85 years and over, received permanent residential care.[8]

4.8 More people receive some form of aged care at home than in residential aged care. In 2015–16, 234,931 people received permanent residential care, over 920,000 people accessed entry-level home care, and 88,875 people accessed home care packages provided under the *Aged Care Act*.[9]

Regulating quality of care

4.9 Ensuring quality of care is perhaps the best safeguard against abuse and neglect. As Professor Simon Biggs submitted, '[i]n addition to adequate monitoring and reporting, residential care work should focus on increasing overall care quality as in these contexts mistreatment is much more likely to be a culture of care than a "bad apple" problem'.[10]

4.10 The task of ensuring that approved providers meet their responsibilities in relation to quality of care is shared by the Department of Health (Cth) (the Department), the Australian Aged Care Quality Agency (Quality Agency), and the Aged Care Complaints Commissioner (Complaints Commissioner).

Department of Health (Cth)

4.11 The Department monitors compliance with the Act and with any agreements or contracts with providers.[11] In the event of non-compliance, the Department may take action, including imposing sanctions on the provider. Sanctions include: revoking or suspending the approved provider's approval as an aged care service provider; restricting such approval; revoking or suspending the allocation of some or all of the places allocated to a provider.[12]

Australian Aged Care Quality Agency

4.12 The Quality Agency accredits residential aged care providers, and assesses existing providers against quality standards.[13] Every residential aged care home

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6 Ibid sch 1 cl 1(g).
7 Department of Health (Cth), *2014–15 Report on the Operation of the Aged Care Act 1997* (2015) 9.
8 Ibid 4.
9 Department of Health (Cth), *2015–16 Report on the Operation of the Aged Care Act 1997* (2016) xiii. The number of home care packages under the Act will increase to around 100,000 places nationally by 2017–18: Department of Health (Cth), above n 3.
10 S Biggs, *Submission 235*.
11 Department of Social Services (Cth), *Aged Care Compliance Policy Statement 2015–2017* (2015) 4.
12 *Aged Care Act 1997* (Cth) s 66-1.
13 *Australian Aged Care Quality Agency Act 2013* (Cth) s 12. See also Australian Aged Care Quality Agency, *Annual Report 2014–2015* (2015) 30. The Accreditation Standards are set out in the *Quality of Care Principles 2014* (Cth).

receives one unannounced assessment against quality standards each year.[14] The Quality Agency may also perform 'review audits' when there are concerns about a home's performance.[15]

4.13 The Quality Agency also reviews home care providers (provided under both the Act and the CHSP) as well as the National Aboriginal and Torres Strait Islander Flexible Aged Care Program against quality standards.[16]

4.14 Where non-compliance with standards is identified, the Quality Agency will require the provider to address the non-compliance and inform the Department. The Department then makes a decision about whether to impose sanctions for non-compliance.[17] Where the Quality Agency identifies a serious risk to care recipients, the service provider and the Department are notified immediately.[18]

4.15 The Quality Agency also promotes high quality care, innovation in quality management and continuous improvement among approved providers, and provides information, education and training to approved providers.[19]

Aged Care Complaints Commissioner

4.16 The Complaints Commissioner can receive complaints from any source about concerns relating to an aged care[20] service provider's responsibilities under the Act or a provider's agreement with the Australian Government. The Complaints Commissioner has the power to direct a service provider to demonstrate that it is meeting its responsibilities under the Act or the agreement.[21] The Commissioner can also refer matters to the Department, the Quality Agency and other relevant agencies.[22]

Systemic concerns relating to quality of care

4.17 The Department stated that the existing regulatory framework in aged care 'has a strong focus on the quality and accountability of aged care services',[23] and aged care providers argued that the existing regulatory framework was 'rigorous'.[24] Nonetheless,

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14 Australian Aged Care Quality Agency, above n 13, 32.

15 A review audit is an assessment of the quality of care provided by a home against all 44 expected outcomes of the Accreditation Standards. They are carried out on-site by an assessment team made up of at least two quality assessors and generally take two to four days: Ibid.

16 The Home Care Standards are specified in the *Quality of Care Principles 2014* (Cth). The National Aboriginal and Torres Strait Islander Flexible Aged Care Program has a separate quality framework, the National Aboriginal and Torres Strait Islander Flexible Aged Care Program Quality Standards.

17 Department of Social Services (Cth), above n 11, 8.

18 Department of Health (Cth), *Submission 113*.

19 *Australian Aged Care Quality Agency Act 2013* (Cth) ss 9, 12(e)–(f).

20 Including residential, home or flexible care.

21 Complaints Principles 2015 s 15.

22 Ibid s 19; Aged Care Complaints Commissioner, *Annual Report 2015–16* (2016).

23 Department of Health (Cth), *Submission 113*.

24 UnitingCare Australia, *Submission 162*; Leading Age Services Australia, *Submission 104*; Aged and Community Services Australia, *Submission 102*.

a number of stakeholders expressed significant concerns about systemic issues relating to the quality of care in aged care, and the processes for monitoring quality.[25]

4.18 Just before the completion of this Report, the South Australian Chief Psychiatrist led a review of the Oakden Older Persons Mental Health Service—parts of which operated as a Commonwealth-regulated residential aged care facility. The Review found the Oakden facility so deficient in its standard of care as to require closure.[26] The Oakden Report observed that the 'Oakden facility is more like a mental institution from the middle of the last century than a modern Older Person's Mental Health Facility'.[27] The Commonwealth-accredited sections of this facility were nevertheless assessed as meeting 44 of the 44 expected outcomes of the Accreditation Standards in March 2016.[28]

4.19 The Oakden Report observed that issues with the quality of care at the Commonwealth-regulated parts of the facility were notorious and long-standing:

> The Review heard from many sources, including some through the media, that significant problems were known as far back as 2007 at Oakden when it first failed to meet certain Commonwealth Standards. At that time, [an] … external review … pointed to some of the reasons for these problems. This Review has confirmed that these problems remain and that … they have been present throughout the last 10 years.[29]

4.20 Following the Oakden Report, the Minister for Aged Care, the Hon Ken Wyatt AM, MP, announced an independent review of the Commonwealth's aged care quality regulatory processes. The independent review is to consider, among other things, what 'improvements to the Commonwealth aged care regulatory system would increase the likelihood of immediate detection, and swift remediation by providers, of failures of care such as those identified in the Oakden Report'.[30] The ALRC considers that the independent review should have regard to the recommendations in this Report, as well as the systemic concerns about quality assurance processes in aged care that have been raised by stakeholders in this Inquiry.

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25 See, eg, Seniors Rights Service, *Submission 169*; Aged Care Crisis, *Submission 165*; Australian Nursing & Midwifery Federation, *Submission 163*; Elder Care Watch, *Submission 84*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*.

26 A Groves, D Thomson, D McKellar and N Procter, 'The Oakden Report' (Department for Health and Ageing (SA) 2017).

27 Ibid 57.

28 Australian Aged Care Quality Agency, *Makk and McLeay Nursing Home RACS ID 6010200 Accreditation Report* (2016). A review of the Oakden facility was commissioned in January 2017 by the South Australian Mental Health Minister, in the wake of allegations of mistreatment of a resident. The Quality Agency undertook a full audit of the home in March 2017, and on 17 March 2017, imposed sanctions upon the facility: *Compliance Information* <www.myagedcare.gov.au/compliance-information>. The CEO of the Quality Agency has said that he is 'taking action to understand' how the home was found to be compliant with the Accreditation Standards: Australian Aged Care Quality Agency, 'Makk and McLeay Nursing Home' (Media Statement, 28 April 2017).

29 A Groves, D Thomson, D McKellar and N Procter, 'The Oakden Report' (Department for Health and Ageing (SA) 2017) 77.

30 Ken Wyatt, MP, 'Federal Aged Care Minister to Commission Review of Aged Care Quality Regulatory Processes' (Media Release, 1 May 2017). The review is to report by 31 August 2017.

Aged care reforms

4.21 The aged care system is in a period of reform, the direction of which was broadly set in the 2011 Productivity Commission Report, *Caring for Older Australians*.[31] The Australian Government responded to this report with the 'Living Longer Living Better' reform package.[32] The goal of reform has been described as an aged care system that is 'more consumer-driven, market-based and less regulated'.[33] There is an increased emphasis on providing aged care in the home, and a shift to a 'consumer-directed' model of home care.[34]

4.22 The move to marketisation and individualisation in aged care mirrors international trends in the provision of care for older people.[35] Delivering services in this way is said to have a number of benefits:

> First, giving service users (or their agents) purchasing power should empower users by enabling them to exercise consumer sovereignty. Second, this should improve the quality of services and reduce costs to purchasers, by forcing providers to compete for business.[36]

4.23 However, for improved choice, efficiency and quality to be realised, 'certain conditions must be met: information about the price and quality of competing suppliers must be freely available to consumers; the costs of changing suppliers must be low; and suppliers must operate in a competitive market'.[37]

4.24 This may not be the case in aged care. For example, decisions about choosing aged care are frequently made at a time of crisis, and at short notice, which limit the ability to make informed choices. Additionally, where continuity of care is important, the transaction costs of switching providers may limit an aged care consumer's ability to choose other, higher quality, service providers. And finally, consolidation of providers to achieve economies of scale may result in a concentrated market and limit competition over quality and price.[38]

4.25 Some stakeholders were concerned by this market-based approach to the provision of aged care. For example, Aged Care Crisis argued that, because aged care recipients are vulnerable, 'the necessary conditions for an unrestricted market to

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31 Productivity Commission, *Caring for Older Australians* (Report No 53, 2011).

32 Rebecca de Boer and Peter Yeend, Department of Parliamentary Services (Cth), *Bills Digest*, No 106 of 2012–13 (May 2013).

33 Department of Health (Cth), above n 3. See also Aged Care Sector Committee, *Aged Care Roadmap* (2016); Department of Health (Cth), *What Has Been Achieved so Far* <www.agedcare.health.gov.au>.

34 Department of Health (Cth), *Why Is Aged Care Changing* <www.agedcare.health.gov.au>. Additional changes to home care commenced on 27 February 2017. From that date, funding for a home care package follows the consumer: Department of Health (Cth), *Increasing Choice in Home Care* <www.agedcare.health.gov.au>.

35 See, eg, Deborah Brennan et al, 'The Marketisation of Care: Rationales and Consequences in Nordic and Liberal Care Regimes' (2012) 22(4) *Journal of European Social Policy* 377, 378; Michael D Fine, 'Individualising Care. The Transformation of Personal Support in Old Age' (2013) 33(3) *Ageing & Society* 421.

36 Brennan et al, above n 35, 379.

37 Ibid.

38 Ibid 379–80.

operate do not exist'. The result is that 'aged care is a failed market and it has been failing citizens for a long time … The failure to provide basic and empathic care to the vulnerable is a form of elder abuse'.[39]

4.26 Concerns also exist about the move to individualisation through consumer-directed care. Consumer-directed care is 'both a philosophy and an orientation to service delivery'.[40] It seeks to empower aged care recipients as 'consumers' and provide them with control of the types of care and services they receive, and how they are delivered. It also seeks to utilise market forces to promote improvements in quality.[41]

4.27 However, some have argued that there are risks of abuse in this model. For example, the Office of Public Advocate (Vic) submitted that its main concern was 'how people with cognitive impairment or mental ill-health are assisted to make decisions in these frameworks'.[42] Other submissions raised concerns about the ability of older people to access and understand meaningful information about care choices.[43] The Australian College of Nursing, for example, said that

> a significant risk of [consumer directed care] is an older person's lack of awareness or understanding of the range of services and service alternatives that are available to them. If a care and/or service recipient is not appropriately informed they may select service options that are not in their best interest or of greatest benefit to them.[44]

4.28 The Complaints Commissioner emphasised that information provision in consumer-directed care is an important safeguard for older people:

> Good information, including how to raise concerns … helps to correct the power imbalance for the consumer. The provision of information must be done well, and in accordance with the requirements of informed consent in the health sector.[45]

4.29 A legislated review of the reforms made by the Living Longer Living Better package is underway at the time of writing this Report.[46] The 'Aged Care Legislated Review' must consider, among other things: demand for aged care places; control of the number and mix of aged care places; further movement towards a consumer directed care model; equity of access; and workforce strategies.[47] It must report by 1 August 2017.[48] This review is the appropriate place to consider the broader policy settings for aged care, including in relation to marketisation and individualisation.

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39 Aged Care Crisis, *Submission 165*.
40 Department of Health (Cth), *Consumer Directed Care* <www.agedcare.health.gov.au>.
41 ARC Centre of Excellence in Population Ageing Research, *Aged Care in Australia: Part II—Industry and Practice* (Research Brief 2014/02) 18.
42 Office of the Public Advocate (Vic), *Submission 95*.
43 See, eg, Aged Care Complaints Commissioner, *Submission 148*; Australian College of Nursing, *Submission 147*; Queensland Nurses' Union, *Submission 47*.
44 Australian College of Nursing, *Submission 147*.
45 Aged Care Complaints Commissioner, *Submission 148*.
46 *Aged Care (Living Longer Living Better) Act 2013* (Cth) ss 4(1), (4); Department of Health (Cth), *Aged Care Legislated Review* <www.agedcare.health.gov.au>.
47 *Aged Care (Living Longer Living Better) Act 2013* (Cth) s 4(2).
48 Department of Health (Cth), above n 46.

4.30 Further reform is also planned for quality assurance processes in aged care. There are plans to consolidate a range of standards applying to approved providers of residential and home care into a single set of aged care quality standards. Consultation on draft quality standards closed on 21 April 2017.[49] Other reforms aim to improve transparency about quality of care. For example, a voluntary National Aged Care Quality Indicator Program began on 1 January 2016 for residential aged care. Home care quality indicators are being developed, with implementation planned for 2018.[50]

4.31 Concerns were raised in this Inquiry about how quality and safety will be regulated in an environment in which approved home care providers can sub-contract or broker services to provide consumer-directed care to an older person. Where approved providers do sub-contract or broker services, they remain responsible for service quality and meeting all regulatory responsibilities.[51] However, submissions to this Inquiry suggested that an emerging issue will be how best to regulate the quality and safety of home care in the further reforms that have been signalled to 'streamline' quality accreditation.[52]

4.32 Improvements to quality assurance processes may prevent or lessen the risk of abuse in aged care. For example, in developing the single set of aged care quality standards, consideration could be given to including standards relating to approved providers' provision of safeguards against abuse and neglect of care recipients.[53]

4.33 Some stakeholders advocated for increased transparency of quality information.[54] For example, Alzheimer's Australia submitted that such information

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49 Department of Health (Cth), *Single Set of Aged Care Quality Standards* <www.agedcare.health.gov.au>.

50 Department of Health (Cth), *About the National Aged Care Quality Indicator Program* <www.agedcare.health.gov.au>; Department of Health (Cth), *Home Care Quality Indicators* <www.agedcare.health.gov.au>. The Department has also indicated that it is developing options for making additional quality information publicly available to 'help consumers make informed choices' about care: Department of Health (Cth), *Improved Information on Quality of Services* <www.agedcare.health.gov.au>.

51 Department of Health (Cth), *Home Care Packages Programme Operational Manual: A Guide for Home Care Providers* (2015) 38.

52 Department of Health (Cth), *Streamlined Accreditation Arrangements Across Residential and Community Aged Care* <www.agedcare.health.gov.au>. Submissions raising this issue included Australian Nursing & Midwifery Federation, *Submission 163*; Older Women's Network NSW, *Submission 136*; NSW Nurses and Midwives' Association, *Submission 29*. Further changes that allow funds to be used to purchase care services other than through brokerage by approved providers will require consideration of how quality and safety of such services might be regulated: whether through aged care legislation or through general consumer protection legislation. For a discussion of the applicability of consumer law in aged care, see, eg: Seniors Rights Service, Submission to *Australian Consumer Law Review Issues Paper* (27 May 2016); R Lewis, *Submission 100*.

53 Safeguarding people from abuse is a fundamental standard for care in the UK: *The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014* cl 13. See also ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; Queensland Nurses' Union, *Submission 47*; Alice's Garage, *Submission 36*.

54 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; Townsville Community Legal Service Inc, *Submission 141*; Capacity Australia, *Submission 134*; Elder Care Watch, *Submission 84*; Australian and New Zealand Society for Geriatric Medicine, *Submission 51*; Queensland Nurses' Union, *Submission 47*.

would 'assist consumers in making informed choices in regard to the services they receive … [and] drive service competition and quality improvement'.[55]

4.34 However, National Seniors expressed caution about the ability of quality indicators to address elder abuse, arguing that these may increase risk:

> There have already been concerns expressed, for example, that specific quality indicators create perverse incentives which divert resources at the expense of other areas. … Unless quality indicators are able to focus resources towards the things that residents and their representatives themselves believe make them safe and supported, quality monitoring systems … will not actively reduce the risks of abuse in residential care. The same will be true in the home care setting.[56]

4.35 The Aged Care Legislated Review, in its analysis of whether further steps could be taken to move to a consumer-driven demand model of aged care service delivery, provides an opportunity to consider the sufficiency of publicly available information about quality of care.[57] In particular, it might explore possibilities for making available information relating to a provider's provision of safeguards against abuse and neglect of care recipients.

Abuse and neglect in aged care

4.36 Some stakeholders submitted that the majority of elder abuse occurs in the community, rather than in formal aged care.[58] However, as with prevalence of elder abuse in the community, there is limited research about the rates of abuse of those receiving aged care. One research study has observed that those living in residential aged care are more vulnerable to abuse and neglect because they 'tend to be frailer and more dependent on others to provide care'.[59]

4.37 There is data available on numbers of alleged or suspected 'reportable' assaults in residential aged care notified to the Department of Health each year. However, as the Department has noted, this information 'reflects the number of reports made by providers … and does not reflect the number of substantiated allegations'.[60] Reportable assaults also capture a narrower range of conduct than may be described as elder abuse.

4.38 There is also data available relating to complaints made about home and residential aged care to the Complaints Commissioner or its predecessor schemes. There are two difficulties with this data. Not all episodes of concern are captured (due to a reluctance to complain); and not all of the complaints made relate to abuse or neglect. Further, not all complaints of abuse are substantiated.[61] A number of stakeholders reported the results of other projects that capture reports of abuse or

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55 Alzheimer's Australia, *Submission 80*.
56 National Seniors Australia, *Submission 154*.
57 *Aged Care (Living Longer Living Better) Act 2013* (Cth) s 4(2)(c).
58 See, eg, Resthaven, *Submission 114*; Aged and Community Services Australia, *Submission 102*.
59 Lynn McDonald et al, 'Institutional Abuse of Older Adults: What We Know, What We Need to Know' (2012) 24(2) *Journal of Elder Abuse & Neglect* 138, 139.
60 Department of Health (Cth), *Submission 113*.
61 Aged Care Complaints Commissioner, *Submission 148*.

neglect in aged care,[62] and there is some evidence available relating to deaths in nursing homes.[63]

4.39 Some taxonomies of abuse also include 'institutional abuse' as a form of abuse—described as occurring when the 'routines, systems and regimes of an institution result in poor or inadequate standards of care and poor practice which affects the whole setting and denies, restricts or curtails the dignity, privacy, choice, independence or fulfilment of individuals'.[64] A number of the concerns raised in this Inquiry about aged care might be characterised as about institutional abuse, particularly in relation to adequate levels of staffing.[65]

4.40 Stakeholders reported many instances of abuse of people receiving aged care. These included reports of abuse by paid care workers[66] and other residents of care homes,[67] as well as by family members and/or appointed decision makers of care recipients.[68] For example, Alzheimer's Australia provided the following examples of physical and emotional abuse:

> When working as a PCA [personal care assistant] in 2 high care units, I witnessed multiple, daily examples of residents who were unable to communicate being abused including: PCA telling resident to 'die you f—ing old bitch!' because she resisted being bed bathed. Hoist lifting was always done by one PCA on their own not 2 as per guidelines and time pressures meant PCAs often using considerable physical force to get resistive people into hoists; resident not secured in hoist dropped through and broke arm—died soon after; residents being slapped, forcibly restrained and force-fed or not fed at all; resident with no relatives never moved out of bed, frequently left alone for hours without attention; residents belongings being stolen and food brought in by relatives eaten by PCAs.[69]

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62 See, eg, Seniors Rights Service, *Submission 169*; ARAS, *Submission 166*; Aged Care Crisis, *Submission 165*; Elder Care Watch, *Submission 84*; NSW Nurses and Midwives' Association, *Submission 29*. See also NSW Nurses and Midwives Association, *Who Will Keep Me Safe? Elder Abuse in Residential Aged Care* (2016).

63 See further Professor J Ibrahim, *Submission 63*; Georgia Aitken et al, 'Frequency of Forensic Toxicological Analysis in External Cause Deaths among Nursing Home Residents: An Analysis of Trends' (2017) 13(1) *Forensic Science, Medicine, and Pathology* 52; Emma Bellenger et al, 'Physical Restraint Deaths in a 13-Year National Cohort of Nursing Home Residents' [2017] *Age and Ageing*; Noha Ferrah et al, 'Death Following Recent Admission Into Nursing Home From Community Living: A Systematic Review Into the Transition Process' [2017] *Journal of Aging and Health*; Tatiana Hitchen et al, 'Premature and Preventable Deaths in Frail, Older People: A New Perspective' [2016] *Ageing and Society* 1; Joseph E Ibrahim et al, 'Nature and Extent of External-Cause Deaths of Nursing Home Residents in Victoria, Australia' (2015) 63(5) *Journal of the American Geriatrics Society* 954.

64 Rochdale Borough Safeguarding Adults Board, *Institutional Abuse* <www.rbsab.org>.

65 Concerns related to staffing are discussed below.

66 See, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; TASC National, *Submission 91*; Advocare Inc (WA), *Submission 86*; Elder Care Watch, *Submission 84*; Alzheimer's Australia, *Submission 80*; Name Withheld, *Submission 19*.

67 See, eg, Name Withheld, *Submission 189*; C Jenkinson, *Submission 188*; Alzheimer's Australia, *Submission 80*.

68 See, eg, Seniors Rights Service, *Submission 169*; L Barratt, *Submission 155*; State Trustees Victoria, *Submission 138*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*; Older Persons Advocacy Network, *Submission 43*.

69 Alzheimer's Australia, *Submission 80*. For a number of other examples, see, eg, Australian Nursing & Midwifery Federation, *Submission 163*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Advocare Inc (WA), *Submission 86*; Elder Care Watch, *Submission 84*.

4.41 The ALRC also received reports of other forms of abuse, including sexual[70] and financial abuse.[71] Restrictions on movement[72] and visitation[73] were also reported. Many submissions also identified neglect of care recipients.[74]

Responses to serious incidents of abuse and neglect

Recommendation 4–1 Aged care legislation should provide for a new serious incident response scheme for aged care. The scheme should require approved providers to notify to an independent oversight body:

(a) an allegation or a suspicion on reasonable grounds of a serious incident; and

(b) the outcome of an investigation into a serious incident, including findings and action taken.

This scheme should replace the current responsibilities in relation to reportable assaults in s 63-1AA of the *Aged Care Act 1997* (Cth).

Recommendation 4–2 The independent oversight body should monitor and oversee the approved provider's investigation of, and response to, serious incidents, and be empowered to conduct investigations of such incidents.

A new serious incident response scheme

4.42 The ALRC recommends that aged care legislation should include a process for reporting the occurrence of serious incidents of abuse and neglect in aged care, and for oversight of provider responses to such incidents. The recommended serious incident response scheme builds on the existing requirements for reporting allegations of abuse in the *Aged Care Act*, while also drawing on existing and proposed schemes for responding to abuse in the disability sector.

The existing scheme for reporting assaults

4.43 Under the current system, approved providers are required to report certain allegations of abuse in respect of residential care recipients. 'Reportable assaults' are defined as 'unlawful sexual contact, unreasonable use of force, or assault specified in

70 See, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Dr C Barrett, *Submission 68*. See also Rosemary Mann et al, 'Norma's Project: A Research Study into the Sexual Assault of Older Women in Australia' (Monograph Series No 98, Australian Research Centre in Sex, Health and Society, La Trobe University, 2014).

71 See, eg, State Trustees Victoria, *Submission 138*; Older Persons Advocacy Network, *Submission 43*.

72 See, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Capacity Australia, *Submission 134*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Older Persons Advocacy Network, *Submission 43*.

73 See, eg, Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

74 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; Capacity Australia, *Submission 134*; Queensland Nurses' Union, *Submission 47*; NSW Nurses and Midwives' Association, *Submission 29*; Aged Care Service, Murrumbidgee Local Health District, *Submission 18*.

the *Accountability Principles* and constituting an offence against a law of the Commonwealth or a State or Territory'.[75]

4.44 An approved provider must report an allegation, or a suspicion on reasonable grounds, of a 'reportable assault' on a care recipient to police and the Department of Health within 24 hours.[76]

4.45 So-called 'resident-on-resident' incidents are exempt from reporting, where the resident alleged to have committed the offending conduct has a pre-diagnosed cognitive impairment, provided the approved provider implements arrangements to manage the person's behaviour within 24 hours.[77]

4.46 While diverging as to the desired reform approach, most stakeholders were critical of the existing scheme.[78] Aged and Community Services Australia (ACSA) called for a review of the reportable assaults requirement, arguing that 'there is little evidence that the reporting requirement to the Australian Department of Health has been effective'.[79] Leading Age Services Australia (LASA) echoed this criticism, submitting that 'it could be contended that those requirements have made little or no difference to the safety of residents … [They] appear to only support red tape and bureaucratic processes, rather than promote safe quality care'.[80]

4.47 The reportable assault provisions place no responsibility on the provider other than to report an allegation or suspicion of an assault.[81] The *Records Principles 2014* (Cth) require providers to keep records of reportable assaults, containing:

- the date when the approved provider received the allegation, or started to suspect on reasonable grounds, that a reportable assault had occurred;
- a brief description of the allegation or the circumstances that gave rise to the suspicion; and
- information about whether a report has been made to a police officer and the Department; or whether no report has been made because the resident-on-resident exemption applies.[82]

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75 *Aged Care Act 1997* (Cth) s 63-1AA(9).
76 Ibid s 63-1AA(2).
77 Ibid s 63-1AA(3); *Accountability Principles 2014* (Cth) s 53.
78 See, eg, L Barratt, *Submission 155*; National Seniors Australia, *Submission 154*; Townsville Community Legal Service Inc, *Submission 141*; Leading Age Services Australia, *Submission 104*; Aged and Community Services Australia, *Submission 102*; Office of the Public Advocate (Vic), *Submission 95*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Advocare Inc (WA), *Submission 86*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Dr C Barrett, *Submission 68*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*. Baptist Care, by contrast, contended that the system was 'working well': Baptist Care Australia, *Submission 288*.
79 Aged and Community Services Association, *Submission 217*.
80 Leading Age Services Australia, *Submission 104*.
81 *Aged Care Act 1997* (Cth) s 63-1AA(2).
82 Records Principles 2014 (Cth) s 8.

4.48 Significantly, no obligation is placed on the provider to record any actions taken in response to an incident.

4.49 The ALRC heard conflicting reports about any subsequent actions taken by the provider or the Department following the making of a report. The Department of Health's submission to the Inquiry stated that it 'may take regulatory action if an approved provider does not … have strategies in place to reduce the risk of the situation from occurring again'.[83] However, there is no further publicly available information regarding how the Department makes an assessment about the suitability of any strategies implemented by the provider.[84]

4.50 ACSA submitted that there was little value in the existing requirement to report to the Department, 'when no action is taken by the agency you are reporting to'. To illustrate its point, ACSA noted that

> on 16 December 2016 in their Information for Aged Care Providers 2016/24, the Department of Health provided the following advice:
>
> 'Compulsory reporting of assaults and missing residents over the holiday period. The compulsory reporting phone line will not be staffed from 3 pm Friday 23 December 2016 to 8.30 am Tuesday 3 January 2017. Providers are still required to report within the legislative timeframe. Providers may leave a message but are encouraged to use the online reporting forms during this period'.[85]

4.51 UnitingCare Australia submitted that the 'process of making a report does not in itself trigger any actions. It is up to providers to implement processes to address risks and negotiate solutions'.[86]

4.52 LASA, by contrast, said that the Department did become involved in oversight of provider responses to reportable assaults:

> When an investigation occurs at the local level the Departmental Officers often require a full report on what actions are taken, and their outcome. This can lead to involvement by the [Australian Aged Care Quality Agency] and or the Complaints Commissioner and compliance action by the [Department of Health].[87]

4.53 In 2015–2016, there were 2,862 notifications of 'reportable assaults'.[88] Of these reports, 2,422 were recorded as alleged or suspected unreasonable use of force, 396 as alleged or suspected unlawful sexual contact, and 44 as both.[89] This represents an incidence of reports of suspected or alleged assaults of 1.2% of people receiving permanent residential care during that period.[90]

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83 Department of Health (Cth), *Submission 113*.

84 The online form for reporting reportable assaults requires providers to indicate action taken to ensure the safety of care recipients and minimise risk of recurrence. Given the required timeframe for reporting, this can only document actions taken within the first 24 hours: *Compulsory Reporting Forms* <www.agedcare.health.gov.au>.

85 Aged and Community Services Association, *Submission 217*.

86 UnitingCare Australia, *Submission 216*.

87 Leading Age Services Australia, *Submission 377*.

88 Department of Health (Cth), above n 9, 78.

89 Ibid.

90 Ibid.

4.54 There is little information available beyond these figures—meaning that, as LASA summarised: 'what we do not know is the outcome of these reports, whether the allegations were found to have had substance, what local actions were put in place, and if any convictions occurred as a result of Police action'.[91]

A focus on response to serious incidents

4.55 The ALRC considers that there should be a new approach to serious incidents of abuse and neglect in aged care. The emphasis should change from requiring providers to report the occurrence of an alleged or suspected assault, to requiring an investigation and response to incidents by providers. This investigation and response should be monitored by an independent oversight body. The recommended design of the scheme is informed by the 'disability reportable incidents scheme' (DRIS) for disability services in NSW—overseen by the NSW Ombudsman[92]—and the serious incident reporting scheme planned for the National Disability Insurance Scheme (NDIS).[93]

4.56 The ALRC agrees with the NSW Ombudsman's submission that

> a reporting and independent oversight system is an important and necessary component of a comprehensive framework for preventing and effectively responding to abuse, neglect and exploitation of more vulnerable members of the community … and is fundamental to enabling a genuinely person-centred approach to supports.[94]

4.57 In the context of the NDIS, the Department of Social Services (Cth) has stated that a serious incident should

> trigger a response that seeks to address the wellbeing and immediate safety of the people involved, and takes the opportunity to review and improve operational practices as appropriate to reduce the risk of further harm. Both the response and the evaluation should focus on the impact of the incident on the client, and the outcome (in terms of client wellbeing) that was achieved as a result of any remedial action.[95]

4.58 There was significant support for a new scheme.[96] A number of stakeholders explicitly advocated for an improved focus on responses to serious incidents. For

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91 Leading Age Services Australia, *Submission 377*.

92 *Ombudsman Act 1974* (NSW) pt 3C. Part 3C is modelled on Part 3A of the *Ombudsman Act*, which has provided for a reportable conduct scheme since 1999. From 1 July 2017, Victoria and the ACT will implement reportable conduct schemes in relation to children, and COAG has agreed, in principle, to harmonise reportable conduct schemes: Department of Health and Human Services (Vic), *Creating Child Safe Organisations* <www.dhs.vic.gov.au>; ACT Ombudsman, *Reportable Conduct Scheme* <www.ombudsman.act.gov.au/reportable-conduct-scheme>; Council of Australian Governments *Communiqué* (1 April 2016).

93 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 49–53.

94 NSW Ombudsman, *Submission 160*.

95 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 51.

96 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Seniors Rights Victoria, *Submission 383*; National Legal Aid, *Submission 370*; Victorian Multicultural Commission, *Submission 364*; National Older Persons Legal Services Network, *Submission 363*; Office of the Public Advocate (Qld), *Submission 361*; Eastern Community Legal Centre, *Submission 357*; M Berry, *Submission 355*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; NSW Ombudsman, *Submission 341*; CPA Australia, *Submission 338*; ACT Human Rights Commission, *Submission 337*; Elder Care Watch, *Submission 326*; L Barratt, *Submission 325*; Speech Pathology Australia, *Submission 309*; P Greenwood, *Submission 304*; Seniors Rights Service, *Submission 296*; ADA Australia, *Submission 283*; ACT

example, the National Older Persons Legal Services Network supported a scheme that could provide a response to serious incidents on both a systemic and individual basis:

> The scheme needs to balance and address two important interests. Firstly, the interests of the individual user. Secondly the interests of the aged care system. … Accountability to each through the reporting process is crucial to its success. For example, a reported incident must provide a critical response to those involved (victim and perpetrator), it must translate into accountability outcomes through systemic accountability including service standards, accreditation etc.[97]

4.59 The Australian Research Network on Law and Ageing (ARNLA) made similar observations and noted that the 'emphasis here should be on a proportionate response, recognising that random and accidental harmful incidents occur in relation to which a regulatory response may be inappropriate'.[98]

4.60 A new scheme would also improve information available about the incidence of abuse and neglect in aged care. A number of stakeholders called for a scheme that could provide more reliable information. For example, Aged Rights Advocacy Service submitted that it

> would like to see further information about 'compulsory reporting' in addition to the current reports in residential aged care including the result of the outcome of such a report [and] the number of older people interviewed by the relevant police jurisdiction.[99]

Approved providers' responsibilities

4.61 The ALRC recommends that the provider be required to report both an allegation or suspicion of a serious incident and any findings or actions taken in response to it.[100]

4.62 The appropriate response will vary according to the specific incident, but in all cases will require a process of information gathering to enable informed decisions about what further actions should be taken.[101] Significantly, the ALRC has not recommended that providers be *required* to report an incident to police.[102] In part, this

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Disability Aged and Carer Advocacy Service (ADACAS), *Submission 269*; Churches of Christ Care, *Submission 254*; NSW Nurses and Midwives' Association, *Submission 248*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; Advocare, *Submission 213*.

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

98 Australian Research Network on Law and Ageing, *Submission 262*. See also Combined Pensioners and Superannuants Association, *Submission 281*.

99 Aged Rights Advocacy Service Inc, *Submission 285*. See also, eg, A Wynne, *Submission 322*; Combined Pensioners and Superannuants Association, *Submission 281*.

100 The reporting systems in place for the DRIS provide instructive guides for how a system could be operationalised: NSW Ombudsman, *Disability Reportable Incidents Forms and Guidelines* <www.ombo.nsw.gov.au>.

101 For examples of how these investigations are expected to be carried out under the DRIS and NSW reportable conduct scheme for children, see further NSW Ombudsman, *Planning and Conducting an Investigation* (Child Protection Fact Sheet 4, 2014); NSW Ombudsman, *How We Assess an Investigation—Employee to Client Incidents* (Disability Reportable Incidents Fact Sheet, 2016); NSW Ombudsman, *Risk Management Following an Allegation against an Employee* (Disability Reportable Incidents Fact Sheet, 2016).

102 Nonetheless, some criminal laws may require the reporting of suspicion of serious offences to the police: see, eg, *Crimes Act 1900* (NSW) s 316.

is due to the expanded scope of the definition of serious incident, discussed further under Recommendation 4–3. It also reflects an approach that requires an approved provider to turn its mind to the response required in the circumstances.

4.63 In some cases an allegation will relate to criminal conduct, and should be reported to police. In such cases, a provider's key initial responsibility should be to facilitate the police investigation. However, where police do not pursue a matter, this should not be the end of a provider's responsibilities. As the Office of the Public Advocate (Qld) noted:

> aged care providers may misinterpret police taking no action on a reportable incident as meaning they have no further responsibilities in responding to the incident. Police taking no further action in relation to an incident may, however, simply mean that the evidence gathered does not meet the threshold for a criminal prosecution. It may be that, while not strictly criminal in nature, these incidents reflect more subtle forms of elder abuse that are caused by mistakes and poor staffing practice, poorly designed organisational systems and/or insufficient resourcing.[103]

4.64 Where an allegation relates to a staff member, the NSW Ombudsman has reported that, under the DRIS,

> even where there may not be a remedy available via the criminal justice system … there can still be effective and appropriate responses. In this regard, we note that in one-third of all matters involving abuse and/or mistreatment by a staff member towards a client, there has been a finding of unacceptable behaviour on the part of the involved employee, and a range of management action has been taken.[104]

4.65 In 91% of matters, the NSW Ombudsman said, 'action has been taken to improve the support and circumstances of the victim'.[105]

4.66 The ALRC considers that the timeframe for reporting a serious incident should be extended from the requirement for notification within 24 hours that exists under the reportable assaults scheme. A requirement to notify the oversight body as soon as possible, and no later than 30 days may be more appropriate to allow a provider to demonstrate a considered response to an allegation or suspicion of a serious incident.

Is compliance with existing quality standards enough?

4.67 Some of those stakeholders opposed to a serious incident response scheme did so on the basis that evidence of compliance with accreditation standards was sufficient to demonstrate that appropriate responses to serious incidents will occur.[106]

4.68 For example, ACSA submitted that the 'Australian Government already has in place a quality and accreditation framework to provide assurance to care recipients of

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

104 This included dismissal of employees or permitting employees to resign: NSW Ombudsman, *Submission 341*.

105 Ibid.

106 See, eg, HammondCare, *Submission 307*; Brotherhood of St Laurence, *Submission 232*; Aged and Community Services Association, *Submission 217*.

aged care services that aged care providers achieve a standard of quality and focus on quality improvement'.[107]

4.69 Many approved providers will have appropriate systems in place to respond to serious incidents. However, current accreditation may be insufficient to guarantee that all incidents in the intervening period will be responded to appropriately. For example, the review of the Oakden Older Persons Mental Health Service found there to be no established process for determining, escalating and reporting possible incidents of elder abuse.[108]

4.70 Even where there are suitable systems in place, the ALRC considers it important to require contemporaneous scrutiny and oversight of the *particular* responses made to each serious incident. Serious incident reporting could be designed to integrate with providers' existing internal processes for responding to serious incidents so as to minimise additional administrative burden.

Oversight body's role and powers

4.71 The oversight body's role should be to monitor and oversee the approved provider's investigation of and response to serious incidents. It should also be empowered to conduct investigations of such incidents. While it is important that the oversight body have powers of investigation, the ALRC anticipates that direct investigations by the oversight body would not be routine. Rather, its focus would be on overseeing providers' own responses to serious incidents, and building the capacity of providers in doing so.

4.72 The oversight body should have the power to make recommendations, as well as to publicly report on any of its operations, including in respect of particular incidents or providers.

4.73 The NSW Ombudsman's role in overseeing the DRIS provides an instructive model for the role and powers of the oversight body. The DRIS requires the head of an agency covered by the scheme to notify all reportable incidents to the NSW Ombudsman within 30 days of becoming aware of the allegation. The Ombudsman considers whether the agency's investigation into the incident has been properly conducted and whether appropriate action to manage risk has been taken. The Ombudsman may monitor the investigation and, where an incident is the subject of monitoring, the agency is required to report the results of investigation and risk management action taken.[109]

4.74 The NSW Ombudsman has a range of powers to enable it to discharge its oversight and monitoring functions, including the power to: require the production of

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107 Aged and Community Services Association, *Submission 217*.

108 A Groves, D Thomson, D McKellar and N Procter, 'The Oakden Report' (Department for Health and Ageing (SA) 2017) 64.

109 NSW Ombudsman, *Submission 160*; NSW Ombudsman, *Disability Reportable Incidents* <www.ombo.nsw.gov.au>.

documents or statements of information; enter and inspect premises; make or hold inquiries; make recommendations; and to report to Parliament and to the public.[110]

Who should have the oversight function?

4.75 In the Discussion Paper, the ALRC proposed that the Complaints Commissioner be responsible for oversight of the scheme. This proposal received a mixed response from stakeholders. The ALRC remains of the view that the Complaints Commissioner is the most appropriate fit for the scheme in the existing aged care 'regulatory framework triangle',[111] and that there are advantages—both in terms of resources and expertise—in having the functions carried out by an aged care regulatory body rather than an external agency.[112]

4.76 However, beyond recommending that the function sit with an independent body, the ALRC does not make a specific recommendation about where the scheme should be located. None of the current 'regulatory triangle' agencies are an ideal fit for the proposed scheme. In part, this is the result of the way that reforms to aged care have been implemented.

4.77 The Productivity Commission's reform package included a recommendation that policy and funding roles be separated from the regulation of aged care. It recommended that the (then) Department of Health and Ageing should be tasked with providing policy advice in aged care, but that a new, independent, regulatory agency—the Australian Aged Care Commission—should be established, with statutory offices for standards and accreditation and complaints handling located within it.[113] This recommendation was not adopted.

4.78 The Department of Health currently receives reports of reportable assaults, but is not an independent body. The ALRC considers that its mix of responsibility for policy, funding and compliance is not best suited to the monitoring and oversight role recommended in this Report.[114] However, Departmental officers do have a range of existing monitoring powers that may be amenable to harmonising with the ALRC's recommendations.[115]

4.79 The Australian Aged Care Quality Agency accredits and audits aged care providers, but is focused on systemic issues in aged care. A serious incident may not be an indicator of systemic risk, but should still be investigated and responded to by the provider with appropriate oversight.

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110 *Ombudsman Act 1974* (NSW) s 25W, pts 3–4.

111 Aged Care Complaints Commissioner, above n 22, 15.

112 ARNLA in contrast suggested that a new body be established with responsibility for oversight of the scheme: Australian Research Network on Law and Ageing, *Submission 262*.

113 Productivity Commission, above n 31, rec 15.1.

114 COTA supported notifying the Department: COTA, *Submission 354*.

115 *Aged Care Act 1997* (Cth) pt 6.4. These powers include, in relation to premises, the power to search the premises; to take photographs; to inspect, examine and take samples of, any substance or thing on or in the premises; to inspect any document or record kept at the premises; to take extracts from, or make copies of, any document or record at the premises: Ibid s 90-4.

4.80 The Complaints Commissioner is focused on conciliation and resolution of complaints as well as educating service providers about responding to complaints.[116] Some submissions emphasised the importance of distinguishing clearly between complaints and reportable incidents.[117] Others suggested that the Complaints Commissioner's focus on local resolution of complaints 'may not be compatible with a role that investigates potentially criminal acts that are currently investigated by appropriate authorities'.[118]

4.81 The Complaints Commissioner can exercise a range of powers when working to resolve complaints, and may commence own-initiative investigations.[119] The Commissioner may also appoint 'authorised complaints officers' who may exercise a range of powers.[120]

4.82 Comparable models have located a complaints handling function and a serious incident or reportable conduct function in the one body—as with the NSW Ombudsman's functions in relation to children and disability. The proposed NDIS Complaints Commissioner under the NDIS Quality and Safeguarding Framework will have responsibility for handling complaints as well as reportable serious incidents.[121] The Australian Health Practitioner Regulation Agency (AHPRA) handles both voluntary complaints and mandatory notifications about health practitioners.[122]

Definition of serious incident

Recommendation 4–3 In residential care, a 'serious incident' should mean, when committed against a care recipient:

(a) physical, sexual or financial abuse;

(b) seriously inappropriate, improper, inhumane or cruel treatment;

(c) unexplained serious injury;

(d) neglect;

unless committed by another care recipient, in which case it should mean:

(e) sexual abuse;

(f) physical abuse causing serious injury; or

116 Aged Care Complaints Commissioner, *Submission 148*; *Aged Care Act 1997* (Cth) pt 6.6.
117 NSW Ombudsman, *Submission 341*.
118 Baptist Care Australia, *Submission 288*. See also NSW Nurses and Midwives' Association, *Submission 248*. There was some explicit support for locating the function with the Complaints Commissioner: see, eg, ADA Australia, *Submission 283*.
119 Aged Care Complaints Commissioner, *Submission 148*.
120 These include the power to: search premises, take photographs, inspect documents and to ask people questions *Aged Care Act 1997* (Cth) s 94B-2.
121 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 47.
122 State and territory health complaints entities may also be involved in investigating complaints about health practitioners: Australian Health Practitioner Regulation Agency, *Other Health Complaints Organisations* <www.ahpra.gov.au>.

(g) an incident that is part of a pattern of abuse.

Recommendation 4–4 In home care or flexible care, 'serious incident' should mean physical, sexual or financial abuse committed by a staff member against a care recipient.

Recommendation 4–5 An act or omission that, in all the circumstances, causes harm that is trivial or negligible should not be considered a 'serious incident'.

4.83 These recommendations extend the incidents required to be reported under the current regime. The effect of the recommendations is to:

- require home care providers to report and respond to serious incidents, when committed by staff (home care providers are currently exempt from the requirements relating to 'reportable assaults');
- extend the types of incidents to be reported to include financial abuse—and, in residential care, seriously inappropriate, improper, inhumane or cruel treatment, as well as unexplained serious injury and neglect;
- require the reporting of instances of resident-on-resident violence in residential aged care, where they reach a higher threshold of seriousness.

4.84 These are serious incidents, and it is appropriate to require reporting and response by providers to them.[123] The ALRC also recommends that acts or omissions causing harm that is trivial or negligible not be considered 'serious incidents', to respond to concerns that time and resources would be unduly used to respond to and oversee the management of non-serious matters if a reporting regime applied to them.

How broad or narrow should the definition be?

4.85 As the NDIS Quality and Safeguarding Framework noted, while

> a broad definition [of serious incident] could enable information about lower-level events to be used as a warning system, employing a narrower definition will ensure that the new system is not overloaded with reports and the most serious incidents can be investigated'.[124]

4.86 The ALRC considers that 'serious incident' should not be too broadly defined so that the recommended scheme does not unduly consume time and resources. The

123 The recommendation draws on the definition of 'reportable incident' in the DRIS, as well as the proposed scope of serious incident reporting for the NDIS: *Ombudsman Act 1974* (NSW) s 25P; Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 52. See also the requirements for notification of certain incidents in health and social care in the UK to the Care Quality Commission: broadly, incidents including injury, abuse or allegations of abuse (where abuse is defined as sexual abuse, physical or psychological ill-treatment, theft, misuse or misappropriation of money or property, or neglect and acts of omission which cause harm or place at risk of harm): *Care Quality Commission (Registration) Regulations 2009* (UK) reg 18.

124 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 51.

definition of incidents that must be reported should be subject to limited extension, but the ALRC also recommends that it be clear that acts or omissions causing trivial or negligible harm will not fall within the scheme.

4.87 Many stakeholders supported a broad definition of reportable conduct.[125] A number were concerned to include incidents committed by anyone when in residential aged care, not just staff.[126]

4.88 The ALRC has recommended that some or all of the following incidents be serious incidents, depending on the setting and the person who is alleged to be responsible.

4.89 ***Physical, sexual and financial abuse***: the term abuse is intended to capture a broader range of conduct than might constitute a criminal offence. The ALRC recommends that this terminology be used to avoid the need for providers, in determining if particular conduct amounts to a serious incident, to engage in technical legal analysis of whether the relevant conduct amounts to a criminal offence.[127] It is also intended to emphasise that the onus for responding to these incidents does not solely lie with police.[128]

4.90 ***Seriously inappropriate, improper, inhumane or cruel treatment***: this is a flexible category intended to capture a range of serious abuse.[129] Examples that might fall into this category include a failure to provide an appropriate form of communication for someone who is communication impaired—described as 'equivalent to "gagging someone"' by Speech Pathology Australia;[130] and the practice reported in the Oakden Report of staff leaving 'the consumer on the floor in considerable distress if they had formed a view that intervening to assist the person was not needed immediately', described as 'among the most abhorrent approaches to

125 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Law Council of Australia, *Submission 351*; Elder Care Watch, *Submission 326*; Speech Pathology Australia, *Submission 309*; National Seniors Australia, *Submission 154*; Australian College of Nursing, *Submission 147*; Old Colonists' Association of Victoria, *Submission 16*.

126 National Older Persons Legal Services Network, *Submission 363*; A Salt, *Submission 278*; UnitingCare Australia, *Submission 216*.

127 Definitions of offences will also vary across state and territory criminal laws.

128 The response required will also vary: for example, an allegation or suspicion of financial abuse of a care recipient by a family member should trigger a different response to that of a staff member. A number of submissions explicitly supported the inclusion of financial abuse: see further Australian Research Network on Law and Ageing, *Submission 262*. Some submissions were opposed on the basis that they should not 'delve into' a resident's financial affairs: Brotherhood of St Laurence, *Submission 232*; Aged and Community Services Association, *Submission 217*.

129 The DRIS requires 'ill treatment' to be reported, and what constitutes ill treatment is described as 'seriously inappropriate, improper, inhumane or cruel treatment'. The ALRC considers that this latter description more effectively communicates the conduct that should be treated as a serious incident than does 'ill treatment': NSW Ombudsman, *Guide for Services: Reportable Incidents in Disability Supported Group Accommodation* (2016) 7.

130 Speech Pathology Australia, *Submission 309*.

providing care to severely disturbed consumers that any of the Review had encountered in well over 110 years of collective practice'.[131]

4.91 ***Unexplained serious injury***: this is intended to ensure that there is appropriate investigation of the circumstances leading to such an injury, appropriate clinical care provided, and appropriate communication with the injured person and their family members or representatives.

4.92 ***Neglect***: many of the concerns in this Inquiry related to neglect of aged care residents. The NSW Ombudsman described the level of neglect that warrants treatment as a serious incident as:

- intentional or reckless failure to adequately supervise or support a client that also involves a gross breach of professional standards, and has the potential to result in death or significant harm; or
- grossly inadequate care that involves depriving a client of the basic necessities of life.[132]

4.93 Examples received by this Inquiry that would meet this threshold include reports of advanced pressure sores said to be caused by failures in wound care.[133]

4.94 Guidance should be developed to assist providers with understanding what constitutes abuse, with a view to building organisational cultures that do not condone abusive conduct.[134]

Serious incidents in home care

4.95 The ALRC recommends that the serious incident response scheme should extend to home or flexible care, where the alleged perpetrator is a staff member of an approved provider. Given the increasing emphasis on provision of aged care in the home, incidents in home care alleged to be committed by staff should be reportable, and providers should be required to demonstrate that a suitable response has occurred.[135]

4.96 Concerns may exist about the abuse or mistreatment of an older person receiving home or flexible care by someone other than an aged care worker. The ALRC

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131 A Groves, D Thomson, D McKellar and N Procter, 'The Oakden Report' (Department for Health and Ageing (SA) 2017) 78.

132 NSW Ombudsman, Submission No 122 to Legislative Council General Purpose Standing Committee 2, Parliament of NSW, *Inquiry into Elder Abuse in NSW* (April 2016).

133 See, eg, R Selir, Y Selir and Selir Family, *Submission 13*; David Lewis, 'Man Dies in Hospital after Nursing Home Staff Fail to Properly Treat Wounds' *ABC News*, 27 September 2016 <www.abc.net.au/news>. See also, for discussion of failures in providing nutrition and hydration: Maree Anne Bernoth, Elaine Dietsch and Carmel Davies, '"Two Dead Frankfurts and a Blob of Sauce": The Serendipity of Receiving Nutrition and Hydration in Australian Residential Aged Care' (2014) 21(3) *Collegian* 171.

134 See, eg, NSW Ombudsman, *Guide for Services: Reportable Incidents in Disability Supported Group Accommodation* (2016).

135 As noted above, a number of stakeholders supported the definition proposed in the Discussion Paper. Additionally, some submissions explicitly supported the extension to home care: L Barratt, *Submission 325*; Mecwacare, *Submission 289*.

considers that these should be reported to other relevant authorities—for example, police or to adult safeguarding agencies (as recommended in Chapter 14)—where appropriate.[136] However, the ALRC does not recommend that these should be reportable within the aged care regulatory framework.

Resident-on-resident incidents in aged care should be serious incidents

4.97 Under the existing reportable assaults scheme, there are exemptions to reporting so-called 'resident-on-resident' incidents, where the resident alleged to have committed the offending conduct has a pre-diagnosed cognitive impairment, provided the approved provider implements arrangements to manage the person's behaviour within 24 hours.[137]

4.98 The ALRC recommends that incidents of violence between residents in residential aged care should be treated as serious incidents, whether or not the person committing the act is cognitively impaired. This approach better calibrates the level of oversight appropriate to the management of violence between residents, and is consonant with a sector-wide commitment to ensuring that aged care recipients live in an environment free of violence and abuse. Responses to such incidents should be contemporaneously monitored, particularly where such responses may involve the use of restrictive practices.[138]

4.99 Resident-on-resident sexual abuse, and physical abuse causing serious injury should be treated as serious incidents. The ALRC also recommends that an incident committed by a care recipient, that forms part of a pattern of abuse (whether or not committed against the same or different residents), should be considered a serious incident.[139]

4.100 A number of stakeholders supported removing the existing exemption.[140] The Office of the Public Advocate (Vic), for example, asserted that the 'exception to mandatory reporting of assaults under these conditions is too lenient'.[141]

4.101 The NSW Nurses and Midwives' Association supported the removal of the exemption, noting that its members were 'extremely concerned that the daily resident-on-resident abuse they witness is already unreported. We must consider that people

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136 For an example of an approved provider responding to such an incident, refer to case study of Mr and Mrs C in Resthaven, *Submission 114*.

137 *Aged Care Act 1997* (Cth) s 63-1AA(3); *Accountability Principles 2014* (Cth) s 53.

138 People with Disability Australia, *Submission 167*.

139 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Mecwacare, *Submission 289*; Churches of Christ Care, *Submission 254*; Office of the Public Advocate (Vic), *Submission 246*. See also Name Withheld, *Submission 189*.

140 Office of the Public Guardian (Qld), *Submission 384*; Seniors Rights Victoria, *Submission 383*; National Older Persons Legal Services Network, *Submission 363*; Law Council of Australia, *Submission 351*; CPA Australia, *Submission 338*; Elder Care Watch, *Submission 326*; Seniors Rights Service, *Submission 296*; ADA Australia, *Submission 283*; ACT Disability Aged and Carer Advocacy Service, *Submission 269*; M Sullivan, *Submission 266*; NSW Nurses and Midwives' Association, *Submission 248*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; W Bonython and B Arnold, *Submission 241*; Advocare, *Submission 213*.

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

living in [residential aged care] are unable to exit that environment and the impact of the abusive act is therefore much higher'.[142]

4.102 Over the course of this Inquiry, a number of fatal assaults on residents by other residents with cognitive impairment have been publicised.[143] A 2015 systematic review concluded that

> resident-to-resident aggression (RRA) is an understudied form of elder abuse in nursing homes … [W]e must continue to grow our knowledge base on the nature and circumstances of RRA to prevent harm to an increasing vulnerable population of nursing home residents and ensure a safe working environment for staff.[144]

4.103 Some stakeholders argued that the current requirements to keep appropriate records of resident-on-resident incidents and of relevant behaviour management plans were sufficient.[145] Particular concern exists in relation to the volume of reports of resident-on-resident incidents that may be required as a result of this reform.[146] Alternatively, that there are high numbers of incidents of resident-to-resident aggression is *itself* an argument for greater oversight of responses by providers to these incidents to ensure the safety of all residents. The higher threshold of seriousness for physical abuse recognises that removing the existing exemption will result in an additional reporting burden.[147]

4.104 HammondCare, for example, was opposed to removing the exemption, arguing that education and advice programs were better suited to dealing with resident-on-resident violence. However, it observed that, in practice, it would report resident-on-resident violence of the kind the ALRC specifies in Recommendation 4–3 as serious incidents, notwithstanding that this was not strictly required under existing legislation.[148]

4.105 The ALRC agrees that education and advice are important in managing and preventing resident-on-resident violence, but considers that an explicit requirement to respond and report to these incidents can prompt appropriate access to such education and advice. Dementia-specific services, like HammondCare, may be the focus of less intensive oversight of reported incidents where they can consistently evidence robust

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

143 See, eg, Angelique Donnellan and Nicola Gage, 'Oakden Nursing Home Murder Haunts Victim's Family' *ABC News*, 6 April 2017 <www.abc.net.au>; Rebecca Opie, 'Nurse Hid as Elderly Patient Went on Rampage, SA Court Told' *ABC News*, 24 November 2016 <www.abc.net.au/news/>; Megan Gorrey, 'Jindalee Aged Care Nurse Left Bashed Man Unsupervised in the Same Room as Suspect' *Canberra Times*, 25 September 2015 <www.canberratimes.com.au>. See also the personal story recounted in Name withheld, *Submission 189*.

144 Noha Ferrah et al, 'Resident-to-Resident Physical Aggression Leading to Injury in Nursing Homes: A Systematic Review' (2015) 44(3) *Age and Ageing* 356.

145 See, eg, Leading Age Services Australia, *Submission 377*; HammondCare, *Submission 307*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; Mecwacare, *Submission 289*; The Benevolent Society, *Submission 280*.

146 HammondCare, *Submission 307*; Baptist Care Australia, *Submission 288*; The Benevolent Society, *Submission 280*; Aged and Community Services Association, *Submission 217*.

147 Some submissions supported the removal of the exemption, but not the different thresholds for reporting: see, eg Disabled People's Organisations Australia, *Submission 360*; S Henderson, *Submission 275*.

148 HammondCare, *Submission 307*.

systems to assess and respond to such instances of violence, and minimise risk of recurrence.

4.106 The response to resident-on-resident incidents where the person using violence has cognitive impairment may be different from, for example, incidents involving staff members. Reporting to police would generally not be warranted. As the NSW Ombudsman noted in relation to the DRIS, in such cases the emphasis is likely to be on 'managing and reducing risks, including identifying the cause of the abuse, and the action that needs to be taken (and the support that needs to be provided) to prevent recurrence'.[149] The NSW Nurses and Midwives' Association similarly observed that the response to these incidents should 'address underlying causes, seek appropriate solutions and monitor their implementation for effectiveness'.[150]

Other elements of the serious incident response scheme

Recommendation 4–6 The serious incident response scheme should:

(a) define 'staff member' consistently with the definition in s 63-1AA(9) of the *Aged Care Act 1997* (Cth);

(b) require the approved provider to take reasonable measures to require staff members to report serious incidents;

(c) require the approved provider to ensure staff members are not victimised;

(d) protect informants' identities;

(e) not exempt serious incidents committed by a care recipient with a pre-diagnosed cognitive impairment against another care recipient; and

(f) authorise disclosure of personal information to police.

4.107 The ALRC recommends that the serious incident response scheme incorporate a number of existing definitions and protections operative in relation to the current provisions for reporting assaults in aged care.

4.108 Staff member is defined in s 63-1AA(9) of the *Aged Care Act* to mean 'an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services'. The ALRC recommends that this definition be utilised for the serious incident response scheme.

4.109 The current reportable assault scheme requires the approved provider to take reasonable measures to require staff members to report serious incidents;[151] to ensure

149 NSW Ombudsman, *Submission 160*.
150 NSW Nurses and Midwives' Association, *Submission 248*.
151 *Aged Care Act 1997* (Cth) s 63-1AA(5).

staff members are not victimised;[152] and to protect informants' identities.[153] These requirements should be a feature of the serious incident response scheme.

4.110 Recommendation 4–6(e) is intended to put beyond doubt that the serious incident response scheme should not retain the current, limited, exemption from reporting serious incidents committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, discussed above.

4.111 The ALRC also recommends that it be made clear that disclosure of personal information to police in relation to the response to serious incidents is lawful and appropriate. Given that the ALRC does not recommend that all allegations or suspicions of serious incidents be reported to police, this recommendation is intended to address concerns that such reporting would breach requirements relating to the protection of personal information without being 'required or authorised' by the *Aged Care Act*.[154]

The aged care workforce

4.112 A safe, qualified aged care workforce in sufficient numbers is an essential safeguard against elder abuse in aged care. As the Older Women's Network pointed out, aged care work is 'important work, carrying high levels of responsibility, requiring well trained, compassionate care workers and care managers'.[155] United Voice emphasised the important role to be played by the aged care workforce in safeguarding older persons from abuse, arguing that '[q]uality support that respects and advances the rights of older Australians to live free from harm and exercise choice and control in their own lives requires a stable, professionally trained, qualified and dedicated workforce'.[156]

4.113 Strategies to address elder abuse in aged care must be integrated with broader aged care policy settings in relation to workforce planning and development. The NSW Nurses and Midwives' Association, for example, observed that policy relating to

> [c]onsumer directed care; increasing use of community based care services and workforce planning within the aged care sector will all impact on the ability of frontline staff and the wider community to ensure adequate protections are in place for the most vulnerable elderly.[157]

4.114 Appropriate planning for a well-supported and qualified aged care workforce is particularly important given projections about the need for expansion of the aged care workforce as the population ages. Some estimates suggest that, by 2050, the number of employees engaged in the provision of aged care will account for 4.9% of all employees in Australia.[158]

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152 Ibid ss 63-1AA (6), 96-8.
153 Ibid s 63-1AA(7).
154 See further Ibid s 62.1; Australian Information and Privacy Commissioner, *Submission 233*.
155 Older Women's Network NSW, *Submission 136*.
156 United Voice, *Submission 145*.
157 NSW Nurses and Midwives' Association, *Submission 29*.
158 Productivity Commission, above n 31, 354.

4.115 Additionally, implementing the NDIS may have an impact on the aged care workforce, with workers increasingly likely to work across sectors. This was identified as an emerging issue in the 2016 Aged Care Workforce Survey, which noted that, while

> at present there appears to have been very little interaction at the workforce level between the aged care and disability sectors … [a]s the NDIS rolls out to full implementation and demand for disability supports increase, we can expect that the two sectors will end up sharing some of one another's workforces. … Given the large numbers involved in the NDIS full roll out over the next two to three years, this could have substantial impacts on the aged care workforce.[159]

4.116 Stakeholders raised a range of issues relating to staffing in aged care, including: the quality of training of aged care workers; their pay and conditions; and the challenges presented by an expanding need for care workers.[160]

4.117 Many of these issues, while intersecting with the concerns of this Inquiry, extend beyond the issue of elder abuse. As such, they are more suited to being addressed in other reviews of aged care. The Aged Care Legislated Review, referred to above, is required to consider workforce strategies in aged care, and is better positioned to make recommendations relating to these issues.[161]

4.118 The ALRC has made some specific recommendations involving the aged care workforce that it considers will assist in providing safeguards against elder abuse and neglect, in relation to: staffing numbers and models of care; codes of conduct applicable to the aged care workforce; and pre-employment screening.

Staffing numbers and models of care

Recommendation 4–7 The Department of Health (Cth) should commission an independent evaluation of research on optimal staffing models and levels in aged care. The results of this evaluation should be made public and used to assess the adequacy of staffing in residential aged care against legislative standards.

4.119 The ALRC recommends that there be an independent evaluation of best practice research on staffing models and levels in aged care, to inform quality assessment of aged care. Significant concerns have been raised in this Inquiry that current staffing practices in residential aged care involve staffing levels that are so inadequate as to

159 Kostas Mavromaras et al, 'The Aged Care Workforce 2016' (Department of Health (Cth), March 2017) 165.

160 See, eg, Seniors Rights Service, *Submission 169*; Australian Nursing & Midwifery Federation, *Submission 163*; L Barratt, *Submission 155*; Australian College of Nursing, *Submission 147*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Advocare Inc (WA), *Submission 86*; Alzheimer's Australia, *Submission 80*; Queensland Nurses' Union, *Submission 47*.

161 Department of Health (Cth), above n 46. The Senate Standing Committee on Community Affairs is also conducting an Inquiry into the future of Australia's aged care sector workforce, to report on 21 June 2017: *Future of Australia's Aged Care Sector Workforce* <www.aph.gov.au>.

result in neglect of care recipients. An independent evaluation, by a suitably qualified research body with expertise in aged and health care,[162] can provide an evidence-based benchmark for assessing the adequacy of staffing arrangements.

Who works in residential aged care?

4.120 People who provide direct care[163] in the residential aged care workforce are, in the main, nursing staff—registered nurses and enrolled nurses—and assistants-in-nursing (AINs).[164] Registered and enrolled nurses are more highly qualified than AINs[165] and are regulated by codes and guidelines developed by the Nursing and Midwifery Board of Australia pursuant to the *Health Practitioner Regulation National Law*.[166] The composition of the residential aged care workforce has changed: between 2003 and 2016 the proportion of registered and enrolled nurses has decreased[167] and the proportion of AINs has increased, such that over 70% of direct care workers in residential aged care are AINs.[168]

Adequacy of staffing

4.121 Many submissions to this Inquiry raised significant concerns about the adequacy of staffing in residential aged care.[169] For example, an Australian Nursing and Midwifery Federation (ANMF) survey about aged care reported that 80% of participants who worked in residential aged care considered that staffing levels were insufficient to provide an adequate level of care to residents.[170] Emeritus Professor Rhonda Nay has commented that

> [w]e tolerate a level of staffing and staff mix in aged care that would close wards in the acute system. Despite years of discussion and criticism it is still possible to work with extremely vulnerable older people while having no relevant qualification. This should be an outrage.[171]

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162 Such as, eg, a specialist university research centre.

163 Direct Care employees provide care directly to care recipients as a core component of their work: Mavromaras et al, above n 159, xiv.

164 AINs are also referred to as personal care workers or personal care attendants.

165 Generally, registered nurses are degree qualified, enrolled nurses require a Diploma of Nursing: Australian Health Practitioner Regulation Agency, *Approved Programs of Study* <www.ahpra.gov.au>. AINs generally have a vocational education qualification such as a certificate III or IV. See, eg, *CHC33015—Certificate III in Individual Support* <www.training.gov.au>.

166 See, eg, *Health Practitioner Regulation National Law* (NSW) No 86a s 39.

167 In 2003, 21% of the direct care workforce were registered nurses and 13.1% were enrolled nurses; in 2016 this had decreased to 14.6% and 10.2% respectively: Mavromaras et al, above n 159, table 3.2.

168 From 58.5% in 2003 to 70.3% in 2016: Ibid.

169 See, eg, Seniors Rights Service, *Submission 169*; Australian Nursing & Midwifery Federation, *Submission 163*; L Barratt, *Submission 155*; Australian College of Nursing, *Submission 147*; Elder Care Watch, *Submission 84*; Alzheimer's Australia, *Submission 80*; Queensland Nurses' Union, *Submission 47*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*.

170 Australian Nursing & Midwifery Federation, *ANMF National Aged Care Survey Final Report* (2016) 13. The survey was referred to in Australian Nursing & Midwifery Federation, *Submission 163*.

171 Rhonda Nay, 'The Good, the Bad and the Downright Ugly: Reflections on 10 Years' (2016) 11(4) *Residential Aged Care Communiqué* 6.

4.122 The *Aged Care Act* requires that residential aged care providers 'maintain an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met'.[172] The Accreditation Standards include an 'expected outcome' that there are 'appropriately skilled and qualified staff sufficient to ensure that services are delivered in accordance with these standards and the residential care service's philosophy and objectives'.[173] The draft quality standards include a standard that the 'organisation has sufficient skilled and qualified workforce to provide safe, respectful and quality care and services'.[174]

4.123 However, there have been consistent calls, repeated in this Inquiry, for a legislated mandated minimum of staff and/or registered nurses in residential aged care.[175] Concerns were raised that an adequate number and mix of staff are not being maintained in residential aged care. The NSW Nurses and Midwives' Association provided this account from a care recipient's relative:

> On a public holiday there was one qualified nurse for 85 people. The catheter had fallen out [and] the nurse was unable to replace it. The hospital phoned for an ambulance to take dad to hospital. It was 8 hours before an ambulance arrived.[176]

4.124 The Queensland Nurses Union (QNU) reported that

> in one negotiation on behalf of an individual member, QNU officials discovered the RN member was accountable for the care of 136 high care residents during her shift, with the assistance of six AINs. This circumstance is repeated in many residential aged care facilities, where a single RN can be accountable for the care of up to 150 residents.[177]

4.125 Stakeholders also cited a number of aged care workers who raised concerns about staffing levels. For example, an AIN said:

> Lack of staffing and/or resources can lead to instances of inadvertent abuse of elders. Eg when residents unable to speak up for themselves are left for hours in wet/soiled

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172 *Aged Care Act 1997* (Cth) s 54-1(b). The Quality Agency, when assessing a residential aged care service, should assess the adequacy of staffing numbers and types: Australian Aged Care Quality Agency, *Pocket Guide to the Accreditation Standards* (2014) 12.

173 *Quality of Care Principles 2014* (Cth) sch 2 item 1.6. There are a number of other outcomes that relate to the qualifications and sufficiency of staffing: see further Australian Aged Care Quality Agency, *Results and Processes Guide* (2014) 24–25.

174 Department of Health (Cth), *Single Aged Care Quality Framework: Draft Aged Care Quality Standards Consultation Paper* (2017) standard 7.

175 See, eg, People with Disability Australia, *Submission 167*; Australian Nursing & Midwifery Federation, *Submission 163*; L Barratt, *Submission 155*; Australian College of Nursing, *Submission 147*; Australian National University Elder Abuse Law Student Research Group, *Submission 146*; Capacity Australia, *Submission 134*; Alzheimer's Australia, *Submission 80*; Queensland Nurses' Union, *Submission 47*. For previous calls for mandated minimum staffing levels, see, eg, Legislative Council General Purpose Standing Committee No 3, Parliament of NSW, *Registered Nurses in New South Wales Nursing Homes* (27 October 2015) 30–1; NSW Nurses and Midwives' Association, *Let's Have RNs 24/7 in Aged Care Across Australia!* <www.nswnma.asn.au>.

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

177 Queensland Nurses' Union, *Submission 245*. QNU also argued that the staffing ratios were such that registered nurses are unable to comply with professional codes and guidelines regarding delegation of care.

> beds or continence aids because staff are busy attending to other, more vocal residents.[178]

4.126 A registered nurse reported:

> Where I work NEGLECT would be without a doubt the main form of Elder Abuse in residential aged care. The cause is time constraints, inadequate training and lack of resources (registered nurses and assistants in nursing) I have seen people who may have difficulty walking soon become wheelchair bound because the nursing and care staff do not have time to walk the resident often enough.[179]

4.127 In the Inquiry, concerns were raised about the number of staff being insufficient to provide adequate care, as well as the qualifications and skill mix of staff being inappropriate to providing appropriate clinical care.

4.128 These concerns have not been limited to this Inquiry—a number of Coronial Inquiries have also observed that staffing numbers were not appropriate in the circumstances of the death under Inquiry.[180] In a coronial investigation into the death of a resident who suffocated when trapped between her mattress and a bed pole, Coroner McTaggart observed:

> the industry benchmarks for adequate staffing did not provide for a realistic workload of the staff nor the ability to fulfil all of their tasks. On a wider scale, the evidence suggests that staffing levels are often inadequate across the aged care industry. The evidence also indicated that staff absenteeism was a significant factor in reducing staffing levels to below what was adequate to provide proper resident care. Again, the evidence gives me no reason to believe such an issue is confined to Vaucluse Gardens.[181]

4.129 The authors of the 2016 aged care workforce census and survey note as an emerging issue that 'facilities within the residential sector are growing by opting for a workforce composition with lower use of direct care staff, which may have future implications regarding quality of provision'.[182]

4.130 The Australian College of Nursing (ACN) was 'concerned by the trend in the makeup of the aged care workforce, which has seen a reduction in the proportion of regulated health professionals working directly at the bedside'. It argued that

> direct care with patients at the bedside provides valuable opportunities where an appropriately trained health professional can assess and identify potential problems and respond accordingly. However, increasingly business models are being deployed where nurses are being utilised only for 'legislative requirements', with AINs (however titled) fulfilling most of the traditional care elements. This is problematic, as they have limited and varied degree of training and preparation.[183]

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178 NSW Nurses and Midwives' Association, *Submission 29*.
179 Ibid.
180 See, eg, *Ambrose, Inquest into the Death of Ambrose, Joan (COR 2009 0711)* [2012] VicCorC 120 (1 August 2012); *Epsimos, Inquest into the death of Savvas Epsimos* (Unreported, NSWCorC, 20 October 2016); *Westcott, Inquest into the death of Barbara Westcott* (Unreported, TASMC, 1 September 2016); *Watson, Inquest into the death of Beryl Joyce Watson* (Unreported, NSWCorC, 23 May 2014).
181 *Westcott, Inquest into the death of Barbara Westcott* (Unreported, TASMC, 1 September 2016).
182 Mavromaras et al, above n 159, 165.
183 Australian College of Nursing, *Submission 379*.

4.131 The ACN argued that

> AINs (however titled) work under RN direction and supervision and they do not possess the education, knowledge and skills to substitute for an RN. At a time of increasing aged care service demand, retaining the number of nurses should be a key priority and … regulation of residential aged care facilities should at a minimum mandate a requirement that a registered nurse be on-site and available at all times to promote safety and well-being for residents.[184]

4.132 The ANMF asserted that 'the ALRC Elder Abuse Inquiry has a duty of care to elderly people to include a specific proposal relating to staffing in aged care, in the final report'.[185]

4.133 The Queensland Nurses' Union was also concerned by changes to the aged care workforce, arguing that 'changes to the composition of the aged care workforce and their increasing workloads provide the potential for incidents of elder abuse to occur and to go unreported'. It argued that workforce issues are 'systemic and must not be attributed to individual staff already working to maximum capacity in a notoriously under-resourced sector'.[186]

4.134 A 2011 systematic review concluded that research on the staffing models for residential aged care that provide the best outcomes for residents and staff is limited, and further research is required.[187] In this Inquiry, the ACN also called for further research to 'identify the right skill-mix of staff to prevent decreases in quality of care in aged care settings including the neglect of care recipients'.[188]

4.135 One method of measuring adequacy of levels of care provided by staff estimates the hours of direct care received by a resident each day. One estimate suggested that, in 2015, residential aged care residents received 2.86 hours of direct care per day.[189] A 2016 study has argued that the minimum care requirement for care residents should be an average of 4.30 hours per day.[190] This same study argued that the optimal skills mix in residential aged care should be 30% registered nurses, 20% enrolled nurses and 50% assistants-in-nursing.[191]

4.136 Where staffing numbers are insufficient, or the mix of staffing is inappropriate, there is potential for systemic neglect of residential aged care recipients. The ALRC therefore recommends that a clear evidence-based benchmark for 'adequacy' of

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184 Ibid.
185 Australian Nursing and Midwifery Federation, *Submission 319*.
186 Queensland Nurses' Union, *Submission 245*.
187 Brent Hodgkinson et al, 'Effectiveness of Staffing Models in Residential, Subacute, Extended Aged Care Settings on Patient and Staff Outcomes' [2011] (6) *Cochrane Database of Systematic Reviews*. The review used the term 'staffing models' to mean how staffing was organised to meet resident/patient needs and included the mix, and the level of skills, as well as interventions such as staffing ratios, skill mixes, continuity of care and primary nursing: Ibid 3.
188 Australian College of Nursing, *Submission 147*. See also United Voice, *Submission 145*.
189 E Willis et al, *National Aged Care Staffing and Skills Mix Project Report 2016 Meeting Residents' Care Needs: A Study of the Requirement for Nursing and Personal Care Staff, 2016)* (Australian Nursing and Midwifery Federation, 2016) 15.
190 Ibid 9.
191 Ibid.

staffing in residential aged care should be developed. The Department of Health should commission an independent evaluation by a properly qualified body of available research to provide this benchmark, which can be used to guide practice in aged care and to inform assessment of the adequacy of staffing against legislative standards.

Code of conduct for aged care workers

Recommendation 4–8 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

4.137 The ALRC recommends that, to provide a further safeguard relating to the suitability of people working in aged care, unregistered aged care workers who provide personal care should be subject to state and territory legislation giving effect to the National Code of Conduct for Health Care Workers.

4.138 Some people who work in aged care—such as registered and enrolled nurses—are members of a registered profession. The Health Practitioner Regulation National Law creates a National Registration and Accreditation Scheme (National Scheme) for registered health practitioners—14 professions, including medical practitioners, nurses and midwives, physiotherapists and psychologists.[192] The professions are regulated by a corresponding National Board. The AHPRA supports the National Boards to implement the National Scheme.[193]

4.139 The National Scheme has, as one of its objectives, keeping the public safe by 'ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered'.[194] Measures to ensure public safety include, among other things:

- requiring that National Boards develop registration standards for registered professions;[195]
- requiring that certain conduct of a health practitioner (including engaging in sexual misconduct and placing the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards) be notified to AHPRA;[196] and
- allowing for complaints to be made about a registered health practitioner.[197]

4.140 However, many aged care workers—variously employed as AINs, aged care workers, or personal care workers—are unregistered.[198] The Council of Australian

192 The National Law is enacted through legislation in each state and territory: Australian Health Practitioner Regulation Agency, *Legislation* <www.ahpra.gov.au>.
193 Australian Health Practitioner Regulation Agency, *Who We Are* <www.ahpra.gov.au>.
194 Australian Health Practitioner Regulation Agency, *Home* <www.ahpra.gov.au>.
195 Health Practitioner Regulation National Law s 38.
196 Health Practitioner Regulation National Law pt 8 div 2.
197 Health Practitioner Regulation National Law pt 8 div 3.

Governments (COAG) Health Council has noted that this may present risks to persons receiving care:

> There is no nationally uniform or consistent mechanism for prohibiting or limiting practice when an unregistered health practitioner's impairment, incompetence or professional misconduct presents a serious risk to the public. There is evidence that practitioners have moved to those jurisdictions that have less regulatory scrutiny, in order to continue their illegal or unethical conduct.[199]

4.141 To address these concerns about unregistered health practitioners, state and territory Ministers have agreed, in principle, to implement a National Code of Conduct for Health Care Workers (National Code of Conduct).[200]

4.142 The ALRC recommends that aged care workers providing direct care should be included in the planned National Code of Conduct.[201] A number of stakeholders supported this recommendation.[202]

4.143 The National Code of Conduct is to be implemented by state and territory legislation. The National Code of Conduct is a 'negative licensing' scheme. It does not restrict entry into health care work, but will set national standards against which disciplinary action can be taken and, if necessary, a prohibition order issued, in circumstances where a health care worker's continued practice presents a serious risk to public health and safety.[203] Any person would be able to make a complaint about a breach of the National Code of Conduct.[204]

4.144 In its Final Report containing recommendations about the Code, the COAG Health Council defines 'health care worker' as a natural person who provides a health service. The COAG Health Council Report also provides a recommended definition of 'health service'. Relevantly, a health service includes 'health-related disability, palliative care or aged care service', as well as support services necessary to implement these.[205] However, the Report noted that it can sometimes be unclear whether a service

198 Many of these will have obtained a vocational qualification such as a Certificate III in Individual Support: *CHC33015—Certificate III in Individual Support* <www.training.gov.au>.

199 COAG Health Council, *Final Report: A National Code of Conduct for Health Care Workers* (2015) 14.

200 Ibid 8, 11. NSW and South Australia have previously implemented a Code of Conduct for unregistered health practitioners: Ibid 12. Queensland has implemented the National Code of Conduct, effective from 1 October 2015: Office of the Health Ombudsman (Qld), *Unregistered Health Practitioner Notifications* <www.oho.qld.gov.au>.

201 COAG Health Council, above n 199.

202 Australian College of Nursing, *Submission 379*; Victorian Multicultural Commission, *Submission 364*; National Older Persons Legal Services Network, *Submission 363*; Office of the Public Advocate (Qld), *Submission 361*; M Berry, *Submission 355*; CPA Australia, *Submission 338*; V Fraser and C Wild, *Submission 327*; Institute of Legal Executives (Vic), *Submission 320*; Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*; Public Guardian (NSW), *Submission 302*; Mecwacare, *Submission 289*; ADA Australia, *Submission 283*; The Benevolent Society, *Submission 280*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; Brotherhood of St Laurence, *Submission 232*; W Millist, *Submission 230*; Aged and Community Services Association, *Submission 217*; Advocare, *Submission 213*.

203 The Code includes requirements such as: health care workers are: to provide services in a safe and ethical manner; not to financially exploit clients; and not to engage in sexual misconduct: COAG Health Council, above n 199, appendix 1.

204 Ibid rec 5. The Complaint would be made to the relevant state or territory health complaints entity.

205 Ibid rec 4.

provided by, for example, an assistant in nursing in aged care, is a 'health service'.[206] The ALRC considers that all aged care workers who provide direct care services should be covered by the National Code of Conduct and proposes that legislation enacting the Code should ensure that these workers are covered by the definition of 'health care worker'.

4.145 Some aged care services regulated by the *Aged Care Act* or the CHSP may provide services that do not involve direct care, such as transport, home maintenance or domestic assistance services. The ALRC does not consider that workers providing these services should be subject to the Code, but should, in appropriate cases, be subject to employment screening processes as set out in Recommendation 4–9.

Registration of aged care workers or a specific code of conduct?

4.146 Some stakeholders criticised the inclusion of aged care workers in the planned National Code of Conduct as inadequate, arguing instead that aged care workers should be either registered or subject to an industry-specific code of conduct.[207] Further, among those who supported the inclusion of aged care workers in the National Code of Conduct, some saw registration as a preferable longer term goal for regulating the aged care workforce.[208]

4.147 Professional nursing organisations in particular urged that AINs be subject to the National Scheme.[209] Future registration of AINs, or development of an industry-specific code of conduct[210] is not precluded by Recommendation 4–8. However, a number of issues need to be addressed in considering the viability of registration of AINs, including a detailed examination of the characteristics of the occupation against the criteria for entry to the National Scheme.[211] These issues were not canvassed in this Inquiry, and extend beyond responses to elder abuse.

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206 Ibid 24–25.

207 See, eg, Leading Age Services Australia, *Submission 377*; Elder Care Watch, *Submission 326*; Australian Nursing and Midwifery Federation, *Submission 319*; NSW Nurses and Midwives' Association, *Submission 248*; W Bonython and B Arnold, *Submission 241*; Australian Nursing & Midwifery Federation, *Submission 163*; National Seniors Australia, *Submission 154*; United Voice, *Submission 145*. See also Legislative Council General Purpose Standing Committee No 3, Parliament of NSW, *Registered Nurses in New South Wales Nursing Homes* (27 October 2015) rec 6: the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to establish a licensing body for aged care workers.

208 See, eg, Australian College of Nursing, *Submission 379*; Elder Care Watch, *Submission 326*; Office of the Public Advocate (Qld), *Submission 361*.

209 See, eg, Australian Nursing and Midwifery Federation, *Submission 319*; NSW Nurses and Midwives' Association, *Submission 248*.

210 A Code of Conduct for NDIS providers forms part of the NDIS Quality and Safeguarding Framework: Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 93–96.

211 The COAG Health Council is responsible for agreeing on the inclusion of new professions in the scheme. A health profession must be able to demonstrate that it meets a number of criteria to be considered for registration, including whether: it is appropriate for Health Ministers to exercise responsibility for regulating the occupation; the activities of the occupation pose a significant risk of harm to the health and safety of the public; existing regulatory or other mechanisms fail to address health and safety issues; regulation is possible and practical to implement for the occupation: *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions* (2008) attachment B. See

Employment screening in aged care

Recommendation 4–9 There should be a national employment screening process for Commonwealth-regulated aged care. The screening process should determine whether a clearance should be granted to a person to work in aged care, based on an assessment of:

(a) a person's criminal history;

(b) relevant incidents under the recommended serious incident response scheme; and

(c) relevant disciplinary proceedings or complaints.

4.148 An employment screening process would enhance safeguards for older people receiving aged care, by ensuring that people delivering aged care are screened for relevant prior history that may affect their suitability to work with older people.

4.149 The ALRC recommends that people wishing to work or volunteer in Commonwealth-regulated aged care[212] should be required to undergo employment screening by a screening agency.

4.150 The employment screening process in aged care should assess a person's criminal history, any adverse findings made about the applicant that resulted from the reporting of a serious incident, as well as any findings from disciplinary or complaint action taken by registration or complaint handling bodies.

4.151 The recommendation will enhance the existing employment screening mechanism—broadly, a police check—to allow non-criminal information to be assessed to determine suitability to work in aged care. Having an independent decision maker will provide greater consistency in decision making about a person's suitability to work in aged care than the current system.

Current pre-employment checks in aged care

4.152 A number of provisions in the *Aged Care Act* and associated Principles set out suitability requirements for employment in aged care. These include:

- Any person who is 'key personnel'[213] of an approved provider must not have been convicted of an indictable offence, be insolvent, or be of 'unsound mind'.[214]

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further Kim Snowball, 'Independent Review of the National Registration and Accreditation Scheme for Health Professions' (Final Report, Australian Health Ministers' Advisory Council, 2014) 24–27.

212 That is, regulated by the *Aged Care Act* or the Commonwealth Home Support Programme.

213 Key personnel include members of the group of persons who are responsible for the executive decisions of the entity; and any other person with authority or responsibility (or significant influence over) planning, directing or controlling the activities of the entity at that time: *Aged Care Act 1997* (Cth) s 8-3A.

214 Ibid s 10A-1. Penalties may apply where an approved provider has a 'disqualified person' in a key personnel role: Ibid s 10A-2.

- Staff[215] of approved providers must be issued with a police certificate.[216] Police certificates are current for three years. Where a person has been convicted of murder or sexual assault, or has been convicted of any other form of assault where the sentence included a term of imprisonment, the person is unable to be employed or to volunteer in aged care.[217]
- Where a police certificate discloses something that is not an outright bar to employment, guidance has been developed to assist providers to assess the information.[218] These note that an 'approved provider's decision regarding the employment of a person with any recorded convictions must be rigorous, defensible and transparent'.[219]

4.153 Aged care providers are also likely to undertake reference checks.[220] These may operate as an additional safeguard against employing unsuitable applicants.

4.154 Members of some health professions working in aged care are subject to the National Registration and Accreditation Scheme. A registered health professional must meet registration requirements, which include an assessment of criminal history.[221]

Pre-employment checks in other sectors

4.155 All Australian jurisdictions require people who work with children to hold a 'working with children' check.[222] Two Australian jurisdictions, the ACT and Tasmania, have moved to broaden their employment screening to people working with other vulnerable groups.[223]

4.156 The NDIS Quality and Safeguarding Framework has signalled that a nationally consistent employment screening process will be developed for workers who have significant contact with people with disability as part of their work. The screening process will take into account:

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215 'Staff member' is defined as being a person that is at least 16 years old; and is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruitment agency) to provide care or other services under the control of the approved provider; and has, or is reasonably likely to have, access to care recipients: *Accountability Principles 2014* (Cth) s 4.

216 A police certificate discloses whether a person has been convicted of an offence; has been charged with and found guilty of an offence but discharged without conviction; or is the subject of any criminal charge still pending before a Court: Department of Social Services, *Aged Care Quality and Compliance Group—Police Certificate Guidelines* (2014) 10.

217 *Accountability Principles 2014* (Cth) s 48.

218 Department of Social Services, above n 216, 11.

219 Ibid.

220 Leading Age Services Australia, *Submission 104*; Alzheimer's Australia, *Submission 80*.

221 Australian Health Practitioner Registration Agency, *Registration Standard: Criminal History* (1 July 2015). The standard is made under the *Health Practitioner Regulation National Law* s 38.

222 *Working with Vulnerable People (Background Checking) Act 2011* (ACT); *Child Protection (Working with Children) Act 2012* (NSW); *Care and Protection of Children Act 2007* (NT); *Working with Children (Risk Management and Screening) Act 2000* (Qld); *Children's Protection Act 1993* (SA); *Registration to Work with Vulnerable People Act 2013* (Tas); *Working With Children Act 2005* (Vic); *Working with Children (Criminal Record Checking) Act 2004* (WA).

223 *Working with Vulnerable People (Background Checking) Act 2011* (ACT); *Registration to Work with Vulnerable People Act 2013* (Tas). See also *Safeguarding Vulnerable Groups Act 2006* (UK).

> information such as convictions, including spent and quashed convictions; other police/court information, such as current or pending charges; Apprehended Violence Orders, Child Protection Orders and child protection information; international police checks for those who have worked overseas, when feasible; and workplace misconduct, which comes to light through complaints and serious incident reporting.[224]

4.157 Working with children checks generally capture a broader range of information than that reported in a national police check. Working with children checks may include assessment of convictions, charges, relevant allegations or police investigations and relevant employment proceedings and disciplinary information from professional organisations.[225] In NSW, the working with children check also considers adverse findings made in relation to reportable conduct.[226]

4.158 The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) has recommended that there be a national model for working with children checks, with consistent standards and a centralised database to facilitate cross-border information sharing.[227]

What information should be assessed?

4.159 The ALRC recommends that both criminal history and some forms of non-criminal information be assessed as part of pre-employment screening for aged care. Most submissions responding to this issue supported an employment screening process.[228] The ALRC agrees with stakeholders that, as far as practicable, the process for screening workers in the aged care, disability and child sectors should be compatible.[229] For example, the NSW Ombudsman suggested that there was 'strong merit in developing a consistent national approach to screening in relation to people seeking to work with vulnerable people more broadly … In the absence of a national

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224 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 62.

225 Australian Institute of Family Studies, *Pre-Employment Screening: Working With Children Checks and Police Checks* (2016). The information captured across jurisdictions can vary.

226 *Child Protection (Working with Children) Act 2012* (NSW) s 35; sch 1. The NSW Ombudsman may disclose information to the Office of the Children's Guardian, including information about reports of investigations into reportable conduct by the Ombudsman or a designated government or non-government agency: *Ombudsman Act 1974* (NSW) s 25DA.

227 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015) 5.

228 See, eg, Office of the Public Guardian (Qld), *Submission 384*; National LGBTI Health Alliance, *Submission 373*; National Legal Aid, *Submission 370*; Victorian Multicultural Commission, *Submission 364*; National Older Persons Legal Services Network, *Submission 363*; Office of the Public Advocate (Qld), *Submission 361*; Eastern Community Legal Centre, *Submission 357*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; NSW Ombudsman, *Submission 341*; AnglicareSA, *Submission 299*; Holman Webb Lawyers, *Submission 297*; Mecwacare, *Submission 289*; ACT Disability Aged and Carer Advocacy Service (ADACAS), *Submission 269*; Office of the Public Advocate (Vic), *Submission 246*; Aged and Community Services Association, *Submission 217*; UnitingCare Australia, *Submission 216*; Advocare, *Submission 213*.

229 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Victorian Multicultural Commission, *Submission 364*; Disabled People's Organisations Australia, *Submission 360*; Office of the Public Advocate (Qld), *Submission 361*; COTA, *Submission 354*; Law Council of Australia, *Submission 351*; NSW Ombudsman, *Submission 341*; AnglicareSA, *Submission 299*; Mecwacare, *Submission 289*. Some stakeholders suggested that information from past conduct in all three sectors should be used to screen aged care workers: see, eg Ibid.

screening system for vulnerable people, we are keen to see alignment between the screening systems'.[230]

4.160 Not all supported further screening. ACSA suggested that, while it understood the intent behind such schemes, it was

> cautious about introducing another administrative process unless there is clear evidence from an ageing/aged care sector perspective that demonstrates such a check provides additional protection for older people and employers without infringing on the rights of employees.[231]

4.161 Similar limitations in evidence exist for working with children screening processes. Background checking is premised on the concept that prior behaviour can be an indicator of future behaviour, and can serve to inform risk assessment. There is some contention about this—for example, research in the context of child abuse suggests that the majority of perpetrators have not been convicted of child abuse in the past.[232]

4.162 Nonetheless, in a 2015 report evaluating working with children check schemes, the Royal Commission concluded that it shared 'the view held by the majority of government and non-government stakeholders whom we consulted … they deliver unquestionable benefits to the safeguarding of children'.[233]

4.163 **Criminal conduct**: A person's criminal history should be screened before a clearance to work in aged care is granted. The ALRC does not make specific recommendations about the kind of criminal conduct that should be assessed, and when such conduct should be disqualifying or evaluated as part of an overall risk assessment. A discussion of stakeholder views is provided to inform the further detailed policy work that is required on these questions.

4.164 Stakeholders in this Inquiry strongly supported an assessment of a person's criminal history as part of pre-employment screening. Some considered that the existing list of offences disqualifying a person from working in aged care should be maintained.[234] Many suggested that the relevant criminal history should align with pre-employment checks in other sectors. However, there was also significant support for including fraud offences or offences relating to financial abuse as disqualifying a

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230 NSW Ombudsman, *Submission 341*.

231 Aged and Community Services Australia, *Submission 102*. See also Leading Age Services Australia, *Submission 377*; Carroll & O'Dea, *Submission 335*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; Brotherhood of St Laurence, *Submission 232*.

232 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 227, 29. See also Clare Tilbury, 'Working with Children Checks—Time to Step Back?' (2014) 49(1) *Australian Journal of Social Issues* 87.

233 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 227, 4.

234 Legal Aid NSW, *Submission 352*.

person from working in aged care.[235] Some considered that drug offences should be disqualifying.[236]

4.165 A number of stakeholders argued that international criminal history should also be assessed for workers who had lived overseas.[237] This was considered particularly important given the large, and increasing, numbers of migrant workers in aged care. The ANMF noted that, given 'around one-third of unregulated health workers who are employed in direct care work within the aged care sector (both residential and community) were born outside Australia … the criminal history declaration for this group must also encompass national and international convictions'.[238]

4.166 Some submissions argued that having been a respondent to intervention orders should be considered as part of the employment screening process, although evidence of this did not necessarily require an outright bar.[239]

4.167 Stakeholders also warned that an overzealous approach to preventing people from working in aged care as a result of prior criminal history can be unfair. For example, Legal Aid NSW warned that a system that prohibits services from employing people who have been convicted of certain offences, with no discretion or procedure for review, can 'lead to the unfair and perhaps unintended outcome of prohibiting people who do not pose a risk'.[240]

4.168 Registered health professionals are already required to have an annual criminal record check as part of the conditions of their registration. Consideration might be given to whether registration should provide sufficient screening of criminal history so as not to require an additional criminal history check.

4.169 **Non-criminal information**: Information about adverse findings arising out of the serious incident response scheme should be considered in the employment screening process, as well as information relating to a person's professional registration.

4.170 Only screening criminal history has limitations in terms of assessing someone's suitability to work in aged care. Conduct must meet a very high evidentiary threshold before it will be recorded on a police check. Capturing conduct that meets a lower threshold would allow a more comprehensive risk assessment of a person's prior history.[241] As the ACT Disability Aged and Carer Advocacy Service noted, 'Criminal charges are rarely progressed in elder abuse cases, therefore the employment screening process would also need access to the reportable incident register so that past

235 See, eg, Law Council of Australia, *Submission 351*; AnglicareSA, *Submission 299*; Mecwacare, *Submission 289*; Office of the Public Advocate (Vic), *Submission 246*.
236 Law Council of Australia, *Submission 351*; Lutheran Church of Australia, *Submission 244*.
237 Australian Nursing and Midwifery Federation, *Submission 319*; Name Withheld, *Submission 266*; NSW Nurses and Midwives' Association, *Submission 248*.
238 Australian Nursing and Midwifery Federation, *Submission 319*.
239 See, eg, National LGBTI Health Alliance, *Submission 373*; Churches of Christ Care, *Submission 254*.
240 Legal Aid NSW, *Submission 352*. See also, eg, Leading Age Services Australia, *Submission 377*; National LGBTI Health Alliance, *Submission 373*.
241 National Disability Services, *Improving Safety Screening for Support Workers* (2014) 9.

allegations of abuse or neglect can be considered in determining whether a person is fit to work in the sector'.[242]

4.171 Submissions were supportive of including non-criminal information in the pre-employment screening process. A number suggested that any adverse finding from the serious incident scheme should disqualify a person from working in aged care.[243] Others considered that such information should not automatically disqualify a person, but should be assessed as part of an evaluation of a person's suitability.[244]

4.172 In NSW the pre-employment process for working with children requires prescribed organisations to report findings that a worker has engaged in sexual misconduct committed against, with, or in the presence of a child; or any serious physical assault of a child to the employment screening body.[245] This is a narrower class of conduct than is required to be reported to the Ombudsman under the reportable conduct scheme in relation to children in NSW.[246]

4.173 The NSW Ombudsman has noted that its oversight of the reportable conduct scheme provides 'confidence in the integrity of the findings of misconduct reported to the screening agency'. It further observed that its oversight role allows it to assess

> the quality of the agency investigation and the validity of the related findings. Both of these elements need to be properly addressed so that they can be relied on by the [Office of the Children's Guardian] for the purposes of informing the … screening process.[247]

4.174 The ALRC considers that similar benefits would accrue from the integration of the serious incident response scheme with pre-employment screening in aged care. Adverse findings should be assessed as part of the screening process. However, it considers that such information should be assessed as part of an overall consideration of risk rather than acting to automatically exclude a person from aged care work.

4.175 Information from professional registration bodies should also be assessed in the pre-employment screening process. For example, information relating to a health practitioner's registration should be considered (such as previous cancellation of registration, suspension, conditions on registration). The planned National Code of

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242 ACT Disability Aged and Carer Advocacy Service (ADACAS), *Submission 269*.

243 Office of the Public Advocate (Qld), *Submission 361*; Law Council of Australia, *Submission 351*; AnglicareSA, *Submission 299*; Holman Webb Lawyers, *Submission 297*; Mecwacare, *Submission 289*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*.

244 Legal Aid NSW, *Submission 352*; Institute of Legal Executives (Vic), *Submission 320*; Seniors Rights Service, *Submission 296*; Lutheran Church of Australia, *Submission 244*.

245 *Child Protection (Working with Children) Act 2012* (NSW) s 35, sch 1. The NSW Ombudsman may disclose information to the Office of the Children's Guardian, including information about reports of investigations into reportable conduct by the Ombudsman or a designated government or non-government agency: *Ombudsman Act 1974* (NSW) s 25DA. The NSW Ombudsman has stated that, in 'determining whether an investigation into a reportable allegation has been properly conducted, and whether appropriate action has been taken in response, we check to see whether, as required under the Working with Children Act, relevant misconduct findings have been notified to the Office of the Children's Guardian': NSW Ombudsman, *Strengthening the Oversight of Workplace Child Abuse Allegations. A Special Report to Parliament under Section 31 of the Ombudsman Act 1974* (2016) 9.

246 *Ombudsman Act 1974* (NSW) pt 3A.

247 NSW Ombudsman, above n 245, 9.

Conduct for Health Care Workers will allow for complaints to be made against unregistered practitioners, and any relevant information relating to such complaints should also form part of the information that is assessed.

How long should clearances last?

4.176 Police certificate information may not be current. Although police clearances are required to be obtained and/or renewed every three years, and providers must take 'reasonable steps' to ensure staff notify them of any convictions, there is no capacity for continuous monitoring of national criminal records.[248]

4.177 Most stakeholders in this Inquiry suggested three years would be an appropriate timeframe for clearances. A number of submissions considered that appropriate timeframes for clearances would depend on whether there was capacity for continuous monitoring of criminal history.[249]

Who should screen?

4.178 An appropriate independent organisation should be responsible for employment screening, and for making a determination about whether a person should be granted a clearance to work in aged care.

4.179 Having an independent decision maker will provide greater consistency in decision making about a person's suitability to work in aged care than the current system, which, where information is available that might suggest risk, but does not disqualify a person from working in aged care, leaves individual providers to make a final decision on suitability.

4.180 Approved providers should still take other steps to establish a person's suitability, including by conducting reference checks with a person's previous employers.

Who should be screened?

4.181 The ALRC considers that potential 'staff members', as currently defined in the *Aged Care Act*, should be required to undergo employment screening as a pre-condition to employment, that is, a person 'who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services'.[250]

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248 The duration of working with children and vulnerable person checks in Australian jurisdictions varies across jurisdictions. South Australia has a 'point in time' check, while a clearance lasts for two years in the Northern Territory, three years in the ACT, Queensland, Tasmania, and Western Australia, and five years in New South Wales and Victoria: Australian Institute of Family Studies, above n 225. Most working with children checks have capacity for continuous monitoring: see Royal Commission into Institutional Responses to Child Sexual Abuse, above n 227.

249 See, eg, ADA Australia, OPA Vic, Churches of Christ Care. The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that, if criminal history was continuously monitored, working with children checks should remain valid for five years: Royal Commission into Institutional Responses to Child Sexual Abuse, above n 227, rec 31.

250 *Aged Care Act 1997* (Cth) s 63-1AA(9).

4.182 There should be a process for review and appeals of decisions made about whether a person be excluded from working in aged care that affords procedural fairness for those who are subject to the screening. In the NSW screening process for working with children, for example, this process includes:

- notifying a person of a proposal to bar them from working with children and inviting them to submit information which may affect the decision, which is taken into account in the final decision;
- informing a person of a decision not to grant a clearance; and
- the opportunity to appeal a decision in the NSW Civil and Administrative Tribunal.[251]

Restrictive practices

Recommendation 4–10 Aged care legislation should regulate the use of restrictive practices in residential aged care. Any restrictive practice should be the least restrictive and used only:

(a) as a last resort, after alternative strategies have been considered, to prevent serious physical harm;

(b) to the extent necessary and proportionate to the risk of harm;

(c) with the approval of a person authorised by statute to make this decision;

(d) as prescribed by a person's behaviour support plan; and

(e) when subject to regular review.

Recommendation 4–11 The Australian Government should consider further safeguards in relation to the use of restrictive practices in residential aged care, including:

(a) establishing an independent Senior Practitioner for aged care, to provide expert leadership on and oversight of the use of restrictive practices;

(b) requiring aged care providers to record and report the use of restrictive practices in residential aged care; and

(c) consistently regulating the use of restrictive practices in aged care and the National Disability Insurance Scheme.

4.183 The use of restrictive practices will, in some circumstances, be elder abuse. Restrictive practices can deprive people of their liberty and dignity—basic legal and human rights. The practices might also sometimes amount to assault, false

251 *Office of the Children's Guardian,* Bars and Appeals *(Fact Sheet 12, 2014)* 12. See also, eg, Department of Justice and Regulation (Vic), *Failing the Check* <www.workingwithchildren.vic.gov.au>.

imprisonment and other civil and criminal wrongs. The ALRC recommends that the use of these practices in residential aged care facilities be regulated in the *Aged Care Act*. This would mean that restrictive practices are used less frequently and only when appropriate, reducing one type of elder abuse and serving to protect older people's legal and human rights.

4.184 The key elements of regulation set out in Recommendation 4–10 are intended to discourage the use of restrictive practices and set a clear and high standard, so that the practices are subject to proper safeguards and only used when strictly necessary.

4.185 The ALRC also recommends that the Australian Government consider a number of additional oversight measures for the use of restrictive practices, as well as the merits of consistently regulating the use of restrictive practices in aged care and the NDIS.

What are restrictive practices?

4.186 Restrictive practices have been defined as 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm'.[252]

4.187 Common forms of restrictive practice include: detention (eg, locking a person in a room or ward indefinitely); seclusion (eg, locking a person in a room or ward for a limited period of time); physical restraint (eg, clasping a person's hands or feet to stop them from moving); mechanical restraint (eg, tying a person to a chair or bed); and chemical restraint (eg, giving a person sedatives).[253] The Australian and New Zealand Society for Geriatric Medicine submitted that restrictive practices are 'still pervasive' in residential aged care facilities, 'particularly in relation to chemical sedation and inappropriate use of drugs'.[254]

4.188 Concerns have been expressed about the use of restrictions as a 'means of coercion, discipline, convenience or retaliation by staff or others providing support, when aged care facilities are understaffed'.[255]

4.189 In practice, restrictive practices are most often used on people with an intellectual disability or cognitive impairment (including dementia) who exhibit 'challenging behaviours', such as striking themselves or other people or 'wandering'. They are therefore intended to be used to protect the restrained person or others from harm.

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252 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014) 4.

253 Admitting a person to a residential care facility against their wishes or without their consent (perhaps when they do not have the legal capacity to consent) may also be considered a type of restrictive practice. In the UK, this is governed by 'deprivation of liberty safeguards', which have been the subject of criticism and a Law Commission inquiry: Law Commission (UK), *Mental Capacity and Deprivation of Liberty* <www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>.

254 Australian and New Zealand Society for Geriatric Medicine, *Submission 51*. 'Much of this practice is driven my lack of skills and knowledge as well as staffing numbers': Ibid.

255 Older Women's Network NSW, *Submission 136* quoting Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

4.190 However, some question whether restrictive practices are ever truly necessary. People with Disability Australia said these practices should be stopped, and that there should instead be a focus on the 'environmental or service factors' that cause problematic behaviour.[256] Instead of using restraints, care workers and informal carers 'need to be supported and given adequate time to provide responsive and flexible and individualized care'.[257] Others submitted that, although they should be a last resort, restrictive practices are sometimes necessary 'to protect other care recipients and staff'.[258]

4.191 Recommendations 4–10 and 4–11 are not intended to imply that restrictive practices are sometimes necessary, much less condone their use. Rather, they are intended to limit and carefully regulate their use.

Regulating restrictive practices in aged care

4.192 A national framework exists for reducing and eliminating the use of restrictive practices in the disability service sector.[259] In aged care, the use of restrictive practices is not explicitly regulated, although guidance has been provided.[260]

4.193 In the *Equality, Capacity and Disability* Report, the ALRC discussed the use of restrictive practices in Australia, highlighted the 'patchwork' of federal, state and territory laws and policies governing restrictive practices, and set out stakeholder calls for reform.[261] The Report recommended that Commonwealth, state and territory governments 'develop a national approach to the regulation of restrictive practices', including in the aged care sector.[262] Calls for reform, including for nationally consistent legislated regulation, were repeated in submissions to this Inquiry.[263]

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256 They also suggested that government guidance on the use of restrictive practices may amount to 'tacit approval of these practices': People with Disability Australia, *Submission 167*. See also Disabled People's Organisations Australia, *Submission 360*; FECCA, *Submission 292*.

257 Older Women's Network, *Submission 136*. See also ARNLA, who submitted that restrictive practices in response to challenging behaviours are 'indicative of environments that have not achieved a sense of wellbeing for the older person with dementia': Australian Research Network on Law and Ageing, *Submission 262*.

258 National Seniors Australia, *Submission 154*.

259 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014).

260 The Department of Health submitted that it had 'produced tool kits to assist staff and management working in both residential and community aged care settings to make informed decisions in relation to the use of restraints': Department of Health, *Submission 113*.

261 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 8. See also Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014) ch 6; Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 15.

262 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 8–2.

263 See, eg, Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; Australian Nursing & Midwifery Federation, *Submission 163*; National LGBTI Health Alliance, *Submission 156*; Office of the Public Advocate (Qld), *Submission 149*; Leading Age Services Australia, *Submission 104*; Queensland Nurses' Union, *Submission 47*.

4.194 That the use of restrictive practices may sometimes amount to elder abuse provides further support for the need for additional regulation. In this Inquiry, the ALRC recommends that aged care legislation regulate the use of restrictive practices in residential care facilities. The scheme in the *Disability Act 2006* (Vic) pt 7 (*Disability Act*) may be a suitable model.[264] Some of the key elements of the Victorian law are contained in Recommendation 4–10, including the requirement that the restraint only be used when necessary to prevent harm.

4.195 Submissions on this issue shared a view that the use of restrictive practices should be reduced or eliminated, but diverged about how this should be done. A number supported legislative regulation of restrictive practices.[265] Those that opposed legislative regulation of restrictive practices argued either that restrictive practices should not be used,[266] or that non-legislative means were a better approach to achieving a reduction or elimination of their use.[267]

4.196 The recommendation adds some additional elements to regulate restrictive practices than made in the Discussion Paper—principally, to further emphasise that the use of restrictive practices should be a last resort and that their use should be subject to regular review.[268] With respect to Recommendation 4–11 that the use of restrictive practices be approved by a person authorised by statute, the ALRC envisages a similar process to that in the Victorian legislation. The *Disability Act 2006* (Vic) requires that disability services that use restrictive interventions appoint an 'authorised program officer', who must approve the inclusion of restrictive practices in a person's behaviour support plan *before* they can be used on a person.[269]

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264 See Michael Williams, John Chesterman and Richard Laufer, 'Consent vs Scrutiny: Restrictive Liberties in Post-Bournewood Victoria' (2014) 21 *Journal of Law and Medicine* 1. See also Office of the Public Advocate (Vic), *Submission 95*.

265 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Australian College of Nursing, *Submission 379*; Victorian Multicultural Commission, *Submission 364*; National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*; Eastern Community Legal Centre, *Submission 357*; M Berry, *Submission 355*; COTA, *Submission 354*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; CPA Australia, *Submission 338*; Carroll & O'Dea, *Submission 335*; V Fraser and C Wild, *Submission 327*; Elder Care Watch, *Submission 326*; L Barratt, *Submission 325*; Institute of Legal Executives (Vic), *Submission 320*; Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*; Speech Pathology Australia, *Submission 309*; M Daly, *Submission 308*; Public Guardian (NSW), *Submission 302*; Seniors Rights Service, *Submission 296*; Aged Rights Advocacy Service Inc, *Submission 285*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; Brotherhood of St Laurence, *Submission 232*; Aged and Community Services Association, *Submission 217*.

266 See, eg, Disabled People's Organisations Australia, *Submission 360*; FECCA, *Submission 292*.

267 See, eg, HammondCare, *Submission 307*. LASA highlighted work within the sector to reduce the use of sedation in aged care: Leading Age Services Australia, *Submission 377*.

268 The Office of the Public Advocate (Vic) pointed out that review was a key element of the regulation of restrictive practices in the *Disability Act*: Office of the Public Advocate (Vic), *Submission 246*. Other stakeholders supported regular review as a feature of any regulation: see, eg, Speech Pathology Australia, *Submission 309*; Australian Research Network on Law and Ageing, *Submission 262*; Aged and Community Services Association, *Submission 217*.

269 *Disability Act 2006* (Vic) ss 139, 145.

4.197 That restrictive practices should only be used when necessary was stressed in many submissions to this Inquiry. For example, the ACN urged that 'restrictive practices in all circumstances must be practices of last resort'.[270] National Seniors Australia also said they should only be used when necessary, and outlined some safeguards:

> Restrictive practices should only be used following assessment by a qualified medical practitioner, preferably a psychogeriatrician, geriatrician or geropsychologist or after advice from a Dementia Behavioural Management Advisory Service or Older Persons Mental Health Service. Restrictive practices should also only be used after the consent of a guardian or representative has been obtained. Restrictive practices should only be used when all behavioural prevention strategies have been systematically attempted or considered.[271]

4.198 Similarly, the Office of the Public Advocate (Qld) argued that the legal framework should ensure that restrictive practices are 'only ever used in aged care environments as a last resort, that they are complemented by appropriate safeguards and that there is appropriate monitoring and oversight of their use'.[272]

4.199 In addition to explicitly recommending that restrictive practices only be used as a last resort, the ALRC also recommends that they be used only to prevent *serious* physical harm, to further raise the threshold for justification for their use.[273]

Regulating restrictive practices—additional considerations

4.200 A Senior Practitioner and required reporting on the use of restrictive practices are features of the regulation of restrictive practices in the disability sector, including in the planned Quality and Safeguarding Framework for the NDIS.[274] The ALRC recommends that these additional oversight mechanisms should be considered as part of any regulation of such practices in aged care.

4.201 A Senior Practitioner role has resource implications. However, there is widespread concern—shared by providers and aged care consumer advocates—that restrictive practices, and especially chemical restraint, are inappropriately used in aged care. These additional measures may assist in providing leadership and expertise in reducing and eliminating the use of restraint.[275]

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270 Australian College of Nursing, *Submission 147*.

271 National Seniors Australia, *Submission 154*.

272 Office of the Public Advocate (Qld), *Submission 149*. See also, eg, Law Council of Australia, *Submission 351*; Speech Pathology Australia, *Submission 309*; Australian Research Network on Law and Ageing, *Submission 262*.

273 See Law Council of Australia, *Submission 351*; HammondCare, *Submission 307*. A failure to comply with the recommended requirements in relation to the use of restrictive practices would likely amount to a reportable 'serious incident' as discussed above.

274 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 71–72. See also *Disability Act 2006* (Vic) s 148.

275 A number of stakeholders supported the establishment of a Senior Practitioner role in aged care: see, eg, Disabled People's Organisations Australia, *Submission 360*; Mecwacare, *Submission 289*; Office of the Public Advocate (Vic), *Submission 246*.

4.202 The ALRC considers that a consistent approach to regulation of restrictive practices in aged care and disability services is desirable, both as a matter of principle and pragmatism. Similar human rights considerations apply across both sectors to decisions to interfere with a person's rights and freedoms, and a consistent approach also provides the opportunity for aged care to adopt best practice approaches to regulation developed in other sectors.[276]

4.203 The ALRC's recommendations relating to restrictive practices are limited to residential aged care. However, people who would have previously moved into residential aged care will increasingly receive aged care at home. The use of chemical restraint in particular will be an emerging issue, and extension of the regulation or restrictive practices to home care settings should be considered in the longer term.

Decision making

Recommendation 4–12 The Australian Government should further consider Recommendation 6–2 of ALRC Report No 124 *Equality, Capacity and Disability in Commonwealth Laws*, that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles set out in that Report.

4.204 Abuse of formal and informal decision-making powers was identified in submissions as a form of elder abuse in aged care. Stakeholders raised concerns about:

- failures to respect or acknowledge the decision-making ability of an older person;[277]
- abuse by informal and appointed decision makers, including misuse of powers of attorney, and abusive or prohibitive lifestyle decisions;[278]
- a lack of understanding of the powers and duties of appointed decision makers, by both the decision maker and aged care workers;[279] and

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276 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Disabled People's Organisations Australia, *Submission 360*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; Office of the Public Advocate (Vic), *Submission 246*. CPSA recommended mandatory reporting on the use of physical restraints: Combined Pensioners and Superannuants Association, *Submission 281*.

277 A number of submissions raised concerns about decision making in relation to admission to residential aged care: Justice Connect, *Submission 182*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*; Office of the Public Advocate (Vic), *Submission 95*. See also the example of 'June', in a case study provided in ADA Australia, *Submission 150*.

278 For example, the NSW Nurses and Midwives' Association submitted that one third of members responding to a survey about elder abuse had either witnessed, or were unsure about witnessing financial abuse of a person by relatives who held Power of Attorney: NSW Nurses and Midwives' Association, *Submission 29*. See also Justice Connect, *Submission 182*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; GLBTI Rights in Ageing Institute, *Submission 132*; Leading Age Services Australia, *Submission 104*; Office of the Public Advocate (Vic), *Submission 95*; Alice's Garage, *Submission 36*.

- in relation to consumer directed care, concern about family members inappropriately influencing the decisions made by older people about the design of a care package.[280]

4.205 In the *Equality, Capacity and Disability* Report, the ALRC recommended that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles.[281] These Principles emphasise the equal rights of all adults to make decisions that affect their lives, and prescribe that the will, preferences and rights of a person who may require decision-making support must direct these decisions.[282] The ALRC also developed a Commonwealth Decision-Making Model that, among other things, makes provision for the appointment of a 'supporter' or a 'representative' for a person who requires decision-making support, and recommended that aged care legislation be amended consistently with this model.[283]

4.206 The ALRC considers that the implementation of these recommendations will assist in ensuring that decisions in aged care are made in accordance with an older person's will, preferences and rights.

4.207 The *Aged Care Act* and associated Principles contain a number of provisions relating to decision making. For example, the Charters of Care Recipients' Rights and Responsibilities include rights in relation to decision making in residential and home care.[284] There are also provisions in aged care legislation that allow for supported or representative decision making. However, the use of terminology across the legislation, and the powers and duties attached to persons who may act in these roles, are not consistent. As the *Equality, Capacity and Disability* Report noted, the

> current legal framework provides for some elements of supported and representative decision-making in aged care. Section 96-5 of the *Aged Care Act* provides for a person, other than an approved provider, to represent an aged care recipient who, because of any 'physical incapacity or mental impairment' is unable to enter into agreements relating to residential care, home care, extra services, accommodation bonds and accommodation charges. Section 96-6 states that in making an application or giving information under the Act, a 'person authorised to act on the care recipient's behalf' can do so.[285]

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279 ADA Australia, *Submission 150*; Advocare Inc (WA), *Submission 86*.

280 Office of the Public Advocate (SA), *Submission 170*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian College of Nursing, *Submission 147*; Aged and Community Services Australia, *Submission 102*; Advocare Inc (WA), *Submission 86*. There are existing safeguards against inappropriate care packages being developed through a CDC model. These include providers' responsibilities in relation to providing ongoing review of a person's home care package: *Aged Care Act 1997* (Cth) s 56-2(k); *User Rights Principles 2014* (Cth) sch 2 cl 3(d); Department of Health (Cth), above n 51, 36. There are also limits on what home care package funds can be spent on: *Quality of Care Principles 2014* (Cth) sch 3 pt 2.

281 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 6–2.

282 Ibid rec 3–1. The National Decision-Making Principles, and the ALRC's approach to supported decision making, are discussed further in ch 2.

283 Ibid rec 6–2. For a discussion of how the ALRC's recommended terminology of 'representative' maps on to the existing use of 'representative' in the *Aged Care Act*, see Ibid 168–73.

284 *User Rights Principles 2014* (Cth) sch 1 cl 1(n), sch 2 cls 2(c)–(d), 5(d).

285 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 168.

4.208 The *Quality of Care Principles* define 'representative' in a way that is 'similar to both supporters and representatives in the Commonwealth decision-making model'.[286]

4.209 The Law Society of South Australia was concerned about the potential for abuse that arises from the 'vague and uncertain' definitions relating to decision makers in the *Aged Care Act* and associated Principles:

> An example of potential abuse (often seen in practice) … is the entitlement of a care recipient within the Charter of Care Recipients' Rights in relation to home care to have his or her representative participate in decisions, etc. There is no definition of 'representative' for the purposes of the Charter, or more generally in the User Rights Principles. If one were to apply the broad and uncertain definition appearing in the Records Principles, any person who had some dealings (whether authorised or otherwise and of whatever level of significance or duration) would be entitled to put themselves forward as a representative of the care recipient and therefore entitled to participate in the choice of services.[287]

4.210 Implementation of the ALRC's recommendation to amend aged care legislation in line with the Commonwealth Decision-Making Model would provide a consistent approach to supported decision making, and offer an important safeguard against abuse for older people receiving aged care. It would provide clear statutory guidance for decision making, with the starting point that the older person's will, preferences and rights should guide decisions made regarding their care.[288]

4.211 This is particularly important when considering major decisions, such as the decision to enter residential aged care. The Law Council of Australia argued that there should be a 'more robust approvals process around entry to aged care, such as determining the wishes and preferences of older person and considering these wishes and preferences, irrespective of the person's capacity'.[289] Justice Connect Seniors Law was similarly concerned about safeguards relating to a person's entry to aged care. It argued that the decision to enter residential aged care is a key decision, and that 'regulation is required to clarify the person responsible for making the decision and safeguards and oversight of those decisions'.[290]

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286 Ibid 169; *Quality of Care Principles 2014* (Cth) s 5.

287 Law Society of South Australia, *Submission 381*. The *Records Principles 2014* (Cth) defines 'representative' as a person nominated by the care recipient as a person to be told about matters affecting the care recipient; or a person who nominates themself to be told about matters affecting a care recipient; and who the provider is satisfied has a connection with the care recipient, and is concerned for the safety, health and wellbeing of the care recipient: s 5(1). A person who has a connection with the care recipient is non-exhaustively defined to include a person who 'represents the care recipient in dealings with the approved provider': s 5(2)(d).

288 See also Deirdre Fetherstonhaugh, Laura Tarzia and Rhonda Nay, 'Being Central to Decision Making Means I Am Still Here!: The Essence of Decision Making for People with Dementia' (2013) 27(2) *Journal of Aging Studies* 143.

289 Law Council of Australia, *Submission 351*.

290 Justice Connect Seniors Law, *Submission 362*.

4.212 Implementation of the ALRC's recommendation would also require:

- consideration of the interaction with state and territory appointed decision makers;[291]
- revision of guidelines and operational manuals across the aged care system, including for aged care assessment teams, approved providers, and advocacy services to ensure consistent guidance about decision making; and
- training and education for aged care workers in principles for decision making for care recipients, including powers and duties of appointed decision makers, and avenues for reporting concerns about abuse of decision-making powers.[292]

4.213 The Office of the Public Advocate (Vic) supported the recommendations relating to aged care made in the *Equality, Capacity and Disability* Report, arguing that these will help 'ensure older people with cognitive impairment are adequately supported to make and enact decisions according to their will and preferences, thereby protecting them from people making decisions for them that contravene their rights'.[293] The GLBTI Rights in Ageing Institute argued that an 'individual's rights and autonomy would be better protected by legal frameworks which emphasised the benefits of supported decision-making processes'.[294] The ACN noted that a person's ability to make decisions may change, and that following a period of dependence, 'processes must facilitate and protect an older person's right to resume control in directing their care planning and resume independence in decision-making'.[295]

4.214 A revision of the decision-making provisions in aged care laws and legal frameworks is particularly timely, given the move towards consumer directed care. As a number of submissions to this Inquiry noted, many recipients of aged care may need support to make decisions about care planning.[296] For example, Speech Pathology Australia noted that communication difficulties 'are one of the greatest barriers to the execution of choice and active participation in decision making and care planning, including development of a support or care plan under a consumer directed care

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291 The ALRC considered this in the context of decision making in the NDIS in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 5. In the context of aged care, the Law Society of SA observed that the 'extent to which rights under the Act are only exercisable by a care recipient's formal appointee has been, and continues to be an area of considerable uncertainty': Law Society of South Australia, *Submission 381*.

292 This was supported by Justice Connect, *Submission 182*; ADA Australia, *Submission 150*; NSW Nurses and Midwives' Association, *Submission 29*. See also Laura Tarzia et al, '"We Have to Work Within the System!": Staff Perceptions of Organizational Barriers to Decision Making for Older Adults With Dementia in Australian Aged Care Facilities' (2015) 8(6) *Research in Gerontological Nursing* 286. Measures might include, eg, guidance about when ACAT teams should speak to the older person alone.

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

294 GLBTI Rights in Ageing Institute, *Submission 132*. See also Speech Pathology Australia, *Submission 168*; Australian College of Nursing, *Submission 147*; TASC National, *Submission 91*; Law Council of Australia, *Submission 61*.

295 Australian College of Nursing, *Submission 147*.

296 See, eg, Speech Pathology Australia, *Submission 168*; Australian Association of Social Workers, *Submission 153*; Office of the Public Advocate (Vic), *Submission 95*.

model'.[297] Stakeholders also highlighted the importance of funded advocacy programs in providing decision-making support.[298]

4.215 Reforms recommended elsewhere in this Report will also assist in providing safeguards against abuse of a person's decision-making rights. These include recommendations for reform of laws relating to enduring powers of attorney and guardianship (Chapter 5); guardianship and financial administration (Chapter 10) as well as the recommendations to provide oversight of the use of restrictive practices in aged care (Recommendations 4–10 and 4–11).

Appointed decision makers—a matter of choice

Recommendation 4–13 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

4.216 A number of submissions to this Inquiry observed that it was the practice of some approved residential aged care providers to require, as part of an agreement with the provider, that a person has appointed a financial and/or a lifestyle decision maker as a condition of entry into residential aged care.[299] ARNLA, who supported the recommendation against such a requirement, referred to this as an 'ingrained' practice of providers.[300]

4.217 The Office of the Public Advocate (Qld) observed that the

> rationale for this policy is likely to be a financial and legal safeguard for the facility by ensuring that all people seeking placement have a mechanism in place to ensure continuity of decision-making in respect of the person's placement should they cease to have capacity.[301]

4.218 Other submissions outlined the complexities that aged care providers can face in relation to decision making. The ACN noted that 'aged care providers can be significantly challenged by situations when an older person does not have advance care directives about the appointment of guardians and there is no suitable substitute decision maker to work with'.[302] Resthaven stated that providers 'face a real challenge

297 Speech Pathology Australia, *Submission 168*.

298 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; Advocare Inc (WA), *Submission 86*.

299 See, eg, Seniors Rights Service, *Submission 169*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*. Agreements entered into between an approved provider and a residential care recipient include accommodation agreements and resident agreements. The Act specifies a number of requirements for those agreements: *Aged Care Act 1997* (Cth) ss 52F-3, 59-1, 61-1.

300 Australian Research Network on Law and Ageing, *Submission 262*. ADA Australia noted that it had been involved in a number of cases of this type: ADA Australia, *Submission 283*.

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

302 Australian College of Nursing, *Submission 147*. See also Leading Age Services Australia, *Submission 377*.

for the older person who has not made any Advance Directives about the appointment of guardians prior to their loss of competency and where it is not evident there is a suitable substitute decision maker to work with'.[303]

4.219 While recognising these challenges, the ALRC considers that appointing a representative decision maker should not be *required* as a condition of receipt of aged care.[304] Advance planning for decision-making support in aged care should, however, be encouraged.[305] Speech Pathology Australia argued that there is a

> need for ongoing training and education for all aged care workers and health professionals regarding the importance of advance care planning and having those difficult conversations with clients as early as possible and across all levels of contact with the health and aged care systems. This must be seen as core business and addressed as a central element of aged care.[306]

4.220 COTA was similarly concerned that any choice not to appoint a decision maker be an informed one, and suggested that providers be required to 'inform care recipients of what the consequences may be if there is no one appointed and they become incapacitated in regard to decision making'.[307]

4.221 ACSA opposed such a recommendation, arguing that it would be inconsistent with a market-based approach, 'as it seeks to override contractual arrangements between an aged care provider and a care recipient'.[308] However, the ALRC considers that requiring that a person has appointed a decision maker before entry into aged care is an inappropriate encroachment on the decision-making rights of older people. Further, it may have harmful effects on the older person. Seniors Legal and Support Service Hervey Bay argued that such a requirement meant that

> too often older people appoint 'risky' attorneys or spend unnecessary time in hospital waiting for the tribunal to appoint a substitute decision maker because aged care

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303 Resthaven, *Submission 114*.

304 Many submissions supported the Discussion Paper proposal: Leading Age Services Australia, *Submission 377*; Victorian Multicultural Commission, *Submission 364*; National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*; Disabled People's Organisations Australia, *Submission 360*; Eastern Community Legal Centre, *Submission 357*; M Berry, *Submission 355*; COTA, *Submission 354*; Law Council of Australia, *Submission 351*; CPA Australia, *Submission 338*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*; Seniors Legal and Support Service Hervey Bay, *Submission 310*; Speech Pathology Australia, *Submission 309*; Public Guardian (NSW), *Submission 302*; Seniors Rights Service, *Submission 296*; ADA Australia, *Submission 283*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; Brotherhood of St Laurence, *Submission 232*; Advocare, *Submission 213*.

305 Information and education about the utility for older people of putting in place arrangements for a person to make financial and/or lifestyle decisions on their behalf would form part of the proposed National Plan to reduce elder abuse (see rec 3–1). National Seniors Australia supported an 'ongoing public campaign' in relation to this: National Seniors Australia, *Submission 154*.

306 Speech Pathology Australia, *Submission 309*.

307 COTA, *Submission 354*. See also W Bonython and B Arnold, *Submission 241*.

308 Aged and Community Services Association, *Submission 217*.

> facilities will not offer accommodation to prospective residents who do not have a substituted decision maker appointed.[309]

4.222 As Seniors Rights Service argued:

> a resident should have the right to choose whether or not they will appoint a substitute decision maker. The provider may wish to take steps to ensure that their fees are paid but this should not encroach on the fundamental rights of the resident to make their own decisions.[310]

4.223 In keeping with an emphasis on respecting a person's decision-making ability, the ALRC recommends that aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot *require* that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

Other issues relating to aged care agreements

4.224 Seniors Rights Service raised broader concerns with aged care agreements, arguing that some provisions included in agreements were 'oppressive' and that further protections for older people against unfair provisions were required. It advocated for a mandated uniform aged care agreement, or failing this, a requirement that the Department of Health produce an information booklet, together with a schedule of rates and costs, relating to aged care agreements on an annual basis, together with a prescription that any aged care agreement which seeks to avoid or restrict the operation of the information contained in the booklet be void and of no effect.[311]

Community visitors

> **Recommendation 4–14** The Department of Health (Cth) should develop national guidelines for the community visitors scheme. The guidelines should include policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients.

4.225 The 'community visitors scheme' (CVS) is a scheme in which recipients of both residential and home care, who are socially isolated or at risk of social isolation, are matched with volunteer visitors. Volunteers are coordinated by organisations funded by the Australian Government (auspices).[312] Community visitors are not advocates, and are directed to report any concerns they have about care to their auspicing organisation.[313]

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309 Seniors Legal and Support Service Hervey Bay, *Submission 310*.
310 Seniors Rights Service, *Submission 169*. See also Office of the Public Advocate (Qld), *Submission 149*.
311 See further Seniors Rights Service, *Submission 296*; Seniors Rights Service, *Submission 169*.
312 *Aged Care Act 1997* (Cth) pt 5.6; Department of Social Services (Cth), *Community Visitors Scheme (CVS) Policy Guide 2013–2016* (2013).
313 Department of Social Services (Cth), *Community Visitors Scheme (CVS) Frequently Asked Questions—Auspices*.

4.226 The CVS provides an important role in reducing social isolation, which may itself be protective against abuse.[314] In 2015–16, the Department of Health (Cth) funded over 220,000 visits by community to people receiving residential and home care.[315] The ALRC does not propose any change to the community visitors' primary function—providing companionship. Nor does it propose that community visitors take on a pro-active role in identifying elder abuse, but does envisage a more limited role should they become aware of it.[316]

4.227 At present, the CVS lacks detailed national guidelines. Auspices are required to develop internal policies, but there is limited guidance on what these should contain, including limited guidance about how to respond to concerns about abuse or neglect.[317]

4.228 The ALRC recommends that national guidelines applying to the CVS should be developed, with standardised policies and procedures for visitors to follow where they become aware of abuse or neglect. That national guidelines for the CVS should be introduced received widespread support from stakeholders.[318] For example, Elder Care Watch argued that 'the present reliance on auspicing organisations is not satisfactory and invites inconsistency'.[319] The Queensland AIDS Council (QuAC) reported that volunteers with 'concerns about abuse or neglect of Community Visitor Scheme care recipients can experience distress and concern in the event of witnessing or learning of a situation of elder abuse impacting the person they visit'.[320]

4.229 Some submissions emphasised that any guidelines about dealing with abuse and neglect observed by community visitors should be carefully designed so as not to compromise a visitor's relationship with a care recipient or care provider. QuAC noted:

> volunteers are not trained advocates and should not act in that position. Advocating for people is a complex matter and it should be done by trained professionals. Volunteers are not trained to take more complex actions, and a good reporting system along with a strong working relationship between the volunteer, client and auspice should prevent any negligence.[321]

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314 See further Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 8–9.

315 Department of Health (Cth), above n 9, 20.

316 CPSA was opposed to national guidelines because of a perception that the role of community visitors was to be changed, however this is not the intent of this recommendation: Combined Pensioners and Superannuants Association, *Submission 281*.

317 Department of Social Services (Cth), above n 313, 4–5.

318 See, eg, State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Eastern Community Legal Centre, *Submission 357*; COTA, *Submission 354*; Law Council of Australia, *Submission 351*; Queensland AIDS Council (on Behalf of the National LGBTI Community Visitor Scheme Auspices' Network), *Submission 331*; Elder Care Watch, *Submission 326*; Seniors Legal and Support Service Hervey Bay, *Submission 310*; ADA Australia, *Submission 283*; Lutheran Church of Australia, *Submission 244*; Brotherhood of St Laurence, *Submission 232*; Aged and Community Services Association, *Submission 217*.

319 Elder Care Watch, *Submission 326*.

320 Queensland AIDS Council (on Behalf of the National LGBTI Community Visitor Scheme Auspices' Network), *Submission 331*.

321 Ibid.

4.230 QuAC and the Eastern Community Legal Centre recommended that visitors should report any concerns that they have regarding abuse or neglect to their CVS coordinator, who would be in a more appropriate position to take further action.[322] ADA Australia suggested that relationships between advocacy services and the CVS could be strengthened, such that National Aged Care Advocacy (NACAP) services could deliver regular education sessions to CVS program coordinators and volunteers on the role of advocacy services and the rights of aged care recipients.[323]

4.231 In 2016, the Department of Health reviewed the CVS.[324] The ALRC suggests that Recommendation 4–14 be considered as part of the Department's response to the CVS review.[325]

Official visitors

4.232 In the Discussion Paper, the ALRC proposed that there be an 'official visitors' scheme established for residential aged care. It was suggested that such a program would offer an additional safeguarding mechanism for older people in residential aged care, providing independent monitoring of residential aged care to ensure that residents' rights are being upheld, and to identify issues of abuse and neglect. A number of submissions were supportive of a visitors program with a rights-monitoring focus in aged care.[326]

4.233 However, the ALRC has decided not to make a specific recommendation that an official visitors scheme be established. At this stage, the ALRC considers that reform efforts are better focused on establishing a robust serious incidents response scheme. It also considers that support for the existing body of highly trained aged care advocates should be continued. The NDIS Quality and Safeguarding Framework intends to undertake an independent evaluation of state and territory visitors schemes to consider how such schemes might integrate with other oversight mechanisms.[327] Results of this evaluation should inform future consideration of the utility of an official visitors scheme in aged care.

4.234 The Australian Government has signalled its intention to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by December 2017.[328] OPCAT's objective is to

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322 Ibid; Eastern Community Legal Centre, *Submission 357*.

323 ADA Australia, *Submission 283*.

324 Department of Health (Cth), *Community Visitors Scheme* <agedcare.health.gov.au>.

325 HammondCare and ACSA argued that national guidelines should be developed after consultation with the aged care sector and exiting auspices: HammondCare, *Submission 307*; Aged and Community Services Association, *Submission 217*.

326 See, eg, Office of the Public Advocate (Qld), *Submission 149*; Australian College of Nursing, *Submission 147*; United Voice, *Submission 145*; State Trustees Victoria, *Submission 138*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*.

327 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 53–54.

328 Julie Bishop MP and Senator George Brandis, 'Improving Oversight and Conditions in Detention' (Media Release, 9 February 2017); *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006.

establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty.[329] Compliance with OPCAT will require the establishment of a 'National Preventive Mechanism' to conduct inspections of all places of detention.[330] As the ACT Human Rights Commission noted in its submission, any place where people may not be free to leave, that is subject to the regulation or oversight of the state, could fall within the scope of a 'place of detention'—including residential aged care facilities.[331] Ensuring that residential aged care facilities are compliant with OPCAT will provide important additional oversight of human rights standards in aged care.

Advocacy services

4.235 The National Aged Care Advocacy Programme (NACAP) provides assistance to people receiving Commonwealth-regulated residential care and home care.[332] The NACAP was reviewed in 2015, and there are plans to redesign the aged care advocacy system.[333] Consultation on a draft National Aged Care Advocacy Framework closed on 7 October 2016.[334]

4.236 The ALRC therefore does not propose any changes to aged care advocacy services. However, submissions to this Inquiry highlighted the importance of an effective system of funded advocacy in providing safeguards for older people. For example, the Office of the Public Advocate (Vic) argued that advocacy services were 'essential to protecting the rights of older people in care. This is particularly important when moving to a consumer directed model of care to enable consumers to get the full benefit of such a system'.[335]

4.237 Stakeholders also pointed out that the effectiveness of advocacy services relied on their independence and accessibility. Accessibility for those with cognitive impairment, as well as those who may be isolated or physically frail, are key challenges that must be addressed to ensure that advocacy operates as a safeguard for older people. A number of submissions also emphasised the importance of ensuring

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329 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006 art 1.

330 Ibid art 3.

331 ACT Human Rights Commission, *Submission 337*; *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006 art 4(2).

332 *Aged Care Act 1997* (Cth) div 81. Advocacy is also available for those receiving aged care through the CHSP: Australian Healthcare Associates, *Department of Social Services Review of Commonwealth Aged Care Advocacy Services Final Report* (2015) 15.

333 Australian Healthcare Associates, above n 332, 17.

334 Department of Health (Cth), *Consultation on the Draft National Aged Care Advocacy Framework* <www.consultations.health.gov.au>. A revised draft Framework was released in December 2016, updated with feedback from this consultation period. The Framework is to be finalised in mid-2017: Department of Health (Cth), *(Draft) National Aged Care Advocacy Framework (Version 2.0)* (2016).

335 Office of the Public Advocate (Vic), *Submission 95*. See also Office of the Public Advocate (Qld), *Submission 149*; Australian College of Nursing, *Submission 147*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*.

that advocacy services should be inclusive of all older people receiving aged care, including Aboriginal and Torres Strait Islander peoples; culturally and linguistically diverse people; and lesbian, gay, bisexual, transgender and intersex people.[336]

Other issues

Aged care assessments

4.238 Before being approved as a care recipient, a person must have their care needs assessed.[337] For care regulated under the *Aged Care Act*, the assessment is conducted by an Aged Care Assessment Team (ACAT).[338] For the CHSP, the assessment is performed by a Regional Assessment Service (RAS).

4.239 The ALRC does not propose any changes to aged care assessments. As identified in the recommended National Plan,[339] it is important that all people working with older people receive appropriate training regarding elder abuse, and this is applicable also to personnel working in aged care assessment programs.

4.240 A number of submissions commended the value of ACATs, and their potential to play a role in identifying abuse.[340] Notwithstanding this, some noted that their role is a specific one—to assess a person's need for aged care—and argued that they were not appropriately placed to take on a broader case management role in cases of suspected elder abuse.[341]

4.241 The ACAT and RAS use the National Screening and Assessment Form (NSAF) when assessing the aged care needs of clients.[342] The NSAF includes items relating to risks, hazards, or concerns to a person in their home,[343] and concerns relating to living arrangements. It also includes a question asking if a person is 'afraid of someone who hurts, insults, controls or threatens you, or who prevents you from doing what you want'.[344] A number of supplementary assessment tools may also be used in the assessment process, including tools relating to pain, alcohol use, and activities of daily living.[345] Consideration might be given to including a validated tool for assessment of

336 See, eg GLBTI Rights in Ageing Institute, *Submission 132*; Older Persons Advocacy Network, *Submission 43*; Alice's Garage, *Submission 36*.
337 *Aged Care Act 1997* (Cth) s 22-4; Department of Health (Cth), above n 2, 76–82.
338 In Victoria, the assessment is provided by an Aged Care Assessment Service. The abbreviation ACAT is used in this chapter to refer to all assessment services for the purposes of the *Aged Care Act*.
339 See further rec 3–1.
340 See, eg, Justice Connect, *Submission 182*; Office of the Public Advocate (SA), *Submission 170*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; GLBTI Rights in Ageing Institute, *Submission 132*; Macarthur Legal Centre, *Submission 110*; Aged and Community Services Australia, *Submission 102*.
341 UnitingCare Australia, *Submission 162*; Aged and Community Services Australia, *Submission 102*; Australian and New Zealand Society for Geriatric Medicine, *Submission 51*.
342 Department of Social Services (Cth) and My Aged Care, *National Screening and Assessment Form Fact Sheet* (2015).
343 Department of Social Services (Cth) and My Aged Care, *National Screening and Assessment Form User Guide* (2015) 137.
344 Ibid 144–45.
345 Ibid 189.

risks of elder abuse where concerns have been identified.[346] Additionally, ensuring that ACATs and the RAS have a clear understanding of the referral pathways for elder abuse, will be an important component of broader elder abuse response strategies.[347]

346 See, eg, in the context of family violence, the Common Risk Assessment Framework: Domestic Violence Resource Centre Victoria, *CRAF* <www.dvrcv.org.au/training/family-violence-risk-assessment-craf>.

347 For the ALRC recommendations regarding adult safeguarding agencies, which would form a significant element of elder abuse referral pathways, see ch 14. Office of the Public Advocate (SA), *Submission 170*; Australian Nursing & Midwifery Federation, *Submission 163*; GLBTI Rights in Ageing Institute, *Submission 132*; Law Council of Australia, *Submission 61*.

5. Enduring Appointments

Contents

Summary

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

5.2 However, enduring documents may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is

the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney.[1]

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

- adopting nationally consistent safeguards that seek to minimise the risk of abuse of an enduring document;
- giving tribunals jurisdiction to award compensation when duties under an enduring document have been breached; and
- establishing a national online registration scheme for enduring documents.

5.4 These recommendations strengthen the important role that enduring appointments have for older people seeking to protect against a loss of decision-making ability in the future, by reducing the potential for those appointments to be misused. This chapter is focused on enduring powers and does not apply to non-enduring powers of attorney.

Development of enduring powers

Historical origins

5.5 Powers of attorney have been used for centuries. The power of attorney gives legal power to one person—the attorney—to deal with financial and property matters on behalf of the person granting the power—the principal (or donor).[2] The relationship created by the power of attorney is one of agency, with the attorney having power as agent for the principal.[3] Agency attracts fiduciary duties in equity.[4] Under the common law, a power of attorney terminates automatically when a principal loses legal capacity.[5] This is because the principal-agent relationship is a personal one and the agent has no authority to do anything the principal could not lawfully do for themselves. When the principal has lost capacity and is unable to make legal decisions, those same decisions can no longer be made by the attorney.

5.6 This created concern for many people who wished to make a power of attorney specifically to allow an appropriate person to manage their affairs for them if their decision-making ability became impaired in their later years. In response, the states and territories enacted legislation in the 1970s and 1980s to establish 'enduring' powers of

1 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria* (2015) 5; Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 11.

2 This power of attorney is also known as a general power of attorney or non-enduring power of attorney.

3 Gino Dal Pont, *Law of Agency* (Lexis Nexis Butterworths, 3rd ed, 2014) [1.30].

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

5 Gino Dal Pont, *Powers of Attorney* (Lexis Nexis Butterworths, 2nd ed, 2015) [11.25]-[11.29]. The concept of 'legal capacity' is discussed in ch 2.

attorney—powers of attorney that continue (or endure) notwithstanding that a principal has lost decision-making ability.[6]

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

5.8 In relation to non-financial matters, the common law did not provide an equivalent to the power of attorney or enduring power of attorney. For example, it was not possible at common law for a person with legal capacity to appoint another person to make personal or lifestyle decisions for them—such as consenting to medical treatment or deciding that they should live in a secure environment—when that person lost the ability to make such decisions for themselves. To address this, the concept of 'enduring guardianship' was first introduced in Australia by the *Guardianship and Administration Act 1993* (SA).[8] Similar arrangements were subsequently enacted in all other states and territories.[9]

5.9 While not the specific focus of this chapter, advance care directives are often prepared at the same time as enduring documents as an important part of planning for a potential loss or impairment of decision-making ability. Advance care directives enable an individual to specifically document the types of medical treatment or intervention they do wish to receive (and do not wish to receive), in the event that they are unable to consent to such medical treatment or its refusal. Advance care directives are written directions regarding future medical treatment recognised under the common law and in most state and territory legislation and which are binding in certain circumstances.[10]

6 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Australasian Legal Information Institute (Austlii) Communities, 2nd ed, 2017) ch 10.
7 Legal Aid ACT, *Submission 58*.
8 O'Neill and Peisah, above n 6, ch 9.
9 See Table 1.
10 O'Neill and Peisah, above n 6, ch 13.

Current law

5.10 The legislation in each state and territory that provides for enduring documents is set out in Table 1.

Table 1: State and Territory legislation covering enduring documents

Jurisdiction	Enduring Powers of Attorney (Financial)	Enduring Guardianship (Personal, Lifestyle and Medical)
Vic	*Powers of Attorney Act 2014* (Vic)[11]	
Qld	*Powers of Attorney Act 1998* (Qld)	
SA	*Powers of Attorney and Agency Act 1984* (SA)	*Advance Care Directives Act 2013* (SA)
WA	*Guardianship and Administration Act 1990* (WA)	
Tas	*Powers of Attorney Act 2000* (Tas)	*Guardianship and Administration Act 1995* (Tas)
NT	*Advance Personal Planning Act 2013* (NT)	
ACT	*Powers of Attorney Act 2006* (ACT)	

5.11 The legislation in each jurisdiction is consistent in that it enables a person to appoint another person to make decisions in relation to financial matters and/or personal/lifestyle/health matters on their behalf now and/or in circumstances where the first person has lost decision-making ability. In each state and territory there is a process for mutual recognition of interstate enduring documents.[12]

5.12 There are, however, significant differences in the way that the legislation prescribes the form of enduring documents. The Australian Capital Territory, Northern Territory, Queensland, and Victoria, provide for a combined financial and personal enduring document.[13] New South Wales, South Australia, Tasmania and Western Australia have separate documents for enduring powers of attorney and enduring guardianship.[14] South Australia has adopted advance care directives legislation which allows a person to appoint a substitute decision maker (equivalent to an enduring guardian),[15] while maintaining a separate process of enduring powers of attorney for financial matters.[16] The Northern Territory has adopted a similar approach to South

11 Certain medical decisions can only be made under a separate enduring document prescribed by the *Medical Treatment Planning and Decisions Act 2016* (Vic).

12 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) ch 3.

13 *Powers of Attorney Act 2006* (ACT); *Advance Personal Planning Act 2013* (NT); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic).

14 *Guardianship Act 1987* (NSW); *Powers of Attorney Act 2003* (NSW).

15 *Advance Care Directives Act 2013* (SA).

16 *Powers of Attorney and Agency Act 1984* (SA).

Australia, but with a combined enduring power of attorney and substitute decision maker for guardianship type matters.[17]

5.13 Beyond questions of form, there are important differences in the legal test of capacity or decision-making ability and differences concerning who has the authority to assess and certify capacity or decision-making ability.[18] Historically, the obligations on the attorney, and the standard by which they were to act, were not set out in legislation. Instead the obligations were defined by common law and equitable fiduciary duties—particularly duties of loyalty and duties of due care and diligence.[19] Guardians are typically required to act in the 'best interests' of the principal.[20] More recently, states such as Queensland and Victoria have passed legislation that sets out principles to guide decision making by attorneys.[21] Those principles seek to uphold the fundamental rights of the principal.[22] This approach is not applied consistently across the states and territories.

5.14 The ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* Report), recommended a shift from the 'best interests' standard to one based on the 'will, preferences and rights' of the person, reflecting the paradigm shift towards supported decision making in the *Convention on the Rights of Persons with Disabilities* (CRPD).[23] The implementation of this approach in state and territory guardianship laws will lead to a change in the way in which individuals with diminished decision-making ability are supported to make decisions.

5.15 Tasmania is the only jurisdiction in which it is compulsory to register enduring documents—both powers of attorney and enduring guardianship.[24] When conducting transactions in land, there is a requirement in all states, except Victoria, to register an enduring power of attorney document with the respective state and territory body responsible for land titles.[25] In certain jurisdictions there is also an option to register an enduring power of attorney.[26] Accordingly, outside of Tasmania, there is no general requirement for registration of enduring documents.

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17 *Advance Personal Planning Act 2013* (NT).

18 See ch 2 for a discussion on the law regarding legal capacity.

19 O'Neill and Peisah, above n 6.

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

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

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

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

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

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

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

Safeguards

Recommendation 5–1 Safeguards against the misuse of an enduring document in state and territory legislation should:

(a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;

(b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;

(c) enhance witnessing requirements;

(d) restrict conflict transactions;

(e) restrict who may be an attorney;

(f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and

(g) mandate basic requirements for record keeping.

5.16 In the *Equality, Capacity and Disability* Report, the ALRC recommended that the appointment and conduct of substitute decision makers be subject to appropriate and effective safeguards.[27] Recommendation 5–1 builds on the excellent work that has been occurring across states and territories to improve protections from abuse for those older persons who have granted enduring powers to an attorney or guardian. Recommendation 5–1 is formulated in an effort to ensure that such safeguards are appropriately calibrated and do not unnecessarily burden principals or their attorney/guardian in making or acting under an enduring document.

5.17 Recommendation 5–1 seeks to achieve national consistency in safeguards supporting the national approach to enduring documents explored later in this chapter.

Giving principals choice

5.18 Recognising the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances, gives principals choice as to who they want to be their attorney/guardian, for what decisions, and gives the principal the option to exclude certain matters and powers. Choice as to when the enduring power comes into force and how that is determined is particularly important when the older person is concerned that the enduring powers should only be exercised when they have genuinely lost decision-making ability in relation to a specific matter (eg, finances). Choice is an important ingredient in giving the principal control over the nature and

27 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 114.

extent of their relationship with the attorney/guardian. It reflects the active role of the older person in crafting the enduring document to meet their needs, rather than handing over a 'blank cheque'.

5.19 This choice can protect an older person from financial abuse, for instance by prohibiting the enduring attorney from selling the older person's home or other valued assets.

5.20 State and territory legislation typically provides this choice and as such this element of the recommendation may not appear new. However, the formalities of registering an enduring power of attorney for the purposes of a land transaction may require, as a matter of practice, that the power of attorney document gives plenary powers to the attorney. While the issue of registration is discussed below, irrespective of changes to registration the ALRC recommends that, at all times and in all circumstances, the principal should be able to determine the scope and extent of their enduring document. Principals should not be required to give broader or unlimited powers in order to be able to effect certain transactions.

Will, preferences and rights

5.21 In the *Equality, Capacity and Disability* Report, the ALRC recommended a new model for decision making to encourage the adoption of supported decision making at a Commonwealth level (the Commonwealth Decision-Making Model).[28] The model represents a significant shift in approaches to decision making. Its application to enduring documents would require that the basis for all decisions made by those acting under an enduring document be the will, preferences and rights of the principal.[29]

5.22 Traditionally this would be considered a description of the decision-making standard required of the enduring attorney/guardian rather than a safeguard. However, the ALRC considers that ensuring that the principal's will and preferences are at the centre of all decisions made by the substitute decision maker, rather than being subjugated to an objective 'best interests' assessment, is an important protection against abuse. As set out in the *Equality, Capacity and Disability* Report, the model addresses what should happen when the current will and preferences of a person cannot be determined. The focus should be on what the person's will and preferences would likely be. In the absence of a means to determine this, the decision maker must act to promote and uphold the person's human rights and act in a way that is least restrictive of those rights.[30]

28 Ibid 63–86.

29 This is expressed in the 'Will, Preferences and Rights Guidelines' in relation to representative decision-making. See Ibid ch 2.

30 Ibid.

5.23 State and territory laws are already moving away from the 'best interests' test that typically applied in relation to enduring appointments (particularly guardianship).[31] Recommendation 5–1 recognises the incremental changes at the state and territory level and suggests that the National Decision-Making Principles and Guidelines be adopted nationally as the standard for substitute decision makers under enduring documents.[32]

Enhanced witnessing

5.24 Witnessing has important evidentiary functions: confirming that the principal did in fact sign the document; and depending on the type of document, providing confirmation that the principal understood the nature of the document they were signing and did so voluntarily.[33]

5.25 Tightening or 'enhancing' witnessing requirements for enduring documents has been an important reform in state and territory legislation in recent years. Key features of enhanced witnessing include limiting the professionals who are authorised to witness enduring documents, and requiring witnesses to certify certain matters as to the nature of the principal's understanding of the document ('legal capacity') and the fact that the document was signed voluntarily.[34]

5.26 Enhanced witnessing assists in ensuring that enduring documents are made and operative only in circumstances genuinely authorised by an older person, thereby upholding choice and control. These stricter witnessing requirements have sought to respond to an identified problem raised by community legal centres, elder abuse hotlines and other welfare groups.[35] Stakeholders have highlighted cases of older people being pressured into signing these instruments.[36] In other cases, the instruments may have been signed by older people with reduced decision-making ability.[37] Enhanced witnessing has also had an educative function, ensuring that the principal understands the nature and extent of the document which is then confirmed by the witnesses.[38]

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31 See, eg, *Powers of Attorney Act 1998* (Qld) sch 1. However, best interests tests are still used, for example: *Powers of Attorney Act 2000* (Tas) s 32(1A)(a).

32 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–1.

33 Andrew Lang, 'Formality v Intention—Wills in an Australian Supermarket' (1985) 15 *Melbourne University Law Review* 82, 87.

34 See, eg, *Powers of Attorney Act 2014* (Vic) ss 35, 36.

35 See, eg, Justice Connect and Seniors Rights Victoria, *Submission 120*; Cairns Community Legal Centre, *Submission 30*.

36 Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; University of Newcastle Legal Centre, *Submission 44*.

37 Alzheimer's Australia, *Submission 80*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Social Work Department Redland Hospital Queensland Health, *Submission 10*.

38 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 81.

5.27 Nevertheless, the ALRC considers that witnessing requirements should not be so onerous that people are dissuaded from putting in place enduring documents.[39] Accordingly, the ALRC's approach to witnessing seeks to provide appropriate protection against abuse, while ensuring that Australians can access enduring documents as an important planning tool for later life and the potential loss or impairment of decision-making ability.

5.28 There is a wide range of approaches to witnessing enduring documents across the states and territories, represented in Appendixes 1 and 2 of this Report. Appendix 1 covers the four jurisdictions where there is one enduring document to cover both financial matters and personal and lifestyle matters. Appendix 2 covers the four jurisdictions where there are separate documents to appoint enduring attorneys and enduring guardians (or equivalent). The appendixes explain how many witnesses are required, the prescribed qualifications of witnesses and what, if any, certificates they are required to provide at the time of witnessing the documents in relation to matters such as legal capacity, understanding and the absence of duress.

5.29 In response to concerns about the adequacy of witnessing requirements and the differences across states and territories, the ALRC proposed in the Discussion Paper a specific model of enhanced witnessing:

> Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:
>
> (a) legal practitioner;
>
> (b) medical practitioner;
>
> (c) justice of the peace;
>
> (d) registrar of the Local/Magistrates Court; or
>
> (e) police officer holding the rank of sergeant or above.
>
> Each witness should certify that:
>
> (a) the principal appeared to freely and voluntarily sign in their presence;
>
> (b) the principal appeared to understand the nature of the document; and
>
> (c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.[40]

5.30 When compared to the witnessing requirements set out in Appendixes 1 and 2, there were four key aspects of the ALRC's recommendation regarding witnessing:

- that there be two witnesses;

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39 The Ontario Law Reform Commission's *Final Report on Legal Capacity, Decision-making and Guardianship* (2017) grappled with finding the balance between addressing abuse and misuse of enduring documents while maintaining the accessibility of an important planning tool for potential loss of capacity. Similarly, the Victorian Law Reform Commission noted, in the context of making wills, that there is a need to balance the risk of abuse with the ability of persons to make their own will easily: Victorian Law Reform Commission, *Succession Laws*, Report (2013) 7.

40 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–4.

- one witness must have prescribed qualifications (which were defined narrowly);
- the witnesses must certify certain matters; and
- that the attorney/guardian's acceptance of the role must also be witnessed and their understanding confirmed by the witnesses.

Two witnesses

5.31 In relation to the number of witnesses required, the ALRC received a number of submissions, particularly from those states and territories where only one witness is currently required, expressing concern that an additional witness would provide little benefit and make it harder to make an enduring document.

5.32 For example, Legal Aid NSW was opposed to the requirement for two witnesses, noting that the prescribed witness in NSW (set out in Appendix 2) must be appropriately qualified to explain the document and confirm that the principal has understood it. Legal Aid NSW explained that the 'proposed requirement for two witnesses would create significant inconvenience for principals and discourage the making of these important documents'.[41]

5.33 In addition, the Office of the Public Advocate (Qld) submitted:

> In our view, a person who is prepared to engage in this type of behaviour and forge a signature of the principal or breach their commitment to the principal, will also not be discouraged from such a course because they may now need to forge a second signature or enlist another person in their abusive or fraudulent conduct.[42]

5.34 The ALRC agrees that, where someone decides to undertake deliberate fraud and/or forgery, a requirement for two witnesses is unlikely to be a deterrent. However, having a second witness provides an opportunity to confirm both the principal's and attorney's apparent understanding of the document and an opportunity to pick up on any behaviours in the principal that may suggest duress or coercion. Another benefit of two witnesses was described by Relationships Australia Victoria: 'this gives more assurance that an older person is not being coerced into the agreement, and secondly provides reassurance for other family members who may be concerned about the legitimacy of the document'.[43]

5.35 The important qualification for the second witness is that they are independent, with no family connection to the principal or attorney. While requiring a second witness, in those states and territories where there is currently no requirement for one, may impose an additional administrative burden on the making of an enduring document, in seeking to harmonise witnessing requirements across the states and territories, the ALRC considers it appropriate to adopt the more rigorous approach of two witnesses.

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41 See, eg, Legal Aid NSW, *Submission 352*.
42 Office of the Public Advocate (Qld), *Submission 361*.
43 Relationships Australia Victoria, *Submission 356*.

One witness must have prescribed qualifications

5.36 In response to the ALRC's proposal that one witness must be either a legal practitioner, medical practitioner, justice of the peace, registrar of the Local/Magistrates Court, or a police officer holding the rank of sergeant or above, two key issues were raised in submissions. The first was whether the list was too narrow; and the second was whether these individuals had sufficient training to assess the 'legal capacity' of the principal.

5.37 A number of stakeholders supported the ALRC's proposed list of professions.[44] COTA, however, submitted that

> [i]t is possible that the list of classes of witness … is too narrow and should be expanded. There will be many places in Australia where the witnesses referred to in the Proposal will simply not be available, or where people will not feel comfortable having such a document witnessed by, say, a local police officer, even if one were available.[45]

5.38 A similar view was submitted by Holman Webb Lawyers:

> We are concerned that the proposed witnessing requirements may not be practical for many elderly people with mobility and complex health issues and suggest that the list of authorised witnesses be expanded, for example, to include registered nurses and pharmacists.[46]

5.39 The Law Council of Australia also considered the list 'too restrictive', which

> may have the effect of discouraging people from making an enduring power of attorney, or result in powers of attorney that are invalid on the basis that the witnessing requirements are not met. Further, there may also be difficulties for people in regional or remote areas in relation to finding appropriate witnesses. The Law Council suggests that an enduring power of attorney should be able to be witnessed by two independent persons, at least one of whom is on the list of authorised witnesses in the *Statutory Declarations Regulations 1993* (Cth). This will mean that the document is required to be witnessed by an independent person of a certain standing and responsibility within the community, while not placing a barrier in the path of an individual wishing to put one of these documents in place.[47]

5.40 In addition, a number of professional bodies suggested that their members be authorised to witness enduring documents.[48]

5.41 The second issue raised in submissions was whether these individuals had sufficient training to assess the 'legal capacity' of the principal. The Australian Research Network on Law and Ageing (ARNLA) submitted that

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44 State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (SA), *Submission 347*; Office of the Public Advocate (Vic), *Submission 246*.

45 COTA, *Submission 354*.

46 Holman Webb Lawyers, *Submission 297*.

47 Law Council of Australia, *Submission 351*.

48 Chartered Accountants Australia and New Zealand, *Submission 368*; CPA Australia, *Submission 338*; Institute of Legal Executives (Vic), *Submission 320*; Financial Planning Association of Australia (FPA), *Submission 295*; Australian Institute of Conveyancers (Vic Div). *Submission 263*.

> [i]t is important that the witnesses are provided with appropriate information and training in this regard and are instructed on factors that may adversely affect optimal capacity in older persons such as the nature of their cognitive impairment, the time of day, the administration of medication etc, and the presence of family members who can both facilitate and obstruct the assessment process. Witnesses also need mandatory education and training on the impact of language and education levels upon capacity, and the use of interpreters where necessary.[49]

5.42 Similarly, a submission led by Dr Kelly Purser said that 'people witnessing must be appropriately trained/qualified to spot a potential lack of capacity and to know how to make an assessment. National capacity assessment guidelines building on an interdisciplinary approach must be developed'.[50]

5.43 The National Older Persons Legal Services Network suggested that

> [a]nyone witnessing documents should have to do training on issues such as legislative requirements, capacity, responsibilities and duties, elder abuse, correct witnessing procedures (eg not in the presence of the attorney) and the consequences of any failure to comply with statutory obligations.[51]

5.44 The ALRC agrees that the list of professionals proposed to witness enduring documents set out in the Discussion Paper was too narrow and that, if implemented, would have imposed impediments to the use of enduring documents. Accordingly, the ALRC suggests that one of the two witnesses to an enduring document should be required to be a professional whose licence to practise is dependent on their ongoing integrity and honesty and who is required to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document. Given that legal tests of decision-making ability underpin such witnessing requirements, the Law Council of Australia should be involved in reviewing the content of training courses on witnessing enduring documents. The training should be sufficient to enable the witness to do the following, as submitted by the Law Council of Australia:

> The prescribed witness should be required to explain to the principal the:
>
> - nature of a power of attorney;
> - different features of the various types of powers of attorney, with particular attention to the distinguishing feature of an enduring power of attorney;
> - attributes most desired in an attorney;
> - fiduciary obligations that an attorney owes the principal;
> - different ways that multiple attorneys may be appointed (being joint, several and consecutive) and the pros and cons with each approach;
> - limit on an attorney's authority imposed by law;

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49 Australian Research Network on Law and Ageing, *Submission 262*.
50 Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*.
51 National Older Persons Legal Services Network, *Submission 363*.

- additional powers that may be conferred on an attorney, and the pros and cons of those powers in the principal's circumstances;
- conditions and limitations that may be imposed on the attorney's authority, and the pros and cons thereof; and
- prescribed and other options concerning the operation of the power of attorney.[52]

5.45 The ALRC considers that this strikes an appropriate balance between access to enduring documents and ensuring appropriate protections against such documents being executed when the principal lacks decision-making ability or is suffering some form of coercion or duress.

Witnesses must certify certain matters

5.46 A key aspect of enhanced witnessing implemented in a number of states and territories has been to require witnesses not just to sign the enduring document but positively certify certain matters, including the 'legal capacity' of the principal to make an enduring document. This approach was suggested in the Discussion Paper. This had broad support in submissions. However, the Law Council of Australia raised particular concerns regarding the proposed form of certification, where the witness was not legally trained. The Law Council of Australia submitted that

> a more workable attestation would be that the witness is not aware of anything that causes them to believe that:
>
> - the principal did not freely and voluntarily sign the document;
> - the principal did not understand the nature of the document; or
> - the enduring attorney did not freely and voluntarily sign the document.[53]

5.47 The ALRC endorses this approach to certification by witnesses to an enduring document in relation to the principal. The ALRC considers that this appropriately balances the need to confirm that the principal understood the nature of the document and was signing voluntarily, with the need to ensure that witnesses are not being asked to make too onerous certifications with respect to the state of mind of the principal or their decision-making ability.

Witnessing the attorney's/guardian's acceptance of the enduring document

5.48 The last, and arguably most important, aspect of the ALRC's proposal regarding enhanced witnessing in the Discussion Paper was that the attorney's/guardian's signature should also be witnessed, and that the witnesses should certify that the attorney/guardian was signing voluntarily and understood the nature of the document. This was designed to address a key concern with respect to the misuse of enduring

52 Law Council of Australia, *Submission 351*.
53 Ibid.

documents, which appears to be caused by the attorney not understanding the nature of their role or the limits on their authority.[54]

5.49 Currently, as set out in Appendixes 1 and 2, in most jurisdictions there is rarely a requirement for the attorney's signature to be witnessed and, accordingly, there is a missed opportunity for a formal discussion with the attorney as to the nature of the obligations they are accepting.

5.50 Most submissions supported the proposed witnessing of the attorney's/guardian's signature.[55] Some raised concerns that this would mean that the attorney and principal had to sign at the same place and same time and this would be problematic where the attorney and principal live in different cities.[56] However, the ALRC suggests that it is in fact beneficial for the principal and attorney to sign the document separately and potentially gives time for independent discussions as to the implications of signing the enduring document.

Restrictions on conflict transactions

5.51 Transactions where there is, or there is perceived to be, a conflict between the personal interests of an attorney and the interests of the principal have been identified as a key source of financial abuse.[57] Moreover, as a matter of law, the fiduciary relationship between the attorney and the principal means that the attorney must not enter such transactions, unless authorised in the instrument of appointment or by the court.

5.52 These arrangements may occur in situations where the principal and attorney were formerly in a family business together and a number of assets of the business are owned by the principal and leased by the attorney. They can also involve the use of 'family assets' such as holiday homes.

5.53 Accordingly, in the Discussion Paper, the ALRC proposed:

> Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:
>
> - the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
> - a tribunal has authorised the transaction before it is entered into.[58]

5.54 The proposal specifically built on the approach to conflict transactions in legislation in Victoria and Queensland.[59] Starting with an express prohibition on

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54 Justice Connect and Seniors Rights Victoria, *Submission 120*; Legal Aid ACT, *Submission 58*.
55 See, eg, National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Vic), *Submission 246*.
56 Seniors Legal and Support Service Hervey Bay, *Submission 310*.
57 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 175.
58 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–6.
59 *Powers of Attorney Act 1998* (Qld) s 73; *Powers of Attorney Act 2014* (Vic) s 64.

conflict transactions means that, when making an enduring document, a principal must consider, having regard to their finances and their relationship with the attorney, whether conflicts are likely and in what areas. Having identified potential conflicts, the principal has the choice whether to authorise the attorney to act in those areas. This ensures that the principal retains choice and control. When appointing a spouse as an enduring attorney it may be appropriate and necessary to permit all conflict transactions in the enduring document.

5.55 Once an enduring power of attorney is in effect, an explicit statutory prohibition on conflict transactions requires an attorney to identify potential conflicts of interest and sends a powerful signal that they must either avoid such transactions or seek approval for those transactions. The statutory prohibition also builds on, and is consistent with, fiduciary duties in equity.

5.56 Prior authorisation by a principal or tribunal can also protect the attorney from subsequent accusations that a particular transaction turned out to be particularly advantageous to the attorney at the expense of the principal.

5.57 The specific drafting of the conflict prohibition would need to take into account gifts and donations made by an attorney on behalf of the principal. Preferably decisions regarding the type and nature of gifts and donations would be guided by the principal's wishes as expressed in the enduring document.

5.58 The proposal had broad support in submissions.[60] For example, Legal Aid ACT submitted that

> [i]t is vital to implement laws regulating transactions where there is, or may be, conflict of attorney/principal interests. Laws of this kind provide additional protections against financial abuses perpetrated by enduring power of attorneys (EPOA), ensuring that the interests of vulnerable older Australians retain primacy.[61]

5.59 However, a number of stakeholders raised concerns that what is a conflict transaction is not well understood.[62] For example, the Assets, Ageing and Intergenerational Transfers Research Program, of the University of Queensland suggests that 'more is needed to ensure that conflicts of interest are well understood'.[63]

5.60 A similar view was expressed by the Australian Research Network on Law and Ageing (ARNLA), who suggested that attorneys 'should be provided with information that includes examples of conflict transactions and prompts them to consider whether a conflict exists'.[64]

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60 Australian Bankers' Association (ABA), *Submission 365*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (SA), *Submission 347*; FINSIA, *Submission 339*; CPA Australia, *Submission 338*; Office of the Public Advocate (Vic), *Submission 246*.

61 Legal Aid ACT, *Submission 223*.

62 Dixon Advisory, *Submission 342*; ACT Disability Aged and Carer Advocacy Service (ADACAS), *Submission 269*.

63 Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.

64 Australian Research Network on Law and Ageing, *Submission 262*.

5.61 The ALRC agrees that education and understanding is important in respect of conflict transactions and that the model enduring document, discussed below, should include appropriate guidance on what conflicts are and how they may be managed by the principal in designing their enduring documents.

5.62 Stakeholders also suggested that, consistent with the approach in Queensland and Victoria, where the enduring document comes into effect prior to a loss of decision-making ability, the principal should be able to approve conflict transactions rather than necessarily seeking tribunal approval.[65] The ALRC agrees with this approach.

Ineligible person

5.63 In the Discussion Paper the ALRC proposed that:

> A person should be ineligible to be an enduring attorney if the person:
>
> (a) is an undischarged bankrupt;
>
> (b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);
>
> (c) has been convicted of an offence involving fraud or dishonesty; or
>
> (d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.[66]

5.64 Excluding inappropriate persons from acting as enduring attorneys is an important protection against abuse. Where individuals who have a history of dishonesty and fraud offences are appointed under an enduring document, there may be a greater risk of abuse.[67]

5.65 Most submissions who commented on this proposal supported it.[68] Two issues were raised in a number of submissions. The first relates to paragraph (d) of the proposal and the need to distinguish between family members providing informal support and paid care workers, health providers and accommodation providers.[69] The ALRC agrees with this clarification. Family and friends providing an older person with care, accommodation and health services should be able to act as an enduring attorney.

5.66 The second issue relates to paragraph (c) of the proposal. Stakeholders noted that in Victoria there is an exception to the prohibition on an individual with such convictions acting as an enduring attorney where the offences have been disclosed to the principal and the principal has chosen to appoint the individual knowing of the convictions.[70] Stakeholders have suggested that this exception retains the older

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65 See, eg, State Trustees (Vic), *Submission 367*.
66 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–7.
67 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 142.
68 See, eg, Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*.
69 Legal Aid ACT, *Submission 223*.
70 See, eg, State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*.

person's choice and control.[71] It also ensures that the older person is able to put in place an enduring document when the only person they wish (or is available) to be an enduring attorney has convictions.

5.67 The Eastern Community Legal Centre (ECLC) raised a separate issue in relation to these convictions, noting in particular that enduring documents are often executed many decades before they are used. They note that there is no mechanism for requiring disclosure of convictions recorded *after* the document is signed. They suggested that

> persons who are acting under an enduring power of attorney document should be required to report any of the ineligibility criteria listed therein which arise after the document has been signed. Where the power has not yet been activated, the report should be made to the donor who may then amend or revoke the document. Where the power has been activated and the donor no longer has capacity to make or revoke an enduring power of attorney, the report should be made to the tribunal with appropriate jurisdiction.[72]

5.68 The ALRC notes that restrictions on individuals with convictions for fraud and dishonesty are designed to address the identified greater risk of financial elder abuse.[73] In this context, the process of disclosure and approval by the principal may not be the most appropriate response. The typically close personal relationship between the proposed attorney and the principal may mean that the principal is unable to objectively assess the risk of future financial abuse.

5.69 Nevertheless, the ALRC considers that a blanket prohibition may be too restrictive. The ALRC considers that state and territory tribunals should have the power to assess and determine the suitability of individuals, with convictions for fraud and dishonesty, to act as enduring attorney in each individual case. The ALRC also supports the suggestion from the ECLC that persons who have been appointed under an enduring power of attorney document should be required to report any subsequent events that may make them ineligible.

5.70 The ALRC considers that, while not allowing a principal to appoint a person who has convictions for fraud and dishonesty offences necessarily reduces choice, the appropriate balance between choice and protection requires the exclusion of those people from being an attorney unless authorised by a tribunal.

Prohibited decisions

5.71 In the Discussion Paper, the ALRC proposed:

> Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:
>
> (a) making or revoking the principal's will;
>
> (b) making or revoking an enduring document on behalf of the principal;
>
> (c) voting in elections on behalf of the principal;

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71 See, eg, State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*.
72 Eastern Community Legal Centre, *Submission 357*.
73 See ch 2.

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

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

(f) consenting to the principal entering into a sexual relationship.[74]

5.72 The purpose of the proposal was to set out in legislation those decisions which cannot be exercised by a representative because those decisions can only be exercised personally and cannot be delegated to an attorney/guardian. In the Discussion Paper, the ALRC also suggested that an attorney not act in relation to the principal's superannuation unless specifically authorised in the enduring document.[75]

5.73 The list built on extensive case law regarding powers of attorney and agents. Lists of this type have been introduced in many states and territories.[76] Stakeholders have stated that having a straightforward statutory list of prohibited decisions can assist in understanding the limits of the roles of an attorney/guardian.[77] A list that can only be distilled from the common law or individual pieces of legislation does not provide a simple and straightforward explanation. It is also useful to set out in statute the specific powers of an attorney/guardian where there is some ambiguity under the common law. Clarity improves understanding which may mitigate against the risk of abuse.

5.74 This proposal was largely non-controversial and received few substantive comments in submissions. A few stakeholders suggested that the list be included together with the enduring document form so that the information was readily disseminated to potential principals and attorneys.[78] Relationships Australia Victoria (RAV) supported the proposal, noting that 'the parameters of a Power of Attorney's responsibilities are one of the main issues raised in Elder Mediation. RAV also hears concerns from the older person's family members that a will may have been altered unlawfully'.[79]

5.75 The Law Council of Australia suggested that the list of prohibited decisions should be expressed as non-exhaustive.[80] Given the general law obligations on attorneys, the ALRC supports this suggestion.

Record keeping

5.76 In the Discussion Paper, the ALRC proposed that enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.[81]

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74 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–8.
75 Ibid 106. See ch 7.
76 See, eg, *Powers of Attorney Act 2014* (Vic) s 26.
77 Claire McNamara, 'How the POA Act Works: Some Key Features of the Reform' (Presentation at Australian Guardianship and Administration Council (AGAC) 2016 National Conference, Reflecting Will and Preference in Decision Making, 17-18 October 2016).
78 Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.
79 Relationships Australia Victoria, *Submission 356*.
80 Law Council of Australia, *Submission 351*.
81 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–9.

5.77 An explicit requirement to keep records and keep property separate is designed to protect the principal and the attorney. By keeping good records and not co-mingling property, the representative is upholding the distinction between their personal affairs and their fiduciary role as an enduring attorney of the principal.

5.78 Good record keeping demonstrates the way in which the attorney has fulfilled their duties and can protect the representative in circumstances where accusations are made that the representative has failed in their duties.

5.79 The explicit requirement to keep records and to keep property separate is also educative, as it reinforces the nature of the fiduciary role of the representative as the manager of the principal's affairs and the importance of doing so diligently and effectively.

5.80 Record keeping requirements are typically included in state and territory legislation.[82] This proposal was non-controversial and received few substantive comments from stakeholders. Cairns Community Legal Centre submitted that proper record keeping:

> allows for greater transparency with respect to an attorney's conduct. It also makes tracing any abuse a simpler task.
>
> We also believe that an attorney's property should be kept separate from the principal's, as again, it allows for greater transparency and ensures that tracing any abuse is a simpler task.[83]

Towards a balanced approach

5.81 The ALRC recommends that the suite of safeguards in Recommendation 5–1 be provided in each state and territory to ensure the appropriate protection for principals making enduring documents, while maintaining the accessibility and practicality of enduring documents as important planning tools for a potential loss or impairment of decision-making ability. These safeguards should be accompanied with increased awareness raising and education to improve the utilisation of enduring documents.

Redress

Recommendation 5–2 State and territory civil and administrative tribunals should have:

(a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and

(b) the power to order any remedy available to the Supreme Court.

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82 See, eg, *Powers of Attorney Act 2000* (Tas) s 32AD; *Guardianship and Administration Act 1990* (WA) s 107.

83 Cairns Community Legal Centre Inc, *Submission 305*.

5.82 Recommendation 5–2 covers misuse of powers by enduring attorneys/guardians, as well as guardians and financial administrators appointed by a court or tribunal.[84] In many instances of financial abuse (or abuse by a guardian which causes loss), there are limited options for an older person to seek redress, and few consequences for the representative who has misused their power.

5.83 An abused person may want their money or assets returned, but may not want police involvement, preferring to retain relationships and not see the person prosecuted. They also may not be willing or able to afford to commence a civil action in the Supreme Court.

5.84 In respect of enduring appointments, state and territory tribunals are typically responsible for supervising enduring arrangements, with the power to revoke or amend those arrangements on the application of an interested party.[85] Recommendation 5–2 would extend that power to enable the tribunal to order an enduring attorney/guardian to pay compensation where they have breached their obligations under an enduring document causing the principal loss. A number of jurisdictions have statutory compensation regimes, including Queensland and South Australia.[86] This recommendation would have the benefit of the tribunal being a 'one stop shop' for enduring power of attorney/guardianship matters.

5.85 Recommendation 5–2 builds on the Victorian model that provides a mechanism for redress in a non-cost jurisdiction—the Human Rights Division of the Victorian Civil and Administrative Tribunal (VCAT).[87] Applications for compensation to VCAT can be made by the person, any attorney or the executor, the public advocate, a family member, or any other person with a special interest in the affairs of the principal.[88] There is no financial cap on the amount that can be compensated. The provision of compensation is discretionary.

5.86 Nevertheless, VCAT can refer an application for compensation to the Supreme Court,[89] and it has been suggested that this may occur where the estate is particularly large or complex.[90] The Act provides an attorney a defence when acting honestly and reasonably.[91]

5.87 In respect of guardians and financial administrators appointed by a court or tribunal, the Queensland Civil and Administrative Tribunal (QCAT) has the power to

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84 Guardians and financial administrators appointed by a court or tribunal are discussed in ch 10.

85 See, eg, *Powers of Attorney Act 1998* (Qld) ss 109A, 110. However, in SA, for example, the powers of the tribunal are narrower, reflecting an expanded role of the Public Advocate to resolve disputes involving substitute decision makers—see *Advance Care Directives Act 2013* (SA) pt 7.

86 *Powers of Attorney Act 1998* (Qld) s 106; *Powers of Attorney and Agency Act 1984* (SA) s 7.

87 *Powers of Attorney Act 2014* (Vic) s 77.

88 *Powers of Attorney Act 2014* (Vic) s 78.

89 Ibid s 80.

90 Elefteria Konstantinou, 'Attorneys: Financial Misconduct and Asset Retrieval: Compensation for a Principal under the *Powers of Attorney Act 2014*. Which Jurisdiction? Supreme Court or Victorian Civil & Administrative Tribunal?' [2016] *Greens List Breakfast Briefing* 4.

91 *Powers of Attorney Act 2014* (Vic) s 74.

order compensation where a guardian or administrator causes loss to the person due to failure to comply with the Act.[92]

5.88 Expanding this jurisdiction to other states and territories was supported by a number of stakeholders.[93] This recommendation should be easily implementable across mainland Australia as there is a civil and administrative tribunal in each of these state and territories.[94] Tasmania currently does not have a single civil and administrative tribunal but is actively considering implementing one.[95]

5.89 Vesting state and territory tribunals with the power to order compensation, where a substitute decision maker has acted outside their powers to cause loss, would serve two purposes. It would provide a practical way to redress loss for older persons unable or unwilling to take action in the Supreme Court. Tribunals aim to facilitate the just, quick and economical resolution of proceedings with a more flexible and informal approach to procedural and evidentiary matters than a court.[96] Having the power to make compensation orders for loss caused by a substitute decision maker fits well within this remit. It would also operate as a deterrent to misusing funds, especially as any interested party, including another family member with an interest in the affairs of the principal, can seek a tribunal order for compensation on behalf of the principal. The tribunals should have appropriate discretion to excuse breaches that are inadvertent or otherwise in good faith, recognising the onerous responsibilities that family members voluntarily assume when taking on the role of a substitute decision maker.

5.90 Recommendation 5–2 uses the Victorian approach as a model—with important variations. In Victoria, the jurisdiction given to VCAT by s 77 of the *Powers of Attorney Act 2014* (Vic) is the power to order an attorney to compensate a principal for a loss caused by the attorney contravening any provision of the *Powers of Attorney Act 2014* (Vic) relating to an enduring power of attorney when acting as the attorney.

5.91 The terms 'compensate' and 'loss' are not defined in the *Powers of Attorney Act 2014* (Vic). Nor are there any provisions in the Act 'detailing the nature of the remedy or orders that can be made'.[97] These provisions have not yet been judicially reviewed

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92 *Guardianship and Administration Act 2000* (Qld) s 59.

93 Seniors Rights Service, *Submission 169*; Mid North Coast Community Legal Centre, *Submission 161*; National Seniors Australia, *Submission 154*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; NSW Trustee and Guardian, *Submission 120*.

94 The Victorian Civil and Administrative Tribunal (VCAT) was established by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the State Administrative Tribunal (SAT) was established by the *State Administrative Tribunal Act 2004* (WA), the ACT Civil and Administrative Tribunal (ACAT) was established by the *ACT Civil and Administrative Tribunal Act 2008* (ACT), the Queensland Civil and Administrative Tribunal (QCAT) was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the NSW Civil and Administrative Tribunal (NCAT) was established by the *Civil and Administrative Tribunal Act 2013* (NSW), the South Australian Civil and Administrative Tribunal (SACAT) was established by the South *Australian Civil and Administrative Tribunal Act 2013* (SA), and the Northern Territory Civil and Administrative Tribunal (NTCAT) was established by the *Northern Territory Civil And Administrative Tribunal Act 2014* (NT).

95 Department of Justice (Tas), *A single tribunal for Tasmania*, Discussion Paper (September 2015).

96 Jason Pizer, 'The VCAT—Recent Developments of Interest to Administrative Lawyers' [2004] (43) *AIAL Forum* 40, 42.

97 Elizabeth Brophy, 'Wayward Attorneys—Financial Misconduct and Compensation for the Principal' (2016) 86 *Wills and Probate Bulletin* 3, 4.

and accordingly, it is not clear how broadly they will be interpreted by the Supreme Court. Accordingly, there is some uncertainty as to the scope of the current jurisdiction granted to VCAT.

5.92 ARNLA suggested that there may be important differences in the nature and the amount of compensation that a tribunal may order to 'compensate a principal for a loss' than may be sought in the equitable jurisdiction of the Supreme Court.[98] Similarly, it has been noted that

> [w]hile the Supreme Court and VCAT both have jurisdiction in relation to s 77, the Supreme Court has broad jurisdiction, including inherent jurisdiction and general equitable jurisdiction but VCAT is a creature of statute and has no inherent jurisdiction or general equitable jurisdiction.[99]

5.93 Importantly, the Supreme Court has available a range of remedies in equity that would extend beyond compensation. These remedies may be particularly important where an attorney has profited from their role, or acted in a situation of conflict of interest such as transferring a property owned by the principal to themselves.[100]

5.94 Accordingly, to avoid any potential for a claimant to receive a markedly different remedy, depending on whether they took their action to the tribunal or the Supreme Court, the ALRC has drafted Recommendation 5-2 in line with the suggestion of the Victorian Law Reform Commission (VLRC) in its *Guardianship Report.*[101] As formulated, Recommendation 5–2 would specifically avoid the situation where the same facts give rise to a different outcome, depending on where the matter was heard.

5.95 Importantly, as is the case in Victoria, the tribunal should have the power to refer a matter to the Supreme Court if the matter is complex or involves questions of law.[102]

Tribunal jurisdiction where the principal and attorney reside in different states

5.96 The ALRC notes that it is possible that a state or territory tribunal vested with the jurisdiction suggested in Recommendation 5–2 could receive a case where the principal and the substitute decision maker reside in different states. State courts are only able to hear matters involving residents of different states in accordance with the *Judiciary Act 1903* (Cth).[103]

5.97 The NSW Court of Appeal, in a 2017 decision, found that states cannot confer jurisdiction on tribunals to make binding determinations on matters involving residents of different states. The Court held that any state legislation attempting to do so would be inconsistent with s 39 of the *Judiciary Act 1903* (Cth) and thus invalid under s 109

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98 Australian Research Network on Law and Ageing, *Submission 262*.
99 Brophy, above n 97, 4.
100 Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 11.
101 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 410.
102 *Powers of Attorney Act 2014* (Vic) s 80.
103 *Commonwealth of Australia Constitution Act* (Cth) s 77(iii); *Judiciary Act 1903* (Cth) ss 39(1), 39A(1)(b), 39(2)(c).

of the *Australian Constitution*.[104] In making this finding, the Court noted that the 'essence of s 39(2) is to invest federal jurisdiction *conditionally*, so as to ensure that appeals lay to the High Court, and to do so *universally*, in *all* matters falling within ss 75 and 76.[105]

5.98 The ALRC considers that implementation of Recommendation 5–2 would require an amendment to s 39 of the *Judiciary Act 1903* (Cth) so that state and territory tribunals would have jurisdiction over disputes where the attorney and principal reside in different states. This may prove difficult, as commentators have queried whether the Commonwealth has the power to legislate with respect to the jurisdiction of state tribunals.[106] Alternatively, Recommendation 5–2 could be implemented by adopting a court registration process for tribunal orders where the case involves parties from different states.[107]

Registration

Recommendation 5–3 A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

(a) agreement on nationally consistent laws governing:

  (i) enduring powers of attorney (including financial, medical and personal);

  (ii) enduring guardianship; and

  (iii) other personally appointed substitute decision makers; and

(b) the development of a national model enduring document.

5.99 A compulsory online national register has the potential to be an important safeguard against abuse. The ALRC acknowledges that, in the absence of a completed prevalence study, the exact incidence of elder abuse involving an enduring document cannot be quantified. This lack of quantification necessarily complicates any assessment of the benefits and costs of introducing a national register of enduring documents.

5.100 However, the ALRC is satisfied, based on studies of elder abuse hotlines, qualitative studies, submissions to the ALRC and consultations with stakeholders, that

104 *Burns v Corbett* [2017] NSWCA 3 (3 February 2017).
105 Ibid [75].
106 Section 77 of the *Australian Constitution* empowers the Commonwealth to legislate to invest state courts with federal jurisdiction. Whether it extends to investing a tribunal with such jurisdiction depends on how expansively the term 'court' is read: Anna Olijnyk, *Burns v Corbett: The Latest Word on State Tribunals and Judicial Power* (19 April 2017) AUSPUBLAW <https://auspublaw.org/2017/04/the-latest-word-on-state-tribunals-and-judicial-power/>.
107 Ibid.

abuse of enduring documents is a problem, and that the extent of the powers granted by enduring documents means that any abuse is often relatively serious in its financial impact.[108] The ALRC is also satisfied, based on international studies, that an appropriately designed register of enduring documents can assist in reducing elder financial abuse, while not being so burdensome as to discourage the use of enduring documents.[109]

5.101 The ALRC recommends that the online registration scheme should be user-friendly and low cost.[110] Privacy is also a key issue and access to information on the register should be restricted.[111] Consistent with research, the register should be designed to provide greater oversight over enduring attorneys/guardians to the extent that such oversight does not place an excessive burden on either the principal or the attorney/guardian. For example, registration and activation[112] should generate automatic notification to the principal and individuals chosen by the principal, with the ability for the principal to customise the notification process at the time of initial registration. The identification of both signed and active documents offers an opportunity to review decisions as to loss of decision-making ability in relation to a particular type of decision (eg financial matters).

5.102 The register would allow only one enduring document of a particular type (ie financial or personal) to be registered at any given time, ensuring that documents are properly revoked and that revoked instruments are unable to be used.[113] The register would also extend to guardianship and financial management orders made by a court or tribunal. It is not proposed that registration would affect the validity of court or tribunal orders. The national online register would replace state-based registration schemes that principally operate with respect to land transactions.

5.103 'Advance care directives' should not need to be placed on the new register, because it is already possible to add 'advance care directives' to an electronic health record—the online recording and storage of individual medical records called 'My Health Record'.[114] While the ALRC suggests that enduring documents should be separately registered to the 'My Health Record', to protect the sensitive medical

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108 National Ageing Research Institute and Seniors Rights Victoria, above n 1, 5; Kaspiew, Carson and Rhoades, above n 1. See also Seniors Rights Victoria, *Submission 171*.

109 Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355. This study considered registration schemes in England and Wales, Scotland, Germany, Japan, Tasmania and the proposed scheme in Victoria.

110 Costs associated with the register are discussed below.

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

112 Enduring documents are typically active, in the sense that the attorney can act on the powers granted, either on signing or subsequently when the principal loses legal capacity.

113 This intention is to prevent the registration of overlapping or inconsistent enduring documents and not to restrict the ability of the principal to appoint more than one attorney (to act jointly and/or severally) where this is their express intention.

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

information contained in these records, information technology solutions should be explored so that the two databases can be accessed using a single portal by health professionals who need to access both sets of information.

5.104 Recommendation 5–3 is limited to enduring powers of attorney and not applied more broadly to non-enduring powers of attorney. The distinction between the two is drawn, firstly, because of the link between enduring documents and planning for later life.[115]

5.105 Secondly, the key safeguard available in respect of general powers of attorney is the ability of the principal to revoke the power at any time. With an enduring document, a principal with diminished decision-making ability may not be able to effectively monitor the activities of their attorney and take action before significant loss is incurred.[116] Accordingly, there is significantly greater risk of loss and the losses may be larger. The ALRC acknowledges submissions that raised concerns that the absence of a register of general powers of attorney may lead to a shift towards greater use of general powers of attorney and greater abuse. This should be monitored and addressed as part of the implementation and review of the register.[117]

5.106 While much of the focus of stakeholders was on financial abuse facilitated through an enduring power of attorney, stakeholders also discussed abuse of enduring documents by enduring guardians. There was also evidence that third parties sometimes simply did not know of the existence of an enduring guardianship arrangement, which led to the older person's choice of representative not being respected.[118] For these reasons, it is proposed that enduring guardianship appointments should also be registered. This will also complement the proposed registration of tribunal orders, including guardianship orders.

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

Enduring documents may be abused

5.108 The idea of a register for enduring documents and tribunal appointments is not new. Since 2007, a number of reviews by state and territory bodies have recommended

115 Ryan, Arnold and Bonython, above n 109, 357. Non-enduring powers of attorney are used more widely, and there is no specific link with older persons. For example, a general power of attorney may be signed when a person goes overseas for an extended holiday, in case documents need to be signed while they are away.

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

117 It could also be possible to allow general powers of attorney to be registered voluntarily.

118 Churches of Christ Care, *Submission 254*; NSW Nurses and Midwives' Association, *Submission 29*.

the establishment of a register to protect against misuse.[119] For example, in 2016 a NSW Legislative Council Committee noted:

> These instruments (enduring documents) fundamentally rely upon an attorney honouring the significant trust placed in them by the principal. It is therefore critical to the integrity of the enduring power of attorney system that the law does all it can to safeguard that trust.[120]

5.109 The University of Newcastle Legal Centre explained to that NSW Legislative Council Committee:

> It is too easy for an attorney to become a rogue attorney and not have any checks made until things have gone a long way wrong … The idea is that [a register] would allow an easy check to see who has been appointed but it would [also] allow someone to record a revocation. At the moment a revocation just takes place by individuals, the previously appointed attorney, in writing saying that their power has been revoked. If we do not know their address there is no certainty that person receives it which means that is also complicated.[121]

5.110 In the *Equality, Capacity and Disability* Report, the ALRC recommended that the Australian and state and territory governments develop methods of information sharing about substitute decision-maker appointments, including enduring attorneys and guardians. In particular, the ALRC noted that information sharing could take the form of an online register of appointments.[122]

5.111 The ALRC also received a broad range of submissions to this Inquiry supporting the establishment of a register.[123] Those submissions are replete with examples of elder abuse of enduring documents.[124] Three factors appear to facilitate abuse:

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119 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007); Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010); Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012); Communities Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the Adequacy of Existing Financial Protections for Queensland's Seniors* (August 2015); and Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

120 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 356.

121 Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 18 March 2016, 16, (Ms Breusch, University of Newcastle Legal Centre).

122 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 4–10.

123 See, eg, SMSF Association, *Submission 382*; Victorian Multicultural Commission, *Submission 364*; COTA, *Submission 354*; Dixon Advisory, *Submission 342*; AnglicareSA, *Submission 299*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Advocare, *Submission 213*; Justice Connect, *Submission 182*; Financial Services Institute of Australasia, *Submission 137*; Office of the Public Advocate (Vic), *Submission 95*; TASC National, *Submission 91*; Australian Bankers' Association, *Submission 84*; Alzheimer's Australia, *Submission 80*; Social Work Department Gold Coast Hospital and Health Service, Queensland Health, *Submission 30*; Social Work Department Redland Hospital Queensland Health, *Submission 10*.

124 See, eg, Hume Riverina CLS, *Submission 186*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Mid North Coast Community Legal Centre, *Submission 161*; University of Newcastle Legal Centre, *Submission 44*.

- principals with diminished decision-making ability may have limited ability to monitor the activities of their attorney;
- family members are most commonly appointed as attorneys and this relationship of trust makes it less likely the principal and third parties will question their actions; and
- there is generally a limited understanding in the community of the powers and duties of the attorney.[125]

A register may reduce abuse

5.112 Registration would assist in ensuring that enduring documents are operative only in circumstances genuinely authorised by an older person, upholding choice and control. The establishment of a register would:

- ensure that only one relevant enduring document can be registered at any one time;
- assist to identify those documents that are active because either they commence immediately or because it has been appropriately confirmed, through a notification scheme that there are no immediate concerns, that the assessment of loss or impairment of decision-making ability is inaccurate; and
- provide clarity as to the precise roles and powers of the attorney.

5.113 The ECLC submitted that a register would 'help minimise the extent to which these documents are misused, forged or amended without consent or knowledge of the older person and their families. It will also be helpful in cases where the original document has been lost or destroyed'.[126]

5.114 This view was supported by academics who noted:

> Registration has become popular as a way of ensuring the effectiveness of enduring powers of attorney as a vehicle for recording a principal's wishes. A common issue arising is confusion in determining whether a valid enduring power of attorney exists and, if so, who the appointees are and what are the wishes of the principal the instrument reflects.[127]

5.115 In relation to providing specific protection against abuse, a register would prevent an attorney attempting to rely on an enduring document that has been revoked. A register would also prevent an individual attempting to arrange a subsequent enduring document in circumstances where there is a question as to the decision-making ability of the principal.[128]

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125 Ellison et al, above n 116, 310–311.
126 Eastern Community Legal Centre, *Submission 177*.
127 Ryan, Arnold and Bonython, above n 109, 358.
128 Advocare Inc (WA), *Submission 86*.

5.116 Seniors Rights Victoria submitted that

> an attorney could potentially purport to rely on the original document to exercise powers that have since been revoked. In the absence of the revocation document, a certified copy of a POA document could still be purported to be evidence of a valid POA although it is a clear abuse of power.[129]

5.117 Another potential benefit of registration was highlighted by a number of stakeholders, including Legal Aid ACT, which suggested that '[c]ompulsory registration of powers of attorneys may assist in preventing elder abuse, as it may alert attorneys to a further level of oversight required in complying with their duties and responsibilities'.[130]

5.118 In addition, a register may have broader benefits than simply protecting an older person from abuse. The ECLC noted:

> Registration would allow authorities such as hospitals, banks, lawyers and aged care facilities to verify documents that are presented to them.
>
> A consequence of the private nature of such instruments is that upon presentation of the instrument to a third party such as a bank or aged care facility, the third party has no way of confirming that the instrument is valid and has not been subsequently revoked.[131]

5.119 Registration would assist banks and other financial institutions, organisations, companies and service providers to establish more easily the authenticity and currency of enduring documents.[132] This may protect against financial abuse and also facilitate transactions where difficulty in confirming the authenticity of an enduring document has delayed property transactions unnecessarily. As the University of Newcastle Legal Centre observed:

> it would be in the interests of those being asked to rely upon the authenticity of appointing documents, if there was the ability to confirm the authenticity of the document (in particular any institution or individual being asked to release an asset on the basis of a power of attorney document, would likely be keen to gain confirmation that the document they are presented with is genuine).[133]

5.120 The financial services industry was strongly in favour of a register of enduring powers of attorney.[134] The Australian Bankers' Association (ABA), which has long advocated for a register, submitted that

> our member banks have noted an increased use of formal arrangements and the number of substitute decision making instruments being presented by third parties. This includes power of attorney appointments and appointments of financial managers by the relevant State Civil and Administrative Tribunal. The industry is concerned

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129 Seniors Rights Victoria, *Submission 171*.
130 Legal Aid ACT, *Submission 58*.
131 Eastern Community Legal Centre, *Submission 177*.
132 Australian Bankers' Association, *Submission 84*. See also FINSIA, *Submission 339*.
133 University of Newcastle Legal Centre, *Submission 44*.
134 Association of Financial Advisers, *Submission 175*; Financial Services Institute of Australasia, *Submission 137*; Financial Services Council, *Submission 35*.

> that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.[135]

5.121 Justice Connect Seniors Law also suggested that 'an easily searchable register of powers of attorney may make it less likely that institutions rely on their own third party documents which in most cases have less robust witnessing requirements and protections'.[136]

5.122 A register would also assist hospitals and health care professionals to quickly identify whether a patient has appointed a substitute decision maker and then contact that person.

5.123 The ALRC accordingly recommends that guardianship and financial administration orders be added to the national online register. Currently, a guardian or administrator who moves interstate must apply to the tribunal in their new state for the order of appointment in their old state to be recognised.[137] In New South Wales, for example, only the appointed guardian or financial manager can apply for recognition of the appointment.[138] The ALRC heard of situations where a person is taken interstate by family members, 'beyond the reach' of a guardianship order. In this set of circumstances, the family is unlikely to register the pre-existing order, and may apply for a new order without reference to the current standing appointment. The national online register should prevent a person from making any new applications in a new jurisdiction until revocation of the prior appointment has been effected.

International perspectives

5.124 The law of England and Wales provides that enduring documents must be registered under the *Mental Capacity Act 2005* (UK).[139] Scotland also introduced compulsory registration of enduring documents in the *Adults with Incapacity (Scotland) Act 2000* (Scotland). In Ireland, enduring documents must be registered before they can be activated—that is, at the time of the loss of decision-making ability and not at the time they are made.[140] In each of these jurisdictions there is evidence that registration has assisted in confirming:

- the existence of an enduring document;
- the identity of the attorney; and

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135 Australian Bankers' Association, *Submission 107*.
136 Justice Connect Seniors Law, *Submission 362*.
137 See, eg, *Guardianship and Administration Act 1990* (WA) ss 44A, 83D. However, South Australia has a process for automatic mutual recognition of interstate orders which does not require an application to a tribunal: *Guardianship and Administration Act 1993* (SA) s 34.
138 *Guardianship Act 1987* (NSW) ss 48A, 48B.
139 *Mental Capacity Act 2005* (UK) c 9.
140 *Assisted Decision-Making (Capacity) Act 2015* (Ireland), s 72.

- that it has been appropriately verified that the principal has lost decision-making ability and that the attorney therefore has authority to make decisions for the principal.[141]

5.125 In these jurisdictions, there is evidence that this has reduced the instances of enduring documents being used to facilitate fraud against older persons.[142] The English and Scottish models, that require registration once an enduring document is made, are preferable, as such an approach provides two opportunities to check the validity of the instrument: at the time of making, and at the time that powers come into force.

5.126 Evidence from the UK also suggests that awareness raising, particularly about the value of putting in place enduring documents as part of advance planning for possible loss of decision-making ability, is integral to the success of a registration scheme. In addition, keeping costs low and ensuring that forms are short and easy to complete are important in increasing people's ability and willingness to register enduring documents.[143]

5.127 A recent comparative study examined registration schemes for enduring documents in a range of jurisdictions including the UK, Germany and Japan.[144] It concluded that

> all opportunities afforded by mandatory registration to exercise greater oversight over representatives should be taken, where these do not place an excessive burden on the parties. For example, registration and activation should generate automatic notification to the principal and proximate parties, with scope for customisation or opting out by the principal at the time of initial registration.[145]

5.128 Consistent with this research, the recommended national registration scheme should be designed with a notification regime. The principal should receive confirmation of registration. The attorney/guardian should be required to notify the manager of the register before they first exercise power under the enduring document. The manager of the register would then issue an automatic notice to the principal and any other person the principal requested to be notified before the enduring document is activated. This builds on the notification regime in Victoria. Section 40 of the *Powers of Attorney Act 2014* (Vic) provides:

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141 Ministry of Justice (UK), *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Mental Capacity Act 2005* (2010) 11. However, the House of Lords Select Committee noted significant problems with the implementation of the *Mental Capacity Act 2005* (UK), particularly the extent to which the community was aware of lasting (enduring) powers of attorneys—see House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, *Mental Capacity Act 2005: Post-Legislative Scrutiny* (2014).

142 See, eg, Rajdeep Routh, Catriona Mcneill and Graham A Jackson, 'Use of Power of Attorney in Scotland' (2016) 61(3) *Scottish Medical Journal* 119, 123.

143 House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, above n 141, 70–71.

144 Trevor Ryan, Bruce Baer Arnold, and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers? A Comparative Analysis' (2015) 36(2) *Adelaide Law Review* 355.

145 T Ryan, *Submission 276*.

> Before an attorney under an enduring power of attorney for the first time commences to exercise power for a matter because the principal does not have decision making capacity for that matter, the attorney must take reasonable steps to give notice that the attorney is commencing to exercise the power to any person who, the enduring power of attorney states, should be so notified.

5.129 Accordingly, an online notification scheme could streamline and expedite such a notification process with little cost by generating automated notifications, for example, by SMS and/or email. The notification process would mean that if the person notified had concerns that the principal had not lost decision-making ability, they could discuss those matters with the attorney/guardian and, if still not satisfied, refer the matter to the tribunal. It should also be possible for a principal to nominate the public advocate to be notified that the attorney has activated the enduring document.

5.130 Such a notification process provides a mechanism to protect against activation in the absence of loss of decision-making ability without overly complicating the process for activating an enduring document—for example, by requiring an individual capacity assessment before an enduring document can be used. The principal retains the power to include a requirement for an assessment in the enduring document if they wish.

5.131 Building a notification scheme into the registration process would balance individual autonomy and choice with the need to ensure that there are not unnecessary burdens on attorneys/guardians.[146]

Arguments against a register

5.132 While there have been a number of reviews supporting a register of enduring documents, there have also been a number of bodies that have recommended against its establishment.[147] Similarly, in this Inquiry, the ALRC received some submissions opposing the establishment of a register of enduring documents.[148] The four key arguments against a register are that it would:

- not be effective in reducing elder abuse (or not sufficiently effective to outweigh the burdens imposed by a register);
- dissuade people from making enduring documents (the so-called 'chilling effect');
- increase the cost of making an enduring document; and
- raise significant privacy concerns.

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146 A notification scheme had support in submissions. See, eg, Ibid; ACT Greens, *Submission 267*; Public Trustee of Queensland, *Submission 249*.

147 See, eg, Advance Directives Review Committee (SA), *Planning Ahead: Your Health, Your Money, Your Life. Second Report of the Review of South Australia's Advance Directives* (2008); Land and Property Management Authority (NSW), *Review of The Powers of Attorney Act 2003* (October 2009); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

148 See, eg, Office of the Public Advocate (Qld), *Submission 361*; Legal Aid NSW, *Submission 352*; Carroll & O'Dea, *Submission 335*; Seniors Legal and Support Service Hervey Bay, *Submission 310*; Hamilton Blackstone Lawyers, *Submission 270*; Costantino & Co, *Submission 225*.

5.133 In relation to cost and privacy, the ALRC acknowledges these issues. Accordingly, these issues are discussed in the section below on implementation.

5.134 In relation to the effectiveness of a register, in 2010, the Queensland Law Reform Commission decided against a compulsory registration scheme, noting that

> there are likely to be limitations on the extent to which a registration system can ensure the essential validity of a registered instrument. In particular, a registration system cannot necessarily detect fraud or abuse … The Commission has therefore concluded that the burdens of a mandatory registration system would likely outweigh its benefits.[149]

5.135 Similarly, in this Inquiry, the Law Society of NSW strongly opposed a register for a number of reasons, including questions as to its efficacy in preventing financial abuse of older persons:

> While a register may have the benefits envisaged in identifying persons holding powers of attorney, the Law Society of NSW is not persuaded that this, in itself, would operate in any practical or effective way to prevent, or affect, the incidence of elder abuse.[150]

5.136 The ALRC recognises that a register will not entirely prevent financial abuse by enduring attorneys, but considers that more easily identifying and confirming who has power under a valid enduring document may assist in reducing abuse where there is a question as to who is the attorney or guardian.

5.137 A second argument against a register was explained by Capacity Australia as a 'chilling effect'. Capacity Australia suggested that a register would discourage use of enduring documents leading to 'an increase in the inappropriate misuse of elderly persons' money' and more court and tribunal financial management orders being made.[151]

5.138 Capacity Australia recognised that enduring documents are an important tool in protecting those with diminished decision-making ability from abuse, but expressed concern that any reduction in the use of enduring documents could put more people at risk, as a significant proportion of abuse occurs in the absence of enduring documents.

5.139 The potential issue of a 'chilling effect' could be addressed by ensuring that the register is easy to use and that it is a simple and quick process to register, revoke and change status on the register. It should be possible for solicitors and other suitably qualified professionals to manage the registration process on behalf of a principal and their attorney. While the ALRC envisages that the register of enduring documents would largely have an online interface for ease of access and to reduce costs, the ALRC also recognises that there will need to be a range of options to address the specific needs of particular groups. This would include face to face interactions with

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149 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) [103].

150 See Law Council of Australia, *Submission 61*.

151 Capacity Australia, *Submission 134*.

those managing the register, particularly for older people who do not use the internet.[152]

Key implementation issues

Nationally consistent legislation

5.140 Given that enduring documents are made under state and territory laws, there is an issue as to whether the register should be a single national register or separate state and territory registers. There was support in submissions that, if there were to be a register, it should be a single national register. The Australian Association of Social Workers stated that 'a register would require national consistency and transferability, and should include national accessibility'.[153] This was supported by ADA Australia which submitted that a register 'needs to be national, not state based, and searchable by services that operate remotely and after hours (such as health services)'.[154]

5.141 The NSW Legislative Council Committee noted that a mandatory national register would provide an incentive for states and territories to move towards uniformity in legislative regimes for enduring documents. The NSW Legislative Council Committee described the issues as complex and, after this ALRC Report, best considered by the Council of Australian Governments.[155]

5.142 An effective national register requires consistent state and territory legislation and a single model enduring document that can be registered. Multiple documents with different legal consequences would make a register unwieldy and complicated, undermining the benefits of the register.[156]

5.143 There was strong support in submissions for harmonising state and territory laws on enduring documents, including from welfare organisations, community legal centres, financial, banking and accountant professional organisations and peak bodies.[157] The Law Council of Australia explained that '[u]niformity would reduce the current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship'.[158]

5.144 Bonython and Arnold submitted that

> [u]niformity would have the benefit of providing protected people with greater certainty that their wishes and needs were being respected and met, and their families,

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152 For many older Australians, particularly from CALD backgrounds, online only systems can be challenging: see, eg, Jo Wainer et al, 'Diversity and Financial Elder Abuse in Victoria' (Protecting Elders' Assets Study, Monash University, 2011). Accordingly, the implementation of an online register of enduring documents will need alternative pathways for those who are unable to access the internet.

153 Australian Association of Social Workers, *Submission 153*.

154 ADA Australia, *Submission 150*.

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

156 Given that achieving national consistency may take time, states and territories may consider establishing state-based registers in the meantime.

157 See, eg, Hume Riverina CLS, *Submission 186*; Seniors Rights Service, *Submission 169*; Australian Bankers' Association, *Submission 107*.

158 Law Council of Australia, *Submission 61*.

> and professionals supporting them, with greater efficiency in locating and utilising the relevant powers and information to better support vulnerable people.[159]

5.145 Submissions also highlighted that national consistency would particularly assist communities along state and territory borders and families where the representative and principal live in different jurisdictions.[160]

5.146 State and territory legislation typically has a prescribed form for enduring documents. The ALRC recommends that a single national enduring document should be developed and that this document should drive the necessary legal reforms towards national consistency.

5.147 The national enduring document should be a short, simple and easily 'navigatable' document that can be downloaded and edited. Appropriate guidance material should be developed to assist individuals to complete the document, understand the nature of the arrangement and the powers that are granted to the attorney. For example, interactive online tools could be developed to assist individuals to identify the key issues in designing their enduring document consistent with their wishes. The national enduring document should operate consistently with the national safeguards outlined earlier in this chapter.

5.148 Recommendation 5–3 recognises that single agreements that cover financial, medical and personal decisions have been successful in jurisdictions such as Victoria and Queensland.[161] A single agreement, while permitting the principal to appoint different individuals for different types of decisions, may reduce confusion as to what enduring documents have been signed, clarify the roles of attorneys and guardians, and reduce confusion as to who needs to be contacted with respect to a particular decision.[162]

5.149 An important benefit of adopting a single national enduring document is that it would ensure consistency across Australia in the form and content of enduring documents, including terminology and assessments of capacity or decision-making ability. This would resolve current issues with enforcement and transferability across the states and territories.[163]

5.150 There may be some resistance to the adoption of a model national enduring document on the basis that there has already been significant reform to enduring documents in a number of jurisdictions. For example, the new laws on powers of attorney in Victoria only came into force in 2015; and South Australia made significant reforms to advance care directives and substitute decision makers which replaced

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

160 Hume Riverina CLS, *Submission 186*.

161 *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic). But see also *Medical Treatment Act 1988* (Vic).

162 Alzheimer's Australia, *Decision Making in Advance: Reducing Barriers and Improving Access to Advance Directives for People with Dementia* (2006) 16.

163 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 70.

guardianship laws in 2013.[164] The ALRC considers that these are excellent reforms.[165] As outlined above, the ALRC supports a number of safeguards introduced by Victoria in 2015. The ALRC also understands that significant and repeated change undermines certainty and understanding—two of the key objectives the ALRC is trying to support.

5.151 Notwithstanding these concerns, the ALRC considers that the continued abuse of enduring documents necessitates reform. A national register supported by a single national enduring document will assist in building protections against elder abuse in the longer term. The ALRC also takes a national perspective and notes that there are states and territories that have not made significant changes to enduring documents in recent years. On balance, the ALRC considers that the long term reform objectives in protecting older persons from abuse outweigh the short term disruption that may arise from implementing Recommendation 5–3 in the context of an area of law that has already been recently amended.

Cost

5.152 In order for the establishment of an online register of enduring documents to be successful, the cost to the consumer of registering documents and accessing the register must be kept low. The Law Council of Australia submitted that 'any cost associated with registering documents should not be such that people are unwilling, or indeed unable, to enter into formal arrangements'.[166]

5.153 State Trustees Victoria commented that 'there would probably need to be community acceptance that such an agency would have to charge a fee for registration to ensure the agency [managing the register] was appropriately resourced'.[167]

5.154 In those states where a power of attorney must be registered with the land titles office if it is to be used as part of land transactions, fees are relatively high.[168] The fees in Tasmania, where registration is compulsory, are similar.[169] In most states and territories, the processes for registration require manual submission and processing of the enduring document. Lower cost models for registration should be considered.

5.155 One such model is the Personal Property Securities Register (PPSR), which was introduced in 2012. The PPSR is a national online register that replaced Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sale, liens, chattel mortgages and security interests in motor vehicles, as well as the Australian Securities and Investment Commission's (ASIC) Register of Company Charges. The PPSR is an easy to use online register and has relatively low fees, while operating on a full cost recovery

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164 *Advance Care Directives Act 2013* (SA); *Powers of Attorney Act 2014* (Vic).

165 The *Advance Care Directive Act 2013* (SA) is subject to a five year review in 2019: see SA Health, *Advance Care Directives Policy Directive* (2014).

166 Law Council of Australia, *Submission 351*.

167 State Trustees Victoria, *Submission 138*. See also Law Council of Australia, *Submission 61*.

168 For example, the cost to register in NSW is $136.30. See Land and Property Information (NSW), *LPI Circular — Land and Property Information Fee Changes from 1 July 2016* (June 2016).

169 The cost to register in Tasmania is $138.46. See Land Tasmania, *Brief Fee Schedule 2016* (1 July 2016).

basis.[170] The cost of searching the register for individuals is $3.40, the cost of registering a security interest depends on the type of interest and its duration, but can be as low as $6.80 and up to $119.00.[171] There is no charge for removing a security interest.[172]

5.156 ADA Australia suggested that enduring documents could be added to *My Health Records,* which currently provides for online storage of medical records and, from 2016, 'advance care directives'. In order to encourage use of the online storage of medical records, the scheme is currently free. There may be similar public policy imperatives that support free registration of enduring documents.[173] However, for the reasons outlined below in relation to privacy, the ALRC suggests that *My Health Records* and enduring documents should be kept on separate registers.

5.157 In any event, the hardware and software from the *My Health Records* system may provide useful models for a register of online enduring documents particularly in relation to safety and privacy standards.

5.158 Cost to the consumer is an important issue and the implementation of the register should proceed on a low cost basis so as not to discourage the use of enduring documents. The costs of establishing and operating the register should be seen in the context of the potential savings the register may provide to the government and the community more broadly. For example, the register would replace state-based registration schemes that principally operate with respect to land, providing potential savings to state governments. A broader context is the cost to the community of elder financial abuse as well as the costs of tribunal processes where a person who lacks decision-making ability has not put in place an enduring document. There are also savings to businesses, such as financial institutions, that will more easily be able to confirm the validity of an enduring document sought to be relied on to effect a transaction.

Privacy

5.159 The uploading of enduring documents onto a register raises privacy concerns. Currently, decisions about enduring appointments and assessments of decision-making ability are not publicly recorded unless registered with the land authorities for the purposes of undertaking transactions in land. The Australian Information and Privacy Commissioner urged that

> [e]nsuring that access to the register is restricted, tightly controlled and monitored will be fundamental to protecting privacy rights. In particular, providing authorised people with access that is limited only to the information which they need to know, will help ensure that personal information is protected from misuse and only used for the purposes for which it was collected. Applying this in practice will mean, for example, implementing access controls so that different users can only access the specific

170 See Australian Financial Security Authority, *Personal Property Securities Register* <https://www.ppsr.gov.au/>.
171 Australian Financial Security Authority, *Fees for Using the PPSR* <www.ppsr.gov.au/fees>.
172 Ibid.
173 ADA Australia, *Submission 150*.

> information that is necessary for them to perform their role or functions and cannot simply browse the register without restriction. Another privacy enhancing feature may be, for example, an audit trail functionality that allows access to the register to be logged and tracked so that there is additional oversight around who has accessed the information.[174]

5.160 Bonython and Arnold suggested that '[a]ll access should be via appropriate information security safeguards, such as passwords and encryption consistent with best practice in Australian privacy law and international useability standards'.[175]

5.161 This view was supported by the Law Council of Australia, Justice Connect Seniors Law and the Office of the Public Advocate (Vic), with each suggesting that the VLRC's proposed privacy controls in their Report on *Guardianship* be adopted:

> A tiered approach was recommended in the VLRC's *Guardianship* Final Report. The report noted that 'people should be given access to the amount of information they need to know in order for them to conduct their dealings with a person with impaired decision-making ability'. Furthermore, the VLRC recommended that an electronic record be generated whenever a user accesses a record, and that it be an offence to access a part of the register without a legitimate interest. Seniors Law endorses the recommendations made in the Final Report, that only authorised people and organisations should have access to the register and to only those parts of the register they are permitted to view at any one time.[176]

5.162 The ALRC strongly supports this approach. A licensing arrangement should be put into place for those organisations and professionals that will need regular access to the register and can demonstrate the need for such access. Such organisations and professionals may include: Aged Care Assessment Services (ACAS); the Royal District Nursing Service; police; ambulance service; banks and other financial institutions; State Trustees; hospitals; Medicare; Centrelink; insurance companies; aged care facilities; medical practitioners; and legal practitioners. Information technology systems for the national register should ensure that the amount of personal information provided to a person accessing the register is no more than is necessary to enable that person to support the attorney fulfilling their role. In addition, the principal should be able to decide which individuals may access the register with respect to their enduring document (eg specified family members).

5.163 The Office of the Public Advocate (Vic) noted that the 'VLRC also recommended that an offence be created for accessing parts of the register that the user did not have a "legitimate interest in viewing"'.[177] Similarly, the ALRC notes that there are offence and civil penalty provisions that govern unauthorised and illegitimate access to an individual's online 'My Health Record'.[178] These offence and civil penalty provisions provide a useful template for the national online register.

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174 Australian Information and Privacy Commissioner, *Submission 233*.
175 W Bonython and B Arnold, *Submission 241*.
176 Justice Connect Seniors Law, *Submission 362* (citations omitted). See also Law Council of Australia, *Submission 351*; Office of the Public Advocate (Vic), *Submission 246*.
177 Office of the Public Advocate (Vic), *Submission 246*.
178 *My Health Records Act 2012* (Cth) part 4 div 1, part 5, part 6.

5.164 A number of stakeholders suggested that, for simplicity and to reduce costs, enduring documents should be registered on *My Health Record.*[179] The Australian Information and Privacy Commissioner, however, suggested keeping the register of enduring documents separate from advance care directives:

> The My Health Record system is an online summary of an individual's key health information which can be accessed digitally by individuals and by healthcare providers, within the specific and tightly-regulated parameters of the *My Health Records Act 2012*. On the other hand, enduring documents are not solely related to an individual's health or medical treatment and are used by a wider group than healthcare providers, such as banks and financial institutions. Considering the sensitivity of the health information within the My Health Record system and its specific purpose in facilitating healthcare, it would not be appropriate to expand the system's scope and purpose.[180]

5.165 The ALRC agrees with the Australian Information and Privacy Commissioner and considers that enduring documents should be kept separate from medical records and advance care directives, as enduring documents will be available to a broader range of organisations, including banks and financial institutions.

5.166 The ALRC considers that protecting individual privacy is an important design principle for the national online register of enduring documents. Appropriate access controls can be established to ensure that individuals' personal information stored on the register is necessarily and appropriately protected. The register should be designed and operated in a manner that is consistent with the Australian Privacy Principles and the *Privacy Act 1988* (Cth).

Revocation

5.167 The ALRC proposed in the Discussion Paper that the making and registering of a new enduring document would automatically revoke an existing enduring document of the same type.[181] This was designed to avoid the identified problem of multiple enduring documents being presented for the same individual with uncertainty as to which document was current. This approach was supported by a number of stakeholders, including Consumer Credit Legal Service WA:

> With an effective system of registration rendering all previous instruments invalid once a current EPA [enduring power of attorney] is registered, there will be a decreased risk of such instruments being misused. It will also ensure that the substitute decision-maker always has the donor's authority to act on their behalf and will give more control to donors to protect themselves against any abuse of trust.[182]

5.168 In the context of revocation, there were also a number of important issues raised by legal academics who sought clarification as to the legal effect of registration. The ALRC does not envisage a Torrens style system of registration—the registration system used for land whereby registration is conclusive proof of valid title.[183] An

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179 See, eg, University of Newcastle Legal Centre, *Submission 264*.
180 Australian Information and Privacy Commissioner, *Submission 233*.
181 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–2.
182 Consumer Credit Legal Service (WA) Inc, *Submission 301*.
183 Australian Research Network on Law and Ageing, *Submission 262*.

enduring document is a powerful document, but its registration should not be treated in the same way as the registration of title in land. This issue was addressed in practical terms by Advocare, who argued that '[t]here should be scope for allowing a previously registered enduring document to be resurrected if it is found that the most recent registered enduring document was invalid (ie by reason of donor's incapacity as at execution)'.[184]

5.169 The validity of any enduring document duly registered should be challengeable before state and territory tribunals. The tribunals should have authority to rescind any registration, restore any previously registered document, and cure any defect in an enduring document that would prevent registration. These powers would be ancillary to the tribunals' power to appoint financial administrators and guardians.

5.170 Notwithstanding the exercise of any of these powers by a tribunal, any person who has relied on the register should not be liable if a document is subsequently found to be invalid. This would sit alongside the ALRC's recommendation for redress in Recommendation 5–2.

Random checks

5.171 As set out in Chapter 14, in each state or territory there is generally a body whose role is to promote and protect the rights and interests of people with disabilities, known as either the public guardian or the public advocate. In the Discussion Paper, the ALRC sought the view of stakeholders as to whether the public advocate's/guardian's powers should be extended to include a power to conduct random checks of enduring attorneys' management of principals' financial affairs.[185]

5.172 The ALRC noted that one of the advantages of a register of enduring documents is that it would provide information as to the existence of all enduring documents made, as well as those that are active. The creation of a national register has the potential to enable greater oversight of the use of enduring documents, which may safeguard against abuse. Random checking by the public advocate/guardian of an attorney's financial management of their principal's affairs has potential to be a deterrent against abuse and may also identify financial anomalies earlier, reducing the losses suffered by a principal.

5.173 Stakeholders had mixed views as to whether random checking was necessary and appropriate. Many stakeholders supported the idea. For example, the Women's Domestic Violence Court Advocacy Services NSW said that,

> [g]iven the great opportunity for abuse, mechanisms must be put in place to ensure this power is not abused and the older person is protected from potential abuse. Public guardians and advocates conducting random audits of enduring attorney's financial management of an older person's financial affairs could be one such mechanism.[186]

184 Advocare, *Submission 213*.
185 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 5–2.
186 Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*.

5.174 The Victorian Multicultural Commission also supported the idea of random checks:

> This would have the effect of increasing the transparency of such arrangements, and increasing accountability and commitment in the best interests of a principal. It would also promote public confidence in the process and reduce the potential for financial disadvantage accruing to principal due to mismanagement or misunderstanding by enduring attorneys. Further, it provides an incentive for enduring attorneys to ensure they are always acting in the best interests of the principal.[187]

5.175 However, Dixon Advisory suggested that any additional random checks into the affairs of an enduring attorney 'may not add substantial value, but rather create unnecessary stress on individuals involved'.[188] Bonython and Arnold submitted that, '[i]n the context of a private or domestic financial manager, such as a spouse or child, this represents an enormous administrative burden which would dissuade many from undertaking the duty'.[189]

5.176 The Law Council of Australia supported random audits 'in principle', when based on the existence of reasonable grounds for suspicion:

> The Law Council supports this function being conferred on the public advocate/guardian, as it may serve as a deterrent against financial abuse. Such audits should be applied on a case-by-case basis and sufficiently rigorous to satisfy the public advocate and/or guardian that no misconduct has occurred without being overly burdensome or intrusive on the appointed decision-maker. Natural justice would require reasonable notice to be provided to the appointed decision maker to provide time to prepare for, and respond to, an audit. Where a random audit reveals a discrepancy in the accounts, the attorney should be given the opportunity to explain the discrepancy. Where the explanation reveals the act or omission was an honest or reasonable oversight by the attorney, the attorney should be given time to rectify any potential breach of their duties caused by the act or omission.[190]

5.177 The ALRC supports the procedural safeguards suggested by the Law Council of Australia and suggests that any scheme for random checking of an attorney's financial management of their principal's funds should adopt those safeguards. The ALRC considers that a scheme for random checking of an attorney's financial management of their principal's funds has merit and would reduce the incidence of financial abuse. The ALRC suggests that such a scheme be considered in the future, once the register has been established and its effectiveness evaluated.

Representatives agreements

5.178 The ALRC suggests that, in developing a national model enduring document, consideration should be given to the form of the model being a Representatives Agreement. This would bring clarity to the nature of the relationship created by an enduring document, the powers and responsibilities it contains, and the safeguards in

187 Victorian Multicultural Commission, *Submission 364*.
188 Dixon Advisory, *Submission 342*.
189 W Bonython and B Arnold, *Submission 241*.
190 Law Council of Australia, *Submission 351*.

place to protect the principal. This addresses the lack of understanding of the nature of the document and the relevant roles and responsibilities of the participants by those who have appointed an attorney or guardian, those who have been so appointed and, more broadly, in the community.[191] Significant numbers of submissions included instances of elder abuse which arose, at least in part, because of a misunderstanding of the enduring document.[192] For these reasons, notwithstanding a number of submissions suggesting that a change of terminology was not warranted and that the current terms were well understood,[193] the ALRC suggests proceeding with this reform as a longer-term strategy. The ALRC also acknowledges submissions that suggested that a change in terminology would require significant investment in a community awareness and education campaign.[194]

5.179 An important part of this suggestion is using terminology that is more easily understood, and more reflective of, the nature of the powers and responsibilities set out in the enduring document. Building understanding of the role of the representative, their powers, and the limits of those powers are important protections against elder abuse.

5.180 This suggestion develops aspects of the ALRC's *Equality, Capacity and Disability* Report, which recommended a Commonwealth Decision-Making Model, and the description of a substitute decision maker as a 'representative'.[195] The suggestion seeks to give substance to this in the form of a model document.

5.181 Representatives agreements are intended to support the 'paradigm shift' in supported decision making reflected in the CRPD, which places the principal as the driver of decisions through their will, preferences and rights. This approach seeks to uphold individual autonomy.[196]

5.182 To highlight the active role of the principal, the term 'appointments' should be replaced with 'agreements'. The principal is making conscious decisions as to who will be responsible for making decisions on their behalf should they lose decision-making ability, and the terms and conditions under which those responsibilities will be exercised.

Commonwealth Decision-Making Model

5.183 In the *Equality, Capacity and Disability* Report, the ALRC recommended a new model for decision making to encourage the adoption of supported decision making at a Commonwealth level.[197] The ALRC noted that there was a question of how the

191 Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives.* (2008).
192 See, eg, Older Women's Network NSW, *Submission 136*; Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Legal Aid ACT, *Submission 58*.
193 See, eg, Law Council of Australia, *Submission 351*.
194 W Bonython and B Arnold, *Submission 241*.
195 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 142.
196 Ibid 116.
197 Ibid 63–86.

ALRC's model would interact with decision-making regimes under state and territory law. The suggestion in this Report develops aspects of the ALRC's Commonwealth Decision-Making Model and, in particular, the description of a substitute decision maker as a 'representative'.

5.184 The application of the Commonwealth Decision-Making Model to enduring documents will lead to consistency in terminology and greater understanding of the nature of the obligation of the representative. The basis for all representative decisions would be the will, preferences and rights of the principal.

5.185 The Commonwealth Decision-Making Model does not start by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision making. Instead, the model asks what level of support, or what mechanisms are necessary to support, people to express their will and preferences.[198] This recognises that the ability of a person who needs decision-making support 'to exercise legal agency is dependent on the integrity, quality and appropriateness of support available'.[199] The Commonwealth Decision-Making Model recognises that there is a spectrum of support required—at one end is full support. Enduring documents are one example of full support or substitute decision making.

5.186 In the *Equality, Capacity and Disability* Report, the ALRC recommended a functional approach to assessing capacity or decision-making ability set out in Support Guidelines:

> (a) All adults must be presumed to have ability to make decisions that affect their lives.
>
> (b) A person must not be assumed to lack decision-making ability on the basis of having a disability.
>
> (c) A person's decision-making ability must be considered in the context of available supports.
>
> (d) A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.
>
> (e) A person's decision-making ability will depend on the kind of decisions to be made.
>
> (f) A person's decision-making ability may evolve or fluctuate over time.[200]

5.187 The model Representatives Agreement should implement these guidelines where activation of a Representative Agreement is determined by the decision-making ability of a principal. The Victorian approach to 'capacity' under the *Powers of Attorney Act 2014* (Vic) is broadly consistent with the Support Guidelines and may be a useful example when implementing the model Representatives Agreement. The South

198 Ibid ch 2.
199 Ibid 93: quoting PWDA, ACDL and AHR Centre, *Submission 66*.
200 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 67.

Australian principles approach in the *Advance Care Directives Act 2013* (SA) may be another useful model.[201]

5.188 The application of the Support Guidelines would provide a consistent approach to assessments of decision-making ability under enduring documents in Australia, contributing to a better understanding of decision-making ability and the right of older Australians to have their will and preferences respected and implemented.

Why 'representatives'?

5.189 The terms 'attorney' and 'guardian' should be replaced with the term 'representative'. The term 'attorney' has very legalistic connotations reflecting the commercial genesis of power of attorney arrangements (as described above). Guardianship has paternalistic connotations of care and responsibility.[202] Neither accurately reflects the modern relationship between the representative and the principal. These terms deny the continuing importance of the agency and preferences of the principal. Existing terms may suggest that the substitute decision maker may act independently of the wishes of the principal or that the attorney has some special legal status above and beyond representing the principal.

5.190 The term representative is chosen because it reflects that the role is to represent the principal, to give effect to the principal's views, and only in very limited circumstances, when the will and preference of the person cannot be ascertained, make a substitute decision that respects and upholds the rights of the principal. This highlights that the will and preferences of the principal continue notwithstanding a loss of decision-making ability at law. If, for example, a resident in an aged care facility wishes to go out for a coffee once a week—that is the resident's preference. It is not to be overridden by the resident's representative on the basis, for example, of financial prudence or austerity.

5.191 As discussed in the *Equality, Capacity and Disability* Report, the terminology relating to capacity and decision making is often a contested area, but the development of a new lexicon of terms may help to signal the 'paradigm shift' in attitudes to decision making reflected in the CRPD.[203] The term 'representative' is used in the Commonwealth Decision-Making Model to signal that the role of a representative is to support and represent the will, preferences and rights of the person who requires decision-making support.[204] 'Representative' was preferred over 'nominee' to signal the shift from existing decision-making arrangements in areas of Commonwealth law, including the National Disability Insurance Scheme (NDIS) and social security, both of which use the term nominee.

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201 *Advance Care Directives Act 2013* (SA) s 10.

202 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 64.

203 Ibid 98.

204 This formulation is currently used under the *My Health Records Act 2012* (Cth). The term representative is also used in other jurisdictions, eg, *Representation Agreement Act 1996* (British Columbia).

Why 'agreement'?

5.192 Using the term 'agreement' signals to third parties that the representative has not been appointed by some higher authority. The representative may only act in accordance with an agreement with the principal. That agreement can be set aside by a tribunal if the representative is acting against the will, preferences and rights of the principal. Many submissions highlighted a reluctance of third parties to question an attorney or guardian when they were prima facie acting against the express wishes of the principal. Examples in submissions included attorneys denying the principal funds for basic toiletries, small personal items and simple outings, and the unwillingness of residential aged care staff to question an attorney's decisions.[205] These submissions highlighted a fundamental misunderstanding in the community of both the role of attorneys and guardians as well as the limits of their powers.

5.193 Using the term 'agreement' rather than 'appointment' may highlight the active role of the principal in the establishment of the arrangement. The representative has not been appointed by a court or tribunal. As it is an agreement, the principal is making conscious decisions as to who will be responsible for making decisions on their behalf should they lose decision-making ability, and has chosen the terms and conditions on which those responsibilities will be exercised. The representative has also made an active choice by agreeing to act as the principal's representative, and has agreed to the scope and limits of the powers set out in the Representatives Agreement.

5.194 Importantly, the term 'agreement' is not intended to be a synonym for contract. There is no benefit to be bestowed upon the representative by the principal under the agreement. In fact, the representative may, with a degree of selflessness, agree to support and represent the principal.

205 Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*.

6. Family Agreements

Contents

Summary

6.1 A specific type of financial abuse of older people has been recognised in the context of family agreements. A 'family agreement', of the kind considered in this chapter, has a number of forms but is typically made between an older person and a family member. The older person transfers title to their real property, or proceeds from the sale of their real property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing. As an exchange of property in return for long term care is at the centre of these family agreements, they are also known as 'assets for care' agreements or arrangements.

6.2 These agreements are typically not put in writing. Where they are written, family agreements may be prepared by one of the parties to the agreement, without legal advice, and the agreement generally does not provide for what happens if there is a breakdown of the relationship.

6.3 While such arrangements can fulfil an important social purpose, there can be serious consequences for the older person if the promise of ongoing care is not fulfilled, or the relationship otherwise breaks down. It may be difficult to establish that a contract was intended, and what its terms were. The other party is likely to be the registered proprietor of the property, and it may be difficult to establish a specific

interest in the land. The older person may be left without money or even a place to live, a kind of financial abuse identified by many stakeholders as financial abuse.

6.4 The ALRC recommends that tribunals be given jurisdiction over disputes within families with respect to residential real property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal provides a low cost and less formal forum for dispute resolution—in addition to the existing avenues of seeking legal and equitable remedies through the courts.

6.5 Moreover, because social security laws and Centrelink processes relating to eligibility for the Age Pension may be driving entry into family agreements in ways that are disadvantageous to the older person if the agreement fails, the ALRC recommends that the *Social Security Act 1991* (Cth) be amended to require that assets for care agreements (known as a 'granny flat interest') be expressed in writing in order for the older person to continue to be entitled to the Age Pension.

6.6 In order to facilitate greater community awareness and understanding, the ALRC also suggests that the Department of Human Services should ensure that any elder abuse strategy developed by the Department, as recommended in Chapter 12, specifically addresses the potential connection between elder abuse and family agreements.

Challenges posed by family agreements

6.7 The majority of older people either live with their partner or alone. Nevertheless, statistics prepared by the Australian Bureau of Statistics show that, in 2011, 8.2% of people aged 65 years and over were living with their children or other relatives (usually a sibling). Only 1.7% were living privately with non-relatives. Of those aged 85 years and over, 12.2% were living with their children or other relatives and 0.9% were living privately with one or more persons who were not a relative. Women across the three age groups of 65–74, 75–84 and 85+, were much more likely than men to live with children or other relatives. Of women aged over 85, 14.8% were living with their children or other relative.[1] The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known. However, stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing.[2]

6.8 Family agreements can take many forms, but for this chapter, the kind considered involves a transfer of an older person's home or other assets to a trusted family member in exchange for a promise of long-term care and support. The proceeds

1 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where and How Do Australia's Older People Live? Cat No 2071.0* (2013).

2 Justice Connect, *Submission 182*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Australian Research Network on Law and Ageing, *Submission 90*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Law Council of Australia, *Submission 61*.

may be used to reduce indebtedness, extend a house, or build a 'granny flat'.[3] Alternatively, the trusted family member may use the proceeds from the sale of the older person's home to purchase a new property for everyone to live in together. The Law Council of Australia described the nature of assets for care arrangements that have come to the attention of legal practitioners:

> these arrangements usually arise in the context of an older person being unable to remain living in the family home. It is agreed, usually verbally, that the family home be sold, and the proceeds transferred to usually an adult child, who in turn uses the funds to pay off their mortgage, extend or renovate their home or build a granny flat on their property. The transfer is not a gift, but rather an exchange of assets for care for life.[4]

6.9 Seniors Rights Victoria also provided an example of a typical family agreement:

> A grandmother took responsibility for the care of a grandson during his childhood after the death of his parents, and continued to provide a home for him as an adult. The grandmother owned her own home, but considered the possibility of downsizing after living on her own for a period. As her grandson and his family wanted to upgrade to a new and larger home with a swimming pool for the children, he suggested that his grandmother could sell her home and then live with the family 'for the rest of her life'. These arrangements were made, but no definite understanding about the ownership of the property was reached. The new home was purchased in the names of the grandson and his wife.[5]

6.10 Family agreements are popular in Australia for many reasons including, as Brian Herd suggests:

- our general aversion to the 'institutional' care of aged care facilities, such as nursing homes and hostels;
- the lack of such facilities (where they become essential) or, at least, of any more sympathetic and empathetic alternatives;
- people are living longer and, as a result, living longer with disabilities;
- our fixation in later life to preserve assets (eg, the icon of the family home) for succeeding generations;
- our consequent reluctance to dissipate assets (especially the family home) to pay any premium for assisted care, such as an accommodation bond in a hostel; and
- our predilection for 'impoverishing' ourselves in order to obtain and maintain social security entitlements and to reduce the tax impact of ageing.[6]

6.11 Herd also noted that overlaying 'these mores is our understandable preference to be cared for by family rather than some unconnected, albeit well-intentioned, professional care provider whenever this becomes necessary'.[7]

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3 The Macquarie Dictionary defines 'granny flat' as 'a self-contained extension to or section of a house, designed either for a relative of the family, as a grandmother, to live in, or to be rented'.

4 Law Council of Australia, *Submission 61*.

5 Seniors Rights Victoria, *Submission 171*.

6 Brian Herd, 'The Family Agreement: A Collision Between Love and the Law?' (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 25.

7 Ibid.

6.12 The making of family agreements is, in many cases, highly beneficial for the older person and not inherently a form of elder abuse. Seniors Rights Victoria has suggested that making an association between family agreements and elder abuse may discourage older people from getting advice to formalise their agreement, on the basis that only those older people with abusive children need advice.[8]

When things go wrong

6.13 A key issue with family agreements, as the Law Council of Australia noted,[9] is that they are often made orally. They are also often made without legal advice and without any consideration of what might happen if things go wrong.[10] Stakeholders identified significant problems with family agreements, typically where the family relationship has broken down and the older person has been evicted from the property without recompense.[11] The Older Persons Rights Service in Western Australia, for example, estimated that 70% of financial abuse matters it deals with involve the breakdown of family agreements.[12] The Federation of Ethnic Communities' Councils (FECCA) suggested further that older persons from culturally and linguistically diverse communities may be more likely to suffer from the breakdown of these agreements as intergenerational care is common in some communities.[13]

6.14 When things go wrong, a failure to clearly document the agreement may mean that the arrangement is unenforceable and the older person may find themselves homeless and having lost the proceeds of their home, which they invested under the family agreement.

6.15 A key problem with oral agreements identified in submissions was the failure of the parties to think through in detail their expectations under the agreement and what would happen if things go wrong.[14] Key issues that are often overlooked are:

- the nature and level of care anticipated;
- what should happen if the older person's care needs increase;
- what should happen if the carer enters into a new relationship, or if their current relationship ends;

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8 Louise Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1.

9 Law Council of Australia, *Submission 61*.

10 Kyle, above n 8.

11 See, eg, Older Women's Network NSW, *Submission 136*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

12 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 Ralph Ruebner, Teresa Do and Ann Taylor (eds), *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, 2015) 333.

13 FECCA, *Submission 21*.

14 See, eg, FMC Mediation and Counselling, *Submission 191*; Eastern Community Legal Centre, *Submission 177*; Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; State Trustees Victoria, *Submission 138*; Legal Aid NSW, *Submission 137*; Legal Aid ACT, *Submission 58*; National Seniors Australia, *Submission 57*.

- what should happen if the carer predeceases the older person; and
- what should happen if the caregiver needs to relocate.[15]

6.16 Accordingly, getting legal advice and documenting the family agreement are important. The ALRC commends the work of a broad range of stakeholders including elder abuse helplines, community legal centres and other welfare groups, who provide encouragement, advice and support to older people to get legal advice and properly document their family agreement. Seniors Rights Victoria, for example, has produced *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse*, in recognition of the role that lawyers can play in helping to prevent the financial abuse of older Australians. The guide includes a checklist of points to consider when drafting an agreement. Seniors Rights Victoria also includes a sample family agreement on its website that lawyers are permitted to use.[16]

6.17 Notwithstanding this important work, because the arrangements are typically made within families, it is unlikely that all, or even a significant majority of older people, will get independent legal advice and assistance in putting in place an appropriate written agreement. As Herd has noted '[d]ocumenting, in a written agreement, a loving, caring or supportive personal relationship, for example, is probably anathema to many Australians'.[17]

6.18 Hervey Bay Seniors Legal and Support Service said that there are also many individuals who are likely to be deterred by the perceived cost of legal advice and the preparation of documentation.[18]

Access to justice

6.19 The main form of redress when a family agreement goes wrong is currently by way of civil litigation. As the Law Council of Australia stated, where parties are able to access the courts, they are effective in resolving complex cases.[19] Doctrines and remedies, particularly in equity, have developed over many centuries to respond to the varied circumstances in which individuals may suffer loss.

6.20 Nevertheless, pursuing litigation in these cases can be prohibitively costly, unsatisfactorily lengthy, and stressful for the older person. Proof, presumptions and remedies pose significant issues in such cases. The access to justice issues were highlighted by the Australian Research Network on Law and Ageing (ARNLA):

> Recovery of property via equitable action is rarely undertaken. The proceedings must commence in the Supreme Court (or sometimes District). They are expensive, time

15 Rosslyn Monro, 'Family Agreements: All with the Best of Intentions' (2002) 27(2) *Alternative Law Journal* 68, 70; Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 *Australian Law Reform Commission Reform Journal* 29, 31.

16 Louise Kyle, 'Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse' (Seniors Rights Victoria, 2012).

17 Herd, above n 6, 25.

18 Hervey Bay Seniors Legal and Support Service, *Submission 75*.

19 Law Council of Australia, *Submission 61*.

> consuming and stressful, and it is unlikely an older party has either the financial or emotional resources to commence proceedings.[20]

6.21 As the Victorian Law Reform Commission (VLRC) reported, action in the superior courts of the states and territories costs tens of thousands of dollars in legal fees and, even if successful, only a fraction of those costs are recoverable.[21] A similar view was expressed by the Older Persons Rights Service in Western Australia, which noted that elder financial abuse involves largely civil actions in the Supreme Court.

> The legal costs are notably quite high and anecdotal statements from lawyers who practise in this jurisdiction have advised us that this remedy is in reality only available to the very rich and/or to companies with access to considerable funds. We are in full agreement with this assessment and have witnessed many cases where older people have lost their family home or life savings with no chance for redress.[22]

6.22 In many of the examples of family agreements gone wrong set out in submissions, the older person had lost their principal asset—their home—and typically had limited other assets.[23] For example, Cairns Community Legal Centre noted that,

> by their nature, family agreements under an 'assets for care' arrangement involve the older person making either significant contributions or transferring title in property to the other person. Accordingly, when the arrangement breaks down, the older person is not usually in a position to be able to finance proceedings in a higher court for the matter to be determined.[24]

6.23 For those unable to afford a lawyer, disputes involving family agreements do not generally fall into the type of matters for which there is public funding.[25] Specifically, Community Law Australia noted that older people 'being financially abused by their carer or family, will often, find it extremely difficult to access free ongoing legal help if they can't afford a lawyer'.[26] Given these challenges, Caxton Legal Centre referred to the Supreme Court as 'arguably the most inaccessible jurisdiction in the country'.[27]

6.24 Another issue regarding action in the Supreme Court is that such actions are lengthy processes that may take many years to be resolved. Where an older person has lost their home and has limited funds, they need access to a remedy quickly. In addition, older people may be put off by the prospect of lengthy and protracted civil litigation.[28]

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20 Australian Research Network on Law and Ageing, *Submission 102*.
21 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).
22 Scott Johnson, 'Elder Abuse: The Need for Law Reform—Enduring Power of Attorney & Family Agreements' (27 April 2010) 25.
23 See, eg, Seniors Rights Victoria, *Submission 171*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.
24 Cairns Community Legal Centre Inc, *Submission 305*.
25 Public funding for legal advice is limited to family law (restricted to matters under the *Family Law Act 1975* (Cth)) and criminal law: see Community Law Australia, *Unaffordable and out of Reach: The Problem of Access to the Australian Legal System* (2012) 4.
26 Ibid 3.
27 Caxton Legal Centre, *Submission 67*.
28 Justice Connect, *Submission 182*.

6.25 Older people may also be fearful of the social and emotional costs of litigation, given the family context of the dispute. Litigation may exacerbate family breakdown, or lead to a loss of access to grandchildren, which may result in the older person being reluctant to take legal action.[29]

6.26 The ALRC received a number of case studies that highlighted the access to justice issues faced by older people when family agreements go wrong. The following was provided by Legal Aid ACT:

> Barry, an eighty five year old man transferred his unencumbered home in the ACT to one of his adult children, Angela. Angela had promised to build a granny flat for Barry and take care of him until his death. There was no written agreement, however Barry had been living in his granny flat on Angela's property for approximately 5 years.
>
> Angela remarried and advised Barry that the arrangement could not continue and demanded he leave his home. Barry was devastated by Angela's actions, however was able to go live with another child, Stephanie and did not want to seek any legal recourse against Angela as he was 'too old and it was too hard' and he felt so ashamed about what had happened to him.[30]

Challenges in seeking an equitable remedy

6.27 Land law in Australia is defined by the Torrens system of title, the core principle of which is indefeasibility of title—once registered, title is conclusive. The objective of this system is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of the current proprietor's title, and satisfy themselves of its validity.[31] The creation or transfer of an interest in land must be in writing or evidenced in writing, and signed by the person creating or conveying the interest.[32]

6.28 While the Torrens system of title may protect purchasers from claims by non-registered individuals who assert an interest in the property,[33] the Torrens system maintains the right of plaintiffs to bring personal claims founded in law or equity against the registered proprietor.[34] Where there is an oral arrangement, the older person would have to rely on equitable doctrines to establish a proprietary interest and right to recompense. The older person also has the capacity to alert potential purchasers that they have an equitable interest or claim over the property by lodging what is known as a caveat, over the property.[35]

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29 Northern Territory Anti-Discrimination Commission, *Submission 93*.
30 Legal Aid ACT, *Submission 58*.
31 Brendan Edgeworth et al, *Australian Property Law* (LexisNexis Butterworths, 2013) vol 9, ch 5. See also Kelvin Low, 'Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 205.
32 See, eg, *Conveyancing Act 1919* (NSW) s 23C.
33 Edgeworth et al, above n 31, ch 5.
34 The so called 'in personam' exception to indefeasibility: see Ibid.
35 Ibid.

6.29 The key problem underpinning many family agreements is that the older person is typically giving up the certainty of registered legal title in one property (usually their home) in exchange for rights in relation to a new property and/or expectations of care and support. Those rights and expectations are often not explicitly discussed and agreed precisely within the family. The older person's rights with respect to the new property are typically not recorded on the title. As a result, the situation is one where the older person has forgone registered legal title in one property and may or may not have certain rights in contract or equity in the new property.

6.30 Where a family agreement breaks down, the equitable remedies available to an older party in an 'assets for care' dispute will depend on the nature and circumstances of the original arrangement, what evidence is available to confirm the nature of the arrangements, as well as the circumstances and facts of the breakdown of the agreement. Whether the older party is on the title for the relevant property and whether the family agreement was in any way reduced to writing will be important issues, not just in terms of the evidence of the arrangement, but the precise remedies that may be available. To be enforceable, a contract for the creation or transfer of an interest in land must be in writing or evidenced in writing, and signed by the person creating or conveying the interest.[36] Where there is an oral arrangement, the older person may be able to rely on equitable doctrines to establish a proprietary interest and right to recompense. However, this requires navigating

> a confusing amalgam of legal issues including, but not limited to, contract law, land law, equity, trusts and family law … [and] contrary legal presumptions about the nature of family arrangements and joint endeavours. It is dominated by the vagaries of equitable doctrine.[37]

6.31 The available equitable actions include:

- resulting trust;
- undue influence;
- unconscionable conduct;
- remedial constructive trusts; and
- equitable estoppel.

Resulting trusts

6.32 If an older person contributes money towards the purchase of a property and this is not reflected on the title, they may be able to claim that the property is held on 'resulting trust' for them in proportion to their contribution. However, where the arrangement is between a parent and their child, the law starts with the presumption that the contribution was a gift: the 'presumption of advancement'.[38] This presumption

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36 Ibid [4.16].
37 Webb and Somes, above n 12, 26.
38 Dyson Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014) pt 2.

may be rebutted, but it places the evidentiary burden on the older person to prove that their payment was not a gift but a contribution to the property. Justice Connect observed that the 'application of the presumption of advancement has the effect of imposing an evidentiary burden on older people in circumstances where the arrangements are often informal and undocumented'.[39]

6.33 Accordingly, there may be difficulties for older persons in asserting that their contribution to the purchase of a property was not a gift but was to be held by their child on trust.[40] A resulting trust may not apply where the older person simply transfers their home into the name of their child.[41] In such cases, transactions involving voluntary transfers of land can only be set aside on the basis of other equitable doctrines.

Undue influence

6.34 Where an older person has been pressured into a family agreement, another relevant equitable doctrine is the doctrine of undue influence.[42] However, this is likely to be of use only where the older person has not benefited from the family agreement and there was either a relationship of dependency when the agreement was made or actual undue pressure was applied on the older person to agree to the arrangement.

6.35 In the case studies provided by stakeholders, the family agreement was often, at least initially, mutually beneficial and there was no pressure applied on the older person to enter into it. Instead, problems arose subsequently when relationships broke down or unforseen events changed the dynamics, as in the example provided by Legal Aid ACT above.[43] In these cases, the equitable doctrine of undue influence would not apply.

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39 Justice Connect, *Submission 182*. Internationally, there are jurisdictions that do not apply the presumption of advancement to adult children. See, eg, the Canadian decisions of *McLear v McLear Estate* (2000) 33 ETR (2d) 272 (Ont SCJ); *Cooper v Cooper Estate* (1999) 27 ETR (2d) 170 (Sask QB). See also Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis, 3rd ed, 2015), 632–633.

40 Susan Barkehall-Thomas, 'Parent to Child Transfers: Gift or Resulting Trust?' (2010) 18 *Australian Property Law Journal* 75, 3.

41 In most Australian jurisdictions, this transaction will be treated as a gift and there will be no legal possibility of asserting the existence of a resulting trust: *Conveyancing Act 1919* (NSW) s 44; *Law of Property Act 2000* (NT) s 6; *Property Law Act 1974* (Qld) s 7; *Property Law* Act 1958 (Vic) s 19A; *Property Law Act* 1969 (WA) ss 38, 39. See also: *Smith v Glegg* [2005] 1 Qd R 561; *Newcastle City Council v Kern Land Pty Ltd* (1997) 42 NSWLR 273; *Bhana v Bhana* [2002] NSWSC 117; *Singh v Singh* [2004] NSWSC 109, [34]–[35]; *Daher v Doulaveras* [2008] NSWSC 583; *Drayson v Drayson* [2011] NSWSC 965, [59]. There are Victorian authorities that support a resulting trust being imposed on gifts of land: *Schweitzer v Schweitzer* [2010] VSC 543, [24]; *Re Association for Visual Impairment the Homeless and the Destitute Inc (in liq) (No 2)* [2014] VSC 183. The Victorian Court of Appeal left the question open in *Xiao Hui Ying v Perpetual Trustees Victoria Ltd* [2015] VSCA 124, [39].

42 Heydon, Leeming and Turner, above n 38, ch 15.See also Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499, 514. Undue influence in the probate context is considered in ch 8.

43 See also, Relationships Australia, Victoria, *Submission 125*.

Unconscionable conduct

6.36 Where an older person is denied promised care and support, or is excluded from their home, another ground for seeking to uphold the family agreement in equity is on the basis that the older person was in a position of 'special disadvantage' and that the other person knew of this. In such a case, it may be 'unconscionable' for the other person to deny the agreement.[44]

6.37 In many family agreement situations, there is no dependency or special disadvantage at the time the agreement was made.[45] In addition, at the time the agreement breaks down, it may be that neither party contemplated what would happen if things went wrong, rather than any intent by the other family member to deceive or take advantage of the older person. Accordingly, unconscionable conduct may be relevant only in a small number of cases.

Remedial constructive trusts

6.38 There are two kinds of constructive trusts that may be imposed by courts in disputes concerning property agreements that were created in the absence of writing. The first is the common intention constructive trust and the second is the constructive trust imposed for unconscionability or unconscientiousness.

6.39 The common intention constructive trust has three elements:

(a) the parties must have formed a common intention as to how property will be shared;

(b) the party claiming a beneficial interest must show that they have acted to their detriment; and

(c) it would be a fraud on the claimant for the legal owner to assert that the claimant had no beneficial interest in the property.[46]

6.40 The unconscionability, or unconscientiousness-based, constructive trust has four elements:

(a) the existence of a joint endeavour between the plaintiff and the defendant for the object or purpose of providing permanent financial security and benefits;

(b) valuable contributions by the plaintiff to the joint endeavour;

(c) an increment in wealth having accrued to the defendant as a result of the joint endeavour; and

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44 Fiona R Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia' (2003) 29 *Monash University Law Review* 336, 351–352.

45 Webb and Somes, above n 12, 34.

46 *Evans v Braddock* [2015] NSWSC 249, [260]; *Sobey v Sobey* [2014] VSC 373, [44]; *Taleb v DPP* [2014] VSC 285, [64]; *Gabini & Gabini* [2014] FamCAFC 18; *Grant v Grant* [2013] VSC 329, [146]–[147]; *Shepherd v Doolan* [2005] NSWSC 42; *Hohol v Hohol* [1981] VR 221, 225. See Radan and Stewart, above n 39, 945.

(d) the unconscionability of the retention of that wealth by the defendant to the exclusion of the plaintiff.[47]

6.41 Webb and Somes have noted that a constructive trust imposed on a failed joint endeavour is the most common equitable doctrine relied on in assets for care arrangements.[48]

6.42 The primary disadvantage of remedial constructive trusts, from the perspective of the older person, is that, if successful, the available remedy is ordinarily the imposition of an equitable lien to the value of the contribution, rather than compensation for the loss of expectation of care and support.[49] Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.

Equitable estoppel

6.43 A claim of estoppel can result in the enforcement of an expectation in equity.[50] This may be the most suitable remedy in family agreement cases.

6.44 In order to succeed in an equitable claim, the older person must show that:

- the defendant made a representation, either by conduct or acquiescence, creating the expectation that the older person would gain an interest in property;
- the older person relied on this representation to their detriment; and
- the defendant knew that the older person was relying on the representation.[51]

6.45 Many of the cases highlighted in submissions give rise to potential claims of estoppel.[52] In many cases, there is a promise—whether explicit or based on acquiescence—that the older person will be able to live in the property for the duration of their life. The older person has made a financial contribution to the property in reliance on that representation, which, if the relationship breaks down and the older person is no longer able to live in the property, is to their detriment. By conduct, it should be possible to establish that the defendant knew of this reliance by the older person.

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47 *Lloyd v Tedesco* (2002) 25 WAR 360, [27]. The first decision to postulate this type of constructive trust was the decision of Deane J in *Muschinski v Dodds* (1985) 160 CLR 583. See also *Baumgartner v Baumgartner* (1987) 164 CLR 137, where Deane J's thesis was accepted by the High Court.

48 Webb and Somes, above n 12. *See also Muschinski v Dodds* (1985) 160 CLR 583.

49 Barkehall-Thomas, above n 40, 155.

50 Note that some members of the High Court have considered that there is one unified form of estoppel: see *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

51 Barkehall-Thomas, above n 40, 168. *Sullivan v Sullivan* (2006) ANZ ConvR 54, [2]–[3] (Handley JA).

52 Advocare Inc (WA), *Submission 86*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; University of Newcastle Legal Centre, *Submission 44*.

6.46 The available remedy in an equitable estoppel action is likely to be compensation to the full value of the promise forgone, particularly in family agreement arrangements where the breach of promise has significant consequences for the older person.[53]

Summary

6.47 Accordingly, there are a range of potential legal actions available to an older person who has suffered financial loss on the breakdown of a family agreement and their success will depend on the extent to which the facts of the particular situation can meet the required tests in law and equity. The fact that the older person has suffered significant financial loss may not be sufficient of itself. An older person has to weigh up the strength of their case in the context of unwritten agreements and conduct that may be evidence of a range of intentions. This assessment must be made with an understanding of the considerable costs of equity litigation.

Low cost options to resolve disputes

Recommendation 6–1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.

6.48 Tribunals should be given jurisdiction over disputes with respect to residential property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal offers a low cost and less formal forum for dispute resolution, in addition to the existing avenues of seeking legal and equitable remedies through the courts. Tribunals are able to resolve disputes in a non-legalistic fashion without regard to formal pleadings and affidavits. This recommendation seeks to provide an alternative avenue for dispute resolution and would otherwise not disturb existing legal and equitable doctrines.

6.49 The tribunal, consistent with the approach in Victoria (see below), would consider the general law of property, but would have a broader jurisdiction to award compensation having regard to contributions of both parties made under the assets for care arrangement. In particular, the tribunal would consider the care and support provided by all parties under an assets for care arrangement as well as the financial contribution to the property.

6.50 Where the tribunal is satisfied that a party has suffered loss as a consequence of a breakdown of a family agreement, the tribunal should award the appropriate remedy that is just and fair having regard to the financial and non-financial contributions of the parties.

6.51 Consistent with the tribunal's role to provide a quick, simple and informal forum for dispute resolution, the recommendation is limited to disputes over residential

53 Barkehall-Thomas, above n 40, 155.

property. Recommendation 6–1 excludes disputes involving family businesses and farms, and focuses on domestic disputes involving residential property under assets for care arrangements. More commercial arrangements are better suited to formal adjudication through the courts.

6.52 Often a failed family agreement may involve an older person, their child and their child's partner. Where the child and their partner are separated and seeking to resolve a property dispute under the *Family Law Act 1975* (Cth), the older person may seek to protect their interest in the property by joining proceedings under the *Family Law Act 1975* (Cth).[54] This recommendation does not seek to interfere with this jurisdiction.

The role of tribunals in dispute resolution

6.53 Victoria was the first state to establish a combined civil and administrative tribunal—the Victorian Civil and Administrative Tribunal (VCAT).[55] Following the establishment of VCAT in 1998, there is now a civil and administrative tribunal in each state and territory, except Tasmania.[56] By volume of cases, VCAT is the largest tribunal in Australia and has a broader jurisdiction with respect to property matters and civil claims than any other tribunal.[57]

6.54 These civil and administrative tribunals are often referred to as 'super tribunals'—a single tribunal with broad jurisdiction for administrative review and to resolve civil and commercial disputes replacing dozens of smaller tribunals, boards and panels that had discrete, specialist and narrow remits.[58] The development of these super tribunals has been described as 'one of the most successful examples of creativity in the area of dispensing of justice that states have embarked upon'.[59]

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54 *Family Law Act 1975* (Cth) s 79F.

55 The Victorian Civil and Administrative Tribunal (VCAT) was established by *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

56 The Victorian Civil and Administrative Tribunal (VCAT) was established by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the State Administrative Tribunal (SAT) was established by the *State Administrative Tribunal Act 2004* (WA), the ACT Civil and Administrative Tribunal (ACAT) was established by the *ACT Civil and Administrative Tribunal Act 2008* (ACT), the Queensland Civil and Administrative Tribunal (QCAT) was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the NSW Civil and Administrative Tribunal (NCAT) was established by the *Civil and Administrative Tribunal Act 2013* (NSW), the South Australian Civil and Administrative Tribunal (SACAT) was established by the South *Australian Civil and Administrative Tribunal Act 2013* (SA), and the Northern Territory Civil and Administrative Tribunal (NTCAT) was established by the *Northern Territory Civil And Administrative Tribunal Act 2014* (NT). Tasmania is considering establishing a super tribunal: Department of Justice (Tas), *A single tribunal for Tasmania*, Discussion Paper (September 2015).

57 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2015–16,* 3.

58 Justice Kevin Bell (President, VCAT), 'The role of VCAT in a changing world: the President's review of VCAT', Speech delivered to the Law Institute of Victoria, 4 September 2008.

59 Bertus De Villiers, 'Accessibility to the Law—the Contribution of Super-Tribunals to Fairness and Simplicity in the Australian Legal Landscape' (2015) 39(2) *University of Western Australia Law Review* 239, 240.

6.55 Key defining features of these tribunals are that they are able to operate flexibly and with a greater degree of informality than a court.[60] The enabling statutes for the tribunals specifically require them to conduct proceedings with as little formality and technicality and as much speed as the circumstances of the case permit.[61] The tribunals are expressly not bound by the rules of evidence, and have a broad power to inform themselves as they think fit.[62] Nevertheless, the tribunals are bound by the rules of procedural fairness (previously 'natural justice') and must act fairly. This flexibility and informality can greatly assist an unrepresented litigant run their legal action when compared to navigating formal court processes.[63]

6.56 Byrne J noted that the enabling statute for VCAT requires the tribunal to act differently from the courts:

> This necessarily involves the Tribunal taking a more active role and identifying the real issues between the parties and directing them as to the evidence which legally and logically bears on the issues. It may be, too, that in a given case the Tribunal will itself interrogate witnesses in a manner and to an extent which would not be expected in a court.[64]

6.57 Notwithstanding this, 'in matters that are complex, or where expert evidence is heard, or where parties are legally represented, the proceedings [in the tribunal] are less informal and often resemble a hearing in a court'.[65] Typically, appeals from the tribunal to the courts are only possible on questions of law.[66] The state and territory tribunals differ in the extent to which there is an internal review or appeals process within the tribunal on matters of fact.[67]

Victorian approach

6.58 While the civil and administrative tribunals have broadly similar processes and procedures, their jurisdiction does differ across states and territories. The civil dispute resolution jurisdiction of these tribunals has even been described as resembling 'a smorgasbord of jurisdictions with little intra-state consistency'.[68]

6.59 Recommendation 6–1 builds on VCAT's jurisdiction to resolve disputes between co-owners of land and goods. This jurisdiction is unique to Victoria and was

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60 Jason Pizer, 'The VCAT—Recent Developments of Interest to Administrative Lawyers' [2004] (43) *AIAL Forum* 40.

61 *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29(3)(d).

62 *Civil and Administrative Tribunal Act 2013* (NSW) s 38(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1); *State Administrative Tribunal Act 2004* (WA) ss 32(2), (4); *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3).

63 De Villiers, above n 59, 47.

64 *Winn v Blueprint Instant Printing Pty Ltd* [2002] VSC 295 (2 August 2002) [9].

65 De Villiers, above n 59, 247.

66 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148; *State Administrative Tribunal Act 2004* (WA) s 105.

67 *ACT Civil and Administrative Tribunal Act 2008* s 79(3); *Civil and Administrative Tribunal Act 2013* (NSW) s 32; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 70.

68 De Villiers, above n 59, 247.

established by amendments to the *Property Law Act 1958* (Vic) (*PLA*) in 2006. VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.[69] The tribunal's jurisdiction over property disputes between co-owners has an uncapped monetary value.

6.60 Notwithstanding the flexibility to make any order that the tribunal considers 'just and fair,' VCAT does not ignore the general law of property. As Senior Member Riegler explained:

> Although the Act does not expressly state that the Tribunal's discretion is to be applied in accordance with the general law, I am of the opinion that to simply determine the issues based on what the Tribunal may, from time to time, consider to be just and fair without having regard to the general law is not an outcome that I consider to be just and fair. The public expect decisions of the Tribunal to be consistent, in terms of applying the law to the facts as found. To disregard the general law may lead to inconsistency in the decisions of the Tribunal which may be difficult to justify on any legal basis.[70]

6.61 VCAT has confirmed that the *PLA* gives it jurisdiction to make orders with respect to equitable, as well as legal, co-owners.[71] The broad statutory mandate gives VCAT considerable flexibility to arrive at a just and fair sale of the land and a division of the proceeds and/or division of land. Justice Connect observed that

> VCAT can order compensation, reimbursement or adjustments to interests between the co-owners reflecting each co-owner's individual contribution to the property. Contributions may be made through improvements to the property and payment of maintenance costs, rates and mortgage repayments. Conversely, interests may be adjusted to take into account damage caused to the property and the benefit that one co-owner may have had of exclusive possession.[72]

6.62 One of the particular advantages of VCAT having this jurisdiction is that it gives the parties access to alternative dispute resolution (ADR) without going through a number of pre-trial steps, which may be required in the Supreme Courts. VCAT may seek to resolve disputes through mediation or compulsory conferences.[73] Compulsory conferences are similar to mediation in that they are pre-trial, confidential, and 'without prejudice' facilitated discussions, designed to assist the parties to resolve their dispute.[74] Unlike mediation, compulsory conferences are only conducted by tribunal members and the role of the tribunal member is to actively assist the parties to reach settlement. As set out in a VCAT Practice Note:

> at a compulsory conference the Tribunal Member may express an opinion on the parties' prospects in the case, or on the relative strengths and weaknesses of a party's

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69 *Property Law Act 1958* (Vic) s 228.
70 *Davies v Johnston (Revised*) (Real Property) [2014] VCAT 512 (5 May 2014), [27].
71 *Garnett v Jessop (Real Property)* [2012] VCAT 156 (13 February 2012).
72 Justice Connect, *Submission 182*.
73 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 83, 88.
74 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 4—Alternative Dispute Resolution* (2014) 3.

> case. The Member will exercise this power if the Member considers it to be of assistance in promoting settlement.[75]

6.63 This more interventionist approach may be better suited to disputes regarding family agreements, where there is often a significant power imbalance between the parties.[76] Seniors Rights Victoria stressed the value of the tribunal's ADR processes in providing a forum in which family members are required to sit down and resolve disputes. Seniors Rights Victoria highlighted the extent to which these disputes may be resolved through ADR, without needing to be adjudicated by the tribunal.[77]

Support for dispute resolution by a tribunal

6.64 Community Legal Centres and elder abuse advice services, including those with experience of the Victorian approach, supported tribunals having jurisdiction over disputes following the breakdown of family agreements.[78] ARNLA, for example, noted that a 'tribunal may be a preferable forum to hear and determine disputes about family agreements as tribunals are considered to be less expensive, more expedient, and less formal than courts'.[79]

6.65 Similarly, Seniors Rights Service suggested that

> [i]t would be beneficial to have a forum other than the Supreme Court, such as the NSW Civil and Administrative Tribunal, for property orders to be made in relation to family agreements to reduce time, cost, and stress for older people in bringing proceedings against family members.[80]

6.66 Seniors Rights Victoria highlighted the value of a tribunal process in assisting older people to resolve failed family agreements:

> This jurisdictional change [in Victoria] has provided 'co-owners' with a much greater ability to institute proceedings to resolve disputes though less expensive and onerous processes than previously existed for Supreme Court matters. This has also provided a significant benefit to older people where Assets for Care situations have failed, and they seek to recover their financial contribution to the purchase of a property in conjunction with other family members.[81]

6.67 Justice Connect also noted that tribunal processes offer a number of benefits, including that 'the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse'.[82]

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75 Ibid 5.
76 Caxton Legal Centre, *Submission 67*.
77 Seniors Rights Victoria, *Submission 171*.
78 See, eg, Justice Connect, *Submission 182*; Caxton Legal Centre, *Submission 174*; Australian Association of Social Workers, *Submission 153*; Older Women's Network NSW, *Submission 136*; Australian Research Network on Law and Ageing, *Submission 102*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Legal Aid ACT, *Submission 58*; University of Newcastle Legal Centre, *Submission 44*.
79 Australian Research Network on Law and Ageing, *Submission 90*.
80 Seniors Rights Service, *Submission 169*.
81 Seniors Rights Victoria, *Submission 171*.
82 Justice Connect, *Submission 182*.

Defining the tribunal's jurisdiction

6.68 One of the key limitations of the Victorian model is that it is restricted to co-owners of land in law and equity. However, it may well be that, in a majority of family agreement disputes, the older person has no property interest as co-owner unless established through, for example, equitable estoppel. If they do have an interest in property, that interest may be a life interest, an equitable lien or licence to reside in the property.[83] The ALRC recommends that the tribunal's jurisdiction encompass any type of legal or equitable interest an older person may have in their current or former principal place of residence. The tribunal's jurisdiction should allow the tribunal to consider the respective contributions, financial and non-financial, under the family agreement. This approach is consistent with the recommendation from the Seniors Legal and Support Service Hervey Bay, that

> [t]here be established an easily accessible Tribunal which has the power to deal with all issues arising from the breakdown of family agreements, not just the issues relating to any real property in which the older person has an interest.[84]

6.69 By focusing on contributions, the tribunal would be able to fully consider the care and support provided by the parties to each other. This addresses a principal criticism that the law of equity in relation to family agreements only considers the asset side of 'assets for care', and not the care side.[85] That is, the law of equity as applied to family agreements is focused on financial contributions towards the purchase of property or renovations to property and not the non-financial contribution of care and support provided.

6.70 The Law Council of Australia supported a tribunal jurisdiction to resolve disputes involving assets for care arrangements and suggested the jurisdiction should be

> defined in a way that ensures parties to assets for care arrangements have a forum to resolve their dispute and that there are appropriate remedies available, including, non-monetary, monetary and real property. Further, the Law Council supports the proposition that general principles of property law should apply in all cases. Where a former property or principal place of residence of the older person in an assets for care arrangement has been disposed of to a third party bona fide purchaser for value without notice, property law principles will ensure an innocent third party purchaser is not unfairly disadvantaged where assets for care arrangements fail. Nonetheless, the victim should still be able to claim compensation from the perpetrator.[86]

6.71 The ALRC agrees that the tribunal should be able to award equitable remedies as suggested by the Law Council of Australia and that their availability and amount be calculated in accordance with equitable principles. The ALRC also agrees that the general laws of property should protect third party purchasers from claims in relation to failed assets for care arrangements.

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83 Kyle, above n 16, 42.
84 Hervey Bay Seniors Legal and Support Service, *Submission 75*.
85 Webb and Somes, above n 12; Justice Connect, *Submission 182*.
86 Law Council of Australia, *Submission 351*.

6.72 Some stakeholders suggested that the presumption of advancement should not apply in the case of older persons and their adult children.[87] Given the breadth of the tribunal's jurisdiction as proposed, the ALRC considers that this change is not necessary. Moreover, the ALRC is concerned that altering equitable doctrines may have broader ramifications outside the context of elder financial abuse.

Defining family

6.73 The tribunal's jurisdiction should be defined by the relationship of the parties, that is, a familial or 'familial like' relationship. This would enable a tribunal to easily confirm its jurisdiction by ascertaining the nature of the relationship between the parties to the proceedings.

6.74 Defining the jurisdiction of the tribunal on the basis of family relationship may be considered novel, given that this has previously only been done in relation to married couples and, more recently, de-facto relationships under the *Family Law Act 1975* (Cth).

6.75 A key issue explored in the Discussion Paper was how widely 'family' should be defined for the purposes of the tribunal's jurisdiction.[88] The ALRC was concerned to ensure that individuals living in non-traditional families would be included.[89]

6.76 There was significant support for a definition of family that was broad and recognised the diverse range of relationships that may exist in assets for care type arrangements. For example, Disabled People's Organisations Australia suggested that

> [u]nderstandings of 'family' must be flexible enough to consider a wide range of non-traditional family and family-type arrangements, including cultural understandings of extended family and kinship arrangements, and how these may differ between various groups and communities.[90]

6.77 Such an approach was supported by stakeholders such as FECCA, the Victorian Multicultural Commission and State Trustees (Vic).[91]

6.78 The Law Council of Australia, Eastern Community Legal Centre, and the Office of the Public Advocate (Vic) also suggested the definition of family in the *Family Violence Protection Act 2008* (Vic) be adopted when implementing Recommendation 6-1.[92] In that Act, family is defined broadly:

> **Meaning of family member**
>
> (1) For the purposes of this Act, a 'family member', in relation to a person (a 'relevant person'), means—

87 See, eg, Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*; Webb and Somes, above n 12.
88 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 8–1.
89 Ibid ch 8.
90 Disabled People's Organisations Australia, *Submission 360*.
91 State Trustees (Vic), *Submission 367*; Victorian Multicultural Commission, *Submission 364*; FECCA, *Submission 292*.
92 Eastern Community Legal Centre, *Submission 357*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (Vic), *Submission 246*.

(a) a person who is, or has been, the relevant person's spouse or domestic partner; or

(b) a person who has, or has had, an intimate personal relationship with the relevant person; or

(c) a person who is, or has been, a relative of the relevant person; or

(d) a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or

(e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.

(2) For the purposes of subsections (1)(b) and (1)(e), a relationship may be an intimate personal relationship whether or not it is sexual in nature.

(3) For the purposes of this Act, a 'family member' of a person (the 'relevant person') also includes any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including the following—

(a) the nature of the social and emotional ties between the relevant person and the other person;

(b) whether the relevant person and the other person live together or relate together in a home environment;

(c) the reputation of the relationship as being like family in the relevant person's and the other person's community;

(d) the cultural recognition of the relationship as being like family in the relevant person's or other person's community;

(e) the duration of the relationship between the relevant person and the other person and the frequency of contact;

(f) any financial dependence or interdependence between the relevant person or other person;

(g) any other form of dependence or interdependence between the relevant person and the other person;

(h) the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person;

(i) the provision of sustenance or support between the relevant person and the other person.

Example

A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members.

> (4) For the purposes of subsection (3), in deciding whether a person is a family member of a relevant person the relationship between the persons must be considered in its entirety.[93]

6.79 The ALRC considers that such a definition may be a useful template as it includes both family relationships and 'family-like' relationships, including relationships between a carer and care recipient in certain circumstances. It would enable sufficient flexibility to address a range of concerns expressed by stakeholders' such as:

> Not only do we have a limited understanding of caring relationships with our current ageing population, it is also difficult to project what types of relationships may be formed in the future, as the idea of 'family' evolves over time. There are many factors that may challenge the traditional role of the adult child caring for their ageing parents, including: pressure on children to remain in the workforce as their parents age; ageing adults who decided not to have children; older people who have become estranged from their 'family', for example some members of the LGBTI community, and have 'family members of choice'.[94]

6.80 Nevertheless, when implementing Recommendations 6–1 some refinement of the definition of family may be required, given the intergenerational nature of elder abuse when compared to family violence. For example the definition of family in the *Family Violence Protection Act 2008* (Vic) starts with domestic partners and persons in intimate personal relationships, whereas when defining family for the purposes of Recommendation 6–1 it may be appropriate to start with familial relationships such as the child/parent relationship and relationships between grandparents and grandchildren.

Centrelink requirements and family agreements

Recommendation 6–2 The *Social Security Act 1991* (Cth) should be amended to require that a 'granny flat interest' is expressed in writing for the purposes of calculating entitlement to the Age Pension.

6.81 Approximately 80% of all persons over Age Pension age receive either a full or part pension.[95] When deciding to enter into an assets for care arrangement, an important consideration for most older Australians is, therefore, how that arrangement may affect their entitlement to the pension.

6.82 The principal place of residence for an older person is an exempt asset for the purposes of the Age Pension. As outlined above, a typical 'assets for care' arrangement

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93 *Family Violence Protection Act 2008* (Vic) s 8.

94 Justice Connect Seniors Law, *Submission 362*.

95 National Commission of Audit, 'Age Pension' in *The Report of the National Commission of Audit* [9.1]. Fewer than 20% of people aged 65 years receive no pension. This figure applies only to older Australians who meet the residency requirements for social security. The Australian Bureau of Statistics reported that, in 2012, 2,278,215 people received income through the Age Pension, which was an increase of 57,831 people from the same point in time in 2011: Australian Bureau of Statistics, *National Regional Profile, 2008 to 2012, Cat 1379.0.555.001*.

involves an older person transferring title to their property, or proceeds from the sale of their property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing. Exceptions under social security law operate to ensure that older persons who enter into this type of arrangement will not lose their pension. This exception is framed as the 'granny flat interest'. Accordingly, a key incentive for older people may be to ensure that their assets for care arrangement is deemed to be a 'granny flat interest' for the purposes of social security law.[96]

6.83 Recommendation 6–2 seeks to assist the earlier Recommendation 6–1 by making it more likely that there will be some evidence of the assets for care agreement in writing in the event that a dispute is brought before a tribunal such as the Administrative Appeals Tribunal (AAT) (for social security) or the proposed state and territory tribunals. This would reduce some of the complexity and evidentiary issues that need to be addressed by an older person making a claim in the tribunal.

6.84 Recommendation 6–2 also seeks to address specific concerns raised by stakeholders that Centrelink policy is encouraging older people to enter into assets for care arrangements in a manner that may be disadvantageous. For example, the Law Council of Australia raised concerns that by 'requiring older people to ensure that they are not registered on title when entering into these arrangements, the Department of Human Services policy can currently prevent older people from protecting themselves against elder abuse'.[97]

6.85 The Older Persons Advocacy Network provided an example of the interactions between Centrelink's pension rules and assets for care arrangements:

> In 2010 Mr and Mrs P (P) then aged 75 and 73 respectively, received the age pension which was their only income. They owned their own home valued at $800K but found they could not afford to service the mortgage over their home. Balance owing to the Bank was about $230K. P entered into an oral agreement with their daughter and son in law (SIL) whereby P would contribute $500K from the sale proceeds of their home to the purchase of a new larger house, the title of which was to be put into the names of the daughter/SIL. In return for their financial contribution P would acquire a right of residence in the new house for life. The financial arrangement was never reduced to writing nor did P obtain any independent legal advice. Moreover P did not lodge a caveat on the title to protect their equitable interest in the house. P did, however, later on notify Centrelink of the financial arrangement they had entered into. Centrelink determined that their contribution of $500K in return for a right of residence for life was allowable in accordance with Centrelink's granny flat rules. …
>
> Some years later there was a falling out in the relationship between P and their daughter/SIL. P were told to vacate the house and that none of their contribution to the purchase price would be refunded. P's daughter/SIL alleged that the contribution had been a gift.[98]

96 Seniors Rights Victoria, *Submission 383*; R McCullagh, *Submission 24*.
97 Law Council of Australia, *Submission 61*.
98 Older Persons Advocacy Network, *Submission 43*.

6.86 In this example, had there been evidence in writing of the agreement between the parties, it would have been much more difficult for the daughter and son-in-law to have asserted that the money was a gift rather than an exchange as part of an assets for care arrangement.

Granny flat interests

6.87 Under the *Social Security Act 1991* (Cth), a single person or couple can make gifts of up to $30,000 over a period of five years without it affecting the amount of government benefits they can receive.[99] Any amount over the allowable amount will be assessed as a 'deprived asset' for five years from the date of the gift, which means it will be counted as the person's asset. These are also known as 'gifting' rules.[100] Therefore if an older person was to sell their home and give the proceeds to their children, the value of that gift would be counted as an asset of the older person for the purposes of calculating the older person's entitlement to the Age Pension.

6.88 However, where a gift creates a 'granny flat interest' for the older person, the asset deprivation rules do not apply. A 'granny flat interest' is defined in the following terms:

> (2) A person has a ***granny flat interest*** in the person's principal home if:
>
> (a) the residence that is the person's principal home is a private residence; and
>
> (b) the person has acquired for valuable consideration or has retained:
>
> (i) a right to accommodation for life in the residence; or
>
> (ii) a life interest in the residence.[101]

6.89 Thus, a granny flat interest is created when a person pays for (or retains) a life interest or right to use certain accommodation for life in a residence that will be the person's principal home. The use of the term 'granny flat' does not describe the type of dwelling—it describes the living arrangement. Family agreements or assets for care agreements are granny flat interests for the purposes of social security.[102] Where a person establishes a granny flat interest, the value of it is generally the same as the amount paid for acquiring the property interest.[103]

6.90 A key criterion of the granny flat interest is that the older person is not on the legal title to the property the subject of the assets for care arrangement. Seniors Rights Victoria expressed concern that the requirement was encouraging older persons to give

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99 With a maximum of $10,000 in any single year. *Social Security Act 1991* (Cth) s 1118.

100 See, eg, Department of Human Services, *Gifting* <www.humanservices.gov.au>.

101 *Social Security Act 1991* (Cth) ss 12C(2), (3).

102 See ch 12.

103 *Social Security Act 1991* (Cth) ss 1118(1)(c)(i)–(iii). Where there is a 'special reason', the granny flat interest can be valued at a different amount from that which was paid. Examples of special reasons include circumstances where the older person transfers the title to their home as well as additional assets, or where an older person pays for the construction of premises as well as additional interests. In these circumstances a reasonableness test is applied. Department of Social Services, *Guide to Social Security Law* (2014) [4.6.4.50].

up their right to be registered on title as a proprietor in order to access the 'granny flat exemption'.[104] A similar view was expressed by the Law Council of Australia.[105]

6.91 The ALRC notes that the granny flat interest is not the only option for co-living recognised under social security law. For example, it is possible for an older person to invest in a property that will become their principal place of residence with their family and stay on title without losing their pension.[106] However, these options are less well known and understood and the criteria for valuing the older person's interest are not as generous or certain as the granny flat interest.

6.92 Accordingly, the ALRC agrees with stakeholders that the rules relating to the 'granny flat interest' may be encouraging older people to enter assets for care arrangements that result in the older person giving up legal title to property. Given this, the ALRC considers that the terms and conditions of the granny flat interest should be reformed.

Importance of reducing the interest to writing

6.93 Currently, there is no requirement for the 'granny flat interest' to be in writing. Nevertheless, Centrelink recommends that a legal document be drawn up by a solicitor and that the document should:

- confirm you have security of tenure[107]
- state whether you are liable for any upkeep of the property or payment of rent, and
- outline how you are to be compensated if the property owner cannot maintain your life interest.[108]

6.94 Notwithstanding this advice, as discussed above, older people may be reluctant to enter into formal, written family agreements because they trust their family, and expect that they will have no problems.[109]

6.95 Accordingly, Centrelink may have a role in encouraging greater documentation of assets for care arrangements. This could be done in one of two ways:

- developing a standard form to be executed to meet Centrelink eligibility for the granny flat interest; or
- requiring written evidence of an agreement to enter into an assets for care in order to meet Centrelink eligibility for the granny flat interest.

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104 Seniors Rights Victoria, *Submission 383*.
105 Law Council of Australia, *Submission 61*.
106 For example, it is possible for a person receiving the age pension to undertake the following transaction without affecting their entitlement to the pension: the Age Pension recipient could sell their house for $500,000 and contribute those funds towards the purchase of a $1,000,000 home with another person provided that they have a 50% interest as tenants in common registered on the legal title to the property.
107 'Security of tenure' here refers to the existence of a right to accommodation for life or a life interest.
108 Department of Human Services, *Granny Flat Right or Interest* <www.humanservices.gov.au>.
109 See also British Columbia Law Institute et al, *Private Care Agreements between Older Adults and Friends or Family Members* (The Institute, 2002) 9.

The Law Council of Australia supported the former approach.[110] COTA supported the latter.[111]

6.96 A standard form signed by both the older person and the party to whom funds are provided or property transferred serves as evidence of the existence of a family agreement. Existing forms and templates for wills or appointing an enduring power of attorney in states such as New South Wales provide one model. Under this approach, the form could provide guidance to the parties to record the nature of the transaction and interest, as well as the obligations of the parties, but leave space for the parties to record the detail. This approach potentially accommodates the variety of ways in which a transfer of resources can be effected and the wide variance in the specific obligations agreed to by the parties.

6.97 However, as outlined above, the law of property is complex and in the absence of advice it would be relatively difficult for most families to fill in such a form in a manner that reflects not just the present intention of the parties but also what they would want or expect to happen if the arrangement broke down. The experience with will kits and standard forms for the appointment of enduring powers of attorney or guardians is illustrative of these problems. However, poorly completed forms could exacerbate the risks associated with a failed assets for care arrangement. Moreover, it imposes a significant hurdle to access an existing exemption from the gifting rules.

6.98 Alternatively, evidence of a written agreement might be required to demonstrate the existence of a granny flat interest. This approach is supported in academic writing,[112] and by stakeholders.[113] This option is less onerous—it simply requires some evidence in writing that both parties have agreed to put in place an assets for care arrangement. It would provide evidence that an arrangement was in place and that there was not simply a gift of a property (or proceeds) by the older person to the trusted party. As outlined above, the current construction of property law means that the argument by a trusted party that there was no assets for care arrangement but a simple gift creates significant evidentiary hurdles that may inhibit an older person from asserting their rights through civil litigation. These concerns were a significant feature of the problems of assets for care arrangements gone wrong outlined in submissions.[114]

6.99 This approach would not, however, result in complete legal agreements in writing that set out clearly the rights and responsibilities of the parties and what specifically happens in the event of the arrangement ceasing to work for one or more of the parties. Accordingly, it would not be a panacea, but would reduce some of the risk

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110 Law Council of Australia, *Submission 351*.

111 COTA, *Submission 354*. They also suggested this be introduced with a requirement for legal advice.

112 Webb and Somes, above n 12, 47; Aviva Freilich, Pnina Levine, Ben Travia, Eileen Webb, *Security of Tenure for the Ageing Population in Western Australia: Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?* (November 2014) 134 <www.cotawa.org.au>.

113 See, eg, COTA, *Submission 354*; WA Police, *Submission 190*; Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Office of the Public Guardian (Qld), *Submission 173*; Townsville Community Legal Service Inc, *Submission 141*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; National Seniors Australia, *Submission 57*.

114 See, eg, Seniors Rights Service, *Submission 169*; Queensland Law Society, *Submission 159*; TASC National, *Submission 91*; Advocare Inc (WA), *Submission 86*.

of the arrangements without burdening the parties with a requirement to enter into formal contracts in order to access the granny flat interest under social security law. This can be complemented with education campaigns particularly around the availability of a model agreement prepared by Seniors Rights Victoria.

6.100 The ALRC notes that a requirement that there be written support of an assets for care agreement in order to be eligible as a granny flat interest would be a departure from other Centrelink practices. Centrelink recognises a variety of legal and equitable interests which are not supported by writing for the purposes of determining eligibility for government payments.[115] The ALRC considers that such arrangements should not change as a consequence of Recommendation 6–2 and that, apart from granny flat interests, it should be possible for equitable interests that are not supported by writing to be recognised for the purposes of social security law. The recommendation is a specific and targeted requirement for some expression in writing because the breakdown of family agreements is a common form of financial elder abuse experienced and Centrelink's granny flat interest exemptions appear to be driving the making of such agreements. In this context, the ALRC considers it appropriate to require additional formality before a granny flat interest can be established for the purposes of calculating social security entitlements. Submissions to the ALRC's Discussion Paper were supportive of this approach.[116]

6.101 The ALRC acknowledges that Recommendation 6–2 will require careful implementation to ensure that unintended consequences do not undermine the specific purpose of the recommendation. For example, allowances for verbal arrangements should be made where enforcing a requirement for evidence in writing would cause undue hardship to the Age Pension recipient. The interaction between 'granny flat interests' and other situations where equitable interests may arise will need to be carefully managed to ensure that the recommendation is not applied more broadly than is strictly necessary.

Centrelink elder abuse strategy for family agreements

6.102 The ALRC suggests that the elder abuse strategy in Recommendation 12–1 should specifically address the risk of elder abuse in the context of family agreements. In particular, the elder abuse strategy might include a number of initiatives such as:

- producing informational material about family agreements, including a discussion of the legal and financial risks of entering into family agreements;

115 For example, in determining the rate of income support payment entitlement, Centrelink will take into account a person's involvement in a private trust or company and their share of income and assets: Department of Human Services (Cth), *Private Trusts and Private Companies* <www.humanservices.gov.au>. For the purposes of determining whether a private trust exists, Centrelink will take into account non-express trusts where the usual documents setting up a trust are absent: Department of Social Services, *Guide to Social Security Law* (2014) [4.12.3.50].

116 See, eg, National Older Persons Legal Services Network, *Submission 363*; COTA, *Submission 354*; Law Council of Australia, *Submission 351*; L Barratt, *Submission 325*.

- preparing and disseminating easy-to-understand guidance materials such as checklists setting out matters to consider when putting in place an assets for care agreement;
- ensuring publicly available material relating to family agreements consistently, explicitly and prominently urges older people to seek independent legal advice prior to entering into family agreements;
- ensuring all communications with older people relating to family agreements include information about the risks of such arrangements, checklists and a strongly worded statement urging the older person to seek independent legal and financial advice prior to entering into them;
- additional community awareness raising; and
- a review of Centrelink requirements and related messaging to reduce the risk of older persons remaining in abusive situations for fear of losing access to their pension entitlements.

An older person's right to be on title

6.103 The law regarding assets for care arrangements is complex and it is important that information provided by Centrelink and the Department of Human Services is accurate and does not overstate the certainty of legal arrangements where the older person is not recorded on the legal title. All existing public material prepared by Centrelink and the Department of Human Services should be reviewed for accuracy as part of the elder abuse strategy.

6.104 In addition, the Department of Human Services should ensure that guidance material, such as the *Guide to Social Security Law,* clarifies that, while the 'granny flat interest' exemption only applies if the older person is not listed on title as a registered proprietor, there are other options. Those options should be specifically explained alongside the granny flat interest so that it is clear that there are alternatives for putting in place an intergenerational assets for care arrangement that enables the older person to be listed on title and continue to be eligible for the Age Pension.

Independent legal and financial advice and the elder abuse strategy

6.105 In an ideal world, older people would routinely access independent legal advice before entering into an assets for care arrangement. The ALRC suggests that Centrelink could strongly encourage older people to seek independent legal advice prior to entering into a family agreement. In particular, Centrelink should prominently incorporate this message both in direct communications and in publicly available material relating to granny flat exemptions.

Requirement to stay in the arrangement for at least five years

6.106 Social security law requires that the granny flat interest be maintained for at least five years. If the reason for leaving the assets for care arrangement before five years could have been anticipated at the time of making the arrangement, the funds used to establish the abandoned granny flat interest will retrospectively be considered

an asset affecting the older person's eligibility for the Age Pension.[117] The ALRC understands that, where elder abuse occurs after a granny flat arrangement has commenced, it is likely to be viewed by Centrelink as an 'unforeseen circumstance', so the pension would not be affected.[118] Caxton Legal Centre pointed out, however, that the five-year requirement could still be inadvertently forcing victims of elder abuse to endure 'intolerable family dynamics'.[119] A case study supplied by the Older Persons Advocacy Network is illustrative:

> Marina is an 80-year old woman from a European background. She came to Australia with her husband in the early 1950s and they prospered. Marina worked in the business and was a driving force behind its success. When her husband died Marina was left reasonably financially secure and owned her own house in an expensive part of Canberra. Marina has a daughter living abroad and a son living in Canberra. Marina has no cognitive impairment and manages her own affairs; however in late 2011 Marina had a bad fall and broke her leg and her arm resulting in long stays in hospital. Marina's son has four daughters who are now getting too old to share bedrooms and was looking to upsize his house and move to a 'better' area but needed additional finance to purchase such a property.
>
> Marina's recovery period was going to be long but she started to progress well physically. Being in hospital with the only visitors being her son and occasionally daughter in law and grandchildren she became isolated and started to lose confidence in her ability to live alone. When her son made her an offer to live with them, sell her house and invest in their new property under a granny flat arrangement with Centrelink, it seemed tempting. Marina had been groomed by her son over a long period of time to believe she could not manage living alone any longer. A property was found by her son with a flat attached, Marina was taken from hospital to look at the flat and returned to the hospital all within the space of a few hours. She had no opportunity to discuss a major financial decision or the suitability of the property with an independent person. Based on promises of the support the family would give her and her now complete loss of confidence in her ability to care for herself Marina agreed and invested in the son's new property.
>
> The arrangement was doomed from the start, the promised care and support never eventuated and the flat could not have been more unsuitable. By the time ADACAS [ACT Disability, Aged and Carers Advocacy Service] became involved Marina was locked in to the Centrelink granny flat arrangement for five years and a large sum of money was paid to the son to secure the granny flat interest. … The ADACAS advocate was able to support Marina and help her establish a new independent living arrangement. It could so easily have been a disaster for this client locked into isolation and despair for the last years of her life. This case highlights the hidden nature of financial abuse of older persons.[120]

6.107 As part of a broader elder abuse strategy, Centrelink should consider specifically listing elder abuse as a circumstance which would allow an older person to leave a granny flat arrangement within five years.[121] This could be supported by greater

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117 Department of Human Services, above n 108. Thus, where a person leaves an assets for care arrangement due to 'unforeseen circumstances' within 5 years, the exemption would continue to apply.

118 Department of Human Services (Cth), Advice Correspondence (11 November 2016).

119 Caxton Legal Centre, *Submission 174*.

120 Older Persons Advocacy Network, *Submission 43*.

121 This approach was supported by stakeholders. See, eg, Justice Connect Seniors Law, *Submission 362*.

awareness raising and community education about what constitutes 'unforeseen circumstances' for the purposes of the application of the 'gifting rules' and granny flat exemption.

6.108 The direct contact principle discussed in Chapter 12 could also apply to granny flat arrangements. The requirement to advise Centrelink staff of the existence of a granny flat arrangement provides an opportunity to have contact with the older person. Direct contact could enable Centrelink to confirm that the person is entering the arrangement willingly; is aware of the criteria required to show a granny flat interest and the exceptions where elder abuse arises; and advise the older person of the free financial counselling service offered by Centrelink.

7. Superannuation

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Summary

7.1 A significant proportion of the wealth of older people is held in superannuation funds.[1] Abuse of an older person may include the use of deception, threats or violence to coerce the person to contribute, withdraw or transfer superannuation funds for the benefit of the abuser. Abuse could also include making certain investment decisions that may advantage the abuser now or in the future. Other issues relating to possible elder abuse include questions about the ability of a person acting under a power of attorney to deal with superannuation.

7.2 Submissions to the ALRC generally identified fewer concerns with financial abuse in the context of superannuation than with respect to bank accounts and other financial assets. This may be because superannuation funds are subject to significant access controls. This was noted by the Financial Services Council:

> A rollover (when a person's super fund is transferred to another super fund in their own personal name or to [a self-managed superannuation fund] where they are a

1 Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2013-14: Superannuation in Australia, 2003-04 to 2013-14, Cat No 6523.0* (2016).

> trustee) is subject to stringent checks by the superannuation fund where funds are withdrawn from;
>
> A transfer from a person's super fund to another person's super fund is only allowed in limited situations such as death or divorce, and in these events additional checks and paperwork is required; and
>
> A withdrawal can only be made once a condition of release is met and for most Australians, this means reaching their preservation age, and even in this circumstance, withdrawals can only be transferred to the superannuation trustee's nominated bank account.[2]

7.3 The ALRC did identify two particular areas of concern regarding potential elder abuse in the context of superannuation. The first relates to what are called 'binding death benefit nominations' (BDBNs). The second relates to self-managed superannuation funds (SMSFs) which are subject to less regulatory oversight than retail and industry superannuation funds. Potential for elder abuse in the context of pressure to make a BDBN may occur through two means: the exercise of influence to have the older person make, or alter, a death benefit nomination in the trusted person's favour; and seeking to make a death benefit nomination under the supposed authority of a power of attorney.

7.4 The ALRC considers that BDBNs should be seen to be 'will-like' in nature, and, from a policy perspective, treated similarly to wills. There is much uncertainty and ambiguity concerning BDBNs of superannuation funds, particularly whether an enduring attorney may sign a BDBN on behalf of a member. The ALRC has therefore concluded that these uncertainties and ambiguities need to be resolved in a focused review of the provisions to establish the clear ambit of the legislative provisions and their relationship to superannuation trust deeds. The central legal issue concerns the scope of the ability for fund members to direct trustees with respect to the payment of funds on the member's death—as a matter of the construction of the trust deed as affected by legislation—and the formal requirements that may be required to do so, under the deed or by regulation.

7.5 The regulatory framework for SMSFs was designed on the premise of self protection. Such a regulatory framework may be problematic, as a larger number of SMSFs come under the control of older people who may require increasing decision-making support. The ALRC's recommendations in relation to SMSFs are designed to:

- better facilitate the process for appointing a person's enduring attorney as trustee/director of their SMSF in the event of a legal disability;
- improve planning for a potential legal disability as part of the operating standards of an SMSF; and
- provide for Australian Taxation Office (ATO) notification where an enduring attorney has taken over as trustee/director of the SMSF following the principal suffering a legal disability.

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2 Financial Services Council, *Submission 78*.

Financial abuse and superannuation funds

Regulation of superannuation

7.6 The Australian Prudential Regulation Authority (APRA) is the prudential regulator for superannuation funds, other than SMSFs. SMSFs operate without prudential controls and are supervised by the ATO.

7.7 The Australian Securities and Investments Commission (ASIC) 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 complaint-handling procedures.

7.8 The Superannuation Complaints Tribunal (SCT) deals with complaints about the decisions and conduct of trustees of superannuation funds other than SMSFs.

Examples of financial abuse

7.9 Stakeholders identified a diverse range of instances of financial abuse of older people through unauthorised access to superannuation funds.[3] ASIC highlighted a number of examples of potential financial elder abuse in the context of superannuation:

> instructions to take a portion of a superannuation benefit as a lump sum rather than a pension may as much reflect the importance to the elder fund member of paying down debt, or facilitating new accommodation arrangements as action by an abuser to access superannuation money for their own benefit.
>
> ... instructions to continue drawdown of only the statutory minimum amount of an account based pension may reflect the active management of the elder person's longevity risk, rather than maximising the value of a death benefit that may become payable to an abuser.
>
> ... instructions in relation to the part commutation of an elder person's account based pension may as much reflect the need to meet a 'lumpy expense', such as in relation to health care, as action by an abuser to access superannuation money for their own benefit.[4]

7.10 The link between financial abuse of superannuation and banking was described in a case study provided by the North Australian Aboriginal Legal Service:

> An older Aboriginal man, who had accessed his superannuation, had his bank card stolen by his daughter who went on to withdraw a substantial amount of money from his account.[5]

7.11 Another example was provided by the Public Trustee of Queensland, who gave the example of a daughter of an elderly person suffering dementia who was able to procure the signature of that adult to withdraw a large sum in three instalments from a fund:

> All that was required in order for the instruction to the fund to transfer money was a form apparently signed by the adult which in this case was emailed to the superannuation fund. As it happens the funds ultimately were dissipated by the daughter for her own benefit.[6]

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3 See, eg, FINSIA, *Submission 339*; Townsville Community Legal Service Inc, *Submission 141*; ASIC, *Submission 125*.

4 Australian Securities and Investments Commission, *Submission 125*.

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

6 Public Trustee of Queensland, *Submission 249*.

7.12 The interaction between superannuation and powers of attorney in the context of elder abuse was demonstrated in the following case study provided by Advocare Inc (WA):

> Enid is an elder woman who nominated her daughter Cathy as her Enduring Attorney. Enid has tolerated financial abuse by Cathy for many years as she has no-one else to assist her with things she finds too difficult to do on her own. Cathy is now pressuring Enid to transfer superannuation funds into Cathy's bank account, claiming that Enid will get a better return on investment. Enid was advised not to sign anything but is still vulnerable as she chose not to revoke her EPA.[7]

7.13 A particular risk in the context of SMSFs was the potential need for trustees to have increasing decision-making support. The Financial Services Institute of Australasia (FINSIA) noted that:

> the issues of population ageing and cognitive decline are a 'silent tsunami' for self-managed super funds (SMSFs), exposing investors in this sector to financial abuse, including fraud and inappropriate investment advice.[8]

7.14 The Office of Public Guardian (Qld) (OPG) provided a case study that highlights the particular complexities that arise where a trustee loses decision-making ability. The case study concerned a man in his 80s named 'Peter':

> Among Peter's many financial assets was a self-managed superannuation fund (SMSF), of which Peter had been appointed director of the trustee company of the fund. A couple of years after moving into care, Peter was diagnosed with dementia, at which time Peter's attorneys, appointed under an enduring power of attorney, assumed control of Peter's financial affairs. A complaint was made to the OPG that the attorneys were financially mismanaging Peter's funds. Peter was aged in the late 80s at the time of the complaint.
>
> The [OPG] investigated the matter and identified … that the attorneys were not competent to manage Peter's financial affairs due to the complexity, and their lack of understanding of the laws regulating SMSFs.
>
> The investigation identified that, following Peter's loss of capacity to make decisions, no changes had been made to the SMSF and Peter remained the director of the trustee company. The accountant, who had managed the accounting for Peter's business for years, was transacting on the SMSF after Peter lost capacity. … The attorneys did not take any action to ensure that the SMSF was compliant after Peter lost capacity, and were allowing the accountant to make decisions in relation to the SMSF when he had no authority to do so.[9]

7.15 Recommendations in other chapters of this Report address financial abuse in the context of powers of attorney and banking. Those reforms would assist in addressing a number of these examples of financial abuse. This chapter focuses specifically on the issue of elder financial abuse in the context of BDBNs, and in the SMSF sector.

Consistency in language about decision-making ability

7.16 Different language is used to describe the instances where a person does not have the decision-making ability to make legal decisions For example, the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*) uses the term 'legal disability' and the *Corporations Act 2001* (Cth) uses the term 'mental incapacity'. Moreover, legal capacity is defined in subtly different ways across the states and

7 Advocare Inc (WA), *Submission 86*.
8 Financial Services Institute of Australasia, *Submission 137*.
9 Office of the Public Guardian (Qld), *Submission 173*.

territories.[10] Differences in terminology can have practical consequences in terms of whether there is an authority to act. The ALRC has previously recommended that there be consistent terminology used for decision-making ability to provide consistency and certainty.[11]

Death benefit nominations

The legal framework

7.17 The payment of the superannuation funds of a member on the member's death is a matter that is determined by the governing rules of the superannuation fund. As a matter of trust law, a trustee is not able to delegate the exercise of their powers under the trust, except to the extent permitted under the trust instrument itself, or by virtue of legislation.[12] Similarly, as a general rule, the beneficiaries cannot direct the trustee how to exercise a discretionary power.[13]

7.18 Part 3 of the *SIS Act* prescribes operating standards for funds, including in relation to benefit payments.[14] The standards themselves are set out in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (*SIS Regulations*). With respect to APRA-regulated superannuation funds or approved deposit funds—collectively referred to as superannuation entities—the payment standards are set out in pt 6 of the *SIS Regulations*, including in relation to payment on the death of a member.

7.19 As the relevant Australian Prudential Regulation 'Prudential Practice Guide' explains, there are five different death benefit arrangements, 'each with its own requirements and consequences':

(a) automatic reversionary benefit (where trustee exercises no discretion);

(b) non-binding nomination (where there is full trustee discretion);

(c) binding nomination (under section 59(1A) of the *SIS Act*);

(d) non-lapsing nomination (under section 59(1)(a) of the *SIS Act*); or

(e) complete discretion of the trustee if none of these nominations has been made and the reversionary benefit is not applicable.[15]

7.20 Section 59(1A) of the *SIS Act* provides that the governing rules of a superannuation entity *may* require a trustee to provide any benefits in respect of the member on or after the member's death to the legal personal representative or a

10 See ch 2.

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

12 *Halsbury's Laws of Australia*, Title 430, 'Trusts', (D) 'Trustees' Power to Delegate and Employ Agents', [430-4385] 'Duty not to delegate and exceptions'; JD Heydon and Mark Leeming, *Jacob's Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1723]. The rule is expressed in the Latin maxim '*delegatus non potest delegare*'.

13 *Halsbury's Laws of Australia*, Title 430, 'Trusts', (B) 'Exercise of Powers of Trustees', [430-4345] 'Influence of view of third parties on exercise of power'.

14 *Superannuation Industry (Supervision) Act 1993* (Cth) s 55A. This section provides that the governing rules of a regulated superannuation fund must not permit a fund member's benefits to be cashed after the member's death otherwise than in accordance with the prescribed standards.

15 Australian Prudential Regulation Authority, *Prudential Practice Guide: SPG 280—Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds* (2012) [55].

dependant or dependants of the member, so long as the notice complies with any conditions contained in the *SIS Regulations*.[16]

7.21 Section 59(1A) of the *SIS Act* is an enabling provision and the governing rules of superannuation funds do commonly provide for funds held by a member to be paid on the person's death in accordance with a binding nomination of the member. The governing rules of the fund may, however, stipulate requirements that are more restrictive.[17] The section also does not exclusively cover the field in which a member can give a trustee a nomination.[18]

7.22 If the governing rules of a fund permit such a nomination, reg 6.17A(4) of the *SIS Regulations* states that the trustee *must* pay a benefit to the person or persons mentioned in the notice if the matters set out are complied with:

> (a) the person or each of the persons, mentioned in the notice is the legal personal representative or a dependant of the member; and
>
> (b) the proportion of the benefit that will be paid to that person, or to each of those persons, is certain or readily ascertainable from the notice; and
>
> (c) the notice is in accordance with subregulation (6); and
>
> (d) the notice is in effect.

7.23 The *SIS Act* defines 'legal personal representative' to mean 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person'.[19] 'Dependant' in this context is defined as meaning the spouse of the person, any child of the person, and any person with whom the person has an interdependency relationship.[20] 'Spouse' is given an extended definition and includes same-sex and de facto relationships, registered or otherwise.[21] 'Interdependency relationship' is also defined as a close personal relationship of people who live together, where one or each of them provides the other financial support and one or each of them provides the other with domestic support and personal care.[22]

7.24 Regulation 6.17A(6) sets out the formal requirements for a nomination under reg 6.17(4). It must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18, and neither of whom is mentioned in the nomination; and

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16 See *Halsbury's Laws of Australia*, Title 400, 'Superannuation', (8) 'Governing Rules of Superannuation Entities', [400-850] Non-delegable discretion. Section 59(1A) does not apply to SMSF: see *Munro v Munro* [2015] QSC 61 and accordingly an SMSF BDBN can last indefinitely.

17 Australian Prudential Regulation Authority, *Prudential Practice Guide: SPG 280—Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds* (2012) [7].

18 *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 12 (8 August 2016) [439] (Blue J).

19 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1). Definition of 'legal personal representative'.

20 Ibid s 10(1) (definition of 'dependant'). For the purposes of taxation law a death benefit dependant has a different definition: see Australian Taxation Office, *APRA-Regulated Funds: Paying Superannuation Death Benefits* <https://www.ato.gov.au/super/apra-regulated-funds/paying-benefits/paying-superannuation-death-benefits/>.

21 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1) (definition of 'spouse'). Importantly, there is no requirement for the relationship to be for two years in duration. The Act simply requires the couple to live together on a genuine domestic basis.

22 Ibid s 10A. The requirements are cumulative.

- contain a declaration signed and dated by the witness stating that the notice was signed by the member in their presence.[23]

7.25 The trustee is also required to give to the member 'information that the trustee reasonably believes the member reasonably needs for the purpose of understanding the right of that member to require the trustee to provide the benefits'.[24]

7.26 A notice under reg 6.17(4) ceases to have effect at the end of three years after the day it was signed, or a shorter period fixed by the governing rules,[25] but can be renewed, amended or revoked.[26]

7.27 To 'amend' or 'revoke' a notice, the member is required to provide a notice complying with reg 6.17A(6).[27] However, to 'confirm' a notice, a lower formal threshold is required.[28] To 'confirm' the notice, the member is only required to give the trustee 'a written notice, signed, and dated, by the member, to that effect'.

7.28 In addition to a binding death nomination, some superannuation funds also permit a member to make a non-lapsing binding death nomination. This nomination is made under s 59(1)(a) of the *SIS Act*. A non-lapsing binding death nomination may only be made if permitted by the trust deed and with the active consent of the trustee.

7.29 When a binding nomination lapses, the nomination becomes non-binding. In such a case, the trustee's discretion with respect to death benefits is governed by the fund rules:

> When the trustee's discretion is exercised, members of industry superannuation funds or their dependants may contest the distribution. They are sometimes successful. The tribunal then sets aside the trustee's decision and substitutes its own decision. The tribunal can also scrutinise the validity of a binding nomination and may substitute its own decision if it so decides.[29]

Disputes

7.30 The SCT was established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) and deals with complaints about superannuation, excluding SMSFs. Such complaints include questions concerning death benefit nominations and the trustees' exercise of discretion in relation to nominations. As the Tribunal explains:

> Key issues that arise for trustees when dealing with death benefit distributions include who should be considered as potential beneficiaries of a deceased member's death benefit and, if there are competing claims made by a number of potential beneficiaries, what must be taken into account when assessing who should be paid the death benefit and in what proportion. These are often complex issues that require careful consideration of multiple factors such as the degree of dependency of the potential beneficiary on the deceased member and the role and purpose of superannuation.[30]

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23 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(6).
24 Ibid reg 6.17A(3).
25 Ibid reg 6.17A(7).This is subject to a trustee of the entity complying with any conditions contained in the regulations, and the member's notice being given in accordance with the regulations. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A).
26 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(5).
27 Ibid reg 6.17A(5)(b).
28 Ibid reg 6.17A(5)(a).
29 Nicola Peart and Prue Vines, 'Will Substitutes in New Zealand and Australia' in Alexandra Braun and Anne Roethel (eds), *Passing Wealth on Death: The Phenomenon of Will-Substitutes from a Comparative Perspective* (Hart Publishing, 2016) 107, 122.
30 Superannuation Complaints Tribunal, *Key Considerations That Apply to Death Benefit Claims* (2006) 2.

7.31 The discretionary nature of the payment of death benefits in many cases gives rise to many complaints to the SCT.[31] The Tribunal reported that, between January and March 2017, complaints concerning the distribution of death benefits comprised the 'biggest single complaint category', amounting to 21.5% of complaints received.[32]

7.32 The Tribunal has produced a guide in relation to its procedures for dealing with such complaints.[33] Where a nomination is binding, the trustee has no discretion to override it.[34] A challenge may only be made, for example, on the basis of the validity of the nomination, including a lack of legal capacity.[35]

The potential for abuse

7.33 BDBNs are often made in the context of broader estate planning and, in particular, a desire to ensure the most tax effective structure for succession.[36] The inclusion of BDBNs in estate planning is encouraged: if superannuation is not considered, 'the family members inevitably will end up in conflict'.[37]

7.34 BDBNs may also be used to limit or manage any potential claims on the deceased's estate. Where the member's funds are paid to a dependant pursuant to a BDBN, those funds do not form part of the member's estate.[38] In all states and territories, except New South Wales, such property is not available under family provision laws. If a member's superannuation death benefit is substantial, the ability to remove the funds from the operation of family provision laws gives a member significant control after death. By contrast, in New South Wales, superannuation death benefits may be classified as 'notional estate' and brought within the jurisdiction of the court for the purposes of making a family provision order.[39]

7.35 The nominations covered by reg 6.17A(4) can only be made to the legal personal representative or 'dependants'. A nomination to a dependant could potentially be made under pressure. Although the person nominated in the notice cannot be a witness, the range of 'dependants' is still quite wide. Given that, for example, there are indications that financial abuse is committed by adult children,[40] and these are within

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31 Australian Prudential Regulation Authority, *Prudential Practice Guide: SPG 280—Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds* (2012) [61]. The Tribunal describes it as 'an emotionally fraught topic': 'Focus: Death Benefits', *SCT Quarterly* (Q1 2017) <www.Sct.Gov.Au/Newsletters/Sct-Quarterly-Q1-2017>.

32 'Focus: Death Benefits', *SCT Quarterly* (Q1 2017) <www.Sct.Gov.Au/Newsletters/Sct-Quarterly-Q1-2017>.

33 Superannuation Complaints Tribunal, *Key Considerations That Apply to Death Benefit Claims* (2006).

34 Ibid [124]; *Determination D15-16\112* [2016] SCTA 39 (17 March 2016) [42].

35 Eg, *Determination No D16-17\124* [2017] SCTA 13 (25 January 2017); *Determination D15-16\112* [2016] SCTA 39 (17 March 2016); *Determination D14-15\172* [2015] SCTA 31 (2 March 2015).

36 See Australian Taxation Office, above n 20.

37 Caroline Harley, 'Supercharging Battles over Superannuation Death Benefits' (August 2014) *Law Society Journal* 68, 69.

38 *Williams v Federal Commissioner of Taxation* 81 CLR 359; *Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248; *McFadden v Public Trustee (Vic)* [1981] 1 NSWLR 15; *Baird v Baird* [1990] 2 AC 548. See, eg, Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [20.3]; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [3.10]–[3.12].

39 The notional estate provisions are discussed in Dal Pont and Mackie, above n 38, [20.57]–[20.76]. One commentator suggests that there may be a conflict between the *SIS Act*, as a Commonwealth law, allowing a member to nominate a recipient of superannuation, and the New South Wales provisions permitting the designation of that same benefit as 'notional estate' for family provision purposes, and that this 'could bring into play s 109 of the *Constitution* under which the Commonwealth law must prevail': Thomson Reuters, *The Laws of Australia* Title 36, 'Wills and Estate Administration', 36.2 'Family Provision' [36.2.730]. This statement is not supported by authority, nor has it been tested.

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

the set of 'dependants' in the context of death benefit nominations, there is potential for contrivance for a nomination preferring a child—so long as there was a separate witness to satisfy reg 6.17A(6).

7.36 Similar pressure may be imposed to encourage a nomination to the estate so that the superannuation funds form part of the estate of the deceased to be governed by their will or intestacy.

7.37 The Law Council of Australia commented that, given the value of many members' death benefits, 'there is an unfortunate incentive to manipulate a member's nomination'.[41] State Trustees Victoria described as 'insidious', 'where a third party manipulates a person into nominating them as a binding death benefit nominee':

> It is unclear to what extent this happens but it should be considered a potential issue to be managed. Given that the binding death benefit nomination only takes effect after the death of the principal, disproving that the nomination was not valid would be very difficult.[42]

7.38 Pressure to make a will may also include pressure to make a binding death benefit nomination, as evident in a case study provided by the Queensland Law Society (QLS). A woman in her 70s, 'V', attended the office of the relevant law firm, brought by her 'partner' to make a will. The firm considered that V did not have legal capacity to make a will. It became apparent that there was also a superannuation nomination involved and the firm was concerned as to possible abuse of 'V' to make it:

> it became apparent through our discussions that V had made a binding death benefit nomination in relation to her superannuation to her 'partner'. Her superannuation, as far as we could tell was her largest asset. V had a copy of the nomination with her (given to her by her partner to bring into our meeting). The nomination had been made within the two weeks prior to our meeting. This concerned me as although the capacity to make a binding death benefit nomination is the ability to enter into a contract, and not the same as making a will, it was doubtful that V had the capacity to understand the nature and effect of that decision. Further it was probable that she was told to sign the nomination by her partner in front of the two witnesses.[43]

Clarifying and reviewing the law

Recommendation 7–1 The structure and drafting of the provisions relating to death benefit nominations in ss 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be reviewed. The review should consider:

(a) witnessing requirements for making, amending and revoking nominations;

(b) the authority of a person who holds an enduring power of attorney in relation to the making, alteration and revocation of a nomination;

(c) whether a procedure for the approval of a nomination on behalf of a member should be introduced; and

(d) the extent to which other aspects of wills law may be relevant.

41 Law Council, *Submission 61*.
42 State Trustees Victoria, *Submission 138*.
43 Queensland Law Society, *Submission 159*.

7.39 Recommendation 7–1 tackles a key problem in relation to BDBNs, namely the uncertainties and ambiguities that arise in the construction of ss 58 and 59 of the *SIS Act* and reg 6.17A of the *SIS Regulations*. The wider context concerns the equitable rules about trusts, and the extent to which beneficiaries can direct trustees in the exercise of their powers, through express provision in the trust deed and/or as authorised or required by legislation.

7.40 In the 2016 decision, *Retail Employees Superannuation Pty Ltd v Pain*, Blue J identified the problems in relation to the existing provisions and suggested that it was 'highly desirable' that the particular provisions 'be reviewed by the Commonwealth and recast'.[44] In particular, Blue J identified ambiguities as to which aspects of reg 6.17A of were prescriptive for a notice to pay a benefit to be effective.[45] Blue J referred to the 'strong desire by members of superannuation funds to be able to make non-lapsing nominations', but said that it was 'a question of policy whether and on what terms binding nominations are permitted and this is exclusively a matter for the Commonwealth Parliament and the Commonwealth Government'.[46] He considered that there were several 'policy options':

> One policy option would be to leave binding nominations to be governed exclusively by the governing rules of the superannuation fund, largely equating the position to that applying to wills under the general law in which (subject only to implied revocation on marriage) a will operates indefinitely until revoked. Another policy option would be to permit indefinite nominations subject to legislated manner and form requirements to ensure that a nomination is intended to be made by a member on an informed basis. Another option would be to provide that all indefinite nominations lapse on the occurrence of a legislatively defined event or events (such as marriage). Another option would be to provide that all nominations lapse on the effluxion of a legislatively defined period of time. Whichever policy option is adopted, it is desirable that it be a simple universal rule applying to all binding nominations as opposed to the current situation involving multiple alternatives adopted by superannuation fund trustees to permit their members to make fixed term or indefinite binding nominations in compliance with the legislation.[47]

7.41 The ALRC considers that such ambiguities need to be resolved in order to include consideration of the specific matters raised in the Discussion Paper and in this chapter.

7.42 The ability to make a BDBN, like the ability to make a will, is a key aspect of advance planning and an exercise of autonomy by older people and fund members generally. Both the language and types of nominations vary greatly. The expanding scope and value of superannuation means that clarity in understanding from the perspective of fund members and trustees is important.

7.43 Recommendation 7–1 adopts Blue J's suggestion for a review. Once the review is completed, improving the understanding of financial advisers and lawyers, as well as the information provided to superannuation fund members can be developed.

7.44 The review could be conducted by the Treasury as the Australian Government agency responsible for advising on broad features of retirement income policy,

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44 *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 12 (8 August 2016) [512].
45 Ibid [495]–[496].
46 Ibid [513].
47 Ibid [514].

including the objectives, adequacy and overarching framework and design of the superannuation system.[48]

7.45 The review should include key government agencies, such as the APRA, the ASIC and the ATO. It should also include key stakeholder groups, such as: the Law Council of Australia; the Financial Planning Association of Australia; CPA Australia; and consumer groups, such as the SMSF Association (SMSFA), the Combined Pensioners and Superannuants Association and the Association of Independent Retirees.

Reducing elder abuse

7.46 The ALRC considers that a number of strategies need to be adopted to assist in combating potential abuse. One is to ensure that the information that members are given about their rights in relation to BDBNs is clear. Another is to ensure that the advisers who are likely to be involved in the preparation of BDBNs are alert to the issues of potential abuse. Another is to consider other integrity measures, such as witnessing, to support the person in the exercise of their choice.

Information for members

7.47 Regulation 6.17A(3) of the *SIS Regulations* provides that the trustee must give to the member information 'that the trustee reasonably believes the member reasonably needs for the purpose of understanding the right of that member to require the trustee to provide the benefits'.

7.48 An area of confusion that would benefit from clarification is the extent to which a nomination is 'binding' in the sense of being lapsing or not. As one solicitor commented:

> It is more important for a person making a death nomination to have the assurance that the nomination is binding and that it will continue to be binding even should they lose capacity. A binding nomination should therefore be binding unless expressly revoked or, at the very least, the principal must have the option to make a non-lapsing binding nomination.[49]

7.49 The clarification of the law, pursuant to Recommendation 7–1, will provide a firmer foundation for advice by trustees to members as required by reg 6.17A(3), and for the information that is provided through other avenues, such as the SCT. Websites of superannuation funds and the Tribunal may be for many people the natural first port of call in relation to locating information about death benefit nominations.

7.50 The approach to improving the provision of information to members needs to be multi-faceted and include recognition of the role of financial advisers, who are often involved in the process of assisting a member. Hamilton Blackstone Lawyers pointed to the 'crucial role' of a financial adviser in this situation:

> in a large proportion of cases where a person has a relationship with a financial adviser, binding death benefit nominations are completed following the provision of advice by that adviser. Furthermore, advisers generally assist in the completion and execution of binding death benefit nominations. It is critical that this continues to be the case.[50]

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48 The Treasury (Cth), 'Superannuation and Retirement' <www.Treasury.Gov.Au/Policy-Topics/SuperannuationAndRetirement>'.

49 T Chapman, *Submission 268*.

50 Hamilton Blackstone Lawyers, *Submission 270*.

7.51 The Financial Planning Association of Australia commented similarly, saying that a financial planner is more important than a lawyer in this context:

> Estate planning and superannuation are core subject areas in financial planning degrees and the Certified Planner Certification Program. Estate planning is not a core requirement of law degrees or Continuing Professional Development programs for legal practitioners.
>
> While a person is permitted to make a binding death benefit nomination without involving a solicitor, Australians who seek financial advice usually establish binding death benefit arrangements with the assistance of their professional financial planner.[51]

7.52 The SMSFA expressed a concern with respect to SMSFs, suggesting that SMSF advisers have 'death benefit nomination templates' which are used with their clients:

> This is a grey area with both accountants and financial planners providing these documents to client perhaps inappropriately and without expertise. In this regard there may be merit in placing the emphasis of death benefit nominations as part of an estate planning specialist process, as wills are. Greater awareness and education as to the legal risks around poorly constructed and executed BDBNs may encourage more SMSF trustees and their advisors to seek legal advice on BDBNs (and reversionary pensions).[52]

7.53 Given the key role that financial planners play in relation to superannuation advice, improving their understanding of the way that pressure to make or amend BDBNs may be brought to bear on older people is one strategy for combating elder abuse.

Witnessing

7.54 The ALRC Discussion Paper included a proposal that the witnessing requirements for BDBNs should be equivalent to those for wills.[53] This was supported by stakeholders. For example, the Institute of Legal Executives (Victoria) commented that '[w]e strongly agree that these should be executed in the same manner as Wills, being an essential part of the estate plan'.[54]

7.55 The requirements in relation to witnessing for BDBNs are set out in reg 6.17A. As noted above, reg 6.17A(6) of the *SIS Regulations* requires that the notice making a BDBN must be signed by the member in the presence of two witnesses. The witnesses must be at least 18 years old and neither can be a nominee of the funds. The BDBN must also contain a declaration signed and dated by the witnesses that the notice was signed by the member in their presence.

7.56 These requirements are similar to wills and perform an analogous function. The witnessing requirements for wills are found in state and territory legislation, the essential elements of which are that there be two witnesses present at the same time and that what they are witnessing is the testator's signature, or the acknowledgment by the testator of their signature.[55] The requirement in reg 6.17A(6)(b)(ii) of the *SIS*

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51 Financial Planning Association of Australia (FPA), *Submission 295*.

52 SMSF Association, *Submission 382*.

53 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) prop 9–2.

54 Institute of Legal Executives (Vic), *Submission 320*. See also Seniors Rights Victoria, *Submission 383*; Law Society of South Australia, *Submission 381*; Chartered Accountants Australia and New Zealand, *Submission 368*.

55 Except in the ACT and Western Australia, it is no longer necessary for the witnesses to sign in the presence of each other: see summary in Croucher and Vines, above n 38, [7.17]; Dal Pont and Mackie, above n 38, [4.12]–[4.16].

Regulations that the witness not be a person 'mentioned' in the notice is similar to the witness-beneficiary rule for wills,[56] although given the modification of the latter rule, the regulation is stricter. Where the witness-beneficiary rule avoids the gift to the beneficiary, a failure to satisfy reg 6.17A(6)(b)(ii) would be a ground of invalidity of the notice. The Law Council of Australia observed that the validity of the nomination is an issue that regularly arises in relation to death benefit nominations.[57]

7.57 The formal requirements of reg 6.17A(6) may also be considered to be more stringent than wills. For example, unlike in relation to wills, there is no 'dispensing power' to forgive non-compliance with formalities.[58] In the context of wills, such matters are only raised post-mortem as part of the probate process. In the context of BDBNs, the ALRC does not suggest that similar powers should be introduced. The trustees of the fund may have an opportunity to identify issues of non-compliance with formal requirements during the member's lifetime, though it may not become clear until the person's death that a nominated dependant is in fact not a dependant.[59]

7.58 Several stakeholders suggested that the witnessing process could be made stricter. State Trustees Victoria, for example, suggested that the risk of misuse of BDBNs could be minimised by requiring there be witnesses 'to verify that the person appeared to have capacity when the nomination was made'.[60]

7.59 Another suggestion was to require independent legal advice. The QLS, for example, suggested this, '[g]iven the ease with which binding death benefit nominations can be made and the risk to that asset'.[61] Law firm, Carroll & O'Dea, also suggested that 'it might be worthwhile to require a member to obtain a certificate of independent legal advice prior to making a superannuation death benefit nomination', but noted a number of questions relevant to this:

> What would the legal advice entail?
>
> Would this advice be required each and every time a member completes a death benefit nomination?
>
> What would be the effect if a member failed to obtain legal advice?[62]

7.60 The Law Council of Australia also noted that lapsing BDBNs may not necessarily need to be treated the same as non-lapsing nominations. In this context the Council did not support a requirement of independent legal advice:

> given that the provision of a certificate for superannuation nominations would mean that every time a person made a nomination (some retail funds require a nomination every three years) with respect to his or her superannuation it would be necessary to see a lawyer.[63]

7.61 The Law Council of Australia commented that, while solicitors are often involved with the preparation of wills, this is much less the case in the preparation of

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56 See ch 8.
57 Law Council, *Submission 61*.
58 On dispensing powers in relation to wills, see Croucher and Vines, above n 38, ch 8; Dal Pont and Mackie, above n 38, [4.30]–[4.47].
59 In the event that a notice is found to be invalid, the funds would be paid at the discretion of the trustee.
60 State Trustees Victoria, *Submission 138*.
61 Queensland Law Society, *Submission 159*.
62 Carroll & O'Dea, *Submission 335*.
63 Law Council, *Submission 351*.

nominations. Abuse could be reduced 'if a solicitor is involved and the direction of the death benefit is to the estate'.[64]

7.62 Even if witnessing were made stricter, Rodney Lewis observed, from cases involving wills, that 'important witness evidence routinely comes from the solicitor who prepared it, the medical practitioners who have attended the testator, the friends and relatives who have been in contact with the person before the signing of the document'.[65]

7.63 In its 2013 *Succession Laws* Report, the Victorian Law Reform Commission explored other integrity measures for witnesses directed towards protecting 'older and vulnerable will-makers from undue influence by potential beneficiaries or others'. Two specific measures were explored: requiring a witness to certify that the will-maker had the necessary mental capacity to sign their will, and signed the will freely and voluntarily; and requiring a medical practitioner to witness and assess the person's capacity and freedom of will. Neither was adopted as a recommendation.[66]

7.64 The ALRC considers that the witnessing requirements of reg 6.17A(6) are set at an appropriately high level to act as a validating measure for a BDBN, similar to that performed for wills. Witnesses to wills are only required to attest that the testator signed the will in their presence. The ALRC concludes that adding witnessing requirements to the making of a BDBN is unnecessary. Obtaining full and independent advice about such matters may be constructive as part of best practice estate planning, but it would be unduly burdensome to add the requirement of independent legal advice to the making of a BDBN. Improving the understanding of financial advisers and lawyers about the dynamics of elder abuse and the ways that this may present in the context of pressure to make or change advance planning instruments is a supportive approach and part of wider strategies to combat elder abuse. Financial advisers and lawyers also need to be sensitive to issues of impaired decision-making ability and how best to support clients in such cases.

7.65 The ALRC notes that the formal requirements for confirmation of a nomination are set at a lower level than for making, amending or revoking a nomination. This is tied up with the issue about lapsing nominations. As a matter of policy, however, this is an area where the formal threshold is lower and therefore consideration of this difference would be an appropriate matter to be analysed as part of the review in Recommendation 7–1.

Death benefit nominations and substitute decision makers

7.66 Specific matters that need to be considered in the recommended review are discussed below.

Should enduring attorneys be able to make BDBNs?

7.67 In the Discussion Paper, the ALRC proposed that donees of enduring powers of attorney should not be able to make a BDBN on behalf of a member. The legal position on this issue was considered briefly in the ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws*,[67] where it was pointed out that, as a matter of law,

64 Law Council, *Submission 61*. With respect to capacity issues, the Law Council of Australia referred to *D14-15\172* [2015] SCTA 31.
65 R Lewis, *Submission 349*.
66 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.19]–[2.26].
67 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.55]–[11.65].

there does not appear to be any restriction in the *SIS Act* or *SIS Regulations* that would prevent a person acting under a power of attorney from completing and signing a BDBN.

7.68 In *Determination D07–08\030*, the SCT stated that, in principle, an enduring power of attorney would permit an attorney to complete and sign a BDBN on behalf of the member. As the Tribunal did not decide the matter on the basis of the binding nomination, however, its comments are not of direct application. Hence, the Law Council of Australia observed that '[w]hether the scope of an attorney's authority extends to making a nomination remains a matter of debate'.[68]

7.69 In the *Equality, Capacity and Disability* Inquiry, the Law Council of Australia pointed to the different practices of funds:

> some funds accept a nomination by a person holding an enduring power of attorney granted by the member, generally without inquiring as to the wishes of the member. Some funds do not accept a nomination by a person holding an enduring power of attorney, with the result that binding nominations cannot be made by these members.[69]

7.70 The Law Council of Australia suggested that superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.[70]

7.71 As explained in the *Equality, Capacity and Disability* Report, the policy issue is a difficult one, given the difference between a nomination, as a lifetime act, and its effect, which is will-like in nature—as it affects property after the death of the member. The Law Council of Australia agreed with the ALRC that the main issue concerning BDBNs is that there is currently no clear policy position on whether a nomination should be considered similar to a will or simply a lifetime instruction in relation to a person's assets. The Council also agreed with the ALRC's analysis that nominations are will-like in nature and they should be treated in policy terms 'similarly to wills'.[71]

7.72 In this Inquiry, the ALRC focused on this issue again and proposed that the *SIS Act* and *SIS Regulations* 'should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member'.[72]

7.73 The ALRC acknowledges that the proposal to prohibit an attorney, acting under an enduring power, from making a BDBN does raise policy challenges in the context of the three-year limit on nominations under reg 6.17A(7).[73]

7.74 For example, a member may make a BDBN and then subsequently lose legal capacity. If the attorney does not have the power to renew the BDBN when it lapses after three years, the principal's superannuation funds may be distributed:

- in a way that the member had not intended;

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68 Law Council, *Submission 61*.
69 Quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.60].
70 Ibid [11.60].
71 Ibid [11.63], citing Law Council *Submission 142*.
72 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016) prop 9–3.
73 *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

- in a manner less ideal for tax purposes when compared with the lapsed binding death nomination; or
- in a manner that results in the funds forming part of the estate of the member which may be subject to certain creditors' claims.[74]

7.75 A number of stakeholders provided very informed submissions on the matter of BDBNs: the Law Council of Australia, several law firms, financial planners and chartered accountants. With respect to the existing position in relation to BDBNs, a common point was that the *making* of a BDBN should be seen as different from the *renewal* of a BDBN. In this context there is a problem of the '*lapsing* binding death benefit nomination'. Reg 6.17A states that a notice under 6.17A(4) ceases to have effect after three years. But there can also be 'non-lapsing binding death benefit nominations', if superannuation fund rules permit them.

7.76 Where BDBNs lapse, a specific policy issue is whether a person who is an attorney under an enduring power, should be able to *confirm* the nomination so that it continues to have validity—that this is different from making a BDBN and it continues the autonomous choice of the member. Where there is *no* BDBN there are two distinct issues: the legal issue of whether a person who is an attorney under power *can* make a nomination in exercise of that power; and the policy issue of whether they *should* be able to do so.

7.77 Richard Williams and Brian Herd explain that the legal issue contains several sub-questions. First, the issue needs to be considered under state and territory enduring powers of attorney (EPOA) legislation—for example, whether a power in relation to 'financial affairs' encompasses the making of a BDBN; and, secondly, under the specific terms of the instrument of appointment itself. Further, the attorney under power, as a fiduciary, would be subject to restrictions as a matter of law on the way any such power may be exercised. Hence, as Williams and Herd conclude:

> Even if an attorney under an EPOA has a sufficiently wide scope of authority to act on behalf of their principal in respect of superannuation, the provision by the attorney of a notice to a superannuation trustee that would have the effect of conferring a benefit on the attorney, or increasing the value of such benefit would (absent any special condition to the contrary) clearly amount to a breach of the attorney's duties. The revocation of an existing nomination, in order to increase the likelihood of a trustee making payment of a death benefit to the member's legal personal representatives, in circumstances where the attorney is a beneficiary under the member's will or on intestacy, would give rise to the same issue.[75]

7.78 A separate issue is the extent to which superannuation laws allow for this. As Williams and Herd explain, reg 6.17A stipulates two distinct acts to be done by a member: the signature of the notice by the member, and the giving of the notice to the trustee. While they suggest that 'it is arguable that the acts of signature and of giving the notice are capable of being performed by an attorney', the matter is not 'beyond doubt'.[76] Carroll & O'Dea said, similarly, that the question of whether an attorney's authority extends to making a nomination 'remains a matter of debate'.[77] Hamilton

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74 Superannuation funds are protected in part by s 116(2)(d) of the *Bankruptcy Act 1966* (Cth). Keeping the superannuation death benefit out of the estate by paying directly to a beneficiary may increase protections against creditor claims.

75 Richard Williams and Brian Herd, 'An Enduring Question: To What Extent Can Those Appointed under an Enduring Power of Attorney in Australia Make, Revoke, Alter or Confirm a Superannuation Death Benefit Nomination?' [2015] (March) *STEP Journal* 18, 25.

76 Ibid 27.

77 Carroll & O'Dea, *Submission 335*.

Blackstone Lawyers stated their view that the *SIS Act* and *SIS Regulations* 'already do not permit attorneys to make binding death nominations on behalf of the principal' and welcomed 'the opportunity for further clarity to be provided on this aspect'.[78]

7.79 Williams and Herd also note the difference in the requirements of making and confirming a nomination and suggest that:

> This may explain why some practitioners suggest that an attorney under an EPOA may renew a nomination, but not make, revoke or alter a nomination. In the absence of any express statement to that effect in the legislation, that view does not appear to be sufficiently supported by the terms of regulation 6.17A itself.[79]

7.80 Carroll & O'Dea commented that 'superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits'.[80] Uncertainty is 'undesirable', and is 'a peculiarity that needs resolution', because, as Williams and Herd conclude:

> For many persons, a binding death benefit nomination will form an integral part of their estate planning, as it should ensure (or, at least, increase the likelihood) that the relevant assets pass as the member intends.[81]

7.81 In the Discussion Paper, the ALRC expressed the policy position that an attorney should not be able make a BDBN on behalf of a member and that the legislative uncertainty should be clarified in line with this. This was based on the analogy made between BDBNs and wills and, as wills can only be made by a person with legal capacity, the ALRC concluded that a person holding an enduring power of attorney should not be able to sign a binding death benefit nomination on behalf of the member. As the role of an enduring attorney is one focused on the lifetime transactions and needs of the person, a point also emphasised in the submission of law firm Carroll & O'Dea,[82] the ALRC concluded that it was not appropriate for such a person to make a binding death benefit nomination that was will-like in effect.

7.82 The Law Council of Australia was concerned about the lack of clarity as to whether an attorney's power extended to the making of a BDBN and considered that it would be desirable if the *SIS Act* and *SIS Regulations* were amended to make clear 'that a person appointed under an enduring power of attorney cannot make (confirm, amend or revoke) a BDBN (or a non-lapsing nomination or a non-binding nomination) on behalf of a member'. However the Law Council of Australia stated an exception: 'unless this is expressly authorised in the document by specific reference to the making of BDBNs (or other nominations)':

> At present this is an area of significant confusion for superannuation funds, with some funds allowing the holder of an enduring power of attorney to make, amend or revoke a BDBN, and other funds not allowing this. The issue has not been tested before the Courts. Conflict issues also commonly arise, where the holder of the enduring power of attorney is an individual who would benefit from the making, amendment or revocation of a BDBN. Such issues can be addressed by the inclusion of specific authorising provisions in the relevant power of attorney, but there may then be further complexity with the correct drafting of such documents. In any event, the authorisation should be express, and should include the ability to nominate the

78 Hamilton Blackstone Lawyers, *Submission 270*.
79 Williams and Herd, above n 75, 27.
80 Carroll & O'Dea, *Submission 335*.
81 Williams and Herd, above n 75, 27, 28.
82 Carroll & O'Dea, *Submission 335*.

> attorney themselves and to amend the BDBN (or other nomination) in their own favour if this is desired by the member.[83]

7.83 The issue of express authorisation was also raised by the Financial Services Council, which said that a person under an EPOA should only be able to make or renew a BDBN on behalf of a member if expressly authorised by the EPOA.[84] Chartered Accountants Australia and New Zealand made a similar comment, but added: 'we would also include a person appointed under a general power of attorney in this prohibition unless the power the power had been specifically granted'.[85]

7.84 The issue of express authorisation in an enduring power of attorney is a matter that should be considered as part of the review set out in Recommendation 7–1. While the ALRC expresses a policy position against a person under an EPOA being able to make a nomination on behalf of the member, the ALRC did not consider the question of express authorisation in the EPOA itself. This is a matter that may require more investigation. For example, the ALRC also proposes that a process for approval of a nomination be considered as part of the recommended review.

7.85 A similar issue may be raised in relation to someone appointed by a tribunal as a financial administrator of a person who has lost, or who has diminished, decision-making ability.[86] If a financial administrator is given wide powers in relation to financial matters, then the analysis of this chapter may also apply to a financial administrator in such a case.[87]

7.86 The ALRC also acknowledges that the policy question, however, is a wider one and needs to address not only whether an attorney under an EPOA, or a financial administrator appointed with respect to a person's financial affairs, should be able to make a nomination, but also the other situations addressed in reg 6.17A: namely, concerning confirming, altering and revoking a nomination.[88]

Responding to changes in circumstances

7.87 Certain aspects of wills law are directed towards changes in circumstances of testators. First, a will is revoked automatically in certain circumstances. Secondly, there is a process of seeking court approval for a will for a person who does not have testamentary capacity.

7.88 It is a longstanding rule that, as a matter of law, wills are revoked on marriage. In the latter part of the twentieth century this was extended to revocation on dissolution of marriage.[89] Given the analogy drawn between BDBNs, especially those that are non-lapsing, and wills, the ALRC considers that a review of the BDBN provisions should be a broad one and include consideration of such doctrines.

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83 Law Council, *Submission 351*.

84 Financial Services Council, *Submission 359*. Similarly: SMSF Association, *Submission 382*.

85 Chartered Accountants Australia and New Zealand, *Submission 368*.

86 See ch 10.

87 The definition of 'legal personal representative' includes a person holding an enduring power of attorney, but does not refer to an appointed financial administrator: *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1).

88 A further issue concerns the non-renewal of a BDBN: if an attorney under an EPOA is able to make a nomination, the attorney may also choose not to do so, which may have beneficial consequences for the attorney or the attorney's family members pursuant to the will or intestacy of the fund member.

89 See Croucher and Vines, above n 38, [9.2]–[9.9]; Dal Pont and Mackie, above n 38, [5.23]–[5.41].

7.89 A concern to be able to respond to changes in circumstances in the superannuation context was raised by stakeholders.[90] Hamilton Blackstone Lawyers suggested that the *non-lapsing* death benefit nominations, offered by many superannuation funds, provided flexibility to deal with changes in circumstances, 'in that the trustee of the superannuation fund can exercise its discretion to withdraw its consent to the nomination if the member's circumstances have changed'.[91] The ALRC acknowledges that, while this is one mechanism for responding to changes in circumstances, it puts matters in the hands of the trustees to honour, or not, the wishes as expressed in the nomination. The alternative, as in the case of wills, is to revoke the nomination in such a case, allowing for a new nomination to be made to reflect the change in circumstances. The ALRC considers that such similarities and differences are best considered in a full review.

7.90 The Public Trustee of Queensland referred to experience in acting as administrator for adults with impaired decision-making ability and suggested that attorneys should have the power to make a BDBN, for example where:

> Circumstances have changed such that it is demonstrably clear that an existing binding nomination should be changed, or effectively withdrawn (for example a binding nomination to a spouse where the relationship has ended).[92]

7.91 The need to renew a nomination that lapses, after a person loses capacity, was a concern for the Senior Rights Service (SRS) in light of the person's 'estate planning requirements'.[93] SRS was concerned that other protections were needed in such a case. The Financial Planning Association gave another example:

> For example, if the principal had not disclosed to his children the existence of a sibling, and the family wanted to treat the newly found child equally. Exceptions to the prohibition should apply under a court order in certain circumstances.[94]

7.92 The ALRC considers that changes in circumstances can be addressed in two ways, both based on analogy from wills laws. The Law Council of Australia, for example, suggested that revocation 'in the same circumstances that a will would be revoked' should be considered.[95] The other way wills law responds to changes in circumstances, and particularly a loss of legal capacity, is through a process of approval known as 'statutory wills'.

7.93 A basic principle of wills formalities is that a person is required to have testamentary capacity when making a will. If a person was regarded as no longer having testamentary capacity, any will made by such person would be void.[96] Now, however, under strict conditions, wills can be authorised by the court in all states and territories where a person is regarded as having lost, or never having had, legal capacity.[97] In the succession context it is a relatively new jurisdiction for the court to

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90 See, eg, Seniors Rights Service, *Submission 296*; Financial Planning Association of Australia (FPA), *Submission 295*; Hamilton Blackstone Lawyers, *Submission 270*.

91 Hamilton Blackstone Lawyers, *Submission 270*.

92 Public Trustee of Queensland, *Submission 249*.

93 Seniors Rights Service, *Submission 296*. See also Institute of Legal Executives (Vic), *Submission 320*.

94 Financial Planning Association of Australia (FPA), *Submission 295*.

95 Law Council, *Submission 351*.

96 See, eg, Croucher and Vines, above n 38, ch 6.

97 *Succession Act 2006* (NSW) ss 18–26; *Succession Act 1981* (Qld) ss 21–28; *Wills Act 1936* (SA) s 7; *Wills Act 2008* (Tas) ss 21–28; *Wills Act 1997* (Vic) ss 21–30; *Wills Act 1970* (WA) s 40; *Wills Act 1968* (ACT) ss 16A–16I; *Wills Act 2000* (NT) ss 19–26.

be able to approve these 'statutory wills'. It is exercised cautiously, given the importance accorded to testamentary freedom as a valued property right.[98]

7.94 There may be an opportunity to consider an analogous process in relation to BDBNs, as part of the broader considerations about how such nominations operate. Such an approach could sit alongside the policy position that an attorney under an enduring power, by virtue of that power alone, should not be able to make a BDBN for a member of a superannuation fund.

7.95 If a member dies, then any superannuation balance is paid in accordance with the rules of the fund. That balance may well form part of the member's estate in due course. A person who holds an enduring power of attorney may apply for a statutory will on behalf of the member during the member's lifetime, but that is an entirely different matter from seeking to use the power of attorney to make the death benefit nomination on behalf of the member. The application for a statutory will would be subject to the strict scrutiny of the court. Whether the authorisation of a court should be required, or some other analogous process, is a matter for consideration in the review recommended in Recommendation 7–1.

7.96 The Law Council of Australia agreed that there should be 'a cost effective way for an attorney to make an application to a tribunal to authorise a change in the principals' affairs in certain circumstances' and supported consideration of a process of court approval as part of the 'consideration of the broader consequences' if attorneys under EPOAs were not allowed to act in relation to BDBNs:

> In the absence of such provisions, individuals who lose capacity will be at risk of having no BDBN in place (given that generally a BDBN in a fund, other than a self-managed superannuation fund, will lapse after 3 years unless a mechanism is adopted for non-lapsing nominations or reversionary pension rules apply).
>
> Perhaps more importantly, individuals will be at risk of having a BDBN that has become inappropriate continue in effect until lapsing.
>
> Clearly, it would be desirable that the Court should have the ability to consider these circumstances and whether it should intervene to revoke, amend or re-make a BDBN to avoid an outcome that would not have aligned with the member's intentions had they had capacity.[99]

7.97 The Law Society of South Australia also supported an approval process for a nomination put forward by an attorney under an EPOA 'where the consent of the Tribunal has been obtained':

> This would offer the opportunity to deal with circumstances where a non-lapsing binding nomination has been put in place by a donor of a Power of Attorney during their lifetime but circumstances have changed. This also deals with the situation where a donor has put in place a binding death benefit nomination which lapses after three years. The Tribunal may be in a position to provide consent to the confirmation of the nomination in circumstances where the Tribunal considers this would be consistent with the intentions of the donor who has lost capacity.[100]

98 See, eg, Croucher and Vines, above n 38, [6.11]–[6.20].
99 Law Council of Australia, *Submission 351*.
100 Law Society of South Australia, *Submission 381*.

Self-managed superannuation funds

7.98 The legal framework for SMSFs was established in 1999.[101] SMSFs have fewer than five members. Importantly, all fund members are also either individual trustees for the fund or directors of the corporate trustee.[102] As at June 2016, there were 577,236 SMSFs in Australia with a total of 1.1 million members.[103] There are currently over $620 billion in assets managed by SMSFs (about 29% of superannuation assets in Australia).[104]

7.99 Around 70% of SMSFs have two members and 22% are single member funds.[105] The most common structure is a super fund held by a couple.[106] While some SMSFs are established and managed by very wealthy investors, 45% of SMSFs have total balances of less than $500,000.[107] Evidence suggests that some SMSFs are used as part of a family business structure, typically with the business premises owned by the SMSF and leased to the family business.[108]

7.100 The Financial Planning Association noted that

> the people who establish and manage their own SMSF are highly engaged with their financial affairs and decision making. They are not forced to establish an SMSF, rather they choose to. And in doing so take on the responsibility and obligations of the SMSF. The regulatory requirements of establishing and managing an SMSF can be complex, so many trustees seek professional financial advice.[109]

7.101 In 2009, the Australian Government established a review into the 'governance, efficiency, structure and operation of Australia's superannuation system', known as the Super System Review Panel (the Panel).[110] The thorough examination of the SMSF sector by the Panel provides context for the recommendations that follow. The ALRC has focused on discrete targeted recommendations that seek to address the issue of reducing elder abuse, particularly among those older people who may have impaired decision-making ability. Recognising the work already undertaken by the Panel, the ALRC does not make broader recommendations affecting the legal and regulatory regime for SMSFs.

Emerging risk of elder abuse

7.102 The ALRC received a small number of submissions raising concerns regarding financial abuse of older people involving SMSFs.[111] Submitters also noted that the rate of non-compliance identified by auditors was low at around 2% of funds.[112]

7.103 The low prevalence of elder abuse in relation to SMSFs may reflect the current demographics of those with SMSFs. Only 8.8% of SMSFs have members aged over 75

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101 *Superannuation Legislation Amendment Act (No. 3) 1999* (Cth). SMSF were previously known as excluded funds.

102 The only exception is single member funds with individual trustees where there must be two trustees one of whom is the member. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 17A.

103 Australian Taxation Office, *Annual SMSF Population Analysis Tables* (2016).

104 Australian Prudential Regulation Authority (APRA), *Statistics: Quarterly Superannuation Performance June 2016* (2016).

105 Australian Taxation Office, above n 103.

106 Ibid.

107 Ibid.

108 Julie Castillo, 'The SMSFs Trustee-Members' (2012) 40(3) *Australian Business Law Review* 177, 178.

109 Financial Planning Association of Australia (FPA), Submission 295.

110 Super System Review Panel, *Super System Review Final Report* (2010).

111 Office of the Public Guardian (Qld), *Submission 173*; Financial Services Institute of Australasia, *Submission 137*.

112 Dixon Advisory, *Submission 342*.

years[113]—who may be more at risk of elder abuse given increasing rates disability and cognitive impairment. However, 55% of SMSF members are aged between 55 and 74 years of age.[114] This suggests that, in the coming decades, a greater number of older and potentially more vulnerable individuals will have an SMSF.

7.104 The risk of vulnerability to financial abuse in relation to an SMSF arises in part because the regulatory framework for SMSFs was designed on the premise of self protection. This model for SMSFs supported reduced government regulation:

> As members of self managed superannuation funds will be able to protect their own interests these funds will be subject to a less onerous prudential regime under the *SIS Act*.[115]

7.105 The different regulatory framework for SMSFs and the larger industry and retail funds regulated by APRA was explained in the following terms:

> APRA considers they have a responsibility for ensuring trustees [of those larger superannuation funds for which APRA is the responsible regulator] have properly formulated their investment strategies as set out in trustee documentation and that this can be demonstrated through practical implementation.... The Tax Office's approach is, however, consistent with past Tax Office practice and the Government's original policy intent. This intent specified that whilst SMSFs are a key vehicle in the accumulation of retirement savings, they do not require onerous prudential supervision as members should be able to protect their own interests.[116]

7.106 The emphasis on responsibility and self protection in the regulation of SMSFs was reiterated by the Panel which identified the following policy principles underpinning regulation in this sector:

> Principle 1—Ultimate responsibility
>
> Principle 2—Freedom from intervention
>
> Principle 3—… but not complete absence of intervention.[117]

7.107 A regulatory framework that relies on self protection may be problematic, however, as a larger number of SMSFs come under the control of older people who may require increasing decision-making support.

What happens when a trustee suffers a 'legal disability'?

Enduring attorney to take over SMSF

7.108 In the event that a trustee/director suffers a 'legal disability'[118] (the term used in the *SIS Act* for a lack of decision-making ability), the SMSF will become non-compliant for the purposes of superannuation law six months after legal disability unless: the principal's interest in the fund can be paid out; the fund is able to be wound up, a tribunal appoints a financial administrator who can step in as trustee/director; or the management of the SMSF is transferred to an APRA licensed trustee. If the fund becomes non-compliant for the purposes of superannuation law there may be a range of administrative and tax penalties that apply and the fund may be wound up.

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113 Australian Taxation Office, above n 103.
114 Ibid.
115 Explanatory Memorandum, *Superannuation Legislation Amendment Act (No. 3) 1999* (Cth).
116 Australian National Audit Office, *The Australian Taxation Office's Approach to Regulating and Registering Self Managed Superannuation Funds* (Report No 52 of 2006–2007, 2007).
117 Super System Review Panel, above n 110, 219.
118 *Superannuation Industry (Supervision) Act 1993* (Cth) s 17A.

7.109 The only exception is where the trustees/directors have appointed an enduring attorney, as the *SIS Act permits* an attorney to become a trustee or director of the corporate trustee for the purposes of the fund's compliance with superannuation law. Accordingly, in order to manage the situation where a trustee/director suffers a 'legal disability', it is essential that all trustees/directors have an enduring power of attorney.[119]

7.110 Importantly, the law only *permits* an enduring attorney to become a trustee/director. The law does not *require* the attorney to become the trustee nor does superannuation law override the particular terms of the trust deed and/or constitution of the corporate trustee.[120] The trust deed and constitution of the corporate trustee must allow for the appointment of the attorney as trustee and the processes set down in the document must be followed.

7.111 With respect to the situation where a person has a legal disability and their enduring attorney seeks to become the trustee or director of the corporate trustee, the ALRC notes that, aside from sophisticated investors and their professional advisers, there appears to be a general lack of awareness of the complexity that surrounds the process of appointing the enduring attorney as a director/trustee of an SMSF.

7.112 The process for an enduring attorney to take control of the SMSF on the principal's loss of capacity is not straightforward, particularly when compared to dealing with bank accounts. In those latter cases, the attorney must simply present the enduring power of attorney document in order to complete transactions from the bank account.

Process of appointing enduring attorney as an individual trustee

7.113 A particular complication arises with respect to SMSFs with individual trustees, as there must be a minimum of two trustees and there are particular rules of general trust law that inhibit the ability of the remaining trustee continuing to act where one trustee has a legal disability. Unless the trust deed specifically provides to the contrary, individual trustees must act jointly; and the trustee with a legal disability continues to be a trustee until removed.[121] Accordingly, where one trustee suffers a legal disability the other trustee (or trustees) cannot make any decisions on behalf of (and in the absence of) the person who has suffered a legal disability.[122]

7.114 Therefore the key issue is how the trustee who has a legal disability may be removed and the enduring attorney be appointed. This is determined by the trust deed. Some of the most common methods included in trust deeds are for the power to be assigned to the outgoing trustee, the member(s) of the fund or, in older deeds, the 'employer sponsor' of the fund.[123] Unless carefully drafted, the trust deed may give power for the removal and appointment to the remaining trustee or members of the SMSF, rather than the enduring attorney for the individual who has suffered a legal disability. Particular legislative provisions applying to trusts generally may also be

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119 As set out in ch 5, given the complexity of managing a SMSFs, the ALRC is recommending that the enduring power of attorney must explicitly include a power to deal with superannuation.

120 Australian Tax Office, *Self-Managed Superannuation Funds Ruling,* SMSFR 2010/2, 21 April 2010 2.

121 *Muir v Inland Revenue Commissioners* [1966] 1 WLR 1269, 1283. For an excellent summary of the law in this area as it relates to SMSFs *see:* Bryce Figot, *Complete Guide to SMSFs: Planning for Loss of Capacity and Death* (CCH Australia, 2016).

122 *In the Estate of William Just deceased (No 1)* (1973) 7 SASR 508 and *Beath v Kousal* [2010] VSC 24.

123 Figot, above n 121, 49–52.

invoked giving the last surviving trustee the power to nominate a replacement for the trustee who has lost capacity.[124]

7.115 Thus a person (John) may appoint his daughter (Maria) as his enduring attorney and in that document specifically give Maria power to manage John's superannuation. Notwithstanding this, if John suffers a legal disability that invokes the enduring power of attorney, Maria will not automatically become the trustee of the SMSF. The terms of the trust deed must be followed. The terms of the SMSF trust deed may give that power to the other individual trustee, John's brother Joshua. Thus Joshua has the power to appoint the successor trustee and he may use this to appoint someone other than the principal's daughter and enduring attorney. If Joshua did this, the SMSF will ultimately become non-compliant for the purpose of superannuation law, but the immediate concern—from an elder abuse perspective—is that John's investment in the SMSF will be under the control of someone other than the person he wished to take control of his finances in the event that he suffered a legal disability. This increases the risk that those funds will not be managed in a manner that upholds John's wishes.

7.116 This type of scenario was reflected in the submission from the Financial Planning Association of Australia:

> The most common SMSF dispute when an individual member has died or lost capacity, involves the spouse of a second marriage trying to disinherit children from the first marriage, particularly where the spouse of the second marriage is a trustee and has discretion of the fund.[125]

7.117 The other complication with an individual trustee is that John's name will be on all the legal documents for all the real property and other assets of the SMSF. If Maria is successful in becoming the trustee, all the documentation will need to be changed from John's to Maria's name. Chartered Accountants Australia and New Zealand explained some of the practical challenges of effecting a change in trustee:

> [the process] can be expensive, time consuming and deeply frustrating. Depending on the assets held by an SMSF the following fees may apply for changing the ownership of fund assets:
>
> - State or Territory filing fees for changing land titles.
> - Fees, chargers or penalties imposed by financial institutions such as, banks, stock brokers and share registries.
> - Amending lease documents.
>
> In addition the administrative process and documentary proofs require to change the owner of a trust asset … will vary greatly from one entity to another.[126]

Process of appointing enduring attorney as a director of the corporate trustee

7.118 Where the SMSF has a corporate trustee, the process of appointing the enduring attorney as a director is somewhat easier. There is no need to change the trustee of the SMSF, but rather there is a need to change a director of the trustee. Standard off-the-shelf corporate constitutions typically (but not in every case) have provisions that provide for automatic vacation of the position of director on the loss of capacity or legal disability. Members holding a majority of shares at a general meeting of

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124 Where the terms of the trust deed are silent or the provisions cannot be invoked (because the outgoing trustee has lost capacity and therefore can't elect a replacement trustee) See, eg, *Trustee Act 1925* (NSW), s 6; *Trusts Act 1973* (Qld) s 12 and *Trustee Act 1958* (Vic) s 41.

125 Financial Planning Association of Australia (FPA), *Submission 295*.

126 Chartered Accountants Australia and New Zealand, *Submission 368*.

shareholders are required to appoint a new director. The enduring attorney may have the authority over the shares held by the director who has suffered a legal disability to vote those shares to appoint themselves a director.[127]

7.119 Using the same example as in paragraph [7.115], but assuming a corporate trustee, John may appoint his daughter Maria as his enduring attorney and in that document specifically give Maria power to manage John's superannuation. John and Joshua are both directors of the SMSF's corporate trustee and each hold one share in the corporate trustee. Thus if John suffered a legal disability, Maria would require the votes of Joshua in a general meeting of shareholders to be appointed as a director (as both Maria and Joshua would control 50% and not a majority of shares). If Joshua did not vote for Maria to become a director, she would not become a director of the trustee. If this were to occur, the SMSF will again ultimately become non-compliant for the purpose of superannuation law, but the immediate concern—from an elder abuse perspective—is that John's investment in the SMSF will be under the control of someone other than the person he wished to take control of his finances in the event that he suffered a legal disability.

Consequences of a trustee suffering a legal disability

7.120 There are two important points from the previous discussion. First, the legal documentation for the SMSF must be drafted in a way that reflects the succession plans of the members on suffering a legal disability. Many of the documents used to establish an SMSF do not properly provide for succession events where a trustee suffers a legal disability.[128] The adequacy and currency of SMSF trust deeds is currently not scrutinised at all, either by the ATO, or the approved auditor.

7.121 Secondly, careful consideration is needed as to who is likely to have effective control of the SMSF in circumstances where a trustee suffers a legal disability. This is because the person who has control has a significant influence over whether the person's wishes for the management of their SMSF are carried out in the event of suffering a legal disability.

Replaceable rules

Recommendation 7–2 The *Superannuation Industry (Supervision) Act 1993* (Cth) should be amended to include 'replaceable rules' for self-managed superannuation funds which provide a mechanism for an enduring attorney to become a trustee/director where this was provided for in the enduring document and notwithstanding the terms of the trust deed and constitution of the corporate trustee or the actions of the other trustees/directors.

7.122 To address some of the challenges of effecting a desired succession in the event of a legal disability, in the Discussion Paper the ALRC asked whether the *SIS Act* should be amended to set out the steps that are to be taken when a trustee or director of the corporate trustee has suffered a legal disability.[129] The ALRC considered that these legislative parameters could provide a safety net in the event that the trustee has not

127 *Corporations Act 2001* (Cth) s 141.
128 Grant Abbott, *Guide to Self Managed Super Funds* (CCH, 3rd ed, 2006) 87.
129 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 7–1.

already put in place an effective succession plan. This recommendation responds to that question.

7.123 Recommendation 7–2 would provide a mechanism for ensuring that a person's enduring attorney is able to step in as a trustee/director where this was provided for in the enduring document. It would overcome deficiencies in the trust deed and company constitution that would otherwise prevent the attorney taking that role. It would also override the ability of the remaining trustee(s)/directors to thwart the appointment of the enduring attorney as trustee/director.

7.124 Under the *Corporations Act 2001* (Cth) a company may choose how its internal governance structures are derived.[130] They can be: a constitution; replaceable rules; or a combination of both. A company's constitution is a contract between: the company and each member; the company and each director; the company and the company secretary, and a member and each other member.

7.125 Replaceable rules are set out in s 141 of the *Corporations Act* and can be 'replaced' by the provisions of a company's constitution. These 42 rules govern a range of matters relating to how the company:

- appoints and removes its directors;
- passes directors resolutions;
- conducts directors meetings;
- organises members meetings;
- remunerates directors;
- transfers shares; and
- pays dividends.

7.126 Where it is agreed that the replaceable rules will apply in full or in part with respect to a company, the replaceable rules operate contractually in the same way as a constitution. That is, a breach of the replaceable rules gives rise to an action for breach of contract whereby shareholders may seek a court order requiring compliance with any replaceable rules. A breach of the replaceable rules cannot lead to a prosecution for breach of the *Corporations Act*.

7.127 By drafting Recommendation 7–2 as a 'replaceable rule', individual autonomy and choice are retained, as individuals have the ability to 'replace' the rule and rely on the primacy of their trust deed/corporate constitution, particularly where those have been drafted as part of complex estate planning arrangements.

7.128 The 'replaceable rule' would be subject to the ordinary consent requirements for becoming a director and trustee. That is, the enduring attorney would have to consent to becoming a director/trustee and thus the appointment would not be immediate on the activation of the enduring power of attorney.

7.129 The replaceable rule would apply on the successful application for the fund to become a registered SMSF with the ATO, unless expressly overruled by the provisions of the trust deed and corporate constitution. Appropriate transitional arrangements would need to be in place to enable SMSF trustees and members to consider whether

130 For a good overview of proprietary companies: see Dr Pamela Hanrahan, 'The Law of Close Corporations Australia' *International Academy of Comparative Law World Congress in Vienna 2014*.

the replaceable rule should apply and, if not, amend their documentation accordingly. The legislation would need to allow, with appropriate safeguards, for SMSF members to alter the fund documentation in the event that all members agree that a change to the applicability of the replaceable rule is required.

7.130 The recommendation would overcome concerns that significant numbers of SMSF are created with off-the-shelf documentation that has not been crafted to meet the estate planning and succession objectives of their members. It would also overcome problems created by the misperception that the law 'requires' rather than 'permits' an attorney under an enduring power to become a trustee/director. Ultimately, this would address the risk of elder financial abuse where a person other than the attorney, (being the chosen person to manage the older person's finances on loss of decision-making ability) is able to control the funds in the SMSF.

Balancing prescription with protection

7.131 Recommendation 7–2 strikes a balance between being overly prescriptive in legislation and (limiting the fetter on SMSF trustees) while also offering protection for SMSF members who may not appreciate the complexities of planning for loss of decision-making ability in the context of their SMSF.

7.132 The idea expressed in the Discussion Paper, that the *SIS Act* should be amended to set out in legislation the steps that are to be taken when a trustee or director of the corporate trustee suffers a legal disability, received mixed views in submissions.

7.133 The GRC Institute supported the proposition that succession events be set out in legislation:

> We agree that there should be certain arrangements for loss of capacity. Many modern trust deeds that set up these arrangements do have these provisions, but a modification to the *SIS Act* incorporating additional clauses in these deeds would be appropriate.[131]

7.134 Similarly, FINSIA supported the proposition and suggested that '[t]his is particularly important for unadvised persons with SMSFs that are using off-the-shelf products'.[132]

7.135 CPA Australia also offered qualified support noting that there was 'scope to prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity'.[133]

7.136 The need for flexibility was emphasised by the Law Council of Australia:

> The Law Council considers that 'hard wiring' a particular course of action may be counterproductive and give rise to inappropriate results. For example, a member may have a legal personal representative but there may be reasons why having that person appointed as a trustee or trustee director in place of the member would be inappropriate in the particular circumstances. Equally, the compulsory transfer of a member's interests might give rise to adverse tax results or might unduly disadvantage the remaining member/s of the self-managed superannuation fund.[134]

131 GRC Institute, *Submission 358*.
132 FINSIA, *Submission 339*.
133 CPA Australia, *Submission 338*.
134 Law Council, *Submission 351*.

7.137 Similarly, the SMSFA and Financial Planning Association of Australia emphasised the importance of member education rather than prescribing certain succession events in legislation.[135]

7.138 The ALRC agrees that education and awareness raising are important, but suggests that the complexity in this area may militate against their effectiveness as the only solution. As set out above, the law regarding SMSFs is highly complex and the legal arrangements for succession on suffering a 'legal disability' requires careful procedural steps be taken. While many individuals with SMSFs are highly educated and sophisticated investors, and many retain specialist advisers, there are over 1.1 million individuals who are members of an SMSF, suggesting a breadth of financial expertise. Many SMSFs have relatively small balances, suggesting not all SMSFs members would be availing themselves of specialist advice. Accordingly, the ALRC considers that this recommendation strikes the right balance, providing a mechanism to overcome deficiencies in documentation and understanding, while providing freedom to develop sophisticated estate planning strategies.

7.139 The ALRC agrees that a 'one size fits all' approach to succession events in the event of a legal disability is inappropriate and undesirable, given the diversity of SMSFs in Australia. As a result, the recommendation is drafted as a 'replaceable rule' that provides a simple mechanism for an enduring attorney to step in as trustee/director while retaining the ability of SMSF members to chose alternative courses of action if this would not be a suitable outcome.

7.140 Another reason for drafting the recommendation as a 'replaceable rule' is that, while SMSFs are most likely to be funds held by a couple or single member funds, they can be funds with up to five members, who may not be related. In the latter circumstance, the ALRC envisages that the replaceable rule is less likely to be appropriate with members unlikely to accept a situation where, irrespective of the trust deed and corporate constitution, a member's enduring attorney can step in if a member suffers a legal disability. In such circumstances, it may be that the nature of the contractual and fiduciary relationships are carefully calibrated in the SMSF documentation and the replaceable rule would upset these arrangements. Alternatively, an individual may not wish their enduring attorney to step into that role of director/trustee and wishes to replace the rule and require that their interest in the fund be paid out or transferred to an APRA-regulated fund on loss of decision-making ability.[136]

Planning for a 'legal disability'

Recommendation 7–3 The relevant operating standards for self-managed superannuation funds in cl 4.09 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), should be amended to add an additional standard that would require the trustee to consider the suitability of the investment plan where an individual trustee or director of the corporate trustee becomes 'under a legal disability'.

135 SMSF Association, *Submission 382*; Financial Planning Association of Australia (FPA), *Submission 295*.
136 For the reasons set out above this may not be possible where there are individual trustees.

7.141 Trustees of SMSFs must ensure that the fund complies with prescribed operating standards.[137] The relevant operating standards are set out in cl 4.09(2) of the *SIS Regulations*:

> The trustee of the entity must formulate, review regularly and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following:
>
> (a) the risk involved in making, holding and realising, and the likely return from, the entity's investments, having regard to its objectives and expected cash flow requirements;
>
> (b) the composition of the entity's investments as a whole, including the extent to which they are diverse or involve exposure of the entity to risks from inadequate diversification;
>
> (c) the liquidity of the entity's investments, having regard to its expected cash flow requirements;
>
> (d) the ability of the entity to discharge its existing and prospective liabilities;
>
> (e) whether the trustees of the fund should hold a contract of insurance that provides insurance cover for one or more members of the fund.[138]

7.142 Recommendation 7–3 recognises that planning for a legal disability, as a central protective strategy against elder abuse, needs to look beyond the legal structures for succession and consider the investments in the SMSF, and how they may be best managed in the event of a trustee suffering a legal disability.

7.143 This recommendation was suggested by the SMSFA:

> Our proposed amendment is similar to the recent addition of SIS regulation 4.09(2)(e) that requires trustees to consider whether their fund should hold insurance. This has had great success in putting insurance to the front of every trustees mind and will have the same effect with estate and succession planning. Furthermore, it then becomes a legal requirement that trustees consider estate planning and then this becomes part of the audit standards that SMSF auditors must see evidence of when auditing the SMSF financials each year.[139]

7.144 A similar reform was suggested by Dixon Advisory:

> the annual reporting requirements to the Auditor or ATO could contain a declaration stating that the trustee has considered succession planning for each of the Trustees. The annual declaration could include considerations like: the benefits of corporate trustees, the importance of appointing an appropriate enduring power of attorney and executor as well as educating the trustee appropriately on their preferences.[140]

7.145 A key part of this proposed operating standard is requiring trustees to consider whether the asset mix of the SMSF is consistent with proposed succession plans. That is, are the assets fungible on a trustee suffering a legal disability or will the assets require long term management by the trustee's enduring attorney. This brings 'front of mind' important questions as to the suitability of the chosen enduring attorney to manage the SMSF. Dixon Advisory noted that

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137 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 31(1) and 34. Failure to comply can lead to the imposition of civil penalties or a criminal conviction: ss 34(2), 166.

138 A number of these obligations were introduced in July 2013 as part of the Government's *Stronger Super Package* and were designed to improve the financial health of SMSFs, recognising the absence of prudential controls over SMSFs.

139 SMSF Association, *Submission 382*.

140 Dixon Advisory, *Submission 342*.

> SMSFs often have tailored strategic approaches and unique investments that require individualised management strategies. Noting our increasing life and retirement phase expectancy, it is entirely appropriate for SMSF trustees to hold investments that have a long term focus. SMSF trustees may also hold business and residential property, unlisted assets and other sophisticated investments which can, at times, be less liquid. A prescribed event, such as rolling a member out of the SMSF within a set period of time, may cause significant losses for the members and beneficiaries in these situations.[141]

7.146 As the requirement to review the SMSF's investment strategy for consistency with succession planning for loss of legal capacity would be an operating standard of SMSFs, trustees would be required to demonstrate to the SMSF's auditors that they have considered their investment strategy in light of the potential for loss of capacity by a director/trustee. Regular reviews through the audit process should encourage consideration of appropriate succession planning and focus on the need to keep the plan up to date. This addresses a key risk for older people in relation to SMSFs: that many members do not understand, or have not considered, how lack of planning for the possibility of a legal disability may make them susceptible to elder abuse.

7.147 Recommendation 7–3 only requires trustees to 'consider a plan', not to have a plan, or a plan of a particular type. This retains ultimate control with the trustee—consistent with the regulatory approach for SMSFs. It is also consistent with the view expressed by submitters that a 'one size fits all' approach to succession on loss of capacity would be problematic given the diversity and complexity of SMSFs in terms of both their assets and structure.[142]

7.148 The ALRC recognises that the regulation was amended in 2012 to require trustees to consider whether their fund should hold insurance. There is no data on the uptake of insurance following the implementation of this requirement. Recommendation 7–3 would add only a limited regulatory burden as it would not require SMSFs to do any more than consider planning for the loss of capacity by trustees/directors as part of the fund's investment strategy.

Australian Taxation Office notification

Recommendation 7–4 Section 104A of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the accompanying Australian Taxation Office Trustee Declaration form should be amended to require an individual to notify the Australian Taxation Office when they become a trustee (or director of a company which acts as trustee) of a self-managed superannuation fund as a consequence of being an attorney under an enduring document.

7.149 Since 1 July 2007, s 104A of the *SIS Act* has required that a person, on becoming a trustee, or director of a company which acts as trustee, of an SMSF sign an ATO approved form—the ATO Trustee Declaration.

7.150 According to the ATO, the purpose of the declaration is primarily educative—reinforcing the roles and responsibilities that are attached to running an SMSF.[143] The

141 Ibid.
142 Ibid.
143 Australian Taxation Office, *Trustee Declaration (NAT 71089)*.

declaration contains information on trustee duties, the sole purpose test, investment restrictions and rules regarding the administration of the SMSF.[144]

7.151 The declaration must be signed within 21 days of being appointed as a trustee, or as a director of the company acting as trustee. There is no requirement to send the declaration to the ATO. The obligation is simply to retain the declaration for as long as the person is a trustee or director of the company and in any event for at least 10 years.[145] The ATO may request to see a copy of the declaration at any time. It is an offence not to sign the declaration within the 21 day period, to fail to provide a signed declaration to the ATO when required, and to fail to retain the signed declaration.[146]

7.152 Existing trustees/directors also have an obligation to ensure that a new trustee/director signs the ATO Trustee Declaration within the 21 day period. Further, the other trustees/directors must ensure that the signed declaration is retained for the required period and provided to the ATO as and when requested.[147]

7.153 Currently, there is little additional oversight when an individual becomes a trustee/director of an SMSF pursuant to an enduring power of attorney. SMSFs are subject to less regulation on the principle of individual choice and control. This is attenuated when a person loses capacity and the central feature of SMSFs is broken—that the beneficiary and manager of the funds are the same person. ATO notification would bring to the regulator's attention SMSFs that may need greater scrutiny and attention.

7.154 The requirement to lodge the form would signal to the new trustee/director the seriousness of the obligations and would highlight the role of the ATO as the regulator of SMSFs. The obligation to lodge the form also ensures the form is read and signed. This cannot be guaranteed with the current arrangement where there is no specific obligation to lodge the form with the ATO.

7.155 Recommendation 7–4 builds on suggestions from both Dixon Advisory and the SMSFA in relation to trustee notifications and annual returns. The SMSFA suggested:

> a simple amendment to the SMSF Annual Return that is lodged with the ATO allowing SMSFs to alert the ATO when an EPOA has been used in the administration of the fund. This can be established by a 'tick box' and will provide a flag to the ATO of which funds may now be at higher risk for elder abuse.[148]

7.156 Dixon Advisory highlighted the important educative value of the ATO Trustee Declaration. The ALRC considers that the declaration is the appropriate vehicle for informing the ATO that an enduring attorney has taken over as trustee/director. While the SMSFA's suggestion of including this information in the annual return has merit, it is less immediate than the ATO Trustee Declaration, which would need to be lodged within 21 days. In addition, the annual return is a broader requirement to lodge the accounts of the fund whereas the ATO Trustee Declaration requires specific focus on the individual responsibilities that apply to trustees/directors.

7.157 The ALRC notes that SMSFs are subject to audit requirements and that these requirements were strengthened in 2013. In this context, it could be argued that, as SMSFs are already subject to regular audits, there may be marginal benefit in making the ATO aware that an individual has been appointed because a member has suffered a

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144 Ibid.
145 *Superannuation Industry (Supervision) Act 1993* (Cth) s 104A.
146 Ibid.
147 Ibid.
148 SMSF Association, *Submission 382*.

legal disability so that they can apply greater scrutiny. Nevertheless, the broader regulatory framework for SMSFs needs to be taken into account. There is less oversight and regulation of SMSFs because those running the funds are the beneficiaries. Where that is not the case, because a member has suffered a legal disability, it is appropriate to provide a legislative basis for the ATO to apply greater scrutiny.

Other areas for reform of self-managed superannuation funds

7.158 In the Discussion Paper, the ALRC considered a number of other issues that are not subject to final recommendation, such as whether the *SIS Act* should be amended to:

- require that all SMSFs have a corporate trustee;
- impose additional compliance obligations on trustees and directors when they are not a member of the fund; and
- give the SCT jurisdiction to resolve disputes involving SMSFs.[149]

7.159 The ALRC also considered whether there should be restrictions as to who may provide advice on, and prepare documentation for, the establishment of SMSFs. This section considers these issues and the responses from stakeholders.

Corporate trustee or individual trustees

7.160 The majority of SMSFs have individual trustees rather than a corporate trustee.[150] The Super System Review Panel (the Panel) noted that it is 'widely accepted by professionals and the ATO that a corporate trustee is superior'.[151] Benefits included:

- perpetual succession—the corporate entity cannot die, so it enables better control in the event of member death or incapacity;
- greater administrative efficiency;
- greater flexibility to pay benefits as lump sums or pensions;
- greater estate planning flexibility; and
- reduced risk of deliberate or accidental intermingling of fund and personal assets, in breach of the covenant in s 52(2)(d) of the *SIS Act*.[152]

7.161 The Panel concluded that it

> is attracted to the potential benefits provided by the corporate trustee structure and is concerned about the large proportion of new SMSFs choosing not to use a corporate trustee. However, consistent with principle 2 regarding freedom from intervention, the Panel believes that the solution here is a better standard of advice, an aim which is addressed by other recommendations.[153]

7.162 Given the greater protection afforded by a corporate trustee, the ALRC sought feedback from submitters as to whether there should be a change in the law requiring a corporate trustee for new SMSFs.

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149 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 7–1.
150 Australian Taxation Office, above n 103.
151 Super System Review Panel, above n 110, 223–224.
152 Ibid.
153 Ibid 224.

7.163 There was broad recognition of the benefits of a corporate trustee when compared to an individual trustee.[154] However, there was significantly less support for mandating a corporate trustee for all SMSFs. For example:

> The Law Council does not think that the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*) should be amended to require that all new self-managed superannuation funds have a corporate trustee. While the Law Council considers that there are strong reasons in favour of such a structure … it does not believe that requiring this to be adopted would of itself reduce the risk of elder abuse occurring.[155]

7.164 Other reasons put forward against mandating a corporate trustee were that it would reduce individual choice, impose additional costs and increasing complexity.[156] The ALRC considers that a corporate trustee, when compared to individual trustees, has numerous benefits (as outlined above) and may contribute to reducing the risks of elder abuse in the context of a loss of legal capacity. However, mandating a corporate trustee would be a significant reform that would have consequences for the entire SMSF sector that cannot be justified solely on the basis of addressing elder abuse.

Improving documentation

7.165 The Panel noted some of the challenges created by the regulatory regime for SMSFs, which requires a fund to be established by private documentation rather than by legislation.[157] Establishment by private documentation results in most individuals being reliant on professional advice for the establishment of their SMSF.[158] Advisers are typically accountants and financial advisers. Lawyers may or may not be engaged to draft the trust deed and the constitution for the corporate trustee.

7.166 Accordingly, in the Discussion Paper, the ALRC sought views about how documentation for SMSFs could be improved to protect against poor documentation facilitating abuse in the context of a loss of decision-making ability. The ALRC also asked about how to improve the quality of professional advice provided in respect of SMSFs.

7.167 Stakeholders acknowledged that the documentation for SMSFs could be improved and that there was an overreliance on generic documents. However, there was a view that this was driven by consumer choice rather than a lack of qualifications or expertise by those preparing documentation.[159]

7.168 In relation to the advice provided on the establishment of an SMSF, many stakeholders pointed to the recent tightening of the rules around who could provide advice on the establishment of SMSFs.[160] Since 30 June 2016, accountants must now have an Australian Financial Services Licence in order to provide advice regarding the establishment of an SMSF. The SMSFA submitted that this has further strengthened the quality of advice surrounding the establishment of SMSFs for a large population of advisers.[161]

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154 For example: SMSF Association, *Submission 382*; Chartered Accountants Australia and New Zealand, *Submission 368*; FINSIA, *Submission 339*. Stakeholders also suggest that the corporate trustee should be a sole purpose company to protect against co-mingling of funds.

155 Law Council, *Submission 351*. Citations omitted.

156 See, eg, GRC Institute, *Submission 358*; Dixon Advisory, *Submission 342*; CPA Australia, *Submission 338*.

157 Super System Review Panel, above n 110, 270.

158 Castillo, above n 108, 181.

159 Dixon Advisory, *Submission 342*.

160 Ibid.

161 SMSF Association, *Submission 382*.

7.169 As a result, many suggested no legal reforms were required. For example:

> Dixon Advisory submits that the vast majority of times, a wide array of professionals are engaged to ensure that the establishment of and running of SMSFs is consistent [with the law]. Further, there are also compulsory documents for the establishment of SMSFs which need professional supervision or approval before they are valid.[162]

7.170 The ALRC is of the view that establishing and running an SMSF is a complex undertaking and that not all those who embark on that course are necessarily sophisticated investors. The ALRC considers that Recommendation 7–2 above, to provide a 'replaceable rule' in relation to succession on loss of capacity will overcome many issues with documentation that is poorly prepared or not suitably tailored to the specific requirement of the SMSF members.

Access to the Superannuation Complaints Tribunal

7.171 If a member of an APRA-regulated superannuation fund has a dispute with the fund, the member may access the SCT for dispute resolution.[163] There is no access to the SCT for members of SMSFs. Essentially, this is because members are also trustees and therefore a dispute between a member and the fund is circular. In its Issues Paper, the Panel raised the potential of extending the jurisdiction the SCT to SMSFs,[164] but decided against it. This conclusion was based on a view that a large proportion of disputes would relate to individuals who were dissatisfied with an SMSF trustee decision regarding a BDBNs and otherwise in relation to complex family law disputes.[165]

7.172 In the Discussion Paper, the ALRC suggested that, where an SMSF member is no longer a trustee because they have a legal disability, there may be a role for the SCT in providing a low-cost forum for disputes. There may also be a role for the SCT in providing advice to trustees on request, and in approving conflict of interest transactions similar to the role played by state civil and administrative tribunals in relation to enduring powers of attorney.[166] The ALRC sought stakeholder views on this issue.

7.173 There was some support in submissions for the SCT having such a role.[167] However, the majority of submissions were opposed to expanding the jurisdiction of the SCT to SMSFs. For example, the Law Council of Australia considered

> it would not be appropriate to involve the SCT in disputes that are ultimately disputes between family members or associates and are private in nature. … The SCT is set up to support individuals in dispute with third party trustees who may be disadvantaged by other legal avenues. It is not equipped to deal with related party disputes.[168]

7.174 Additionally, it was noted that the SCT is self-funded, and expanding its jurisdiction would increase costs which would have to be borne by all superannuation fund members. It was also suggested that SMSF disputes were unlikely to be limited to superannuation matters and that the tribunal would therefore only be able to address

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162 Dixon Advisory, *Submission 342*.
163 *Superannuation (Resolution of Complaints) Act 1993* (Cth).
164 Super System Review Panel, '*Phase Three: Structure (Including SMSFs) Issues Paper*' (14 December 2014).
165 Super System Review Panel, above n 110.
166 Rec 5–2.
167 FINSIA, *Submission 339*; Public Trustee of Queensland, *Submission 249*.
168 Law Council, *Submission 351*. See also Chartered Accountants Australia and New Zealand, *Submission 368*.

part of a dispute relating to superannuation law and not matters relating to corporations law or family law.[169]

7.175 Stakeholders also drew attention to the fact that the SCT is currently under review. On 5 May 2016, the Australian Government established an independent expert panel to review the financial system's external dispute resolution and complaints framework. On 6 December 2016, the expert panel released an interim report making a number of findings with respect to the SCT—including that it was subject to significant delay in resolving complaints, that it is under resourced and its governance arrangements need to be reformed with a need for greater transparency in operations.[170] The interim view of the expert panel is that the SCT should be replaced with an ombudsman type model.

7.176 The ALRC considers that SMSF members do need access to a low-cost forum for dispute resolution. In light of the expert panel's ongoing review of dispute resolution in the financial sector, further consideration of the SMSF sector's need for dispute resolution forums should be considered as part of the work of the expert panel.

Additional obligations on trustees and directors

7.177 There are now a range of statutory obligations imposed on attorneys under state and territory powers of attorney legislation, in addition to general law fiduciary duties owed to the principal. However, when an attorney becomes a director or trustee in relation to an SMSF, they do so in their personal capacity and not in their capacity as attorney.[171] Accordingly, they would not be bound by the additional statutory obligations that have been imposed on attorneys under state and territory powers of attorney legislation.[172] In that role they are bound by the general law of fiduciary duties of trustees or the *Corporations Act,* and not the state and territory powers of attorney legislation. The ALRC sought submissions on whether these protections are sufficient.

7.178 Submissions were generally of the view that the existing obligations and protections were sufficient.[173] For example, Dixon Advisory submitted that

> the wide array of responsibilities imposed on trustees are sufficient to ensure a regulated approach in managing the affairs of the member. The imposition of further requirements would not only create confusion and overlap in the operation of the laws, but may potentially create obligations that infringe and restrict the way that a large majority of bona fide trustees operate.[174]

7.179 The Association of Financial Advisers (AFA) noted that an enduring attorney stepping into replace a trustee who has lost decision-making ability is not the only time that the law permits trustees/directors not to be members of an SMSF. When an SMSF has a corporate trustee it can have additional non-member directors and the AFA

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169 Law Council, *Submission 351*; Dixon Advisory, *Submission 342*.

170 Professor Ian Ramsay, Julie Abraham and Alan Kirkland, *Interim Report—Review of the Financial System External Dispute Resolution and Complaints Framework* (2016).

171 See [7.110]

172 Therese Catanzariti, '"There in Spirit" Powers of Attorney in the SME Context' (13 Wentworth Chambers, 2012). The relevant duties include: *Corporations Act 2001* (Cth) ss 180–182

173 This was not a universal view of submitters. FINSIA agreed that additional compliance obligations should be applied to assist with the correct use of SMSF funds. See FINSIA, *Submission 339*.

174 Dixon Advisory, *Submission 342*. Similar views were expressed in the following submissions*:* GRC Institute, *Submission 358*; Financial Planning Association of Australia (FPA), *Submission 295*; Financial Services Council, *Submission 78*.

submitted that differentiating between directors that are members and those that are non-members in terms of legal duties and obligations would be problematic.[175]

7.180 The Law Council of Australia also suggested that

> [t]o impose additional compliance obligations in respect of what is already a highly regulated and onerous role may simply make it difficult for older persons to find an individual willing to take on the role (noting that this must be unpaid).[176]

7.181 Accordingly, the ALRC considers that at this time no additional obligations on trustees and directors should be imposed where they are appointed as a result of being an enduring power of attorney for a trustee/director that has suffered a legal disability.

175 Association of Financial Advisers (AFA), *Submission 346*.
176 Law Council, *Submission 351*.

8. Wills

Contents

Summary

8.1 Wills are 'important family, social, economic and legal documents'.[1] Almost 60% of adult Australians have made a will and 93% of people over 70 years of age have a will.[2] Pressuring older people to make or change their wills in particular ways are examples of financial abuse, both in general guidelines on elder abuse and raised by stakeholders in this Inquiry.

8.2 Advance planning documents, such as wills, are a key part of estate planning and are an expected part of a lawyer's practice—either because it is the kind of practice the lawyer undertakes or as an aspect of serving the wishes of particular clients. A lawyer has an important role in supporting a client to make a will and understand its nature and content. A lawyer can also protect a client in situations of potential undue influence. As the National Older Persons Legal Services Network commented, advance planning documents 'can prevent harm and be used to cause harm'.[3]

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1 Cheryl Tilse et al, 'Having the Last Word? Will Making and Contestation in Australia' (University of Queensland, 2015) 6.
2 Ibid 8.
3 National Older Persons Legal Services Network, *Submission 363*.

8.3 This chapter considers existing doctrines, particularly those that respond to coerced wills, and notes a number of aspects of succession law generally that may be considered appropriate to reflect upon, in time, through state law reform processes and in a cooperative way as was undertaken through the wide-ranging uniform succession laws project undertaken principally between 1995 and 2009.[4]

8.4 To aid in combating elder abuse and to reduce undue influence in the making of wills, the ALRC recommends a national coordinated response to improving lawyers' understanding, through national best practice guidelines developed by state law societies and the Law Council of Australia. Other professionals, such as financial advisers, may similarly benefit from improved understanding. Where lawyers are not involved in will making, the ALRC recommends community education in addressing the difficulties associated with 'do-it-yourself' wills.

Pressure to change wills and financial abuse

8.5 Most Australians have a will or expect to make one. While most younger people do not have a will, 93% of people over 70 years of age did, and the likelihood of making a will increased with age and the amount of assets.[5]

8.6 Pressure to make or change wills may reflect a range of issues. One clearly goes to control over finances and property and seeking to shore up testamentary benefit. A number of guidelines on elder abuse in Australia include the use of pressure to make or change a will as an example of financial abuse. For example, the Department of Family & Community Services (NSW) published an interagency policy that included the following definition of financial abuse:

> Financial abuse is the illegal or improper use of an older person's property or finances. This includes misuse of a power of attorney, forcing or coercing an older person to change their will, taking control of a person's finances against their wishes and denying them access to their own money.[6]

8.7 The Financial Ombudsman Service Australia provided an extensive list of examples of financial abuse of vulnerable older people and included '[g]etting an older

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4 The Uniform Succession Laws Project is a useful model of cooperation. It was initiated by the Standing Committee of Attorneys-General in 1991; and in 1995 a National Committee on Uniform Succession Laws was established to direct it. Its brief was to review the laws in the Australian jurisdictions relating to succession and to recommend model national uniform laws. The Queensland Law Reform Commission was the co-ordinating agency and the Committee comprised representatives from all Australian jurisdictions, including a representative from the Australian Law Reform Commission. The publications of the participating agencies towards the project are listed in New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Report No 124 (2009) xiv–xv.

5 Tilse et al, above n 1, 8. This finding was based on a national survey of the prevalence of wills in Australia, in-depth interviews with non will makers over 45 years who have decided not to make a will and interviews with other targeted groups who have a will: Cheryl Tilse et al, 'Will-Making Prevalence and Patterns in Australia: Keeping It in the Family' (2015) 50(3) *Australian Journal of Social Issues* 319.

6 Department of Family and Community Services (NSW), *Preventing and Responding to Abuse of Older People: NSW Interagency Policy* (2014).

person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence'.[7]

8.8 Although there is no deprivation to the older person through a change in their will, if the pressure to change a will occurs within a relationship of trust and causes 'harm or distress' to the older person, such action fits within the World Health Organization description of elder abuse.[8]

8.9 If descriptions or definitions of elder abuse are narrower, for example defining abuse in terms of 'harm' or 'risk of harm', and not including the element of 'distress', there may be arguments about whether to include pressure to change a will as 'elder abuse'. Whether or not pressure to change a will is identified and tracked within the data collection on elder abuse is a matter that will need to be considered as part of prevalence studies.[9]

8.10 State Trustees Victoria urged that concepts like 'harm' 'should not be viewed narrowly':

> Unauthorised interference with an older person's estate planning arrangements (such as their will), even if there is no direct loss to the older person, is harm to that person's 'legacy', and represents an infringement of their rights. For example, if a child of an older person exercises undue influence in getting the older person to change their will in the child's favour, and the older person dies soon afterwards, the older person may suffer no direct financial or other loss from the child's actions, but the older person's intended legacy will be harmed, as their actual testamentary intentions will not be able to be fulfilled.[10]

8.11 Stakeholders provided a number of examples where controlling conduct exerted over an older person included pressure to change a will. Some were personal stories;[11] others were case studies or examples provided by advocacy groups and other non-government bodies.[12] The Queensland Law Society submission, for example, included the following case study:

> In 2013 V, in her 70s, was brought to our office by her 'partner' to make a new Will. The partner was adamant that he wanted to be present for the meeting and was very keen to tell the writer what V 'wanted'. After insisting that we could not see V with him present he reluctantly waited in our reception area. Within a very short time frame it became apparent that V would not have the capacity to make a Will, did not know why she had been brought to the appointment, did not know her date of birth, had no idea about her assets and although she could name her family members (children) had no idea about their ages, relationship status or their children's name

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7 Financial Ombudsman Service Australia, *Banking & Finance—Bulletin 56*, (December 2007) 6.

8 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) ch 1. See ch 2.

9 See ch 3.

10 State Trustees Victoria, *Submission 138*.

11 See, eg, Name Withheld, *Submission 279*; Name Withheld, *Submission 181*; Name Withheld, *Submission 144*; Name Withheld, *Submission 25*. A number of confidential submissions also included changes to wills in the examples of financial abuse.

12 See, eg, Association of Financial Advisers, *Submission 175*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; ARAS, *Submission 166*; University of Newcastle Legal Centre, *Submission 44*. See also Carroll & O'Dea, *Submission 335*.

> and ages. V also kept changing her mind about what it was that she wanted to do (when she could remain focused on the discussion).[13]

8.12 An additional reason for seeking to lock in testamentary benefit through changes to a will may be the possibility of an enlarged estate through unspent funds under 'consumer directed care' arrangements. Aged and Community Services Australia (ACSA) reported concerns of some aged care providers about the 'rising risk of financial abuse for vulnerable older Australians and an unintended consequence of consumer directed care that is now becoming more evident':

> A risk that will need to be managed is the change from February 2017 requiring unspent funds contributed by older people to be returned back to them or their estate, as it may also provide motivation for some family members to limit home care package spending.
>
> Ensuring that there is a requirement for regular and timely planned reviews of a Home Care Package by the provider, even when a family member or representative is self-managing the package, would allow some level of external oversight to minimise the risk of abuse going unobserved.[14]

The law's response

8.13 The law does not ignore coerced transactions. There are several doctrines that deal with situations that include abuse of older people. Rather than suggesting specific amendments of these doctrines, the focus in this chapter is principally on improving the understanding and contribution of lawyers involved in the making and execution of wills, noting relevant law reform developments.

8.14 Transactions that involve undue pressure may be rendered void or voidable through doctrines of equity and probate. With respect to lifetime transactions, the equitable doctrine of undue influence places the emphasis on the person who seeks to gain under particular transactions to demonstrate that they were not the result of undue influence.[15] Probate also has a doctrine of undue influence, but it is different from the equitable doctrine.[16]

8.15 Probate law requires that will-makers have 'testamentary capacity' and have knowledge and approval of the contents of their will. Probate law also closely scrutinises wills that benefit 'strangers'—those unrelated to the testator. Integrity

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13 Queensland Law Society, *Submission 159*.

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

15 For a detailed discussion of the inter vivos doctrine of undue influence, see Anthony Duggan, 'Undue Influence' in *The Principles of Equity* (Thomson Lawbook Co, 2nd ed, 2003) 393. The doctrine in relation to lifetime transactions is noted in ch 6 on family agreements.

16 For a consideration of the topic generally, see: Fiona Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *University of New South Wales Law Journal* 145; Fiona Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23(2) *Legal Studies* 251; Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617; Matthew Tyson, 'An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 38. The perspective of medical professionals is seen, eg, in Carmelle Peisah et al, 'The Wills of Older People: Risk Factors for Undue Influence' (2009) 21(1) *International Psychogeriatrics* 7.

measures are also built in to the formalities of will making. One aspect of this is the rule that witnesses cannot be beneficiaries, known as the 'witness-beneficiary rule'. Although significantly changed, and in places abolished, the rule reflects a concern for self-interest affecting the validity of another's will. A further rule of this kind is the forfeiture rule, which prevents a person who has caused the death of another from benefiting from that person's estate.

Undue influence in probate

8.16 The probate law doctrine of undue influence requires more than just pressure; nor is it presumed in any particular relationship. Professor Gino dal Pont and Ken Mackie summarise the probate doctrine in this way:

> Only actual coercion will invalidate a will. Persuasion, influence or indeed importunity is not sufficient—after all, a testator is ordinarily free to accept or reject persuasion—unless the testator is thereby prevented from exercising a free will.[17]

8.17 In the leading case of *Wingrove v Wingrove*, endorsed by Australian courts, Sir James Hannen P explained, in his direction to the jury, about the different kinds of coercion, in terms that may be particularly pertinent to older persons:

> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage or illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion though not actual violence.[18]

8.18 'Coercion' is the essential characteristic of undue influence in the probate context—forcing someone to do something against their wishes. Actions that are the result of pressure, and acquiesced in, even where the person knows that others may think what they are doing is unwise, do not amount to 'undue influence'. Clearly, however, there are no bright lines. As a person's cognitive ability declines, so their vulnerability to pressure may increase.

8.19 Undue influence is a difficult matter to establish in the probate context, particularly as the onus of proof lies upon the person who alleges undue influence.[19] In its 2013 report, *Succession Laws*, the Victorian Law Reform Commission (VLRC) commented:

> The main problem with probate undue influence is that it has been too difficult to prove. This may lead to the Court upholding a will that does not in fact reflect the will-maker's true intentions. This is particularly concerning given the ageing population and increasing vulnerability of older people making wills. As the

17 Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.39].

18 *Wingrove v Wingrove* (1885) LR 11 PD 81, 82–3. See Dal Pont and Mackie, above n 17, 54 n 151.

19 In 1992 Phillip Hallen reported that in 50 years in New South Wales there had been no successful plea of influence with respect to a will: Phillip Hallen, 'Undue Influence—What Constitutes?' (1992) 66(8) *Australian Law Journal* 538. Since then, there have been a handful of cases: see Victorian Law Reform Commission, *Succession Laws*, Report (2013) 16.

> population ages, there may be an increasing number of people who, despite having testamentary capacity, are vulnerable to pressure from relatives, caregivers and others.[20]

8.20 In *Nicholson v Knaggs*, Vickery J made observations about the degree and nature of pressure, particularly as it relates to the 'vulnerability and susceptibility' of the individual:

> The key concept is that of 'influence'. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle.[21]

8.21 Vickery J also commented about the standard of proof:

> The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.[22]

8.22 The VLRC suggested that, following *Nicholson v Knaggs*, undue influence may now be easier to prove in Victoria.[23] There is also New Zealand authority that supports a similar broadening of the doctrine. In *Carey v Norton*, the New Zealand Court of Appeal stated that the alleged undue influence need not be accompanied by malign intent:

> 'Undue' relates to impairment of judgment rather than the improper conduct on the part of the person possessing influence. It will be 'undue' when it can no longer be said that the will represents the will-maker's independent judgment.[24]

8.23 Dal Pont and Mackie suggest that the facts in this case did not show 'coercion in the accepted sense of the word', which, together with *Nicholson v Knaggs*, may represent 'the developing trajectory of judicial opinion' and 'herald some (limited) convergence between common law and equitable concepts of undue influence'.[25]

8.24 The VLRC also considered as a reform option the legislative change in British Columbia, which commenced in 2014, to introduce into the probate context the equitable doctrine of undue influence. The section provides:

> In a proceeding, if a person claims that a will or any provision of it resulted from another person

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20 Victorian Law Reform Commission, *Succession Laws*, Report (2013) 15.
21 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [150].
22 Ibid [127].
23 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.67].
24 *Carey v Norton* [1998] 1 NZLR 661, referred to with approval in *Mahon v Mahon* [2015] NZHC 1072, [31].
25 Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.45].

> (a) being in a position where the potential for dependence or domination of the will-maker was present, and
>
> (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
>
> and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.[26]

8.25 Stakeholders to the VLRC inquiry were divided about whether to introduce a similar provision in Victoria: some 'saw advantages in such a change, while others were concerned that the equitable doctrine is not appropriate to the probate context'.[27]

8.26 The VLRC concluded that the British Columbia provision was 'groundbreaking' and could suggest a reform direction for Australia to follow. But the VLRC also pointed to the decision of Vickery J in *Nicholson v Knaggs*, and suggested that 'the recent developments in the common law probate doctrine appear to have made undue influence easier to prove', which may mean that legislative change is unnecessary.[28] The final recommendation was that Victoria should review the effect of the British Columbia legislation in practice, after it had been in effect for four years, to consider whether a similar provision should then be introduced in Victoria.[29] The commencement date for the BC reforms was 31 March 2014. The proposed Victorian review would therefore be undertaken after 31 March 2018.

8.27 The ALRC considers that the emphasis of the proposed law reforms in this Inquiry should be on the role that lawyers, and other professionals, can play in assisting older persons in their estate planning and the instruments to give effect to such plans; and community education strategies that may be developed and enhanced through the National Plan discussed in Chapter 3. Further law reform in relation to specific doctrines can be developed through state and territory law reform inquiries, such as in relation to the effect of the British Columbia reform and through a cooperative approach, as in the uniform succession laws project.

Testamentary capacity

8.28 The test for testamentary capacity, the legal competency to make a will, is a longstanding one, and stems from the 1870 decision of Cockburn CJ in *Banks v Goodfellow*,[30] where he stated, in relation to the power to make a will:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to

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26 *Wills, Estates and Succession Act*, SBC 2009, c 13, s 52.
27 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.76].
28 Ibid [2.81].
29 Ibid rec 2.
30 *Banks v Goodfellow* (1870) LR 5 QB 549.

> give effect; and, with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties —that no insane delusions shall influence his will in disposing his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[31]

8.29 This is a functional test of capacity, related to the nature of the transaction and the circumstances of the testator at the time of making the will. Peisah and O'Neill summarise it as requiring that will-makers must:

1. understand the nature and effect of a will;
2. know the nature and extent of their property;
3. comprehend and appreciate the claims to which they ought to give effect; and
4. are not affected delusions that influence the disposal of their assets at the time they are making their will.[32]

8.30 When wills have been challenged on the basis of a lack of testamentary capacity, judges have emphasised the important role that the lawyer plays in supporting their client. For example, in *Pates v Craig*, Santow J said that the duty of the solicitor taking instructions 'from an obviously enfeebled testator, where capacity is potentially in doubt' is 'to take particular care to gain reasonable assurance as to the testamentary capacity of the testator'.

> It is clearly undesirable to attempt to lay down precise and specific rules as to what that necessarily entails for every case. Such rules may lead to a perfunctory, mechanical check list approach. What should be done in each case will depend on the apparent state of the testator at the time and other relevant surrounding circumstances. Any suggestion that someone, potentially interested, has instigated the will, whether or not a client of the will draftsperson, should particularly place the solicitor concerned on the alert. At the least, a solicitor should ask the kind of questions designed to probe the testator's understanding of the basic matters which connote testamentary capacity, as [set out in *Banks v Goodfellow*].[33]

8.31 Professional bodies have developed guidelines for solicitors in such cases.[34]

The doctrine of suspicious circumstances

8.32 The requirement of knowledge and approval of the contents of a will is a separate probate element from establishing that a person had the requisite 'testamentary capacity'. It must be established that the will-maker knows that the document being signed is their will and that it deals with their property. Where a will benefits someone

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31 Ibid 565.

32 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Australasian Legal Information Institute (Austlii) Communities, 2nd ed, 2017) [4.3]. On testamentary capacity, see also Dal Pont and Mackie, above n 17, ch 2.

33 *Pates v Craig & Public Trustee; Estate of the Late Joyce Jean Cole* [1995] NSWSC 87, [147]. See discussion in O'Neill and Peisah, above n 32, [4.4].

34 See, eg, Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016); Attorney General's Department (NSW), *Capacity Toolkit* (2008); Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity Is in Doubt* (2016). See also Dal Pont and Mackie, above n 17, 'Ascertaining the client's mental capacity', [24.5]–[24.7].

completely unrelated to the testator, probate calls for greater scrutiny to ensure that the testator had the appropriate knowledge and approval of the contents of the will. Justice Hallen of the New South Wales Supreme Court explained that, where knowledge and approval of a will is challenged, there is generally a two-stage process:

> The first stage is to ask whether the circumstances are such as to 'excite suspicion' on the part of the court. If so, the burden is on the propounder of the will to establish that the deceased knew and approved the contents of that will. If the circumstances do not 'excite suspicion', then the court presumes knowledge and approval in the case of a will that has been duly executed by the deceased who had testamentary capacity.[35]

8.33 While circumstances that may be raised to suggest undue influence do not satisfy the probate doctrine of undue influence, they may nonetheless point to a lack of knowledge and approval. However, as Dal Pont and Mackie state, 'this does not mean that undue influence is to be subsumed into suspicious circumstances; it is a separate issue that, where relevant, must be specifically pleaded'.[36]

8.34 The kinds of matters that 'excite suspicion' include:

> the circumstances surrounding the preparation of the propounded will; whether a beneficiary was instrumental in the preparation of the propounded will; the extent of physical and mental impairment, if any, of the deceased; whether the will in question constitutes a significant change from a prior will; and whether the will, generally, seems to make testamentary sense.[37]

8.35 In its 2013 *Succession Laws* report, the VLRC provided the following illustrations of situations that have been considered to constitute suspicious circumstances and have required further investigation of the 'righteousness of the transaction', and therefore the validity of the will:

- A beneficiary is involved in the will-making process, for example by witnessing the will, writing or preparing the will or taking the will-maker to a legal practitioner.
- The will-maker is 'blind, illiterate or mentally or physically enfeebled'.
- The will was not read to or by the will-maker before it was executed.
- The will changes a pattern of previous wills by cutting out 'natural' beneficiaries and replacing them with recent acquaintances.[38]

8.36 The VLRC inquiry involved a specific focus on protecting 'older and vulnerable will-makers from undue influence'. From this perspective, the VLRC commented that, while the doctrine of suspicious circumstances was a 'well settled area of the law', and no changes were suggested, a constructive contribution would be for the Law Institute of Victoria to include a discussion of knowledge and approval and suspicious

35 *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 (17 November 2011) [258].
36 Gino Dal Pont and Ken Mackie, above n 25, [2.46].
37 *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 (17 November 2011) [259].
38 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.93], case references omitted.

circumstances in guidelines on undue influence.[39] Recommendation 8–1 is based on the VLRC recommendations.

Wills formalities

8.37 The formalities for wills, including the requirement of witnessing, serve a number of purposes, one of which is to protect a testator from being forced to sign a document they do not wish to sign.[40] The VLRC *Succession Laws* inquiry included specific consideration of wills formalities and particularly with reference to 'whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others'.[41]

8.38 The VLRC concluded that, although

> widespread concern was expressed … about potential beneficiaries improperly prevailing upon vulnerable will-makers to make wills that do not reflect their wishes, there was little support for the view that changing the witnessing requirements would deal with this problem'.[42] The VLRC considered that changing the witnessing requirements was 'unlikely to prevent undue influence.[43]

8.39 However, as the VLRC observed:

> increasing concern that older and vulnerable will-makers are being subjected to pressure about their wills has led some judges and commentators to suggest other ways of reducing the risk of undue influence in the will-making process. The key suggestion in this area is to ensure that legal practitioners take greater care when making wills.[44]

8.40 A focus on the role and understanding of legal practitioners informs Recommendation 8–1, considered below.

8.41 The power of the Court to dispense with the formal requirements of a will—the 'dispensing powers', may potentially require consideration of elder abuse.[45] Such powers enable a court to forgive compliance with wills formalities where the deceased intended the particular document in question to be a will. Given that pressure to make a will has been cited as an example of potential elder abuse, a situation might arise where a person may go along with pressure, but not succumb to it by, for example, keeping a draft will, and even signing but not having the draft will witnessed, as a strategy to keep the peace, but fully aware that it was an invalid will. Judges in such circumstances need to continue to exercise vigilance as to whether the supposed testator really intended that document to constitute their will, rather than just intending it to be a draft

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39 Ibid [2.95].

40 See, eg, Andrew Lang, 'Formality v Intention—Wills in an Australian Supermarket' (1985) 15 *Melbourne University Law Review* 82; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [7.4].

41 Victorian Law Reform Commission, *Succession Laws*, Report (2013) x, Terms of Reference.

42 Ibid [2.2].

43 Ibid [2.3].

44 Ibid [2.45].

45 On dispensing powers, see Croucher and Vines, above n 40, ch 8; Dal Pont and Mackie, above n 17, [4.30]–[4.47].

of something not yet completed—not confusing 'inadvertence'[46] with a deliberate choice.[47]

Disqualifying beneficiaries

8.42 Two particular doctrines directed towards the disqualification of beneficiaries and others from taking in an estate are the 'witness-beneficiary rule' and the 'rule of forfeiture'.

Witness-beneficiary rule

8.43 From 1752 the law in England was that a witness who was a beneficiary would lose the gift in the will, but the will itself would remain valid.[48] This rule, known as the 'witness-beneficiary rule' was included in the *Wills Act 1837* (UK), which formed the basis of the wills legislation in Australian states and territories.

8.44 If a person or that person's spouse was a beneficiary, and the person witnessed the will, the gifts were 'utterly null and void'.[49] The argument in favour of such a rule was that 'if a witness or a witness's spouse were allowed to take a benefit under a will, an opportunity for undue influence would arise'.[50] Since 1837, however, the rule has been ameliorated, principally because the rule does not distinguish 'between the innocent and the guilty witness'.[51] In Australia this has led to its abolition in the Australian Capital Territory, South Australia and Victoria.[52] Change was also achieved through implementation of the model Wills Bill 1997, proposed in the uniform succession laws project.[53] In other states and territories, the rule was retained but in the modified manner included in the model Wills Bill, namely that a witness should not be absolutely disqualified from taking a benefit under a will, but should be able to retain the gift if:

- there are at least two other witnesses who are not beneficiaries under the will;
- all the persons who would benefit directly, if the gift were avoided, consent to the distribution of the gift according to the will;
- the court is satisfied that the testator knew and approved of the gift and the gift was given freely and voluntarily.[54]

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46 *Estate of Williams* (1984) 36 SASR 423, 425.
47 *Estate of McNamara*, SC (NSW), Powell J, 10 April 1992, Unreported.
48 The background to the rule as an evidentiary rule is explained in DEC Yale, 'Witnessing Wills and Losing Legacies' (1984) 100 *Law Quarterly Review* 453.
49 *Wills Act 1837* (UK) s 15.
50 New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998) [3.17].
51 Ibid [3.18].
52 *Wills Act 1968* (ACT) s 15; *Wills Act 1936* (SA) s 17; *Wills Act 1997* (Vic) s 11.
53 See the summary in New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998) [3.29]–[3.50].
54 Ibid 17–18, Model Provision: Clause 12. The provision has been introduced in: *Succession Act 2006* (NSW) s 10; *Succession Act 1981* (Qld) s 11; *Wills Act 2008* (Tas) ss 12, 13. Queensland has an additional provision with respect to interpreters: *Succession Act 1981* (Qld) s 12.

8.45 Additionally, the rule should no longer disqualify the spouse of a witness from taking a benefit.

8.46 The reason for the change in the rules is reflected in the analysis made in the United States in the notes accompanying the Uniform Probate Code. The purpose of the change was 'not to foster use of interested witnesses', because 'attorneys will continue to use disinterested witnesses in execution of wills'. Rather, it was not to penalise 'the rare and innocent use of a member of the testator's family on a home-drawn will':

> This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the devise might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.[55]

8.47 In probate contexts, where the witness-beneficiary rule is abolished, the behaviour of someone who seeks to secure a will in their favour is left to be considered under the doctrine of suspicious circumstances.

Forfeiture

8.48 In succession law, a person who causes the death of another is not permitted to benefit from the person's estate as a result of that killing. Known as the 'forfeiture rule', it is a common law rule of public policy that a person should not benefit from their own wrongdoing.[56] The rule extends to those claiming through the killer. Applicable to both wills and intestacy, the rule operates as 'a matter of the civil law (as opposed to the criminal law), proof of the killing must be carried out in the civil court according to the civil law rules of proof, and a previous criminal trial may be irrelevant'.[57]

8.49 There are two exceptions recognised at common law: first, where the killer is found not guilty by reason of mental illness;[58] and where the will benefiting the killer is made after the criminal act.[59]

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55 National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code (1969)* (2010) Comment to s 2-505, 147.

56 It was an expression of the Latin maxim, *nullus commodum capere potest de injuria sua propria*. Details of the rule are set out in Gino Dal Pont and Ken Mackie, above n 25, [7.47]–[7.67]. See also Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) ch 2. The Report contains an extensive bibliography relevant to the topic.

57 Croucher and Vines, above n 40, [14.10].

58 See, eg, *Re Plaister: Perpetual Trustee v Crawshaw* (1934) 34 SR (NSW) 547; *Troja v Troja* (1994) 33 NSWLR 269, 283 (Kirby P); *Perpetual Trustee Co Ltd v Gillett* [2004] NSWSC 278, 228; *Public Trustee (NSW) v Fitter* [2005] NSWSC 1188 [40].

59 This exception is 'more nebulous' and only applies to a 'very narrow fact situation': Dal Pont and Mackie, above n 17, [7.49].

8.50 The VLRC noted a number of concerns with the operation of the common law rule:

- whether the rule applies to every unlawful killing that results from an inadvertent, involuntary or negligent act or omission;
- the relevance of the moral culpability of the person responsible—for example, the difference between murder and manslaughter; and
- the impact of the rule on third parties—such as the children of the person who caused the death;
- the absence of any judicial discretion to respond to such concerns.[60]

8.51 A number of Australian jurisdictions have responded by enacting legislation, following the United Kingdom in 1982:[61] the Australian Capital Territory in 1991 and New South Wales in 1995.[62] The legislation allows for an application to the Court for an order modifying the effect of the rule.[63] In 2007, the Committee for Uniform Succession Laws considered the rule in the context of intestacy and recommended legislation.[64] In 2014, the VLRC recommended such legislation be introduced in Victoria.[65]

8.52 In the United States, in addition to forfeiture provisions, called 'slayer' laws,[66] a number of states have expanded these statutes to disqualify persons from inheriting when they abuse or financially exploit an elderly or vulnerable adult testator.[67] Given that a 'distinguishing aspect' of elder abuse cases is that family members and trusted individuals may 'stand to inherit from the victim', such expanded slayer laws seek to reduce elder abuse:[68] '[b]y recognizing elder abuse as a matter of probate law, the goal

60 Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) [1.5]. For a fulsome consideration of the rule in Victoria in a case of defensive homicide see, eg, *Edwards v State Trustees Ltd* [2016] VSCA 28.

61 *Forfeiture Act 1982* (UK).

62 *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW). Specific provision in the intestate context is made by: *Succession Act 2006* (NSW) s 139; *Intestacy Act 2010* (Tas) s 40.

63 See summary in Gino Dal Pont and Ken Mackie, above n 25, [7.68]–[7.70]. The NSW provision was amended in 2005 so that, where a person was not guilty by reason of mental illness, the court may nonetheless consider that the forfeiture rule should apply as if the person had been found guilty of murder: *Forfeiture Act 1995* (NSW) s 11. The provision was applied in *Guler & Ors v NSW Trustee and Guardian & Anor* [2012] NSWSC 1369; *Hill v Hill* [2013] NSWSC 524; *Estate of Raul Novosadek* [2016] NSWSC 554.

64 New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007). Rec 42, which was reflected in the Model Intestacy Bill 2006 cl 40, was that: 'Where the forfeiture rule prevents a person from sharing in the intestate estate or where a person has disclaimed the share to which he or she is otherwise entitled, that person should be deemed to have died before the intestate'.

65 Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014). An instructive comparative analysis is made in Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31 *Common Law World Review* 1.

66 Summarised in, eg, Karen J Sneddon, 'Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire' (2007) 76(1) *UMKC Law Review* 101.

67 A summary is provided in Jennifer Piel, 'Expanding Slayer Statutes to Elder Abuse' (2015) 43(3) *The Journal of the American Academy of Psychiatry and the Law* 369.

68 Ibid 369.

is to disincentivise elder abuse by those who stand to gain from the death of an elderly individual'.[69]

8.53 An example is the Illinois probate statute of 2004.[70] It links the disinheritance provision to criminal elder abuse statutes and requires a criminal conviction under those statutes to invoke the disinheritance provision.[71] Another model targets financial abuse.[72]

8.54 Queensland University of Technology (QUT) academic, Barbara Hamilton, argued that a similar approach should be taken in Australia, using the Illinois statute as an example.[73] The trigger for disinheritance is a conviction of an offence of financial exploitation, abuse or neglect of an elderly person or disabled person. 'Financial exploitation' is defined as occurring when a 'person in a position of trust and confidence' knowingly obtains control over an elderly person's property by means of deception or intimidation.[74] As Hamilton explains:

> The aim would be to provide an additional (and potentially powerful) deterrent to combat the serious and widely prevalent problem of family violence, particularly elder abuse, and to encourage through financial incentives (potential disinheritance under a will or intestacy) respectful behaviour towards elderly family members.[75]

8.55 Two stakeholders suggested amending the forfeiture rules along similar lines in Australia in response to elder abuse. The New South Wales Trustee & Guardian said that

> [t]he reason for expanding the forfeiture legislation in the USA to financial abuse cases is to help prevent and reduce elder abuse. Family members often stand to inherit from the victim and by recognising elder abuse as a matter of succession law, the aim is to deter elder abuse by those who are likely to gain from the death of an elderly person. The introduction of such measures in Australia are worthy of investigation and evaluation.[76]

8.56 In the Discussion Paper, the ALRC suggested that the other strategies identified for preventing and responding to elder abuse should be considered and evaluated, before consideration is given to amending the forfeiture rule in the way noted above. The Law Council, however, considered that the suggestion of the NSW Trustee & Guardian deserved further attention.[77]

8.57 There are two major constraints on a simple transposition of such provisions into Australia. First, the US forfeiture provisions are linked to specific elder abuse offence

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69 Piel, above n 67.

70 Other examples are referred to in Travis Hunt, 'Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 and Using It as a Model' [2014] (2) *Brigham Young University Law Review* 445, 464–466.

71 Hunt, above n 70.

72 Ibid 466–469.

73 Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] *Elder Law Review* 8.

74 720 Ill Comp Stat 5/16-1.3 (2005); 720 Ill Comp Stat 5/17-56 (2012).

75 Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] *Elder Law Review* 8 2.

76 NSW Trustee and Guardian, *Submission 120*. Citing Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] *Elder Law Review* 8. See also P Johnson, *Submission 70*.

77 Law Council of Australia, *Submission 351*.

provisions. The ALRC has concluded against recommending specific alteration to criminal laws in this way, emphasising improved responses to existing laws and an expansion of the jurisdiction of civil and administrative tribunals to handle some of the allegations of financial abuse that may arise, for example with respect to misuse of powers of attorney.[78]

8.58 Secondly, such a specific amendment to forfeiture provisions, as a matter of probate law, would also need to be set in the wider context of succession law in Australia. In particular, in Australia, the distribution of an estate may be affected by family provision laws in each state and territory.[79] Under such laws, an eligible person who has been left without 'adequate provision for their proper maintenance, education or advancement in life'[80] in the will or on the intestacy of a particular family member may apply for provision, or increased provision from the estate.

8.59 In New South Wales this also includes the ability to claw back property into the estate that may otherwise be regarded as lifetime transactions as 'notional estate'.[81] This means that there are other 'corrective' means to the distribution of an estate that may have been affected by the pressures of relatives to benefit them in this context—without the necessity of having to establish a conviction under specific elder abuse offences. This corrective means is not available in the same way in the US.

8.60 Any consideration of the introduction in Australia of amendments to state and territory probate laws, in the form of disinheritance provisions similar to those in the US, would need to be undertaken in the context of a wider consideration of succession law in Australia. The uniform succession laws project provided a significant opportunity for coordinated law reform across all areas of succession law: wills, intestacy, family provision and the administration of estates. While a consideration of forfeiture provisions would be a project of a smaller scale, the necessity for considering it in the wider context of succession laws would still be essential.

8.61 The initiative could be a matter for, and led by, a state law reform agency, such as the specific project undertaken by the VLRC with respect to the forfeiture rule. It could also form part of the ongoing agenda of, for example, succession law and elder abuse committees of the state and territory law societies and the Law Council, together with other issues that have been noted in this Report, including, for example, the undue influence doctrine in probate. The bigger issue surrounding these matters is the way that property law, and particularly inheritance law, expresses ideas of 'unworthiness' in families. Civil law and common law systems have approached such matters differently, both in terms of property in marriages and property on death. Reviewing any aspect of inheritance law needs to be located within an understanding of this complex history.[82]

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78 Rec 5-2

79 For an exposition of the Australian laws see, eg, Gino Dal Pont and Ken Mackie, above n 25, pt III.

80 The jurisdictional formula is expressed in these or similar terms: see Ibid [17.57].

81 See, eg, Ibid [20.57]–[20.77].

82 See, eg, B Willenbacher, 'Individualism and Traditionalism in Inheritance Law in Germany, France, England and the United States' (2003) 28 *Journal of Family History* 208; Croucher and Vines, above n 40, [15.41]–[15.46] and the further reading list at [15.47].

The role of the lawyer

Recommendation 8–1 The Law Council of Australia, together with state and territory law societies, should develop national best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they provide thorough coverage of matters such as:

(a) elder abuse in probate matters;

(b) common risk factors associated with undue influence;

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

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

(e) the importance of ensuring that the person has 'testamentary capacity'—understanding the nature of the document and knowing and approving of its contents, particularly in circumstances where an unrelated person benefits.

Lawyers and advance planning documents

8.62 Stakeholders were broadly supportive of ensuring that lawyers understood the legal issues as well as their responsibilities to their clients in the context of the preparation of advance planning documents. A number pointed to the excellent guidelines that are available in some jurisdictions. While recognising that there are good examples, there is room for a more integrated response, identifying best practice nationally.

8.63 However it was also pointed out that lawyers may not be involved in the preparation of documents and that improving the understanding of solicitors did not address the problem of, for example, 'do-it-yourself' wills and other documents. Recommendation 8–1 focuses on the role of the lawyer. Consideration of the importance of community education in addressing the difficulties associated with 'do-it-yourself' wills is also considered.

Guidelines for legal practitioners

8.64 Recommendation 8–1 identifies topics that best practice guidelines should cover. Paragraphs (a) and (b) are matters of general understanding about the dynamics of elder abuse and about family relationships in relation to property and how they may be manifested as improper or undue influence in the context of advance planning documents. Paragraph (c) reinforces the lawyer's role in supporting the client's autonomy and to ensure that the person's wishes are obtained personally and separately from anyone else. Paragraph (d) concerns best practice approaches to ensure that the client's wishes are recorded fully so that any later challenge can be reviewed in the full context of the client's instructions. Paragraph (e) concerns the specific elements

required to be established for testamentary capacity, should a will be challenged on the basis of a lack of capacity.[83] Capacity questions may affect other transactions and lawyers need to understand the legal tests that apply and support a client in circumstances where capacity issues may be raised.[84]

8.65 The guidelines in Recommendation 8–1 are similar to ones recommended by the VLRC in its report, *Succession Laws*, in 2013. They are designed to reduce the risk of undue influence.[85]

8.66 A number of state law societies have prepared or endorsed guidelines on a range of topics included in Recommendation 8–1, particularly relating to legal capacity: as in Victoria;[86] New South Wales;[87] Queensland;[88] and South Australia.[89] Professors Carmelle Peisah and Nick O'Neill observed that '[o]ne of the most fundamental tasks of solicitors is to take instructions from their clients', adding that '[n]evertheless, clients must have the capacity to give those instructions'.[90]

8.67 The South Australian guidelines include, for example, a section on 'Taking Instructions' that is expressed in terms of 'Exploring and Enhancing Client Autonomy', which emphasise that

> client difficulty in communication does not abrogate the lawyer's obligation diligently to seek a client's instruction, and may positively require the lawyer to take further action to ensure effective client communication.[91]

8.68 The guide endorsed by the Queensland Law Society similarly includes advice on taking instructions in terms of 'What can I do to maximise my client's capacity?'.[92] The use of support persons and interpreters is a matter expressly commented upon in this context, but with an emphasis on 'extreme caution' and with the client's consent

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83 See ch 2 on the concept of legal capacity.

84 Examples of guides on the different tests are: Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016) 13–15; Allens Linklaters and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (2014) 59–69; Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012) 28–41; Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity Is in Doubt* (2016) 3.

85 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.57].

86 Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity Is in Doubt* (2016).

87 Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016). The Law Society has also produced a quick access information sheet for lawyers on wills and estates: Law Society of New South Wales, *Wills & Estates FAQs* <www.lawsociety.com.au>.

88 Allens Linklaters and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (2014). The handbook was endorsed by Queensland Law Society.

89 Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012).

90 O'Neill and Peisah, above n 32, [1.5].

91 Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012) [35]. Similarly, the New South Wales guide includes as an Appendix an extract on 'Techniques lawyers can use to enhance client mental capacity', drawn from a document prepared for the American Bar Association in 2005: Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016) Appendix C.

92 Allens Linklaters and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (2014) [5.3].

for any third party involvement.[93] However, there is danger inherent in any situation where instructions are obtained and someone else is involved, even if by way of support, especially if this involves interpreting, where that person is a family member.

8.69 The South Australian guide includes reference to enhancing communication through interpreters and other supporters, but with similar cautions about third party assistance:

> Having as much information to assist in advising a client is always the preferred position of lawyers.
>
> However, seeking information from apparently helpful, well meaning or 'innocuous sources' close to the client is an invasive step and contrary to professional duties if it should occur without the consent of the client.
>
> Although most people are well intentioned, a person's familiarity with the client's lifestyle and with the role of giving practical assistance, can sometimes lead to their overstepping the boundaries of sought after assistance.
>
> Do not assume the client's carer or support person knows that the client has sought the lawyer's advice and assistance.
>
> Do not assume that presence of others will be welcomed or make a client comfortable. Sometimes it may have the reverse effect and may increase anxiety.
>
> Even where not sought out, family or others may raise issues of lack of client capacity with the lawyer. Where this occurs, the lawyer should raise the matter with the client and explore the extent to which the client concurs with the concern. The client may instruct the lawyer to explore the matter further. Importantly, the lawyer should test the 'supposition' with other information known and shared with them.[94]

8.70 The VLRC acknowledged the availability of such resources for legal practitioners on assessing legal capacity when this was in doubt, but recommended that more was needed. To minimise the risk of undue influence, the VLRC recommended that the Law Institute of Victoria, as the professional body of Victorian legal practitioners, should prepare best practice guidelines 'on the detection and prevention of undue influence when preparing a will'.[95] The VLRC also said that the guidelines could draw from existing guides and resources that document best practice when taking instructions for a will.[96]

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93 Ibid [5.3] (e), (j).

94 Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012) [36.1]. There is also a section on steps to be taken before any third party attends with the client: [38].

95 Victorian Law Reform Commission, *Succession Laws*, Report (2013) rec 1.

96 Ibid [2.58]. The VLRC noted in particular, British Columbia Law Institute, 'Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide' (61, 2011); Kenneth Schulman, 'Assessment of Testamentary Capacity and Vulnerability to Undue Influence' (2007) 164(5) *American Journal of Psychiatry* 725; O'Neill and Peisah, above n 32, ch 4.

8.71 Stakeholders in the VLRC inquiry suggested a range of matters that guidelines on undue influence should contain:

- the importance of taking instructions from the will-maker alone
- common characteristics of how a person subject to undue influence may present
- common warning signs of undue influence, for example a sudden change in beneficiary from close family member to recent acquaintance
- the role of interpreters who accompany the will-maker
- the importance of making enquiries about previous wills, and possibly obtaining previous wills
- the need to take and retain detailed file notes in the event that a will is challenged.[97]

8.72 In this ALRC Inquiry stakeholders emphasised similar points, noting available guidelines and making suggestions as to matters that should be included in a coordinated national approach as included in Recommendation 8–1. The Law Council of Australia also suggested that consistency in succession legislation and advance care planning frameworks would assist in developing national guidelines.[98]

8.73 The Australian Research Network on Law and Ageing, for example, suggested that guidelines should stress 'the importance of asking open-ended questions' to ensure that the person understands the nature of the document and knows and approves of its contents. An example of poor practice was given 'of lawyers explaining or reading the content of a Will and then following up with the closed question "do you understand?"'[99]

8.74 The Eastern Community Legal Centre and the Eastern Elder Abuse Network recommended that the guidelines 'include information on obtaining medical assessments of capacity where the legal practitioner is alerted to any doubts around testamentary capacity'.[100] Another said that such a strategy could be used to support a client and head off a later challenge:

> In addition the question of the mental competence of the person at the time should be clearly established to prevent the Will being challenged later, on the alleged basis of mental impairment at the time.[101]

8.75 The importance of using interpreters was emphasised by the Federation of Ethnic Communities Councils of Australia. They also reiterated that 'the use of family members and friends as "interpreters" is not supported by policy in Australia'.[102]

> The person making a will, codicil, powers of attorney or any form of transfer of property or vesting of rights, must clearly understand the content of the instrument they are required to sign. Most of these documents use technical jargon that the person

97 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.54].
98 Law Council of Australia, *Submission 351*.
99 Australian Research Network on Law and Ageing, *Submission 262*.
100 Eastern Community Legal Centre, *Submission 357*.
101 W Millist, *Submission 230*.
102 FECCA, *Submission 292*. See also Australian Research Network on Law and Ageing, *Submission 262*.

> making a will may not be familiar with. Thus, the respective professionals who are involved in drafting these documents must ensure that the individuals understand the content of the document and facilitate meeting the translation or interpreting needs of older people from CALD backgrounds.[103]

8.76 The Financial Planning Association of Australia (FPA) urged that the guidelines need to ensure that legal practitioners 'have the relevant education, training and experience to provide estate planning advice'. The FPA also expressed concern that 'inappropriate estate planning advice has been provided to clients by generalist lawyers who have not had the requisite training or experience'. At a minimum, FPA urged, 'estate planning training should be promoted via continued professional development'.[104]

A national approach

8.77 Recommendation 8–1 advocates a national approach and affirms the important role that law societies and the Law Council, can play in assisting lawyers. Seniors Rights Victoria pointed to the important role of the National Elder Law Committee of the Law Council of Australia currently plays in identifying critical issues relating to elder abuse. These include: legal capacity; undue influence; entering into guarantees and reverse mortgages in the interests of others; and misuse of influence by carers.[105]

8.78 The Institute of Legal Executives (Victoria) pointed out that legal practitioners in that state had a 'plethora of information sources'. However, with 'the best will in the world',

> it is difficult to be completely 'across' all of these matters and completely up to date at any given time. We would very much like to see 'one' major source/resource covering all of these particular ethical matters, and agree that the Law Council of Australia would be the most efficient developmental vehicle.[106]

8.79 A coordinated national approach would assist in overcoming the problem identified by a group of QUT academics, 'that each of these sets of guidelines is being produced independently of the others':

> As such, they all cover similar ground but differences exist which can cause confusion and undermine attempts at establishing best practice. Guidelines, such as those with respect to assessing capacity … have recently been updated in, for example, New South Wales and Queensland and yet they differ markedly from one another.[107]

8.80 The QUT group also noted the importance of involving other professionals in developing guidelines on capacity assessment:

> An interdisciplinary approach through the inclusion of health professionals in the preparation of guidelines will expose the process to wider scrutiny. Such external investigation will strengthen the development and application of any guidelines,

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103 FECCA, *Submission 292*.
104 Financial Planning Association of Australia (FPA), *Submission 295*.
105 Seniors Rights Victoria, *Submission 383*. The work of the committee is set out at *Elder Law—National Elder Law and Succession Law Committee* <www.lawcouncil.asn.au>.
106 Institute of Legal Executives (Vic), *Submission 320*.
107 Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*.

> especially when proposing that the health professionals have a greater role in the context of testamentary and enduring documents as a way to combat elder abuse. …
>
> Building upon this would then be the inclusion of other relevant stakeholder groups including financial organisations, medical and legal insurers, but also groups representing people who have had their capacity assessed to ensure that superior assessment processes taking into account the lived experiences of the people who will be the subject of such guidelines.[108]

8.81 The National Older Persons Legal Services Network also suggested that the Australian Solicitors Conduct Rules could include commentary on the importance of legal practitioners being aware of elder abuse in their practice.[109]

What lawyers are required to know

8.82 In the context of an ageing population, and the recognition that wills and other advance planning documents are a significant exercise of autonomy,[110] lawyers may well become increasingly called upon to assist in the preparation and execution of such documents. Lawyers may therefore be in a key position to recognise where clients may be affected by cognitive impairments or subject to undue pressure in relation to their preparation. To ensure that lawyers can play this crucial supportive role, they need to have an understanding of legal competency relevant to the particular context, and how to ensure that the documents are freely and voluntarily made by people who are legally competent to do so. Knowledge about such matters will not necessarily be gained through the completion of a legal qualification, hence the importance of providing information about such matters in a coordinated way through law societies and the Law Council.

8.83 A specific knowledge of succession law is not a compulsory requirement for admission to legal practice in Australia. The *Legal Profession Uniform Admission Rules 2015* set out the required 'academic areas of knowledge' for admission to practice in Australia,[111] reflecting the work of the Law Admissions Consultative Committee.[112] This includes the topic of 'property' and 'equity', but no specific requirement for knowledge of the substantive doctrines of succession law and the legal test of testamentary capacity. Lawyers are also required to learn about 'ethics and professional responsibility': a practitioner's duty to the law, to the courts, to clients, and to fellow practitioners. With respect to practical legal training, which is also required for admission to practice, 'wills and estates practice' is only an optional practice area. Legal practitioners are also required to undertake mandatory continuing

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108 Ibid. The importance of involving health practitioners was also emphasised by W Bonython and B Arnold, *Submission 241*. They pointed to the error of 'conflating common diagnostic tests for cognitive impairment with the test for legal capacity' and 'failure to recognise the context-dependent nature of legal capacity'. The need to reach other professional service providers was also identified: Financial Planning Association of Australia (FPA), *Submission 295*.

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

110 See, eg, Tilse et al, above n 1, 9.

111 *Legal Profession Uniform Admission Rules 2015* pt 2.

112 Set out, eg, in Law Admissions Consultative Committee, *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession* (February 2015) sch 1.

education on an annual basis. One common component concerns ethics and professional responsibility.[113]

8.84 More particular knowledge about matters relevant to supporting clients in the preparation of wills may be obtained in several ways. Law students may undertake optional units of study in succession law, where available. Lawyers may undertake continuing professional development in a relevant substantive law area related to succession matters, or become accredited specialists in some jurisdictions—as in New South Wales, Queensland and Victoria.

8.85 Many lawyers, therefore, will not necessarily have a good understanding of the range of matters relevant to the preparation and execution of wills and the ways to reduce undue influence. Hamilton Blackstone Lawyers observed, for example, that, while legal practitioners who specialise in estate planning 'are already well-versed (or should be well-versed)' with the matters included in Recommendation 8–1, the 'unfortunate reality' is that 'estate planning documentation is often not prepared by estate planning specialists: specifically, documentation is prepared by solicitors with little to no expertise in this space'.[114] They also pointed to the reality of 'the "commoditisation" of estate planning':

> where documents are sold 'off the shelf' as 'products' or prepared by solicitors with inadequate expertise, meaning 'templates' are usually produced with little to no regard to a client's specific circumstances: DIY and generic versions are available online for less than a few hundred dollars, all at the click of a few buttons on an 'instruction sheet' and the provision of credit card details. Those with little to no expertise in estate planning promote 'wills and estates' services in a variety of forms, with the end product being a 'one size fits all' template which falls well short of being the definitive representation of one's personal, business and financial circumstances and intentions. Wills are not prepared with the empathy and attention to detail that one should come to expect when reflecting on what should happen with their affairs when they pass away.[115]

8.86 The importance of continuing legal education was emphasised by stakeholders,[116] and particularly for the national implementation of reforms.[117] The New South Wales Legislative Council also emphasised the role of continuing education. Its report, *Elder Abuse in New South Wales*, included a specific recommendation:

> That the NSW Government liaise with Law Society of New South Wales to request that the Society include a unit on the assessment of mental capacity in respect of

113 The requirements in each state and territory are set out on the website of the relevant professional body: the Law Institute of Victoria and the Law Society in the other states and territories.
114 Hamilton Blackstone Lawyers, *Submission 270*.
115 Ibid.
116 See, eg, Australian Research Network on Law and Ageing, *Submission 262*; W Bonython and B Arnold, *Submission 241*; Costantino & Co, *Submission 225*.
117 Seniors Rights Victoria, *Submission 383*.

substitute decision making, wills and property transactions in its Continuing Professional Development Program for legal practitioners.[118]

How lawyers are required to act

8.87 Even in the absence of specific subject knowledge, conduct rules reflect how lawyers are to behave in practice. Many aspects of these rules are relevant to matters reflected in the ALRC's Recommendation 8–1. For example, the *Australian Solicitors' Conduct Rules 2015*[119] include the following obligations:

- as a 'fundamental ethical duty', to act in the best interests of a client in any matter in which the solicitor represents the client;[120]
- a solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken;[121] and
- a solicitor must follow a client's lawful, proper and competent instructions.[122]

8.88 While these rules depend on adoption in each state and territory, they are illustrative of conduct obligations nationally.

8.89 How these obligations may work in practice in the context of suspected elder abuse is seen in the following example, provided by Seniors Rights Victoria:

> In one case a daughter-in-law took her mother-in-law to her own lawyer without discussing the matter with her prior to the visit, and gave 'instructions' to her lawyer of the changes required to her older family member's will. The older person was at an enormous disadvantage in this situation, as she had no prior warning of the reasons for visiting an unknown lawyer. She was from a CALD background and had little experience in dealing with lawyers and limited literacy in English, so was placed in a difficult position, and given inadequate legal advice. Her daughter-in-law was at that time her main carer, and provided transport and assistance she relied on. The will that was produced appointed her daughter-in-law as Executor and also as a beneficiary along with other family members. The older woman was placed under enormous stress through this process and could not voice her concerns or disapproval.[123]

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118 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 8.

119 The Australian Solicitors' Conduct Rules were made as the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 under the Legal Profession Uniform Law which commenced in New South Wales and Victoria on 1 July 2015. The Rules have also been adopted in Queensland and South Australia. Law societies in other states and the territories continue to work towards adoption of the Rules, according to the processes and approvals set out in their respective local legal profession regulatory arrangements. In March and April 2015 the Law Council of Australia approved a number of minor changes to the Conduct Rules, republished as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*: see Law Council of Australia, *Australian Solicitors Conduct Rules* (2015).

120 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* [4.1.1].

121 Ibid [7.1].

122 Ibid [8.1].

123 Seniors Rights Victoria, *Submission 383*.

8.90 Seniors Rights Victoria said that, in this situation, the lawyer should not have accepted instructions in this manner, and 'it was unclear in retrospect who the actual client was, as the daughter-in-law had paid the lawyer's account'.

> A lawyer must receive instructions for a will from the Testator direct, and also be satisfied of the client's capacity to provide those instructions.
>
> Equally the conduct of any lawyer who undertakes instructions that alter the legal and financial standing of older people through instigating transactions they regard essentially as transactional matters, is seriously in breach of their ethical and professional conduct standards. The lawyer in this case has, by default, sanctioned elder abuse against an older client.[124]
>
> After the family relationships subsequently broke down, the older woman revoked this will, and was able to then make another will in accordance with her own wishes.[125]

8.91 The problem of identifying who the client is may also arise where other professionals are involved in estate planning. Estate planning advice often involves multiple parties (both legal and natural persons) and includes input from a number of professionals such as lawyers, accountants and financial planners. In this context, it is important to be clear about who is the client. The Code of Professional Practice of the Financial Planning Association of Australia, for example, refers to this in requiring that 'A Member must identify the client to whom professional services will be provided'.[126] Financial planners are likely to play an increasing role in relation to advance planning documents, such as binding death benefit nominations in the context of superannuation,[127] which are considered in Chapter 7. To ensure that they are able to contribute to safeguarding against elder abuse the guidelines available to them could be enhanced in light of the material available to legal practitioners.

Community education

8.92 Recommendation 8–1 considers the role of lawyers in advance planning documents. Chapter 3 discusses matters that a National Plan to combat elder abuse might address, and community education is clearly an important strategy of such a plan. This strategy should include information about the importance of seeking appropriate information and professional advice in relation to advance planning documents.

8.93 In that context, the problem of homemade, 'do-it-yourself' (DIY) documents can be targeted. 'Home made wills are a curse', said Master Sanderson in the Western Australian case, *Gray v Gray*, which involved a will dispute.[128] Although the case involved the construction of the will and not a matter of alleged elder abuse, the

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124 Ibid.
125 Ibid.
126 Financial Planning Association of Australia, *The Pillars of Our Profession*, Code of Professional Practice (July 2013) rule 1.6.
127 See ch 7.
128 *Gray v Gray* [2013] WASC 387 [1].

remarks are apposite to the problems that may arise in the DIY context and the frustration of a person's intended estate plans as a result:

> Occasionally where the assets of a testator are limited and where the beneficiaries are not in dispute no difficulties may arise in the administration of an estate. Flaws in the will can be glossed over and the interests of all parties can be reconciled. But where, as here, the estate of the deceased is substantial, the will is opaque and there is no agreement among the beneficiaries, the inevitable result is an expensive legal battle which is unlikely to satisfy everyone. All of this could have been avoided if the testator had consulted a lawyer and signed off on a will which reflected his wishes. There is no question but that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent.[129]

8.94 The problems that can arise from 'inadequate templates such as "Will Kits" which can be purchased from local post offices' was also referred to by Hamilton Blackstone Lawyers. This firm said that reforms should focus on 'education, advocacy and awareness on the importance of proper estate planning and the preparation of enduring documents':

> The timing for proper education, advocacy and awareness is no more pertinent than it is today. As family dynamics change, a proper will becomes even more critical. Breakdowns in family relationships now occur at a far greater rate than at any time in Australian history. Blended family arrangements are now common. Grandparents and relatives are now more likely than ever to have the full-time care of children, and more people are raising children who aren't biologically related to them. With the growth in superannuation balances and increasing property values, estates are becoming larger and larger, which means tax and social security become even more relevant post-death.
>
> …
>
> We strongly encourage the ongoing development of education, advocacy and awareness programs, led by the Law Societies in each state and territory, to highlight the importance of proper estate planning in consultation with specialists in these critical areas.[130]

8.95 Community education and awareness could also include a focus on encouraging women to make wills:

> Unfortunately, women are disadvantaged when it comes to many of the key social and financial indicators which particularly impact their estate planning, which means that proper estate planning becomes particularly critical. The statistics tell us that women endure a disproportionate share of the financial burden of their families, whether because of increased life expectancy, care of elderly relatives, and/or care and custody of children. However, women are also disproportionately subject to financial abuse, domestic violence, and divorce can be financially crippling to them when they also have to manage the financial burden of children and the elderly.[131]

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129 Ibid.
130 Hamilton Blackstone Lawyers, *Submission 270*.
131 Ibid.

8.96 The ACT Law Society and the Law Institute of Victoria have produced guidelines on wills directed to the general public.[132] Such initiatives provide an instructive example of community education. The Hume River Community Legal Service (HRCLS) also provided an example of a specific community education strategy to make older persons less vulnerable to financial abuse. They cited wills workshops conducted especially for Aboriginal clients:

> Over a two day period in the years 2015 and 2016, Gilbert and Tobin (a private law firm) assisted HRCLS on a pro bono basis with the running of a free Wills, Power of Attorney and Guardianship workshop for Aboriginal people in the Albury Wodonga region. On Day 1, Gilbert and Tobin provided education about legal planning and focused on issues particularly relevant to Aboriginal people. In the afternoon of Day 1, lawyers began taking instructions from people attending the workshop. On Day 2, lawyers drafted wills and power of attorney documents, and returned the completed documents for clients to sign and take home. The workshop in 2015 was held at Albury Wodonga Aboriginal Health Service and the workshop in 2016 was held at the Mungabareena Aboriginal Corporation in Wodonga.
>
> This initiative was taken to address the low numbers of Aboriginal people who have wills or power of attorney documents. By delivering a workshop in partnership with the local Aboriginal Health Service, the workshop was culturally appropriate and also well promoted within the local Aboriginal community. As a result of having wills and power of attorney documents in place, elderly people are less likely to be exposed to elder abuse.[133]

8.97 Other examples of community education include the campaign of the New South Wales Government, 'get it in black and white', explaining 'Planning Ahead Tools' as an exercise of a person's rights: 'When you have planning ahead documents in place—a Will, Power of Attorney and Enduring Guardianship—you can rest assured that your rights and wishes can be respected because they are properly documented'.[134] Another example is a guide for making enduring powers of attorney, produced by the Office of the Public Advocate of Victoria, entitled 'Take Control'.[135] Such strategies could be complemented by those emphasising the importance of careful estate planning and the assistance that professionals—particularly lawyers and financial advisers—can provide. For example, the Law Society of New South Wales includes community information on its website on making a will, with an opening section on 'The truth of homemade wills' and their inherent dangers.[136] The ACT Law Society's community education guide on making a will includes a similar message, under the heading 'How can a solicitor help me?'[137]

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132 ACT Law Society, *Making a Will* <www.actlawsociety.asn.au>; Law Institute of Victoria, *Wills and Estates* <www.liv.asn.au>.

133 Hume Riverina CLS, *Submission 186*.

134 New South Wales Government, *3 Easy Ways to Plan Ahead—Planning Ahead Tools* <http://planningaheadtools.com.au/>.

135 Office of the Public Advocate (Vic), *Take Control: A Guide to Making Enduring Powers of Attorney* (2015).

136 Law Society of New South Wales, *Making a Will* <www.lawsociety.com.au>.

137 ACT Law Society, above n 132.

8.98 The ALRC recognises that not all older persons will have access to lawyers and other professionals and acknowledges that some may find access to free will making and accompanying advice the only way to gain such support. In the absence of direct access to lawyers in this way, the provision of clear and informative advice provided through law society websites for example is a significant safeguarding step.

8.99 The ALRC commends such initiatives as supportive of older persons in exercising their rights. They provide illustrations of best practice approaches that can inform the education and awareness strategies developed through the National Plan. Community education may also address broader issues about people's rights in relation to will making in Australia.

9. Banking

Contents

Summary

9.1 Banks and other financial institutions will often be in a prime position to detect and prevent the financial abuse of their older and at-risk customers. As discussed in Chapter 2, financial abuse is one of the most common types of elder abuse. Banks can play a valuable role in protecting their customers and encouraging them to consider carefully the risks of certain practices and transactions.

9.2 In this chapter, the ALRC proposes that banks be required take 'reasonable steps' to identify and prevent the financial abuse of vulnerable customers, and that this standard be prescribed in the *Code of Banking Practice* (the Code), so that the standard is contractually binding. The specific steps should continue to be set out in an industry guideline, so that they can be readily updated.

9.3 The chapter discusses some of the steps banks should take to protect their at-risk customers. These steps include training staff in how to respond appropriately to elder abuse and setting up systems and using software and technology to detect unusual transactions and other potential avenues for abuse.

9.4 Banks should also speak with vulnerable customers directly, or otherwise check arrangements that purport to authorise another person to operate someone's bank accounts. They should also warn customers, train staff, and take other steps to ensure people are not being financially abused when they guarantee a loan.

9.5 In some cases, banks should report suspected abuse to relevant authorities, with the customer's consent. These authorities will include state and territory public advocates and public guardians, the police, or the adult safeguarding agencies recommended in Chapter 14.

Banks and financial abuse

9.6 Financial elder abuse may often involve taking or spending funds held in an older person's bank account. Legal Aid NSW told the story of Doris, an 83 year old pensioner who found she had a large outstanding balance on her credit card:

> Doris was easily confused and her memory was not good. … Doris said she had not received any credit card statements for some time but she knew how much she was putting on her card and made sure she made the payments every month. [Her bank statements showed that] the amount and frequency of transactions on her credit card increased dramatically over a short period. … The statements also showed a marked change in the usual pattern of transactions. For example, there were large online purchases and large cash advances, when Doris had never obtained a cash advance on the card before, nor was aware it was possible.[1]

9.7 The Hervey Bay Seniors Legal and Support Service provided examples of the types of elder abuse that it had observed:

> The older person lives with the abuser and has given them authority to access their bank account, either by giving them the card or through internet banking access. The account is used to pay household expenses and to make cash withdrawals. Often the older person has no knowledge as to the extent of the use of their funds, especially as with internet banking, bank statements are no longer posted through the mail. The use of the funds continues after the older person goes into care and is often only picked up when nursing home fees are not paid.
>
> The older person has difficulty getting to a bank and gives the abuser access for the purpose of withdrawing funds for them. The abuser withdraws funds for their own use.
>
> The older person authorises use of a credit card for a specific purpose but it is then used for other purposes.[2]

9.8 Some of these examples suggest that online and mobile banking may present challenges for some older people on the 'wrong side of the digital divide'. No doubt such technology is very convenient for many older people, as it is for most of the rest of the population. These technologies may allow many older people to monitor their accounts more actively and in their own homes, and thus better protect themselves from financial abuse. Advances in fraud detection technology may be another valuable safeguard against abuse. However, some older people may be unfamiliar or uncomfortable with internet and mobile banking and other people may take advantage of this.

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1 Legal Aid NSW, *Submission 140*. Legal Aid NSW argued that 'the bank should have seen the "red flags" and contacted Doris to confirm whether she was aware of this unusual activity on her account. Big Bank agreed to waive the debt': Ibid.

2 Hervey Bay Seniors Legal and Support Service, *Submission 75*.

9.9 Concerning the broader context of this topic, COTA submitted that there were:

- generally low levels of financial literacy among older people, and particularly older women;
- growing complexity in the operation of banking;
- accelerating change of banking business practices and product offerings;
- a shift to online transactions; and
- a reduction in physical bank branch offices and numbers of staff available to assist older customers in person or on the telephone.[3]

9.10 Poor health, remote living and poverty in the community are among the factors that may make some older Aboriginal and Torres Strait Islander people more vulnerable to financial abuse. The Top End Women's Legal Service (TEWLS) told the story of Queenie, a 70 year old Indigenous woman living outside a regional centre with family who help care for her:

> Queenie is frail, with multiple significant health issues and disabilities. In addition, she has been diagnosed with psychological disorders as a consequence of five decades of domestic violence that included multiple physical assaults causing multiple physical impairments, as well as multiple sexual assaults.
>
> Queenie's family accesses her bank account via her pin number, often without her consent. Queenie feels unable to regain control of her bank account; she does not know how to change her pin number, does not have a relationship with her financial institution, speaks limited English, and cannot communicate with her financial institution without assistance.[4]

9.11 TEWLS also wrote about Margaret, a 50 year old Indigenous woman who suffered significant health problems. Her husband and carer 'assists her to conduct her financial matters, but also uses her key card without permission to purchase items for himself and often retains Margaret's key card'.[5]

Financial literacy and other ways to protect yourself

9.12 The ALRC recommends that banks be required to do more to stop the financial abuse of older people, but recognises that there are limits to what banks are able to do to stop some types of financial abuse of older people by trusted family, friends and carers. For example, some financial abuse will be difficult for a bank to detect: will banks know when a carer, who buys groceries for an older person using the older person's credit card, adds a few items of their own to the shopping cart? Furthermore, some methods of detecting financial abuse, even if possible, might be considered too intrusive.

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3 COTA, *Submission 354*.

4 Top End Women's Legal Service, *Submission 87*.

5 Ibid. Another stakeholder told the story of a terminally ill elderly man who had given his partner access to his ATM card and pin number, and when he died, 'his partner cleaned out his ATM account': National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.

9.13 Customers will therefore continue to need to monitor their accounts and take an active interest in their own finances. Financial literacy is itself a safeguard from abuse, and some stakeholders noted the importance of government initiatives to improve people's financial literacy.[6] Alzheimer's Australia said that to prevent financial abuse, 'older people require targeted, consumer-friendly information to support their financial literacy'.[7] The Financial Services Council submitted that such initiatives were particularly important for women and people from culturally and linguistically diverse backgrounds.[8] TEWLS recommended 'increased community financial and legal education to reduce the prevalence of Indigenous elder abuse'.[9]

9.14 It will also remain important for people to plan for the possibility that in the future they may have limited ability to manage their own finances. In 2016, it was estimated that over 400,000 Australians have dementia,[10] which for some will make managing their own finances difficult or impossible. People may need to consider appointing a trusted family member or friend to help them manage their financial affairs and protect them from abuse by others, should they later need such help.[11]

9.15 This chapter proposes additional safeguards against financial abuse, but the ALRC is mindful of the need not to create new rules for banks that might in fact be a burden, not only for other bank customers, but for older people and the people who care for them. One submitter told the ALRC that he could give 'myriad examples' of the way 'inflexible procedures or unhelpful staff can multiply the work required by a carer'.[12]

Banks responding to elder abuse

Recommendation 9–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse.*

The guideline should set out examples of such reasonable steps, including in relation to:

(a) training staff to detect and appropriately respond to abuse;

(b) using software and other means to identify suspicious transactions;

(c) reporting abuse to the relevant authorities, when appropriate;

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6 On financial literacy more generally as a crucial strategy to reduce elder abuse, see ch 3.
7 Alzheimer's Australia, *Submission 80*.
8 Financial Services Council, *Submission 78*.
9 Top End Women's Legal Service, *Submission 87*.
10 Laurie Brown, Erick Hansnata and Hai Anh La, 'Economic Cost of Dementia in Australia 2016–2056' (National Centre for Social and Economic Modelling for Alzheimer's Australia, 2017) 6. See also ch 2.
11 Although guardianship powers, powers of attorney and other such arrangements are also sometimes abused, as discussed in chs 5 and 10.
12 S Dunlop, *Submission 220*.

(d) guaranteeing mortgages and other loans; and

(e) measures to check that 'Authority to Operate' forms are not obtained fraudulently and that customers understand the risks of these arrangements.

9.16 Banks are often in a good position to detect financial elder abuse and protect their at-risk customers. National Seniors Australia said that employees of financial institutions 'may be in the best, and sometimes the only, position to recognise financial exploitation as it occurs'.[13] The Australian Bankers' Association (ABA) submitted that banks can 'play an important role in recognising potential financial abuse'.[14] For some, banks are not only in a good position to stop abuse, they have a moral duty to protect their customers. The Office of the Public Advocate (Qld) said that with 'unparalleled commercial success comes a level of social responsibility'.[15]

9.17 There is an industry guideline on how banks might respond to elder abuse, but it is voluntary and unenforceable. The ALRC recommends that the Code explicitly state that the reasonable steps that banks must take are provided for in the industry guideline. As discussed below, this is intended to make the provisions of the guideline contractually binding on the banks, as are the provisions of the Code.

9.18 This chapter focuses on the ABA's *Code of Banking Practice* and industry guidelines, but related changes should also be made to the *Customer Owned Banking Code of Practice*, to protect the customers of the credit unions, mutual banks and mutual building societies that subscribe to that Code.[16]

The Code, guidelines and other regulation

9.19 The *Code of Banking Practice* (the Code) is part of what has been described as a 'complicated tapestry' of banking regulation.[17] Regulations to protect bank customers from fraud, unauthorised transactions and other potentially abusive conduct include those in case law, the *National Credit Code*, the *Australian Securities and Investments Commission Act 2001* (Cth), and the *ePayments Code*.

9.20 For example, the *ePayments Code*, administered by the Australian Securities and Investments Commission, 'regulates electronic payments, including ATM, EFTPOS and credit card transactions, online payments, internet and mobile banking, and BPAY', and includes 'rules for determining who pays for unauthorised transactions'.[18]

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13 National Seniors Australia, *Submission 154*.
14 Australian Bankers' Association, *Submission 107*.
15 Office of the Public Advocate (Qld), *Submission 361*.
16 This code is owned and published by the Customer Owned Banking Association (COBA) and monitored by the Customer Owned Banking Code Compliance Committee: Financial Ombudsman Service, *Customer Owned Banking Code of Practice* <www.fos.org.au/about-us/codes-of-practice/customer-owned-banking-code-of-practice/>.
17 Phil Khoury, *Report of the Independent Review of the Code of Banking Practice* (2017) 10.
18 Australian Securities and Investments Commission, *ePayments Code* (March 2016) 2.

9.21 Eighteen banks, including each of the 'big four', have signed up to the Code—it reportedly covers 95% of the retail banking market.[19] While banks are not required to subscribe to the Code, those that do are 'contractually bound by their obligations under the Code'.[20] The Code provisions address:

> bank accounts, bank transfers, loans, credit cards, terms and conditions, account statements, financial difficulty, debt collection, dispute resolution and related matters. All of these matters are subject to other legal requirements that have continued to evolve since the Code was first conceived.[21]

9.22 The ABA, which developed the Code, states that

> [t]he principles and obligations set out in the Code apply to the majority of banking services delivered to individuals and small businesses across Australia. … The Code gives individual and small business customers important rights and confirms existing rights.[22]

9.23 Compliance with the Code is monitored by the Code Compliance Monitoring Committee (CCMC).[23]

9.24 The Code does not include provisions specifically directed at elder abuse.[24] Instead, guidance for banks on elder abuse is set out in the ABA's industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (the industry guideline).[25] The Financial Ombudsman Service has called the guideline 'best practice' in dealing with a bank dispute about financial abuse.[26] The ALRC acknowledges the value of this resource. As discussed below, many of the safeguards recommended by stakeholders are already featured in these guidelines.

9.25 However, the industry guideline is voluntary and 'does not have legal force or prescribe binding obligations on individual banks'.[27] The ALRC considers that banks

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19 Code Compliance Monitoring Committee, *Code Subscribers* <www.ccmc.org.au/code-of-banking-practice-2/code-subscribers/>.

20 Australian Bankers' Association, *Code of Banking Practice—FAQs* (2013) 1.

21 Khoury, above n 17, 10.

22 Australian Bankers' Association, *Code of Banking Practice—FAQs* (2013) 1.

23 The CCMC was reviewed by Mr Phil Khoury at the same time as he reviewed the *Code of Banking Practice*. The report was published in February 2017. Industry was found to be 'largely satisfied with the performance of the CCMC', particularly with its work 'focused on good practice', rather than its work 'focused on breaches'. Non-industry stakeholders were less satisfied, but criticisms were said to be directed at the Code, the CCMC mandate and its resourcing. 'Although some urged the CCMC towards more of a quasi-regulatory role, I concluded that it should be focused on public assurance through more visible, transparent monitoring—and adding value to the industry through a greater focus on good practice and continuous improvement': Phil Khoury, *Independent Review of the Code Compliance Monitoring Committee* (2017) 5.

24 As noted below, it does include provisions for 'customers with special needs', but these concern matters broader than abuse. Some of the general provisions in the Code, such as those related to guaranteeing loans, discussed below, will of course be relevant to elder abuse.

25 This is part of 'a package of materials to promote good practice and clearer processes for banks so they can better support customers who may be vulnerable to financial abuse or who want to plan ahead and manage their financial affairs, especially as they get older': Australian Bankers' Association, *Financial Abuse Prevention* <www.bankers.asn.au>.

26 Australian Bankers' Association (ABA), *Submission 365*.

27 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013) 1. Some of the guideline may reflect pre-existing legal obligations.

should have binding obligations to protect their older customers from abuse, to the extent that this is reasonable. This is why the ALRC recommends that the industry guidelines be incorporated into the Code.

9.26 There are two ways the guidelines could be incorporated into the Code. First, the Code itself could set out the reasonable steps that banks should be expected to take. This was proposed by the ALRC in the Discussion Paper.[28]

9.27 A second approach would be to leave the specific steps in the industry guideline, but have the Code provide that banks must comply with the guideline. This is a useful approach if it is easier to update the guideline than the Code, which in turn may be important if the guidelines include measures that refer to technologies or practices that are likely to change often.[29] With advances in technology and new research into effective responses to elder abuse, banks might reasonably be expected to do more in the future to identify and respond to potential abuse.[30]

9.28 The ALRC recommends this second approach, which is more consistent with recommendations of Phil Khoury in his 2017 review of the Code:

> The Code could be more effective if redrafted in a modern structure, based on key principles, in a plain-speaking style with fewer carve-outs and exceptions, and with supporting detail in linked Industry Guidelines.[31]

9.29 The ABA, which administers the Code and Guidelines, is also somewhat more supportive of this second approach. The ABA said it was 'committing to a review of the guideline, re-evaluating the reasonable steps guidance and working with member banks on the implementation of the guideline to their internal processes, procedures and policies'.[32]

> The industry guideline provides guidance for banks and assists banks in responding to suspected cases of financial abuse on an individual case-by-case basis. A prescriptive clause in the Code will not allow for this flexibility and will impede the ability of banks to effectively and appropriately respond to individual circumstances of financial abuse.[33]

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28 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 7–1.

29 This may also support placing the requirements in industry codes or guidelines, rather than legislation. On the question of whether there should be a Code at all, the independent reviewer writes: 'I also see a voluntary Code as able to be more flexibly framed than legislation, easier to understand than the law and in theory at least, much faster to update and evolve over time': Khoury, above n 17, 5. Although if compliance with voluntary industry codes and guidelines proves poor, this may highlight the need for stricter regulation. The ALRC is also not suggesting that more prescriptive banking regulation is not appropriate for other banking requirements.

30 The Code already includes a 'reasonable steps' clause: 'We recognise the needs of older persons and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services': Australian Bankers' Association, *Code of Banking Practice* (2013).

31 Khoury, above n 17, 6.

32 Australian Bankers' Association (ABA), *Submission 365*.

33 Ibid.

9.30 Alternatively, the ABA submitted, the Code could 'include a clause reflecting a banks' commitment to addressing elder abuse' (presumably with the detail remaining in the guidelines).[34]

9.31 The proposal that banks should be required to take reasonable steps to respond to elder abuse was almost unanimously supported by those stakeholders who commented on it.[35] Seniors Rights Victoria submitted that there should be standard mandatory protocols for banks in relation to elder abuse, and that the industry guidelines on elder abuse should be made mandatory and incorporated into the Code.[36] National Seniors Australia submitted that the financial services sector should 'use codes of practice to better address the risk of financial elder abuse among older clients'.[37] Aged Care Steps agreed that

> banks should be implementing strict guidelines that will assist in preventing cases of elder abuse … Such guidelines and rules should be implemented within the Banking Code of Practice which will ensure the enforcement of such preventative measures to prevent and reduce the risk of financial elder abuse.[38]

9.32 COTA supported the proposal and said that '[b]anks must take a holistic approach to supporting older consumers to feel confident in the conduct of their own business. This could make a significant contribution to reducing the vulnerability of some people to elder financial abuse'.[39]

9.33 The Public Trustee (Qld) said that incorporating the guidelines into the Code 'would be of great benefit to combating elder abuse'.[40] The Public Trustee submitted that, in its experience as administrator for over 9,000 adults with impaired capacity,

> banks sometimes singularly are the institutions which can recognise and take action in respect of misappropriation of funds. The proposed incorporation of reasonable steps, particularly training of staff, coupled with protections to permit banks to report (untrammelled by the strictures of privacy and confidentiality) would be useful steps.[41]

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34 Ibid.

35 Office of the Public Guardian (Qld), *Submission 384*; Chartered Accountants Australia and New Zealand, *Submission 368*; Victorian Multicultural Commission, *Submission 364*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*; Disabled People's Organisations Australia, *Submission 360*; M Berry, *Submission 355*; COTA, *Submission 354*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; CPA Australia, *Submission 338*; Institute of Legal Executives (Vic), *Submission 320*; Consumer Credit Legal Service (WA) Inc, *Submission 301*; Seniors Rights Service, *Submission 296*; FMC Mediation & Counselling, *Submission 284*; ADA Australia *Submission 283*; Customer Owned Banking Association (COBA), *Submission 271*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; Assets Ageing and Intergenerational Transfers Research Program, The University of Queensland, *Submission 243*; Carers Queensland, *Submission 236*; C Fairweather, *Submission 228*.

36 Seniors Rights Victoria, *Submission 171*.

37 National Seniors Australia, *Submission 154*.

38 Aged Care Steps, *Submission 340*.

39 COTA, *Submission 354*.

40 Public Trustee of Queensland, *Submission 249*.

41 Ibid.

9.34 Legal Aid NSW supported the idea of placing an obligation on banks to protect older customers in the Code, but suggested that, rather than banks being required to take 'reasonable steps', they should be required to 'take all steps that are "reasonably practicable" to prevent the financial abuse of customers'.[42]

9.35 The Office of the Public Advocate (Qld) said that many financial institutions 'already have these types of protections in place', but the practices should be 'adopted as part of standard banking practice':

> Often, banks are the first institution to become aware of unusual transactions on older people's bank accounts. They are therefore well positioned to detect fraud and financial abuse, and act early to prevent or stop it.[43]

The reasonable steps

9.36 As discussed above, the ALRC recommends that banks and other financial institutions should be required to take reasonable steps to prevent the financial abuse of their customers. Such a provision in the Code would be a valuable additional safeguard against the financial abuse of vulnerable customers.

9.37 The industry guideline sets out many steps that banks should take, including:

- staff should be 'trained to identify potential financial abuse as part of their fraud prevention programs';
- where abuse is suspected, staff should consider talking to the customer—and ask 'clear, factual, and non-threatening questions';
- staff should check third party authorisations and documentation—'If a third party presents a withdrawal form or instructions, bank staff should verify the third party's authority by directly contacting the customer or checking associated documentation (ie power of attorney document)';
- staff might seek advice from others in the bank—eg, managers, internal lawyers, fraud, security—and delay transactions until further investigation work is done; and
- staff might also seek advice from the Public Advocate or other relevant agency, but without identifying the customer.[44]

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42 Legal Aid NSW, *Submission 352*. 'The "reasonably practicable" requirement is from work safety legislation. We consider that the position of employers, who control the working environment of their employees and who are in a position of trust, is analogous to the position of banks, who are entrusted with the money of their customers and have a duty to keep it safe': Ibid.

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

44 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013).

9.38 The guidelines also discuss administration, guardianship and powers of attorney, stating, in part:

> Before an administrator or guardian can be provided with access to, and information on, a customer's accounts or facilities, banks should ask for written proof of their status, such as certified copies of an instrument or order. Once verified, banks should note the appointment or authority on the customer's accounts or facilities. … Banks need to understand the level of access the attorney has over their customer's account or facility because a power of attorney can be tailored to certain types of decisions or transactions.[45]

9.39 In a 2016 report about financial elder abuse, a US federal regulator, the Consumer Financial Protection Bureau, recommended that banks and credit unions: train staff to recognise and respond to abuse; use fraud detection technologies; offer 'age-friendly' services; and report suspicious activity to authorities, whether or not reporting was mandatory in their state.[46]

Training

9.40 Many stakeholders in this Inquiry stressed the importance of banks responding to elder abuse. Training staff was the most commonly suggested step, with some stakeholders submitting that such training should be mandatory.[47]

9.41 For example, National Seniors Australia submitted that relevant codes of practice should require that staff be trained to:

- recognise signs of abuse and recognise the common profile of a vulnerable customer and/or potential abusers;
- understand protocols to deal with suspected abuse; and
- understand enduring powers of attorney and administration orders made by tribunals.[48]

9.42 The Law Council of Australia also said it supports mandatory training for staff and that training should include:

- the nature of an enduring power of attorney, including the difference between joint and joint and several;

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45 Ibid 5.

46 Consumer Financial Protection Bureau (US), *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* (2016).

47 Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; People with Disability Australia, *Submission 167*; Legal Aid NSW, *Submission 140*; Consumer Credit Legal Service (WA), *Submission 112*; Office of the Public Advocate (Vic), *Submission 95*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*; Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*. 'Staff training and the alignment of on-the-ground performance measures and business practices with the intentions set out in the Code will be essential': COTA, *Submission 354*.

48 National Seniors Australia, *Submission 154*.

- ensuring that, where an enduring power of attorney commences upon loss of capacity, the person dealing with the attorney is satisfied that there has been a loss of capacity with respect to the particular transaction at hand (a principal may have capacity for some decisions and not others);
- the difference between an enduring power of attorney for personal matters (which does not confer authority to conduct financial affairs) and an enduring power of attorney for financial matters; and
- awareness of the types of limitations on the exercise of power under an instrument and the effect of those limitations.[49]

9.43 Another stakeholder listed these examples of possibly suspicious transactions:

> Atypical use of ATM cards; Uncharacteristic non-sufficient funds activity or overdraft fees; Activity in previously inactive accounts; Opening new joint checking account or adding joint owner to existing account; Increase in total monthly cash withdrawals compared to historical patterns.[50]

9.44 The Financial Services Institute of Australasia submitted that its members 'broadly support strategies to strengthen educational and ethical standards for financial services professionals to identify and appropriately respond to cases of elder abuse'.[51]

9.45 In some cases, it might be appropriate for bank staff to try to speak with an older person alone, for example, where an older and at-risk customer comes into a branch with a relative or friend and asks to transfer funds to that person.[52] Further, if the older person does not speak English, 'staff should not rely on the relative or friend to translate for them'.[53]

9.46 Alzheimer's Australia said that banks should train staff to prevent the financial abuse of people with dementia.[54] Similarly, Disabled People's Organisations Australia submitted that staff should be 'trained in supported decision-making to ensure they are aware of the supports to which their clients may be entitled, as well as the limitations of supporters in this area'.[55] Capacity Australia said that it had produced training on elder abuse for accountants and financial planners, but is 'struggling with engaging the interest of the industry', and that therefore training should be required.[56]

9.47 The Institute of Legal Executives commented that training should include 'appropriate questioning and listening techniques', because some transactions which appear suspicious may not be.[57]

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49 Law Council of Australia, *Submission 351*.
50 Consumer Credit Legal Service (WA) Inc, *Submission 301*.
51 Financial Services Institute of Australasia, *Submission 137*.
52 Legal Aid NSW, *Submission 352*.
53 Ibid.
54 Alzheimer's Australia, *Submission 80*.
55 Disabled People's Organisations Australia, *Submission 360*.
56 Capacity Australia, *Submission 134*.
57 Institute of Legal Executives (Vic), *Submission 320*.

9.48 Another stakeholder stressed that banks need to be sensitive to the needs and convenience of carers:

> I understand why financial institution staff may need more training to alert them to the risk of elder abuse. However, I ask that this training also be tempered by the understanding that the vast majority of carers are doing the right thing by the elders who need their help.[58]

9.49 Training to help bank staff identify suspicious transactions was also recommended in a Parliamentary Inquiry into elder abuse:

> In the Committee's opinion, banks and financial institutions should be providing such assistance to customers as part of their normal duty of care. It is vital that the staff of banks and financial institutions are trained to recognise signs of potential abuse and that there are specific protocols with the bank or financial institution, and indeed across the industry, for dealing with such reports.[59]

9.50 Unsurprisingly, banks might also employ software and other digital tools to identify suspicious transactions. Some of the tasks that stakeholders have suggested should be performed by bank staff might be performed by, or with the assistance of, these digital technologies. This will only become more important as increasing numbers of Australians use the internet for their banking and rarely visit a bank branch.

Reporting abuse

9.51 Reporting suspected abuse may also be a reasonable step for banks to take in some circumstances. A number of stakeholders submitted that banks should report elder abuse to a relevant authority.[60]

9.52 Before reporting abuse to the police or other authority, banks should consider discussing the suspected abuse with the customer who may be being abused.[61] Where the older person has a guardian, attorney or other substitute decision maker for financial matters, the bank might also, or instead, contact that person (assuming it is not that person who is suspected of the abuse).

9.53 Seniors Rights Service submitted that the Code 'should make clear that no consequences will follow' from bank staff reporting suspected elder abuse.[62] Paul Greenwood, a US prosecutor, went further and submitted that if 'we make every bank

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58 S Dunlop, *Submission 220*.

59 Australian Government, *House of Representatives Standing Committee on Legal and Constitutional Affairs: Older People and the Law—Government Response* (2009) [2.107].

60 See, eg, Seniors Rights Victoria, *Submission 171*; Financial Services Institute of Australasia, *Submission 137*; Consumer Credit Legal Service (WA), *Submission 112*; Australian Bankers' Association, *Submission 107*; Public Trustee of Queensland, *Submission 98*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*.

61 'Financial service providers need to be supported to be able to educate clients and to be able to identify and report abuse to clients': National Seniors Australia, *Submission 154*.

62 Seniors Rights Service, *Submission 296*.

employee a mandated reporter of suspected financial elder abuse, then this will ensure that proper training is given'.[63]

9.54 In Chapter 14, the ALRC recommends that adult safeguarding agencies should investigate the abuse of 'at-risk adults' and provide necessary support and protection. The ALRC also recommends that people who report suspected abuse to adult safeguarding agencies be given immunity from certain legal obligations that might otherwise prevent them from reporting abuse. This should remove an impediment to reporting abuse that banks have identified. The ABA submitted that

> legal obligations including privacy laws and anti-discrimination laws as well as obligations of confidentiality and concerns about possible actions in defamation provide challenges for banks in reporting suspected financial abuse. Although the ABA does not support mandatory reporting, the industry would like to see the establishment of clear reporting guidelines for banks to follow if a bank chooses to report what it believes to be suspected financial abuse as well as a government body to which banks can report suspected financial abuse, and statutory immunity for banks choosing to report suspected financial abuse.[64]

9.55 The National Older Persons Legal Services Network submitted that this may not be necessary and that in most abusive situations, 'the primary strategy should be to talk directly and alone to the person who is the suspected victim' about the situation and what might be done.[65] Banks should then 'take proactive or remedial action within their power, in consultation with the older person':

> They can move money into another bank account, refuse loan applications, investigate and report matters where appropriate—all with the undisclosed consent of the apparent victim.
>
> It is more complex when the suspected victim is unable to protect their own interests and in those situations the advice of the suitable public guardian or advocate should be sought.[66]

9.56 The Customer Owned Banking Association said its members would like to see 'a clear and consistent approach and guidelines for the banking institutions to identify and report suspected elder abuse':

> For example, if a staff member knows a family member of a person they suspect is a victim of elder abuse, the bank should have the ability to consult with that member (without disclosing too much information about the account). Banking institutions should also be able to consult with the suspected victim's doctor or refer the matter to the police. The law currently limits bank staff to merely verifying a transaction that they suspect is taking place in the form of financial abuse.[67]

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63 P Greenwood, *Submission 304*. As discussed below and further in Ch 14, the ALRC does not recommend mandatory reporting in this report.

64 Australian Bankers' Association, *Submission 107*.

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

66 Ibid.

67 Customer Owned Banking Association (COBA), *Submission 271*.

9.57 Some customers might object to banks 'interfering' in their affairs—questioning how they or their family and friends spend their money, suggesting they are being abused, or reporting suspicions to the police or other authorities. Some customers may consider this an invasion of their privacy. Such objections may be even stronger if it is considered that the interference is partly because someone is considered old. There is no doubt that banks must act with tact and sound judgment. As the ABA guidelines state:

> Intervening in a customer's financial matters or questioning them without due consideration and sensitivity may embarrass the customer, and possibly damage the bank's relationship with their customer. In cases of suspected financial abuse, it is important to be vigilant and cautious.[68]

9.58 Where the older person or their representative can take steps to prevent the abuse, or to seek help from others, then it should often not be necessary for the bank to notify anyone else. Older people should generally be able to decide for themselves how to respond to abuse. The need to respect people's autonomy is, for some, the key reason underpinning their objection to mandatory reporting. State Trustees Victoria submitted that mandatory reporting 'may be seen by the elderly as intrusive and patronising'.[69]

9.59 The ALRC does not recommend that banks be required to report all instances of suspected abuse to authorities, but rather that reporting abuse will sometimes be the appropriate step to take. The circumstances in which banks should report abuse should be clearly set out in the industry guideline.[70]

9.60 If the person has impaired decision-making ability in relation to this matter, the relevant authority is likely to be the state Public Advocate or Public Guardian. If adult safeguarding laws are enacted, as recommended in Chapter 14, then the abuse of 'at-risk' adults might be reported to adult safeguarding agencies, with the consent of the at-risk adult.[71]

9.61 This is broadly consistent with the findings of a Parliamentary Inquiry into elder abuse, which recommended the development of 'national, industry-wide protocols for reporting alleged financial abuse' and 'a training program to assist banking staff to identify suspicious transactions'.[72]

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68 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013 2.

69 State Trustees Victoria, *Submission 138*.

70 See ch 14 for a discussion of reporting abuse to adult safeguarding agencies.

71 In Western Australia, suspected abuse of a person with legal capacity may be reported to Advocare. A Parliamentary Committee has suggested that other states might adopt a similar approach: 'The Committee recommends that the members of the Australian Guardianship and Administration Committee examine the Western Australian legislation relating to reporting by banks and other financial institutions of suspected abuse to the Public Advocate and Advocare, and develop similar initiatives for consideration by their respective state and territory governments': House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.114].

72 Ibid [2.110].

Guaranteeing loans

9.62 Some older people guarantee loans to their adult children, perhaps to help them buy a house. Some stakeholders suggested that these guarantees, along with 'reverse mortgages' or joint loans for children, are a site of abuse, and should be addressed in banking codes and guidelines. For example, the National Older Persons Legal Services Network submitted:

> It is now seen as relatively normal to ask older parents to provide some financial support or guarantee to a child seeking to buy their own home as some sort of 'early inheritance'. In our experience, the normalising of this particularly dangerous transaction is troublesome. Unless explicitly stated, it is unlikely that front line bank staff would identify this as a potentially abusive situation that may ultimately lead to an older people becoming homeless.[73]

9.63 The Consumer Credit Legal Service (WA) submitted that some people who have provided guarantees may not be adequately protected under the Code, which 'leaves them in a vulnerable position because they cannot seek assistance from the financial service provider in cases of financial difficulty'.[74]

9.64 The industry guideline acknowledges that financial abuse can include 'pressuring a vulnerable customer into being a guarantor when they lack sufficient knowledge about the transaction or the capacity to make informed decisions'.[75]

9.65 Clause 31 of the Code concerns guarantees. It has been said to largely 'codify case law and overlap with National Credit Code requirements', including provisions in the National Credit Code with respect to warnings, the need to get legal and financial advice, and restrictions on enforcement.[76] Clause 31 provides, in part, that before taking a guarantee, signatory banks will give potential guarantors a 'prominent notice' that: they 'should seek independent legal and financial advice on the effect of the Guarantee'; they 'can refuse to enter into the Guarantee'; 'there are financial risks involved'; they have a right to limit their liability; and they 'can request information about the transaction or facility to be guaranteed'.[77]

9.66 Legal Aid NSW submitted that banks should also ask guarantors to confirm in writing whether they have sought independent legal or financial advice about the arrangement.[78] The independent reviewer considered that this was not necessary. The Code already requires that banks give prominent notice to guarantors recommending that they seek advice and that there be a 'warning notice' directly above the place

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

74 Consumer Credit Legal Service (WA) Inc, *Submission 301*.

75 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse* (June 2013) 2.

76 Khoury, above n 17, 106. See *National Consumer Credit Protection Act 2009* (Cth) Sch 1 (National Credit Code), s 90.

77 Australian Bankers' Association, *Code of Banking Practice* (2013) cl 31.4.

78 Legal Aid NSW, *Submission 352*. They also said banks should notify customers that acting as a guarantor can affect their Centrelink income: Ibid. In their submission, Legal Aid NSW suggested other protections that might be added to the guidelines, including in relation to financial hardship.

where guarantors should sign.[79] The independent reviewer was 'not persuaded that the signing of an additional document waiving the right to advice would sufficiently add to the Code protections'.[80]

9.67 However, the independent reviewer did make other recommendations about guarantees, including that the Code be amended to:

- 'require signatory banks to provide a guarantor with the signatory bank's assessment that credit is "not unsuitable" for the debtor, where the signatory bank is required by *National Consumer Credit Protection Act 2009* to prepare this';
- 'prohibit signatory banks from signing a guarantor, who has not been legally advised, until at least the third day after the provision of all required information to the guarantor'; and
- require signatory banks 'to inform a guarantor where the debtor has been in continuing default for more than 2 months or where the debtor's credit contract has been changed because the debtor has encountered financial hardship'.[81]

9.68 The independent reviewer also made the following recommendation:

> In consultation with consumer representatives, signatory banks should enhance Industry Guidelines to assist bank staff to identify when a guarantee should be viewed as financial abuse and accordingly when the signatory bank should exercise its discretion not to accept a guarantee as security for credit.
>
> The guidance should cover the factors that might be suggestive of financial abuse and what further steps a signatory bank should take in response, including enquiries about the guarantor's financial position to assess the extent of hardship that would result if the guarantee is enforced by the signatory bank.[82]

9.69 The ALRC has accordingly recommended that industry guidelines include provisions in relation to guaranteeing mortgages and other loans.

Authorising third parties to operate bank accounts

9.70 Retail banks in Australia typically have a standard form that customers may submit to authorise someone else to operate their bank account on their behalf. This is known as an 'Authority to Operate'. Giving a trusted person access to one's bank account will sometimes be convenient or even necessary, particularly for someone who finds it difficult to use online banking services or visit a bank branch. However, these

79 Australian Bankers' Association, *Code of Banking Practice* (2013) cll 31.4 and 3.8.
80 Khoury, above n 17, 116.
81 Ibid recs 38, 39 and 41.
82 Ibid rec 42.

arrangements can be abused,[83] and have been said to undermine the protections in powers of attorney legislation.[84]

9.71 These forms must typically be signed by the bank customer and the person authorised to access the account, but the signing of the form does not need to be witnessed by others and the customer is not required to visit the branch to submit the form. There is therefore a risk that the forms will be completed and submitted fraudulently. An account holder's signature might be forged, or unreasonable pressure might be placed on the account holder to sign the form themself. Also, some customers may not understand the arrangement or its risks, particularly if they have not visited a bank branch or otherwise sought advice.

9.72 One reasonable step that banks might take to protect customers from financial abuse might therefore be to increase protections around these 'Authority to Operate' forms. For example, banks might require that an employee of the bank, and perhaps another person, witness the forms being signed. This might make it more difficult to submit a fraudulent form. The additional formality may also discourage the person given authority from later misusing the funds. These people might also be required to sign a declaration or undertaking that they will not misuse the arrangement, such as for their own benefit.[85]

9.73 Banks might also require the customer to sign a declaration or undertaking stating that they understand the scope of the authority and the additional risk of financial abuse. Customers may then be more reluctant to enter these arrangements with people they should not trust.

9.74 In the Discussion Paper, the ALRC proposed that such protections should be prescribed in the Code.[86] Submissions in response to this proposal were mixed, but many supported the proposal.[87] The National Older Persons Legal Services Network said that third party authorisations 'ought to be considered as seriously as any other substitute decision making instrument':

> If it is not possible in a particular situation to obtain an EPOA or an administration order (and we struggle to think of a situation when this would not be more

83 The Law Council of Australia has said that authority to operate arrangements may 'easily' be used for financial abuse: Law Council of Australia, *Submission 61* citing the views of the Law Institute of Victoria.

84 Ibid. For example, compare with governing the making of power of attorney, guardianship and other such instrument: see ch 5.

85 Consumer Credit Legal Service (WA) Inc, *Submission 301*.

86 Similar changes could also be made to the *Customer Owned Banking Code of Practice.*

87 Chartered Accountants Australia and New Zealand, *Submission 368*; Victorian Multicultural Commission, *Submission 364*; National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; M Berry, *Submission 355*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; CPA Australia, *Submission 338*; Cairns Community Legal Centre Inc, *Submission 305*; FMC Mediation & Counselling, *Submission 284*; ADA Australia *Submission 283*; Customer Owned Banking Association (COBA), *Submission 271*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*.

> appropriate), then a third party authorisation should have as close to possible the features of an EPOA.[88]

9.75 Some said that that one of those witnesses should be a medical practitioner, lawyer or another prescribed professional,[89] a suitable bank employee or Justice of the Peace,[90] or at least that they should be independent and unrelated to the parties.[91] ADA Australia suggested that the principal should be required to sign the forms without the appointee present.[92]

9.76 The Law Council of Australia supported the proposal, but noted that another approach would be 'to require banks to rely on instruments such as enduring powers of attorney, powers of attorney, or administration orders'.[93] However, the ABA, which opposed the proposal, said that while banks 'strongly encourage the use of formal arrangements, some bank customers prefer to put in place appropriate measures to help protect themselves yet retain their financial independence, including an Authority to Operate'.[94]

9.77 A number of stakeholders either opposed the proposal, or expressed serious reservations.[95] Some suggested it would not significantly reduce elder abuse and that other steps were more important, while others were concerned that the cost and inconvenience of the process might outweigh any benefits.

9.78 One stakeholder said that requiring people to sign a declaration is unlikely to stop financial abuse partly because many people 'do not read or do not understand' what they are signing.[96] Others said that people from culturally and linguistically diverse backgrounds or with impaired decision-making ability may 'not understand the declaration, its risks or its implications'.[97]

> How are the witnesses going to attest to the fact that the customer had capacity unless it is very clear? Training and education will be key.[98]

9.79 Office of the Public Advocate (Qld) said that if a person is prepared to forge one signature, they will be prepared to forge two,[99] although this problem might be met by requiring an employee of the bank to witness the signing of the form when it is lodged.

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88 National Older Persons Legal Services Network, *Submission 363*. See also V Fraser and C Wild, *Submission 327*.

89 Customer Owned Banking Association (COBA), *Submission 271*.

90 Aged Care Steps, *Submission 340*; A Salt, *Submission 278*.

91 Chartered Accountants Australia and New Zealand, *Submission 368*; Institute of Legal Executives (Vic), *Submission 320*; Cairns Community Legal Centre Inc, *Submission 305*.

92 ADA Australia *Submission 283*.

93 Law Council of Australia, *Submission 351*.

94 Australian Bankers' Association (ABA), *Submission 365*.

95 Ibid; Office of the Public Advocate (Qld), *Submission 361*; Office of the Public Guardian (Qld), *Submission 384*; Legal Aid NSW, *Submission 352*; Carers Queensland, *Submission 236*.

96 Consumer Credit Legal Service (WA) Inc, *Submission 301*.

97 Ibid.

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

99 Office of the Public Advocate (Qld), *Submission 361*. See also Office of the Public Guardian (Qld), *Submission 384* ('increased witnessing requirements are unlikely to positively impact the behaviour of the dishonest third party (family member or friend) who is assisting the older person').

9.80 Others suggested that these arrangements are convenient for many people, particularly for those older people who have limited ability to visit their bank or use online banking services, and that witnessing rules might be an administrative burden for customers and inhibit them from entering the arrangements. Legal Aid NSW suggested the costs may outweigh the benefits: 'It could create excessive barriers for older people needing assistance with their banking, but not wishing to create a power of attorney'.[100]

9.81 Witnessing rules might also be a burden for carers. The Office of the Public Advocate (Qld) said it would be 'more work and obstacles for honest people trying to make these arrangements for the benefit of the older person'.[101] Carers Queensland considered the proposal to be 'sound in principle but ineffective in reality'.[102]

9.82 Others suggested the safeguard might not be sufficient, because the older person giving authority may be under someone's influence and 'may have been coached to state they understand the scope of the authority'.[103] Banks would therefore need to ensure their customers were not being coerced to give authorisation.

9.83 Another concern some stakeholders expressed was that banks might use the additional witnessing rules to limit their liability. Consumer Credit Legal Service (WA) submitted that financial institutions may use the declaration 'as a tool to show that the customer has "waived" their rights' and to 'prevent older Australians from redress against their perpetrators or their banks'.[104]

9.84 The ABA submitted that the current arrangements offered sufficient protection:

> A third party signatory may be added to a customer record when a customer requests another person have access to their accounts, for both financial and non-financial transactions, on a temporary or permanent basis. Unlike a formal instrument, a third party signatory does not have the authority to open or close existing accounts on behalf of the customer. The current procedure requires the accountholder to attend in person at the bank or provide certified ID. This is sufficient protection to verify the authenticity of the form.[105]

9.85 The ABA also noted that it was difficult to see how additional witnessing requirements and declarations could be made to apply only to 'a particular category of customer … without discriminating and restricting the actions of many older people who remain highly competent'.[106]

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100 Legal Aid NSW, *Submission 352*.
101 Office of the Public Advocate (Qld), *Submission 361*.
102 Carers Queensland, *Submission 236* (noting that it was 'aware of many circumstances where a person with an intellectual or cognitive disability has been asked to provide a "mark" (signature) on the relevant paperwork in order to open a bank account').
103 A Salt, *Submission 278*.
104 Consumer Credit Legal Service (WA) Inc, *Submission 301*.
105 Australian Bankers' Association (ABA), *Submission 365*.
106 It was also suggested that the requirements should not apply to everyone, because they were too burdensome: Ibid.

9.86 Given the above concerns, the ALRC does not recommend that the Code or industry guideline provide that the signing of 'Authority to Operate' forms must necessarily be witnessed by others. The potential administrative burden to older people and their carers seem to suggest that caution should be exercised.

9.87 However, safeguards against the abuse of these arrangements appear to be necessary, and witnessing rules and formal declarations may be one way of protecting against abuse for some customers. In other cases, it might be more appropriate for the bank to call a customer to confirm that they did in fact sign an 'Authority to Operate' form and that they understand the risks of allowing other people to operate their bank account.[107] These or other such safeguards should be set out in the industry guideline.

Internet banking

9.88 It is reportedly common for some people to allow a spouse or other intimate partner or family member to operate their bank accounts online. This can be as simple as sharing an account number and password, even though banks warn people not to do this.

9.89 The National Older Persons Legal Services Network submitted that 'many older people rely on adult children to operate internet banking and that passwords are routinely accessible by those children'.[108] The Office of the Public Guardian (Qld) stressed the need to consider internet banking and 'the mechanisms that should be in place to protect the interests of the older person who provides their family member, or attorney with access to their online accounts'.[109] The Institute of Legal Executives said 'the issue of internet banking is of grave concern':

> We are informed of many instances where abuse has been perpetrated simply because the account holder has provided his/her account access details to another—whether through pressure being brought to bear, or simply because it is 'easier' for the other person to attend to (usual) payments on the account holder's behalf.[110]

9.90 Online banking can be risky, Consumer Credit Legal Services (WA) submitted.

> Some older Australians rely on close family members or friends for help with activities such as online banking. In this process, they may end up sharing their online banking details with these family members or friends, which would constitute a breach of the terms and conditions of their bank account.[111]

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107 Legal Aid NSW submitted: 'Banks should contact older people to confirm any written authorities they purport to have given to another person to transact on their accounts'. They also said that banks should contact older people by phone to confirm that they have authorised large transactions: Legal Aid NSW, *Submission 352*. 'Banks could use their mobile staff, who have received appropriate training about elder financial abuse and undue influence, to talk to customers face-to-face in their homes, to satisfy themselves that the arrangements for third parties to access their accounts are appropriate': Office of the Public Advocate (Qld), *Submission 361*. Others said that 'bank staff can, and often do, intervene under existing protections where there is an obvious abuse such as an unusually large withdrawal or transfer of money': National Older Persons Legal Services Network, *Submission 363*.

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

109 Office of the Public Guardian (Qld), *Submission 384*.

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

111 Consumer Credit Legal Service (WA) Inc, *Submission 301*.

9.91 A related concern is whether online banking services are sufficiently accessible to some people with disability and to people who do not use computers or the internet. The National Older Persons Legal Services Network said banks should provide services that are accessible to people who 'struggle with internet services and automated telephone programs'.[112]

9.92 This is reflected in the Code, which states that banks 'recognise the needs of older persons and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services'.[113]

9.93 Accessible online banking may make some people less likely to delegate their banking to others, which may in turn reduce financial abuse, however this topic is broader than elder abuse and is not the subject of recommendations in this Report.

Community education

9.94 Providing information to older customers about financial abuse and discussing with customers how they might protect themselves are other steps banks might take.[114] Consumer Credit Legal Services (WA) suggested that banks might sponsor educational activities for elderly account holders, as part of a broader strategy to raise community awareness of elder abuse. It noted that '[c]ommunity education can include financial seminars for local seniors, including providing case studies of elder abuse and outlining the steps that can be taken to prevent or protect against financial exploitation of an elder person'.[115]

9.95 Community education about the risks of online banking may also help older Australians make informed choices about 'who they share their personal details with and the potential consequences of doing so'.[116]

9.96 This education about the risks of online banking should be one aspect of the broader community education strategy recommended as part of the National Plan to combat elder abuse.[117]

112 National Older Persons Legal Services Network, *Submission 363*.
113 Australian Bankers' Association, *Code of Banking Practice* (2013) cl 7.
114 'National Seniors recommends that financial service providers be supported to deliver information to clients about the potential risks of elder abuse and the mechanisms that can be put in place to protect against future abuse': National Seniors Australia, *Submission 154*.
115 Consumer Credit Legal Service (WA) Inc, *Submission 301*.
116 Ibid.
117 See ch 3.

10. Guardianship and Financial Administration

Contents

Summary

10.1 In this chapter, the ALRC recommends a practical program of reform for guardianship and financial administration schemes to enhance safeguards against elder abuse, including a requirement for private guardians and private financial administrators to sign an undertaking with respect to their obligations and responsibilities. The ALRC also recommends the development of a best practice model on how state and territory tribunals may facilitate the participation, to the greatest extent possible, of a person who is the subject of a guardianship or financial administration order, in the application and determination process.

10.2 The ALRC envisages that the recommended National Plan to combat elder abuse will provide a platform for the Commonwealth to work with states and territories to develop and implement best practice models, including for guardianship and financial administration.

Guardianship and financial administration

10.3 Laws and legal frameworks for guardianship and financial administration are the responsibility of states and territories. Each state and territory has a tribunal or board[1] that appoints a guardian or financial administrator for a person with diminished decision-making ability.[2]

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1 These bodies are referred to as tribunals in this chapter. These tribunals share their jurisdiction to appoint a guardian or financial administrator with courts. For the purposes of this Inquiry, the ALRC focuses on the jurisdiction of state and territory tribunals.

2 For a discussion of the different guardianship bodies, see: John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66(1) *Australian Social Work* 26, 27–28.

10.4 Guardianship and financial administration orders[3] are orders of a court or tribunal conferring powers of guardianship or financial administration over a person with diminished decision-making ability.[4] A guardian can be granted the power to make health and lifestyle decisions, and a financial administrator can make decisions about financial affairs (for example, operating bank accounts, selling or buying property, and paying bills).

10.5 Both guardianship and financial administration orders must be used as a last resort and be the least restrictive of a person with diminished decision-making ability.[5] This means that guardianship orders are usually limited to decision making in certain areas of a person's life, and usually only apply for a limited time. Financial administration orders are generally made for a limited time,[6] and in practice, tend to cover the entirety of a person's estate.

10.6 A member of the person's family or someone who knows the person will be given preference for appointment as guardian or financial administrator subject to suitability and willingness to act (private guardians or private financial administrators). Financial administrators can also be professional accountants, trustee companies, or equivalent (professional financial administrators). Each state and territory also has a statutory body that constitutes the guardian or financial administrator of last resort—appointed where the tribunal considers that a person requires a guardian or financial administrator but there is no suitable person who is willing or able to fulfil the appointment (public guardian or public trustee).

10.7 Private and professional financial administrators are generally required to submit a financial management plan, keep records of financial transactions, and lodge accounts annually with tribunals or state trustees.[7]

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3 Financial administration orders are also referred to as 'financial management' orders. In this Report, this class of orders are referred to as financial administration orders. Those appointed under such orders are referred to as financial administrators.

4 Guardianship and financial administration orders can also be made by the Supreme Court. For the purposes of this inquiry, the ALRC focuses on tribunal orders.

5 *Guardianship and Management of Property Act 1991* (ACT) ss 4(2)(d)–(e); *Guardianship Act 1987* (NSW) ss 4(b), (f), 14(2)(d), 15(4); *Guardianship of Adults Act 2016* (NT) ss 4(a), 11(d); *Guardianship and Administration Act 2000* (Qld) s 1(1), sch 1 cl 7(2), (3)(a); *Guardianship and Administration Act 1993* (SA) ss 5(c)–(d); *Guardianship and Administration Act 1995* (Tas) ss 20(2), (5), 51(2), (4); *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a), (5), 46(2)(a), (4); *Guardianship and Administration Act 1990* (WA) ss 4(4), (6).

6 Requirements for the review of guardianship and administration orders are discussed below.

7 *Guardianship and Management of Property Act 1991* (ACT) s 26(1); *NSW Trustee and Guardian Act 2009* (NSW) s 66; *Guardianship of Adults Act 2016* (NT) s 32; *Guardianship of Adults Regulations 2016* (NT) cll 4–5; *Guardianship and Administration Act 2000* (Qld) s 49; *Guardianship and Administration Act 1993* (SA) s 44; *Guardianship and Administration Act 1995* (Tas) s 63; *Guardianship and Administration Act 1986* (Vic) s 58; *Guardianship and Administration Act 1990* (WA) s 80. In NSW, the requirements to submit a financial management plan, keep records and lodge accounts are set out in directions given to a financial administrator by the NSW Trustee and Guardian under the *NSW Trustee and Guardian Act 2009*.

10.8 Guardians and financial administrators are generally obliged to act in the 'best interests' of the person,[8] with reference to statutory guiding principles to observe the interests, freedom, participation and family life of the person, and to protect the person from abuse.[9] In addition to any common law obligations, statutory provisions can also prevent financial administrators from conducting conflict of interest transactions, or combining or using the estate for their own benefit.[10]

10.9 Guardianship and financial administration orders are generally subject to periodic review.[11] An appointment may be revoked by the tribunal where it is alleged the appointee is not meeting their obligations under the relevant Act.

Guardianship and financial administration and elder abuse

10.10 Guardianship and financial administration orders are increasingly being made for older people.[12] For example, in NSW, 61% of applications in the 2015–16 financial year were for people aged 65 years and above.[13] The NSW Civil and Administrative Tribunal (NCAT) stated in its 2015–16 *Annual Report*, that 'the workload of the Guardianship Division is directly impacted by the ageing of the population'.[14]

10.11 Elder abuse is often committed by people with no authority to make a decision on behalf of an older person, or by substitute decision makers appointed by the older person themselves, such as those appointed under enduring powers of attorney. However, stakeholders noted that there is some evidence of elder abuse committed by private guardians and private financial administrators.[15] For example, the NSW Trustee

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8 In its *Equality, Capacity and Disability in Commonwealth Laws* Report, the ALRC recommended that guardianship and financial administration laws facilitate a shift toward supported decision-making, including the appointment of supporters rather than substitute decision makers, and most relevantly here, by requiring guardians and financial administrators to make decisions in accordance with a person's will, preferences and rights, rather than in their 'best interests': Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 10–1, [10.10].

9 *Guardianship and Management of Property Act 1991* (ACT) s 4; *Guardianship Act 1987* (NSW) ss 4, 21A(2); *NSW Trustee and Guardian Act 2009* (NSW) s 39; *Guardianship of Adults Act 2016* (NT) s 4; *Guardianship and Administration Act 2000* (Qld) sch 1; *Guardianship and Administration Act 1995* (Tas) s 6; *Guardianship and Administration Act 1986* (Vic) ss 28, 49; *Guardianship and Administration Act 1990* (WA) ss 51, 70.

10 *Guardianship and Administration Act 2000* (Qld) ss 37, 49, 50.

11 In most jurisdictions, there is a requirement to review an order within a maximum set timeframe. This varies between three and five years, depending on the jurisdiction: *Guardianship and Management of Property Act 1991* (ACT) s 19; *Guardianship and Administration Act 2000* (Qld) s 28; *Guardianship and Administration Act 1993* (SA) s 57; *Guardianship and Administration Act 1995* (Tas) s 52; *Guardianship and Administration Act 1986* (Vic) s 61; *Guardianship and Administration Act 1990* (WA) s 84. NSW and the Northern Territory do not make specific provision for automatic review. However, in both jurisdictions, the legislation makes provision for a periodic review. In NSW, the tribunal *may* specify in the financial administration order or in a subsequent order that the financial administration order must be reviewed within a specified time: *Guardianship Act 1987* (NSW) s 25N. By contrast, in the Northern Territory, the order *must* include a 'reassessment date': *Guardianship of Adults Act 2016* (NT) s 19.

12 Chesterman, above n 2, 28–29, 34.

13 NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015–2016* (2016) 41.

14 Ibid.

15 See, eg, Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; NSW Trustee and Guardian, *Submission 120*; Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; TASC National, *Submission 91*. State Trustees Victoria on the other hand submitted that there was 'plenty of

and Guardian (NSW T&G) advised that only six of the 521 matters it litigated in 2015–16 on behalf of represented persons involved financial abuse by a private financial administrator.[16] While the numbers were low, stakeholders provided some examples of abuse by private guardians and private financial administrators.[17] The NSW T&G advised that over the period 2010–16, there had been

> a few cases where close family members are appointed financial manager and misappropriate the funds of those whom they manage. There have been cases involving misappropriation of a client's funds by a mother, another involving a client's father and others have involved misappropriation by siblings.[18]

10.12 Stakeholders identified that the key issue with private guardians and private financial administrators is a lack of knowledge and understanding of their roles and responsibilities.[19] Abuse of older persons by private guardians or private financial administrators may therefore be inadvertent. For example, private financial administrators may be unaware of the requirement to keep the assets of the person separate from their own. Informal arrangements in place prior to the commencement of the order may persist, which may involve conduct in breach of the appointment. Justice Connect provided the following example:

> Bill, 70, had a stroke and was admitted to hospital for three months. Following admission, his sister was appointed as his administrator. She was initially reluctant to be appointed because she had her own health issues and could not deal with too much paperwork. However, Bill's finances were relatively straightforward: his only income was the age pension and he lived in public housing.
>
> Every pension day he would withdraw enough cash to pay his bills and buy food and whatever was leftover he kept as cash. He had been very successful in managing his money this way, having saved $15,000 over the last 10 years, by virtue of a direct debit into a savings account. His sister managed Bill's finances in the same manner: she paid for expenses in cash and whatever was left over she gave directly to Bill. Even though Bill's sister paid all his expenses while he was in hospital, she did not keep all the receipts ... [m]any months later, Bill's sister was asked to provide a statement to VCAT of how she managed his money. She was having some problems with her own health, and didn't have time to get all the paperwork together, so Bill and his worker tried to provide evidence that she had managed Bill's finances while he was in hospital. This evidence was insufficient.[20]

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evidence that VCAT appointed administrators are guilty of financial abuses of represented persons. State Trustees has no reason to assume that VCAT appointed guardians are not also equally guilty of offending'. It referred to a case review conducted in February 2016. Of the 128 cases of financial abuse reviewed, 49% of abusers had no legal authority to act for the victim; 27% held a power of attorney; and 20% had acted under a financial administration order: State Trustees Victoria, *Submission 138*.

16 NSW Trustee and Guardian, *Submission 120*.

17 See, eg, Seniors Rights Service, *Submission 169*; Australian Association of Social Workers, *Submission 153*; ADA Australia, *Submission 150*; Legal Aid NSW, *Submission 140*; State Trustees Victoria, *Submission 138*; NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.

18 NSW Trustee and Guardian, *Submission 120*.

19 See, eg, UnitingCare Australia, *Submission 162*; Resthaven, *Submission 114*.

20 Justice Connect Seniors Law, *Submission 362*. While this case study was provided to the ALRC as evidence of how onerous oversight mechanisms attached to financial administration can be, the ALRC considers it is a useful example of how a person's pre-existing patterns of behaviour might continue despite the changed nature of their role.

10.13 Bill's sister was found to have managed Bill's affairs appropriately.[21] However, greater vigilance was required in her role as a financial administrator (for example, with respect to keeping receipts). Helping her to understand her responsibilities better may have assisted her in this regard.

10.14 Abuse can also happen where a representative is indifferent or reckless as to their legal responsibilities. There may also be a small cohort of people who deliberately set out to exploit or abuse their powers under guardianship or financial administration.[22]

Undertakings

Recommendation 10–1 Newly-appointed private guardians and private financial administrators should be required to sign an undertaking with respect to their responsibilities and obligations.

10.15 The nature and seriousness of guardian or financial administrator appointments can go unrecognised.[23] For example, the Australian Association of Social Workers noted that 'it is not uncommon to be aware of appointed decision makers taking actions that are not in the interests of the older person'.[24]

10.16 A requirement to sign an undertaking presents an opportunity to reiterate the nature and seriousness of the role. The requirement to sign an undertaking was supported by many stakeholders.[25] It was also a recommendation of the Victorian Law Reform Commission (VLRC) in its report on guardianship (*Guardianship Report*).[26] Such an undertaking would be given to the relevant tribunal by the private administrator or private guardian at the time of appointment, and a record of it could be retained on the tribunal's file.[27] It may also be included in the recommended national register.[28] The ALRC does not recommend that a sanction be imposed for a failure to comply with the undertaking. However, a signed undertaking may also be relied on in any subsequent proceedings concerning failure of a decision maker to comply with their obligations.[29]

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21 Ibid.

22 See examples given by: Seniors Rights Victoria, *Submission 171*; NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.

23 See, eg, UnitingCare Australia, *Submission 162*; Resthaven, *Submission 114*.

24 Australian Association of Social Workers, *Submission 153*.

25 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Seniors Rights Victoria, *Submission 383*; GRC Institute, *Submission 358*; Eastern Community Legal Centre, *Submission 357*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; Office of the Public Advocate (Vic), *Submission 246*; Advocare, *Submission 213*. The Office of the Public Guardian (Qld) emphasised the need to ensure the requirement is accompanied by additional information and education for private guardians and financial administrators.

26 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 296.

27 This approach was adopted in the VLRC *Guardianship Report*: Ibid rec 296, [18.55].

28 Rec 5–3.

29 This approach was adopted in the VLRC *Guardianship Report*: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.56].

Who should sign an undertaking

10.17 In the Discussion Paper, the ALRC proposed that an undertaking should be signed by all tribunal-appointed guardians and financial administrators (including those acting for state bodies of last resort).[30] However, the Office of the Public Advocate (Vic) submitted that this would be quite burdensome for public guardians and professional and public financial administrators, noting that the Public Advocate (Vic) was appointed guardian of last resort for 862 new matters in 2015–16.[31] A review of other trustee and public advocate/guardian bodies provides similar statistics. For example, the NSW T&G was made financial administrator for over 1000 clients in 2015–16.[32] The Public Trustee (WA) took on 684 new appointments.[33] The Office of the Public Advocate (SA) was appointed as guardian of last resort for 250 new matters in 2015–16.[34] The Office of the Public Guardian (Qld) was appointed for 807 matters in the same period.[35]

10.18 In light of this, the ALRC recommends that the requirement to sign an undertaking be limited to newly-appointed private guardians and private financial administrators. During the transitional phase, it may be appropriate to require existing private guardians and private financial administrators to sign an undertaking at the time of reappointment.

Providing information, support and assistance

10.19 Some stakeholders suggested that an undertaking would simply be an additional burden.[36] The ALRC considers that signing an undertaking is a significant act which may have a large impact on a private guardian or private financial administrator's appreciation of their role. To be effective, however, it should be accompanied by education, support and assistance to improve the understanding of guardians and financial administrators of their roles, responsibilities and obligations.

10.20 Education has a two-pronged effect. First, training may help inform those decision makers who are unaware of their obligations.[37] For the small number of people who deliberately set out to exploit or abuse a person, training would reinforce the seriousness of their role and the consequences of any breach.[38]

10.21 In the Discussion Paper the ALRC asked whether additional support and assistance for guardians and private financial administrators should be provided in the form of:

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30 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 6–2, [6.41].
31 Office of the Public Advocate (Vic), *Submission 246*. See also Office of the Public Guardian (Qld), *Submission 384*.
32 NSW Trustee and Guardian, *Annual Report 2016* (2016) 16.
33 Public Trustee (WA), *Annual Report 2015–16* (2016) 14.
34 Office of the Public Advocate (SA), *Annual Report 2015–16* (2016) 21.
35 Office of the Public Guardian (Qld), *Annual Report 2015–16* (2016) 14.
36 See, eg, Office of the Public Advocate (Qld), *Submission 361*; CPA Australia, *Submission 338*; W Bonython and B Arnold, *Submission 241*.
37 Office of the Public Advocate (Qld), *Submission 149*; Advocare Inc (WA), *Submission 86*.
38 Office of the Public Advocate (Qld), *Submission 149*.

(a) compulsory training;

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

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

(d) other ways?[39]

10.22 While stakeholders continued to support training for private guardians and private financial administrators about their roles, obligations and responsibilities,[40] there was strong opposition to compulsory training.[41] Those supporting compulsory training emphasised its importance in ensuring all newly-appointed private guardians and private financial administrators have a greater understanding of their roles and responsibilities.[42] However, compulsory training would place a heavy burden on potential guardians and administrators.[43] Tanya Chapman of Patrick McHugh & Co Solicitors noted that 'the requirement for training [of itself] gives ... the impression that the appointment may be too onerous'.[44]

10.23 There are two main alternative approaches:

- making information, training and support available to guardians and private financial administrators on a voluntary basis;[45] or

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39 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 6–1.

40 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; National LGBTI Health Alliance, *Submission 373*; Justice Connect Seniors Law, *Submission 362*; GRC Institute, *Submission 358*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (SA), *Submission 347*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; AnglicareSA, *Submission 299*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Alzheimer's Australia, *Submission 282*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Legal Aid ACT, *Submission 223*; Seniors Rights Service, *Submission 169*; UnitingCare Australia, *Submission 162*; Townsville Community Legal Service Inc, *Submission 141*; Legal Services Commission SA, *Submission 128*.

41 Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; GRC Institute, *Submission 358*; Law Council of Australia, *Submission 351*; Office of the Public Advocate SA, *Submission 347*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Victoria), *Submission 320*; Anglicare SA, *Submission 299*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Alzheimer's Australia, *Submission 282*; T Chapman, *Submission 268*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Legal Aid ACT, *Submission 223*.

42 See, eg, National LGBTI Health Alliance, *Submission 373*; State Trustees (Vic), *Submission 367*.

43 Stakeholders also recognised this: see, eg, Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; GRC Institute, *Submission 358*; Law Council of Australia, *Submission 351*; Office of the Public Advocate SA, *Submission 347*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Victoria), *Submission 320*; Anglicare SA, *Submission 299*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Alzheimer's Australia, *Submission 282*; T Chapman, *Submission 268*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Legal Aid ACT, *Submission 223*.

44 T Chapman, *Submission 268*.

45 See, eg, Law Society of South Australia, *Submission 381*; Office of the Public Advocate (Qld), *Submission 361*; GRC Institute, *Submission 358*.

- making a guardianship or financial administration order conditional upon the completion of a designated training program.[46]

10.24 The ALRC considers that the provision of information, support and guidance alone may not be sufficient to facilitate increased understanding of a guardian or financial administrator's roles and responsibilities.[47] A 2016 report into decision-making support and guardianship in Queensland found there was 'limited awareness of the guardianship principles and the roles and responsibilities of attorneys, guardians and administrators'.[48] This is despite the availability of online guidance, and access to a helpline for private guardians in Queensland.[49] The Office of the Public Advocate (Vic) supported this view:

> OPA ran the Private Guardian Support Program (PGSP) until 2008, and, since then, has offered support to private guardians through the OPA Advice Service. Through these program areas, OPA has found that few private guardians seek OPA's support or advice. Further, OPA's experiences with providing advice to private guardians suggest that they are largely uninformed about the scope of their role.[50]

10.25 The key question is how to ensure those people who most need support and assistance in fulfilling their roles get access to it. State and territory tribunals may have an important role to play here. Tribunals must be satisfied of the guardian or financial administrator's suitability, competency and compatibility.[51] They are also empowered to make conditional guardianship and financial administration orders.[52] The tribunal's role and powers present an opportunity to assess whether the proposed guardian or financial administrator could better understand their roles and responsibilities.[53] If the

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46 See, eg, Law Council of Australia, *Submission 351*; Institute of Legal Executives (Vic), *Submission 320*; T Chapman, *Submission 268*; Legal Aid NSW, *Submission 352*.

47 This view was shared by a number of stakeholders: Office of the Public Guardian (Qld), *Submission 384*; Legal Aid NSW, *Submission 352*; Institute of Legal Executives (Vic), *Submission 320*; T Chapman, *Submission 268*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Legal Aid ACT, *Submission 223*.

48 Office of the Public Advocate (Qld), *Decision-Making Support and Queensland's Guardianship System* (2016) 9.

49 Office of the Public Guardian (Qld), *Information for Guardians* <www.publicguardian.qld.gov.au/adult-guardian/information-for-guardians>.

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

51 *Guardianship and Management of Property Act 1991* (ACT) ss 10(3), (4)(f); *Guardianship Act 1987* (NSW) ss 17, 25M; *Guardianship of Adults Act 2016* (NT) ss 15(1)(b), (2)(b); *Guardianship and Administration Act 2000* (Qld) s 15; *Guardianship and Administration Act 1993* (SA) s 50(1)(c); *Guardianship and Administration Act 1995* (Tas) ss 21, 54(1)(d)(iv); *Guardianship and Administration Act 1986* (Vic) ss 23, 47; *Guardianship and Administration Act 1990* (WA) ss 44, 68(1)(d), (3)(c).

52 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 56(2); *Civil and Administrative Tribunal Act* (NSW) s 58; *Guardianship Act 1987* (NSW) s 16(1)(d); *Guardianship of Adults Act 2016* (NT) s 11(3); *Guardianship and Administration Act 2000* (Qld) s 12(2); *Guardianship and Administration Act 1993* (SA) ss 29(6), 35(4)(a); *Guardianship and Administration Act 1995* (Tas) ss 20(1), 51(5); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 30(1); *Guardianship and Administration Act 1990* (WA) ss 43(3), 64(3)(a).

53 In most jurisdictions, the competency of a private guardian or private financial administrator is one of a number of factors a tribunal considers in determining whether a person should be appointed as a guardian or financial administrator: *Guardianship and Management of Property Act 1991* (ACT) s 10(4); *Guardianship of Adults Act 2016* (NT) s 15(2); *Guardianship and Administration Act 2000* (Qld) s 15; *Guardianship and Administration Act 1993* (SA) s 50; *Guardianship and Administration Act 1995* (Tas) ss 21, 54; *Guardianship and Administration Act 1986* (Vic) ss 23, 47; *Guardianship and Administration*

tribunal considers that a guardian or financial administrator could benefit from additional education and training to enhance their understanding of their roles and responsibilities, they have the power to make a guardianship or financial administration order conditional on the successful completion of a designated training program.[54] This approach was adopted in the VLRC *Guardianship Report*.[55]

Exercise of tribunal discretion

10.26 Concerns were raised that a requirement to complete training might impede the timely appointment of guardians and financial administrators, especially as applications can often be urgent.[56] The Office of the Public Guardian (Qld) noted, for example, that

> the vast majority of guardianship appointments are driven by the need for decisions to be made regarding permanent residential aged care. These appointments are often instigated by hospitals where there are concerns that the adult is unable to be returned from the hospital to live independently in their own home.[57]

10.27 However, it is not necessarily an impediment to a tribunal exercising its discretion to require that a guardian or financial administrator undergo training. For example, as suggested by Seniors Legal and Support Service Hervey Bay, a tribunal might make an appointment conditional upon the training being completed within a set time period.[58]

10.28 One suggestion was that tribunals might choose to adopt a standard practice or presumption that, in the absence of compelling reasons why it should not do so, the tribunal would require all newly-appointed private guardians and private financial administrators to undertake training.[59] A standard practice or presumption would have the advantage of ensuring greater numbers of guardians and private financial administrators are well informed of their roles and responsibilities. It may also reduce the likelihood of additional delays in the tribunal process by circumventing the need for additional specific questioning about a guardian or financial administrator's understanding of their roles and responsibilities. However, concerns raised about the deterrent effect of compulsory training on those who may otherwise have been willing

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Act 1990 (WA) ss 44, 68.This provides considerable scope for a tribunal to make an order conditional on the completion of additional training. In NSW, a person 'shall not be appointed as the guardian ... unless the Tribunal is satisfied that the proposed guardian is both willing and *able* to exercise the functions conferred or imposed by the proposed guardianship order (emphasis added): *Guardianship Act 1987* (NSW) s 17(1)(c). Thus, in NSW, in the absence of legislative amendment, the tribunal may only exercise its discretion to improve the level of understanding of an otherwise competent private guardian.

54 To ensure compliance, the order could, for example, require certification that the required training has been completed. This could be lodged with the tribunal, or another body such as the public guardian or public trustee.

55 The VLRC supported this approach: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 293.

56 See, eg, Law Society of South Australia, *Submission 381*; Office of the Public Guardian (Qld), *Submission 173*.

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

58 Seniors Legal and Support Service Hervey Bay, *Submission 310*.

59 The Office of Public Advocate (Victoria) supported this approach: Office of the Public Advocate (Vic), *Submission 246*.

to take on the roles also apply to this approach. This approach may also require legislative amendment.

10.29 A preferable approach might be for the tribunal to make an order for training only when it is satisfied that additional training is required or would be beneficial. If this approach is adopted, all private guardians and private financial administrators should be provided with guidance material at the time of appointment. Guides such as Victoria's 'Good Guardianship' guide and the 'Administration Guide' are examples of material that could be provided at the time of appointment.[60] There is also scope to provide information and guidance to guardians and private financial administrators at the point of registration.[61]

10.30 The ALRC commends the work of state and territory bodies, including tribunals, trustee bodies and offices of the public advocate and guardian in making information, training and support available to private guardians and private financial administrators.[62] The availability of materials and support on such matters is an important and continuing source of support and assistance for private guardians and private financial administrators as they fulfil their roles.

10.31 Stakeholders highlighted the importance of ensuring training was available through both online and face-to-face modes of delivery, particularly for guardians and private financial administrators living in rural and remote regions.[63] There was also an emphasis on the need for the available material to be developed in a culturally sensitive manner and available in a range of community languages.[64]

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60 Office of the Public Advocate (Vic), *Administration Guide: A Guide for People Appointed as Administrators under the* Guardianship and Administration Act 1986 (2011); Office of the Public Advocate (Vic), *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act* (2011).

61 Rec 5–3.

62 See, eg, Public Trustee (WA), *Private Administrator's Guide*; Office of the Public Advocate (Vic), above n 60; Office of the Public Guardian (NSW), *Now You're the Guardian* (2009); NSW Trustee and Guardian, *Fact Sheets* <www.tag.nsw.gov.au/fact-sheets---private-managers.html>.Office of the Public Guardian (Qld), *Submission 384*; Holman Webb Lawyers, *Submission 297*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*; UnitingCare Australia, *Submission 216*. In NSW, the Private Guardian Support Unit provides an information line service; In Victoria, the Victorian Civil and Administrative Tribunal provides a phone line for administrators seeking advice and the Office of the Public Advocate (Victoria) has an advice line. In Queensland, the Office of the Public Guardian runs the Guardianship Information Service.

63 Office of the Public Guardian (Qld), *Submission 384*; State Trustees (Vic), *Submission 367*; Holman Webb Lawyers, *Submission 297*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*; Office of the Public Advocate (Vic), *Submission 246*.

64 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Holman Webb Lawyers, *Submission 297*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*; UnitingCare Australia, *Submission 216*.

Maximising participation

Recommendation 10–2 The Australian Guardianship and Administration Council should develop best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible.

10.32 The principle, that the 'will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives',[65] is one of a set of four National Decision-Making Principles formulated by the ALRC in its report *Equality, Capacity and Disability in Commonwealth Laws* to 'guide reform of Commonwealth laws and legal frameworks and the review of state and territory laws'.[66] This principle is of particular importance in the appointment of a guardian or financial administrator. It is reflected in guardianship legislation in all states and territories, which requires that the tribunal must, prior to making an order, consider the views of the person who is the subject of a guardianship or financial administration application (the represented person).[67]

10.33 Currently, all tribunals encourage attendance of the represented person at the hearing, where attendance is possible.[68] Tribunals will also notify the represented person when an application is made for guardianship or financial administration concerning them,[69] generally, by providing copies of the application to the person's address. Some states will provide persons who are the subject of an urgent hearing with a verbal notice of the hearing.[70]

10.34 The ALRC expressed a preliminary view in the Discussion Paper that a best practice model which reflects the principle of maximum participation should require the tribunal, where possible, to speak with the represented person, regardless of

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65 *Equality, Capacity and Disability in Commonwealth Laws*, above n 8, principle 3. See also ch 2 of this Report.

66 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [3.1]. See ch 2 for a discussion of the interaction between this Inquiry and the ALRC's previous inquiry into *Equality, Capacity and Disability in Commonwealth Laws*.

67 See, eg, *IF v IG* [2004] NSWADTAP 3 (22 January 2004) [26]; *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a); *Guardianship Act 1987* (NSW) ss 4(d), 14(2)(a)(i); *Guardianship of Adults Act 2016* (NT) s 4(3)(a); *Guardianship and Administration Act 2000* (Qld) s 11, sch 1 cl 7(1); *Guardianship and Administration Act 1993* (SA) s 5(b); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(c), 22(2)(ab); *Guardianship and Administration Act 1990* (WA) s 4(7).

68 See, eg, eCourts portal Western Australia, *Guardianship and Administration* <https://ecourts.justice.wa.gov.au/eCourtsPortal/>.

69 See, eg, *Guardianship and Management of Property Act 1991* (ACT) s 72A(2)(a); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 54; *Guardianship and Administration Act 2000* (Qld) s 103; *Guardianship and Administration Act 1990* (WA) s 41.

70 See, eg, NSW Civil and Administrative Tribunal, Guardianship Division, *What to Expect at a Hearing* <www.ncat.nsw.gov.au>.

attendance at the hearing, before the tribunal appoints a guardian or financial administrator.[71]

10.35 Stakeholders were strongly supportive of this approach.[72] However, stakeholders identified other elements that should inform best practice models in maximising participation of the represented person. Reflecting these broader considerations, this recommendation is focused on the principle of maximum participation.

Best practice model

10.36 The ALRC considers that the Australian Guardianship and Administration Council is well placed to develop a best practice model to facilitate maximum participation of the represented person in the process of determining whether to appoint a guardian or financial administrator. The Council is comprised of state and territory tribunals, public advocates, guardians, and trustees. Its functions include 'developing consistency and uniformity, as far as practicable in respect of significant issues and practices' and 'encouraging dialogue at a national level, and across relevant jurisdictions'.[73]

10.37 Key elements of such a model could include:

- case management and support during the pre-hearing stage;
- composition of the tribunal for the purposes of a particular proceeding;
- ensuring an oral hearing is held for all substantive applications; and
- alternative methods for participation.

10.38 These approaches support and facilitate the exercise of a represented person's right to access to justice under art 13 of the *Convention on the Rights of People with Disabilities*, which provides that access to justice should be provided 'including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants'.[74]

Pre-hearing support

10.39 As discussed above, the number of applications for guardianship and administration is increasing. This places increasing time pressures on tribunal members in hearing an application for guardianship or financial administration. A greater role for pre-hearing case management and support, therefore, provides an opportunity to maximise participation by the represented person.[75]

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71 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) [6.51].

72 National LGBTI Health Alliance, *Submission 373*; State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*.

73 Australian Guardianship and Administration Council, *About Us* <www.agac.org.au/about-us>.

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

75 A similar conclusion was reached in the VLRC *Guardianship Report*: 'VCAT's role in the preparation of Guardianship list matters should be expanded to ensure that in all cases ... the subject of the application is

10.40 For example, in the NCAT, a tribunal officer will liaise with applicants and the represented person. The officer explains tribunal processes, and obtains the views of the represented person on the application. The tribunal officer also assists in identifying how the represented person can best participate in the hearing, ensures that they receive a copy of all documents before the tribunal, and prepares a hearing report for the use of the tribunal and all the parties to the application.[76]

10.41 Pre-hearing case management also presents an opportunity to address situations such as the example provided by ADA Australia where an applicant was required to inform the represented person of the application, but the notice of the hearing was never received by the represented person, and an appointment was made without the represented person's involvement.[77]

10.42 In considering how case management and pre-hearing support might be provided, stakeholders noted the importance of ensuring that the represented person is able to access support such as a 'skilled communication partner to provide communication support and accessible information'.[78]

Composition of the tribunal for the purposes of a particular proceeding

10.43 An advantage of multi-member panels, comprised of members with differing backgrounds and expertise, is that the evidence suggests that members with specific experience with people with disabilities or cognitive impairments may be able to engage better with the represented person.

10.44 Except in NSW,[79] the President of each of the state and territory tribunals has the power to determine, in relation to a particular matter or class of matters, the number of members that might constitute the tribunal.[80] However, it appears that only NSW and Tasmania convene multi-member panels regularly.[81] In NSW, the legislation mandates that all hearings relating to applications seeking the appointment of a guardian and/or financial administrator be heard by a panel of three members: a lawyer, a professional member (for example, medical practitioner, psychologist or social worker with experience in disability), and a community member who has professional or personal experience with people with disabilities.[82] The ALRC acknowledges that convening a multi-member panel for all initial applications requires

able to participate in the hearing process to the extent that they are able and wish to do so: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 348.

76 NSW Civil and Administrative Tribunal, *Application Process* <www.ncat.nsw.gov.au>.

77 See, eg, ADA Australia, *Submission 283*; ADA Australia, *Submission 150*.

78 Speech Pathology Australia, *Submission 309*.

79 *Civil and Administrative Tribunal Act* (NSW) ss 17(3), 27, sch 6 cl 4(1).

80 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 89; *Civil and Administrative Tribunal Act* (NSW) s 27(2); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 22; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 165; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 23; *Guardianship and Administration Act 1995* (Tas) s 8A; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 64; *State Administrative Tribunal Act 2004* (WA) s 11.

81 In Tasmania, '[s]ingle member boards ... are normally reserved for urgent applications and less complex matters': Guardianship and Administration Board (Tas), *Processes* <www.guardianship.tas.gov.au/process/processes>.

82 *Civil and Administrative Tribunal Act* (NSW) ss 17(3), 27, sch 6 cl 4(1).

a significant investment of resources. An alternative approach might be, for instance, to limit the use of such panels to complex matters.[83]

Oral hearings

10.45 Attendance at an oral hearing is an important mechanism to maximise the participation of the represented person. In most states and territories, the tribunal retains a discretion to determine a matter, including a matter relating to the appointment of a guardian or financial administrator, without a hearing.[84] While fact sheets and similar guidance generally refer to a matter going to hearing, AGAC should, in the proposed guidelines, specifically address the need to hold an oral hearing for the exercise of all substantive functions relating to guardianship or financial administration. In NSW for example, this requirement is contained in legislation.[85]

Methods of participation

10.46 Stakeholders highlighted that maximising participation of the represented person hinges upon providing people who are unable to attend a hearing in person, with other means to participate.[86] This could include, for example, access to video conferencing or telephone participation, or conducting hearings in alternative venues such as aged care facilities and hospitals.[87] VCAT, for example, may conduct hearings via videoconference and teleconference, and in many locations, including hospitals.[88]

Redress

10.47 In Chapter 5, the ALRC recommends the vesting of tribunals with expanded compensatory powers for the abuse or misuse of a power, or the failure to exercise a duty, by substitute decision makers including guardians and financial administrators. This aims to deter people from acting outside of their power, while also providing a

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83 This is the approach in Tasmania: Guardianship and Administration Board (Tas), above n 81. The VLRC *Guardianship Report* adopted this approach, and suggested that 'VCAT may wish to consider allocating a regular day, perhaps once a month, for multi-member hearings and listing some of the more complex matters for that day: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 380, [21.151].

84 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 54; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 69(2); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 32(2); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 67(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 100(2); *State Administrative Tribunal Act 2004* (WA) s 60. The legislation in Tasmania is silent about whether a discretion exists to conduct proceedings on the documents. In NSW, the tribunal is required to hold a hearing in relation to the exercise of its substantive functions relating to guardianship and financial administration on the documents.

85 *Civil and Administrative Tribunal Act* (NSW) sch 6 cl 6(1).

86 Seniors Rights Victoria, *Submission 383*; State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Institute of Legal Executives (Vic), *Submission 320*; ADA Australia, *Submission 283*; Office of the Public Advocate (Vic), *Submission 246*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.

87 Seniors Rights Victoria, *Submission 383*; State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Institute of Legal Executives (Vic), *Submission 320*; ADA Australia, *Submission 283*; Office of the Public Advocate (Vic), *Submission 246*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.

88 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 7—Hearing Room Technology* (2016).

more accessible avenue for redress when that occurs. State Trustees Victoria, however, observed:

> One of the more distressing features of State Trustees' investigations into allegations of financial abuse is that often, by the time the issue has been identified, an application made to VCAT, and an administrator appointed, the offender has squandered what was misappropriated and there are no assets to recover.[89]

10.48 As a protection against this, some states and territories permit the public trustee to require that security be lodged with state trustees.[90] NSW introduced a surety bond scheme in March 2015. In the Discussion Paper, the ALRC asked whether 'the [mandatory] surety bond scheme of the NSW T&G should be adopted nationally, to address situations where compensation orders cannot restore the person to their original state because misused funds have been totally depleted'.[91]

10.49 Since the release of the Discussion Paper, the NSW Government has announced an independent review of this scheme due to the generally negative reception of it by the public.[92] Additionally, while the ALRC only received a few submissions on this issue, the majority of those were opposed to a mandatory scheme.[93] The Law Society of South Australia submitted, for example, that surety bonds were a failure in the context of intestate estates because insurance companies would not provide them.[94] The Law Council of Australia also raised questions about the commercial availability of surety bonds.[95] The Office of the Public Advocate (Vic) noted:

> data presented by State Trustees (Vic) and the NSW Trustee and Guardian suggests around 9 to 20 per cent of identified financial abuse is perpetrated by a financial administrator. It is important to note that the data presented involves just 30 or so cases across both states ... this is far less than one per cent of the thousands of administration orders that are in force in a given year ... OPA questions whether the potential benefits of surety bonds would be worth the significant costs imposed on thousands of people each year.

10.50 Further, stakeholders submitted that a mandatory requirement would capture all private financial administrators, regardless of how well the administrator is performing, and noted the deterrent effect on people willing to take on this role.[96]

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89 State Trustees Victoria, *Submission 138*.

90 See, eg, *NSW Trustee and Guardian Act 2009* (NSW) ss 64, 68; *Guardianship and Administration Act 2000* (Qld) s 19.

91 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 6–2, [6.44].

92 NSW Trustee and Guardian, *Surety Bond Scheme* <www.tag.nsw.gov.au/surety-bond-scheme.html>.

93 Law Society of South Australia, *Submission 381*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; Public Trustee of Queensland, *Submission 249*; W Bonython and B Arnold, *Submission 241*; Advocare, *Submission 213*. Only State Trustees (Victoria) were in favour: State Trustees (Vic), *Submission 367*.

94 Law Society of South Australia, *Submission 381*.

95 Law Council of Australia, *Submission 351*.

96 Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; W Bonython and B Arnold, *Submission 241*. Recent media articles provide an illustrative example. 'Sofie Korac, a financial planner in Gordon, has managed her relative's estate for 24 years, regularly providing documents to TAG to ensure every cent is accounted for ... [she told reporters that she was required to provide a surety bond despite her record because she] could get dementia or

10.51 In light of the ongoing review of the mandatory surety bond scheme and the concerns raised by stakeholders, the ALRC does not recommend that a mandatory surety bond scheme be adopted at this time. The Public Trustee (Qld) suggested the adoption of a statutory insurance scheme, as part of the establishment of a national register, may be an alternative approach.[97] Consideration of this approach could occur as part of a broader consideration by state and territory governments of the ALRC's recommendations on the establishment of a national register.[98]

develop a gambling addiction': Esther Han, 'NSW Trustee and Guardian Hits Hurdle in Its Bid to Force Private Managers to Buy Surety Bonds' *Sydney Morning Herald*, 21 April 2017.

97 Public Trustee of Queensland, *Submission 249*.

98 Rec 5–3.

11. Health and National Disability Insurance Scheme

Contents

Summary

11.1 This chapter considers two discrete issues: the role of health professionals in identifying and responding to elder abuse; and the potential interaction between elder abuse and the National Disability Insurance Scheme (NDIS).

11.2 Health professionals play an important role in identifying and responding to elder abuse. As frontline service providers, they have regular contact with older people. However, health professionals may often only have a small window of opportunity to assist. This may be due to an older person's reluctance to discuss the abuse or neglect they are suffering, or due to limited opportunities to seek assistance. It is therefore important that health professionals are able to take advantage of any opportunity to assist, for example by relying on multidisciplinary approaches and integrated models of care to provide coordinated support and assistance for an older person suffering abuse or neglect. Health-justice partnerships in particular may have great potential in responding to elder abuse.

11.3 There are barriers that may limit a health professional's ability to assist in identifying and responding to elder abuse. These include difficulty detecting elder abuse, limited knowledge of and access to appropriate referral pathways, and concerns that responding to elder abuse might result in a breach of privacy laws. These barriers may be addressed in a number of ways, including, for example, by:

- providing training that focuses on issues such as better recognition of elder abuse and the interaction between the role of health professionals and privacy laws;
- developing improved referral pathways; and
- adopting multidisciplinary responses to elder abuse.

11.4 While the ALRC does not make specific recommendations in this chapter, the discussion that follows should inform the development of initiatives relating to training and referral pathways under the National Plan as they apply to health professionals.

11.5 As the NDIS continues to roll out, concerns about abuse or substandard care under the NDIS, as well as the potential for quality and safeguarding mechanisms to assist in combating elder abuse, may increase. However, the ALRC considers that it is too early to determine whether the scheme is an avenue for elder abuse or test whether there are effective safeguards against elder abuse in place. Therefore, the ALRC does not make any recommendations in relation the NDIS at this time.

Health professionals

11.6 Since most elderly people trust them, medical practitioners, nurses, pharmacists and other health professionals are often in an ideal position to identify elder abuse.[1] Such professionals are also well placed to identify risks and signs of abuse as part of their clinical assessment.[2] In 2014–15, people aged between 65 and 74 years accounted for 28.8 million unreferred GP visits. People aged 85 years and over accounted for 6.2 million visits.[3] In a joint submission, cohealth and Justice Connect Seniors Law stated that, 'in relation to any legal problem, not just elder abuse, nearly 30% of people will initially seek the advice of a doctor or another trusted health professional or welfare adviser'.[4]

11.7 However, stakeholders identified the following issues as key factors which may affect a health professional's capacity to recognise and respond to elder abuse:

- difficulties detecting elder abuse, particularly where the signs are subtle;
- limited knowledge of, and access to, referral pathways and available services; and
- concerns that disclosing information about elder abuse to other service providers, police or a government agency might result in a contravention of privacy laws.[5]

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1 A Almogue et al, 'Attitudes and Knowledge of Medical and Nursing Staff toward Elder Abuse' (2010) 51 *Archives of Gerontology and Geriatrics* 86, 86.

2 Australian Medical Association, *AMA Position Statement on Care of Older People 1998—amended 2000 and 2011* (2011) [28]. See, eg, cohealth and Justice Connect Seniors Law, *Submission 179*.

3 Australian Institute of Health and Welfare (Cth), 'Older Australia at a Glance' (2016).

4 cohealth and Justice Connect Seniors Law, *Submission 179*.

5 See, eg, MIGA, *Submission 258*; cohealth and Justice Connect Seniors Law, *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Australian Nursing & Midwifery Federation, *Submission 163*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; MIGA, *Submission 119*. cohealth and Justice Connect Seniors Law also recognised that language barriers, and other factors such as increased isolation and limited engagement with mainstream services, make engagement with older people from culturally and linguistically diverse backgrounds more complex. It recommended greater coordination and integration of community workers from culturally and linguistically diverse communities in the delivery of health services: cohealth and Justice Connect Seniors Law, *Submission 179*. Such initiatives could be coordinated through the National Plan discussed in ch 3.

Training

11.8 Many stakeholders emphasised the need for additional training to assist health professionals better recognise that an older patient might be experiencing, or at risk of, elder abuse, and provide an appropriate response.[6] The ALRC agrees, and considers that additional training for health professionals should be an important initiative under the proposed National Plan.[7] Such training could build on existing training, and be focused on providing health professionals with the tools to identify elder abuse, and information on appropriate referral pathways. It might address issues such as ensuring older people from culturally and linguistically diverse backgrounds are provided 'appropriate language support to facilitate accurate communication', and raise awareness among health professionals about the potential concerns relating to the accuracy of the interpreting, confidentiality and potential conflicts of interest arising from the use of family and friends as interpreters.[8]

11.9 Existing training materials for general practitioners include specific guidance on elder abuse in the Clinical Guidelines published by the Royal Australasian College of General Practitioners (RACGP). This sets out risk factors, and includes a discussion of possible signs and symptoms of elder abuse, guidance on management, and a case study.[9] The RACGP has also made available a webinar on elder abuse as well as video case studies to assist GPs.[10]

11.10 The family violence GP toolkit prepared by Women's Legal Service NSW is an illustrative example of how information can be made readily available to health professionals. The toolkit is short, succinct and easy to understand. It discusses a range of matters, including how to discuss the issue with a patient, safety planning, and referrals. Further, specific guidance is provided about the interaction between family violence provisions and immigration laws to allay fears of 'partner visa' applicants

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6 See, eg, Seniors Rights Victoria, *Submission 383*; St Vincent's Health Australia, *Submission 345*; cohealth and Justice Connect Seniors Law, *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Australian Nursing & Midwifery Federation, *Submission 163*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; Capacity Australia, *Submission 134*; S Kurrle, *Submission 121*; MIGA, *Submission 119*; Leading Age Services Australia, *Submission 104*; Aged and Community Services Australia, *Submission 102*; H Vidler, *Submission 12*.

7 The NSW Legislative Council also recognised the importance of additional training for health professionals, and recommended that the NSW Department of Family and Community Services and Ministry of Health 'develop and fund a comprehensive plan addressing the training needs of service providers, to enable better identification of and responses to abuse': Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 5. See ch 3 of this Report for a discussion of the need for training to assist frontline staff and professionals in recognising and responding to elder abuse.

8 Federation of Ethnic Communities' Councils of Australia, *Submission 89*.

9 Royal Australasian College of General Practitioners, 'Clinical Guidelines—Abuse and Violence: Working with Our Patients in General Practice' (February 2014) 10.1.

10 Royal Australasian College of General Practitioners, *Elder Abuse—Recognise, Respond and Explore Risk* <www.racgp.org.au/education/courses/elder-abuse-webinar/>; Royal Australasian College of General Practitioners, *Elder Abuse* <www.racgp.org.au/education/courses/elder-abuse/>.

from culturally and linguistically diverse backgrounds. It is available both in hard copy and as a downloadable document.[11]

Referral pathways and integrated care models

11.11 Stakeholders raised the need for appropriate referral pathways and better information sharing.[12] The Australian Medical Association, in a submission to the NSW Legislative Council's inquiry into Elder Abuse (NSW Elder Abuse Inquiry), raised a related issue: medical practitioners need to spend 'significant non face-to-face time' to 'coordinate an appropriate continuum of referrals and services for patients experiencing abuse'.[13] The ALRC supports the call for better information sharing and clearer referral pathways to assist health professionals. This may be achieved in a number of ways.

11.12 NSW has developed 'a streamlined and integrated approach to victim safety assessment, referrals and service coordination of domestic violence' called 'It Stops Here: Safer Pathway' (Safer Pathway).[14] It is an example of how tools might be developed to assist health professionals and other service providers to more easily recognise and respond to elder abuse. Safer Pathway seeks to streamline referral pathways to secure the safety of victims of domestic and family violence. Once fully implemented:

- service providers, including health professionals, will have access to an assessment tool to guide the identification of risks of intimate partner violence;
- the health professional can make a referral via the electronic Central Referral Point if a risk is identified;[15] and
- the electronic system allocates a case to a Local Coordination Point. At the Local Coordination Point, staff undertake a comprehensive threat assessment and coordinate access to relevant local services:
    - if a person is considered to be at serious threat, a 'Safety Action Meeting' will be convened that brings together government and non-government agencies to coordinate an integrated response;
    - if there is no serious threat, the victim is referred to domestic and family violence specialists and other services for ongoing support and assistance.[16]

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11 Women's Legal Service NSW, 'A Toolkit for GPs in NSW' (2013).

12 See, eg, Seniors Rights Victoria, *Submission 383*; St Vincent's Health Australia, *Submission 345*; Justice Connect, *Submission 182*; cohealth and Justice Connect Seniors Law, *Submission 179*; Caxton Legal Centre, *Submission 174*; Seniors Rights Service, *Submission 169*.

13 Australian Medical Association, Submission No 73 to General Purpose Standing Committee No 2, NSW Legislative Council, *Inquiry into Elder Abuse* (November 2015).

14 Ministry of Health (NSW) and Women NSW, *Safer Pathway* <http://domesticviolence.nsw.gov.au/__data/assets/file/0019/301555/it-stops-here-safer-pathway-factsheet.pdf>.

15 The Central Referral Point is an electronic referral mechanism used to coordinate access to other services.

16 NSW Government, *Safer Pathway Service Delivery Map*.

11.13 Stakeholders also emphasised the potential for multidisciplinary approaches to improve referrals between health professionals and other service providers and better respond to elder abuse.[17] For example, many stakeholders were supportive of the development of health-justice partnerships and other integrated care models to implement a multidisciplinary approach.[18] Health-justice partnerships rely on utilising pro bono legal resources to embed legal services in a health service. Key elements are:

- locating a lawyer at a health service or hospital;
- integrating the lawyer as part of the health service;
- secondary consultations with the lawyers; and
- training health professionals on legal issues.[19]

11.14 Evidence suggests that older people are reluctant to come forward about elder abuse for a number of reasons, including shame and fear.[20] An older person may be reluctant to repeat their concerns numerous times to different professionals. They may also be unable to seek legal assistance discreetly. These concerns may be magnified in smaller rural and regional communities, where an older person may face greater fears of discovery.

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17 See, eg, National Older Persons Legal Services Network, *Submission 180*; cohealth and Justice Connect Seniors Law, *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Carers Australia, *Submission 157*; ADA Australia, *Submission 150*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; S Goegan, *Submission 115*; Leading Age Services Australia, *Submission 104*; Office of the Public Advocate (Vic), *Submission 95*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

18 See, eg, National Legal Aid, *Submission 192*; Commissioner for Senior Victorians, *Submission 187*; Hume Riverina CLS, *Submission 186*; Justice Connect, *Submission 182*; National Older Persons Legal Services Network, *Submission 180*; cohealth and Justice Connect Seniors Law, *Submission 179*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; Australian Nursing & Midwifery Federation, *Submission 163*; Carers Australia, *Submission 157*; National Seniors Australia, *Submission 154*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; Legal Aid NSW, *Submission 140*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Legal Services Commission SA, *Submission 128*; S Kurrle, *Submission 121*; North Australian Aboriginal Legal Service, *Submission 116*; S Goegan, *Submission 115*; Macarthur Legal Centre, *Submission 110*; Aged and Community Services Australia, *Submission 102*; Office of the Public Advocate (Vic), *Submission 95*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

19 cohealth and Justice Connect Seniors Law, *Submission 179*.

20 See, eg, FMC Mediation and Counselling, *Submission 191*; WA Police, *Submission 190*; Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; United Voice, *Submission 145*; Townsville Community Legal Service Inc, *Submission 141*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; University of Melbourne and Multicultural Centre for Women's Health, *Submission 129*; National LGBTI Health Alliance, *Submission 116*; S Goegan, *Submission 115*; Protecting Seniors Wealth, *Submission 111*; Aged and Community Services Australia, *Submission 102*; Australian Research Network on Law and Ageing, *Submission 90*; Alzheimer's Australia, *Submission 80*; E Cotterell, *Submission 77*; National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*; Law Council of Australia, *Submission 61*; Cochrane Public Health Group, *Submission 54*; Ethnic Communities' Council of Victoria Inc, *Submission 52*; University of Newcastle Legal Centre, *Submission 44*.

11.15 Professor Lynette Joubert and Sonia Posenelli suggest that 'the "window of opportunity" for responding to aged abuse in a health service is brief'.[21] Health-justice partnerships have great potential to use this window effectively because they can build on the trust developed between health professionals and older patients, and can provide legal advice and assistance discreetly and conveniently. In a health-justice partnership, the health professional can confer with a lawyer to determine appropriate pathways for referrals.[22] With the consent of their patient, the health professional could also brief a lawyer of the older person's concerns and organise for a lawyer to discreetly speak with the older person either as part of a medical appointment, or in a separate consultation.[23] An integrated care model which incorporates legal practitioners into a health practice may reduce the number of separate appointments and interactions required to seek assistance.

11.16 The case study of Ms Li, provided by cohealth and Justice Connect Seniors Law, is illustrative. Ms Li was receiving physiotherapy treatment following a stroke, when she raised concerns about pressure from her husband to access her superannuation funds and savings to make mortgage payments on a house bought in his name. Her husband was very controlling, did not allow her to go out on her own, and managed the family finances. He had been physically and verbally abusive. Due to her complex health needs, there was limited scope for Ms Li to live independently of her husband. The police had taken out an intervention order which permitted him to remain in the house, but prohibited family violence. Ms Li wished to prepare a will and protect her interest in the family home. She was concerned that her husband may become violent if he heard of her plans. Ms Li's care coordinator organised, with Ms Li's consent, for a health-justice partnership lawyer to attend her next physiotherapy appointment, who advised Ms Li on preparing a will and checked on Mr Li's ongoing compliance with the intervention order. The lawyer arranged for specialist pro bono lawyers to prepare a will and attend the next physiotherapy appointment, where Ms Li signed the will and binding death nomination form for her superannuation. The pro bono lawyers agreed to store the will at their offices so Ms Li's husband would not find it.[24]

11.17 Surveys of medico-legal partnerships in the United States of America have shown that they provide financial benefits to clients, improve their health and well-being, and increase the knowledge and confidence of health professionals.[25] In Australia, an evaluation of a health-justice partnership established in Victoria between

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21 Lynette Joubert and Sonia Posenelli, above n 20, 712.

22 MIGA cautioned that a health-justice partnership must develop appropriate protocols and guidance about the role of the lawyer in the partnership, and explore how the partnership interacts with a health professional's duties: MIGA, *Submission 258*.

23 However, MIGA noted that some patients may be reticent to engage with a health service featuring on-site lawyers: Ibid.

24 cohealth and Justice Connect Seniors Law, *Submission 179*.

25 National Center for Medical-Legal Partnership, 'Making the Case for MLPs: A Review of the Evidence' (February 2013) 3.

Inner Melbourne Community Legal and the Royal Women's Hospital Victoria aimed at addressing family violence made similar findings.[26]

11.18 A number of other health-justice partnerships focused on assisting older people are being trialled, or under development.[27] These partnerships appear promising, and states and territories could potentially consider supporting their expansion.

Privacy and confidentiality

11.19 A common theme in submissions was that health professionals may be reluctant to report elder abuse or discuss it with other professionals because of concerns about confidentiality and compliance with privacy laws.[28] Some stakeholders submitted that privacy laws may need to be amended to clarify that health professionals can report instances of elder abuse to the police.[29] Stakeholders also submitted that reports or referrals to other public authorities with an investigative role should be exempt from privacy laws.[30]

11.20 However, as the Office of the Australian Information Commissioner noted, while privacy laws are 'often named as a barrier to sharing or accessing personal information', upon closer examination, this is usually not the case.[31] The privacy and confidentiality of health information is governed by Commonwealth, state and territory legislation and the equitable duty of confidence. Exemptions allowing the use and disclosure of health information under state and territory legislation are similar to the exemptions set out in the Australian Privacy Principles.[32]

11.21 Although it is generally prohibited to disclose a person's sensitive personal information without their consent, there are exceptions where, among other things:

- the person would 'reasonably expect' the disclosure, and the disclosure is 'directly related' to the primary purpose for which the information was collected (secondary purpose exception);[33]
- the disclosure is authorised by or under an Australian law or a court or tribunal order (authorised by law exception);[34]

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26 University of Melbourne, 'Acting on the Warning Signs Evaluation: Final Report' (August 2014) 1–5.

27 Examples include partnerships between Justice Connect and cohealth, Senior Rights Victoria and Footscray Hospital, Justice Connect and St Vincent's Hospital, Townsville Community Legal Services and Townsville Hospital, and Justice Connect and Caulfield Hospital.

28 ` MIGA, *Submission 258*; Seniors Rights Service, *Submission 169*; cohealth and Justice Connect Seniors Law, *Submission 179*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; Legal Aid NSW, *Submission 140*; Older Women's Network NSW, *Submission 136*.

29 See, eg, Seniors Rights Service, *Submission 169*; Australian College of Nursing, *Submission 147*.

30 See, eg, Seniors Rights Service, *Submission 169*; Australian College of Nursing, *Submission 147*; Legal Aid NSW, *Submission 140*; Older Women's Network NSW, *Submission 136*.

31 Office of the Australian Information Commissioner, *Submission 132*.

32 This chapter discusses the provisions in the Australian Privacy Principles, but broadly similar exemptions are also available under relevant state and territory privacy laws.

33 *Privacy Act 1988* (Cth) sch 1 cl 6.2(a).

34 Ibid sch 1 cl 6.2(b).

- the disclosure is required to prevent a serious (or in some jurisdictions 'serious and imminent') threat to the life, health or safety of a person, and it is unreasonable or impracticable to obtain the patient's consent (serious threat exception);[35] or
- the disclosure is 'reasonably necessary for an activity related to law enforcement (law enforcement exception).[36]

11.22 Under the secondary purpose exception, a health professional may, in some circumstances, be able to confer with and discuss an older person's situation with other service providers to assist an older person to address elder abuse. To rely on this exception, the health professional will need to establish clear expectations with the patient, so the patient understands how their information might be used and to whom it might be disclosed.[37] An open discussion with the older patient about a care plan can establish reasonable expectations about what services may be included as part of a multidisciplinary response to elder abuse.

11.23 A health professional may be able to report elder abuse to police or a public authority under a number of existing exemptions to Commonwealth, state and territory privacy laws. Where a common law duty of care owed by an organisation would require that a health professional report elder abuse, the disclosure would be exempt under the 'authorised by law' exception, as the definition of 'Australian law' includes a rule of common law or equity.[38]

11.24 Under the serious threat exception, if there is a threat to the life, physical or mental health or safety of an older person, and it is potentially life threatening, or could cause other serious injury or illness, a health professional may, without consent, disclose information to relevant authorities in circumstances where it would be unreasonable or impracticable to get the older person's consent prior to disclosure.

11.25 Under the 'law enforcement exception', a health professional may report elder abuse to the police, but not to other state and territory bodies such as the public advocate or public guardian. An enforcement body is relevantly defined to mean a state or territory police force or other state or territory body with the power to conduct criminal investigations or inquiries, or impose penalties or sanctions.[39] An enforcement related activity is defined to include the prevention, detection and investigation of criminal offences.[40]

11.26 The ALRC considers that existing exemptions in privacy laws, the proposed establishment of protocols to guide health professionals on when they should refer abuse to adult safeguarding agencies,[41] and the recommended immunity for reports to

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35 Ibid s 16A, sch 1 cl 6.2(c).
36 Ibid sch 1 cl 6.2(e).
37 Office of the Australian Information Commissioner (Cth), *Draft Business Resource: Using and Disclosing Patients' Health Information* (2015).
38 *Privacy Act 1988* (Cth) s 6; Office of the Australian Information Commissioner, *Submission 132*.
39 *Australian Privacy Principles Guidelines* (March 2015) B.70.
40 Ibid B.71.
41 Rec 14–8.

such agencies,[42] are sufficient protection for health professionals seeking to disclose concerns about elder abuse to other service providers or a government agency.

11.27 Some submissions noted that health professionals may be reluctant to speak about the patient's situation to relatives or significant others without an enduring power of attorney. This is seen to be of particular concern where the person exercising the enduring power of attorney is perpetrating the abuse.[43] However, existing exemptions under the *My Health Records Act 2012* (Cth) and the Australian Privacy Principles allow health professionals to disclose information to persons other than someone exercising an enduring power of attorney or other enduring document.

11.28 Under the *My Health Records Act 2012* (Cth), a health professional may disclose information in a healthcare recipient's health record if it is 'necessary to lessen or prevent a serious threat to an individual's life, health or safety', and it would be unreasonable or impracticable to gain the health care recipient's consent.[44]

11.29 Under the Australian Privacy Principles, where the patient is unable to 'communicate consent', disclosure is permitted to a responsible person where necessary for appropriate care and treatment, or for compassionate reasons.[45] Such disclosure is not permitted where it is contrary to a patient's wishes expressed before they became unable to communicate consent, or contrary to wishes the health professional is or could reasonably be expected to be aware of.

11.30 'Responsible persons' for this purpose include:

- parents, children or siblings;
- spouses or de facto partners;
- an individual's relative, where the relative is over 18 and part of the household;
- a guardian;
- a person exercising an enduring power of attorney, exercisable in relation to decisions about a patient's health;
- a person who has an intimate personal relationship with the patient; or
- a person nominated as an emergency contact.[46]

11.31 If a health professional is concerned that an older person with impaired decision-making ability is being abused by someone exercising an enduring power of attorney or by another appointed decision maker, the health professional can apply to the relevant

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42 Health professionals who make a report of elder abuse to an adult safeguarding agency in good faith and on reasonable suspicion, should not be civilly or criminally liable, including under privacy laws. Health professionals would also not be considered to have breached standards of professional conduct under this recommendation: rec 14–7.

43 See, eg, Australian College of Nursing, *Submission 147*.

44 *My Health Records Act 2012* (Cth) s 64.

45 *Privacy Act 1988* (Cth) s 16B, sch 1 cl 6.2(d).

46 *Privacy Act 1988* (Cth) s 6AA.

state or territory civil and administrative tribunal for a guardian or financial administrator to be appointed or replaced.[47]

11.32 The ALRC considers that concerns about potential breaches of confidentiality and privacy are best addressed by incorporating information and guidance on privacy laws and confidentiality into the training discussed above. This could include detailed guidance on exemptions to privacy laws and how they may apply to a health professional presented with an older person experiencing, or at risk of experiencing, elder abuse. It might also include an in-depth exploration of the circumstances in which a health professional may disclose information to family and friends.

The National Disability Insurance Scheme

11.33 The NDIS supports people with a 'permanent and significant disability'.[48] Although a person must be under the age of 65 years at the time they seek to become a participant in the NDIS,[49] 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.[50]

11.34 Participants can access individualised plans for the delivery of 'reasonable and necessary supports to participate in economic and social life.[51] 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.[52] However, risks to the participant's well-being, 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.[53]

11.35 Some stakeholders expressed preliminary concerns about the potential for abuse and substandard care under the NDIS.[54] However, others noted that at this early stage

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47 Ch 5 discusses a suite of recommendations targeted at reducing instances of elder abuse by a person exercising an enduring power of attorney by improving the understanding of both attorneys and third parties dealing with attorneys. Ch 10 discusses recommendations targeted at reducing instances of elder abuse by a person appointed as a guardian or financial administrator.

48 *National Disability Insurance Scheme Act 2013* (Cth) s 24.

49 Ibid s 22(1)(a).

50 Ibid s 29(1)(b). As people can expect to live longer 'disability-free', and the proportion of people with disability who are older increases, the number of people eligible to remain in the NDIS is likely to drop. According to the Australian Institute of Health and Welfare, 'men aged 65 in 2012 could expect to live 8.7 additional years disability-free' and a further 6.7 years 'without severe or profound core activity limitation'. Women in the same age cohort 'could expect 9.5 additional years disability-free' and a further 6.7 years 'without severe or profound core activity limitation': Australian Institute of Health and Welfare, 'Aboriginal and Torres Strait Islander People with Disability: Wellbeing, Participation and Support' (May 2011) 237. People with a disability who are over 65 years of age are increasing as a proportion of all people with a disability. In 1981, 10% of all Australians with disability were aged under 15 years and 31% were 65 years or older; in 2009, 7% of the population with disability were aged 0–14 years and 39% were 65 years or over: Australian Institute of Health and Welfare, *Australia's Welfare 2011, Cat No AUS 412* (2011) 12

51 *National Disability Insurance Scheme Act 2013 2013* (Cth) s 8(c).

52 Ibid s 34(1)(e).

53 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) rule 3.4(b)(i).

54 Office of the Public Guardian (Qld), *Submission 173*; NSW Ombudsman, *Submission 160*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Legal Aid NSW, *Submission 137*.

of the rollout of the NDIS, they have had limited experience with the scheme.[55] Legal Aid NSW and the Law Council of Australia noted that 'it is not aware of any elder abuse being experienced by participants in the NDIS'.[56]

11.36 In December 2016, a comprehensive quality and safeguarding framework was introduced. It includes safeguards targeted at individuals participating in the NDIS (participants), the NDIS workforce, and NDIS providers, and incorporates preventative and corrective mechanisms.[57]

11.37 Key safeguards for participants include:

- conducting a formal risk assessment during the plan development process, that will be used to identify those 'who may be most at risk of abuse, violence, neglect and exploitation';[58]
- calibrating the level of support provided to the person's personal circumstances. A participant who is identified as vulnerable to exploitation or abuse will have access to a 'support coordinator' to help implement a 'participant plan';[59]
- ongoing monitoring and evaluation, including through regular plan review;[60] and
- Commonwealth funded individual and systemic advocacy services.[61]

11.38 These are supported by a number of systemic safeguards, including:

- a risk-based nationally consistent screening of NDIS workers, reliant on a variety of sources of information, including police checks and evidence of workplace misconduct that 'comes to light through complaints and serious incident reporting';[62]
- limits on the use of restrictive practices, including prohibitions on certain practices, the establishment of requirements that must be met before a restrictive practice can be used, and the introduction of a NDIS Senior Practitioner with the power, among other things, to review 'serious incident reports involving the unplanned or unapproved use of a restrictive practice';[63]

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55 Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Federation of Ethnic Communities' Councils of Australia, *Submission 89*; Law Council of Australia, *Submission 61*.

56 Legal Aid NSW, *Submission 137*.

57 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 13–14. These are underpinned by initiatives to strengthen the capabilities of individuals, the workforce and providers: Ibid.

58 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 31.

59 Ibid 30. A support coordinator works 'intensively with participants to shortlist and investigate suitable providers, choose preferred providers, create an agreement with the providers, and to move to a different provider if required': Ibid 32.

60 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 32–33.

61 Ibid 35.

62 Ibid 61–62.

63 Ibid 73–74.

- a requirement for all providers and workers to comply with an NDIS code of conduct;
- a requirement for providers delivering higher-risk supports, or supporting participants at heightened risk to undergo quality assurance certification. Certification will involve audits against practice standards, and usually will be conducted every three years. Providers with a history of serious non-compliance may be audited more frequently. An auditor will be required to notify the NDIS registrar of 'major non-compliance' issues;[64]
- the establishment of an NDIS registrar with responsibility to monitor compliance with the NDIS code of conduct and provider quality and competency standards; and
- the establishment of a NDIS Complaints Commissioner whose main focus 'will be on complaints suggesting that an individual worker or provider has breached the NDIS code of conduct'.[65] People are also able to raise broader issues about service quality, abuse and neglect with the Commissioner. This allows the Commissioner 'to identify emerging issues in the NDIS market and make recommendations to government'.[66]

11.39 The ALRC considers that it is too early to determine whether the scheme is an avenue for elder abuse, or test whether there are effective safeguards against elder abuse in place.

64 Ibid 87.
65 Ibid 46.
66 Ibid 46–7.

12. Social Security

Contents

Summary

12.1 Engaging with social security through Centrelink is a part of life for most older Australians. This gives Centrelink a distinct opportunity to assist with the detection and prevention of elder abuse, especially financial abuse.

12.2 Stakeholders suggested that elder abuse is largely invisible in legal frameworks that determine Centrelink processes and responses. This 'invisibility' may result in a lost opportunity for Centrelink to detect and respond to elder abuse—particularly in areas such as Carer Payment and payment nominees, or in policies governing the entitlements of older persons.

12.3 The recommendations in this chapter focus on enhancing elder abuse visibility in these legal frameworks and frontloading safeguards against abuse. This chapter should be read together with Chapter 6 on family agreements, which discusses the role Centrelink can play in assisting to safeguard against elder abuse in the context of family agreements.

Elder abuse strategy

Recommendation 12–1 The Department of Human Services (Cth) should develop an elder abuse strategy.

12.4 The majority of older Australian residents receive regular income through the Age Pension. The National Commission of Audit reported that, in 2012, approximately

80% of all Australians over Age Pension age received income through government pensions.[1] It estimated that the proportion of eligible people receiving income through the Age Pension will remain steady over the next 30 years.[2]

12.5 The Department of Human Services (Cth) designs, develops, delivers, and monitors social security.[3] Centrelink is the body that delivers social security payments, including the Age Pension.[4] Given that it is such a contact point with older Australians, Centrelink is in a frontline position to contribute to combating elder abuse. Moreover, as the Women's Domestic Violence Court Advocacy Service NSW said, 'Centrelink is a non-threatening, universal 'soft-entry' point for older people to access supports'.[5]

12.6 The ALRC recommends that the Department of Human Services (Cth) develop a discrete elder abuse strategy, to assist Centrelink staff to be alert to the possibility of elder abuse, and to develop appropriate responses when dealing with older people. Stakeholders responding to the Discussion Paper were broadly supportive of the development of an elder abuse strategy, while acknowledging the resource implications of such a strategy.[6]

12.7 Centrelink's *Family and Domestic Violence Strategy 2016–19* provides a useful model. It focuses on providing information about family and domestic violence, identifying those at risk of family and domestic violence, providing referrals and support, training staff in relation to family and domestic violence, and embedding responses to violence across systems and processes.

12.8 While older people may be subjected to family violence, and there are points of intersection between family violence and elder abuse,[7] Centrelink's *Family and Domestic Violence Strategy 2016–19* may not facilitate the development of specific

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1 National Commission of Audit, 'Age Pension' in *The Report of the National Commission of Audit* [9.1]. Fewer than 20% of people aged 65 years receive no pension. The Australian Bureau of Statistics reported that, in 2012, 2,278,215 people received income through the Age Pension, which was an increase of 57,831 people from the same point in time in 2011: Australian Bureau of Statistics, *National Regional Profile, 2008 to 2012, Cat 1379.0.555.001*.

2 National Commission of Audit, above n 1, [9.1].

3 Department of Human Services (Cth), *Department of Human Services Annual Report 2015–2016* (2016) 2.

4 Department of Human Services (Cth), *About Us* <www.humanservices.gov.au/corporate/about-us>.

5 Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*.

6 Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*; Disabled People's Organisations Australia, *Submission 360*; COTA, *Submission 354*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; V Fraser and C Wild, *Submission 327*; Carers NSW, *Submission 321*; Institute of Legal Executives (Vic), *Submission 320*; Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*; Seniors Rights Service, *Submission 296*; Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*; FECCA, *Submission 292*; ADA Australia *Submission 283*; Alzheimer's Australia, *Submission 282*; The Benevolent Society, *Submission 280*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; W Bonython and B Arnold, *Submission 241*; Carers Queensland, *Submission 236*; UnitingCare Australia, *Submission 216*; Advocare, *Submission 213*.

7 See ch 2.

policies to prevent, identify and respond to the abuse of older persons.[8] The Welfare Rights Centre (WRC) observed, for example, that despite the reference to carers of older persons, the strategy document 'fails to directly mention or refer to elder abuse'.[9] The National Welfare Rights Network suggested that a more 'comprehensive explanation of elder abuse is warranted' in the *Guide to Social Security Law*.[10]

12.9 A discrete strategy should increase the attention given to the circumstances that can lead to the abuse of older persons and facilitate improved responses. The elder abuse strategy would complement and sit within the proposed National Plan, discussed in Chapter 3. Implementation of the recommendations and suggestions that follow could be specific actions forming part of a broader elder abuse strategy. The role of an elder abuse strategy in responding to specific concerns arising from family agreements is discussed in Chapter 6.

Potential intersection between social security and elder abuse

12.10 Social security legislation includes the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth). Social security laws and legal frameworks are administered by the Department of Human Services through Centrelink in accordance with policies and processes developed by the Department of Social Services (Cth). The Department of Social Services produces a comprehensive electronic publication for Centrelink decision makers called the *Guide to Social Security Law* that details the processes for a wide variety of social security payments.

12.11 For some people who receive government benefits, Centrelink processes and practices are a regular feature of their daily lives. As a corollary, social security laws and legal frameworks can intersect with older persons experiencing, or at risk of, abuse. Stakeholders have identified that the risk of this potential intersection is high in relation to:

- Carer Payment and Carer Allowance;
- Assurance of Support requirements for older migrants on Contributory Parent and Parent Visas;
- 'granny flat interests' and exemptions to the 'gifting rules' in the context of the Age Pension;[11] and
- the payment nominee scheme.

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8 The strategy document defines family and domestic violence as 'conduct that is violent, threatening, coercive or controlling, or intended to cause the family or household member to be fearful'. This can include conduct relevant to elder abuse such as economic (financial) abuse, emotional or psychological abuse, and serious neglect, where there is a relationship of dependence. It also includes relationships involving carers. The key aim of the strategy is to identify and respond to women and children in situations of domestic violence.

9 Welfare Rights Centre NSW, *Submission 184*.

10 National Welfare Rights Network, *Submission 151*.

11 See ch 6 for a discussion of these issues.

Carer payments

12.12 The key payment available to unpaid carers is Carer Payment.[12] It is income and asset tested, including the income and assets of the person receiving care.[13] The amount to be paid is equivalent to the Age Pension.[14] To qualify, a carer must personally provide constant and significant care[15] to one or more adults or children with a disability in the home of the carer or the person receiving care.[16]

Carer payments and elder abuse

12.13 The National Commission of Audit reported that 220,000 people were in receipt of Carer Payment in 2013.[17] There is no available data on the composition of the cohort of people receiving care, but, as older people with dementia make up the largest proportion of people under guardianship,[18] it is likely that older persons with intermittent or diminished decision-making ability or limited mobility make up a sizable proportion of people needing full-time carers.

12.14 Stakeholders identified a potential intersection between Carer Payment and elder abuse.[19] UnitingCare Australia, for example, noted that data from Queensland's Elder Abuse Helpline pointed to increased neglect of older people by recipients of Carer Payment.[20] Stakeholders identified a number of examples of abuse of Carer Payment. The North Australian Aboriginal Legal Service advised that it was aware of

> allegations about carers, often family members, who are receiving Centrelink carer payments and not providing proper care to older persons (including not providing proper or full meals and not assisting with the cleaning of households). In these situations, the local community or aged care service (if available or in existence) often fills this gap, despite funds being allocated to the individual carer for this purpose.[21]

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12 Department of Social Services, *Guide to Social Security Law* (2014) [1.2.5.20], [1.2.5.50]. A Carer Allowance is also available as a regular extra payment for 'additional daily care at home' to a child or adult with a disability. It is not income or assets tested, and is a supplement that may be paid in addition to wages or a social security payment: Department of Human Services (Cth), *Payments for Carers* <www.humanservices.gov.au>. An annual Carer Supplement is also available: Department of Social Services, *Guide to Social Security Law* (2014) [3.6.13].

13 Department of Human Services (Cth), *Income and Assets Tests for Carer Payment* <www.humanservices.gov.au>; *Social Security Act 1991* (Cth) ss 198A(1), 198D.

14 *Social Security Act 1991* (Cth) s 201.

15 For definitions see case law cited: Law Book Company, *Laws of Australia*, Vol 22 (at 31 October 2016) 22 Insurance and Income Security, '22.3 Social Security' [22.3.1480].

16 *Social Security Act 1991* (Cth) ss 197–198. There are some exceptions: ss 198AAA, 198AA, 198AB.

17 National Commission of Audit, 'Carer Payments' in *The Report of the National Commission of Audit* [9.10].

18 See ch 2.

19 National Older Persons Legal Services Network, *Submission 363*; Law Council of Australia, *Submission 351*; Darwin Community Legal Service Aged and Disability Advocacy Service, *Submission 316*; Seniors Rights Service, *Submission 296*; UnitingCare Australia, *Submission 216*.

20 UnitingCare Australia, *Submission 216*.

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

12.15 This case study from the National Aboriginal and Torres Strait Islander Legal Services is an illustrative example:

> An elderly woman sought advice from a Brisbane civil lawyer on housing issues. The elderly woman resides with her daughter, who has locked her out of her own house. The daughter continued to claim Centrelink carers' payments, despite her mother no longer residing with her. The elderly woman was effectively homeless and only has the clothes on her back, as all her property is held in the house. She has no way to retrieve the property. A Brisbane civil lawyer referred her to an appropriate legal service.[22]

12.16 However, carer groups cautioned that checks and balances applicable to Carer Payment, which are already onerous for many carers, should not further lengthen or complicate the application process. Carers NSW suggested further scrutiny should only be applied where other risk factors were identified, and that any elder abuse strategy and associated training should not 'disproportionately focus on carers as perpetrators, but rather include carers as potential victims and encourage staff to consider preventative responses to risk of abuse, including support referrals'.[23]

12.17 There is a strong policy impetus to encourage and maintain full-time carers for older persons who need assistance. Carers provide an important and necessary service, and receive a social security payment in recognition of the fact that their caring duties mean that they are unable to receive regular income through paid employment.[24] The WRC urged that '[i]t is important that false community perceptions about the incidence of carer abuse are not created, as this can undermine carers and deter carers from offering this invaluable support'.[25]

Processes relating to Carer Payment

12.18 To show that the adult is a person with a disability or severe medical condition in need of a significant level of care, the needs of the adult requiring care are assessed using the 'Adult Disability Assessment Tool' (ADAT). This comprises two questionnaires that together measure the amount of assistance required to undertake 'basic activities of daily living', such as mobility, communication, hygiene, eating and management in a range of cognitive and behavioural activities.[26] One questionnaire is to be completed by the potential recipient of the Carer Payment, and the other by a treating health professional, which may be the person's general practitioner, registered nurse, occupational therapist, physiotherapist, a member of an Aged Care Assessment Team or an Aboriginal health worker.[27]

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22 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.
23 Carers NSW, *Submission 321*.
24 Welfare Rights Centre NSW, *Submission 184*.
25 Ibid. See also Carers Victoria, *Submission 348*.
26 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [3.6.9].
27 See forms for Adult Disability Assessment Determination 1999 and Carer Payment and/or Carer Allowance Medical Report for a Person 16 Years or Over: <www.humanservices.gov.au>.

12.19 A person receiving Carer Payment must notify Centrelink of changes in circumstances that may affect their qualification for the payment, including if they are no longer providing the required level of care to the care recipient.[28]

12.20 The Department of Human Services conducts reviews of a random sample of social security payment recipients including recipients of Carer Payment.[29] The review assesses the circumstances of the payment recipient to establish the accuracy of payment.[30] In 2015–16, the survey indicated that approximately 96% of Carer Payments were accurately paid.[31] It also uses 'data analytics to improve and refine the detection of fraud and non-compliance'[32] as part of a broader 'risk based compliance approach'.[33]

12.21 There may be opportunities to improve Centrelink's ability to safeguard older people against abuse by recipients of Carer Payment. These are explored as part of the discussion of actions that may be included in Centrelink's elder abuse strategy.

Assurance of support

12.22 For older migrants experiencing abuse and who are in situations of financial dependence, there may be limited options for exiting the abusive situation. Older persons who enter Australia on a Contributory Parent Visa or Parent Visa (collectively referred to as parent visas) cannot access welfare benefits for determined time periods, and are required to enter under an assurance of support (AoS).[34] The *Guide to Social Security Law* states that '[t]he primary objective of the AoS scheme is to protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia'.[35]

12.23 An AoS 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. However, during the 10-year disqualification period,[36] if an older person's circumstances 'change beyond their control', they may be eligible for a Special Benefit Payment.[37] A Special Benefit Payment is usually paid at

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28 Department of Human Services (Cth), *Change of Circumstances While Receiving Carer Payment* <www.humanservices.gov.au>.

29 Department of Social Services (Cth), *Department of Social Services Annual Report 2015–2016* (2016) 112 <www.dss.gov.au>.

30 Ibid.

31 Ibid Table 3.1.1. This is above the target of 95%: Ibid 112.

32 Department of Human Services (Cth), above n 3, 119.

33 Ibid 116, 119.

34 Most older migrants enter Australia on a Contributory Parent Visa, which requires a 10-year AoS, and aligns with the 10-year waiting period to qualify for the Age Pension.

35 Department of Social Services, *Guide to Social Security Law* (2014) [9.4.1.10].

36 Ibid.

37 Ibid. The National Social Security Network submitted that the Special Benefit Payment should be paid at the Age Pension rate. This is a broader social policy and budgetary question that is beyond the scope of this Inquiry.

the same rate as the Newstart Allowance.[38] Where an older migrant accesses such a payment during the AoS period, it is recoverable as a debt to be paid by the assurer.[39]

12.24 Stakeholders submitted that older migrants in Australia on parent visas are particularly vulnerable to abuse[40] and that Centrelink benefits should be accessible to older migrants on parent visas experiencing abuse, similar to migrants on spousal visas.[41] Some stakeholders called for a general review of the 10-year waiting period.[42]

12.25 Older migrants on parent visas who apply for a Special Benefit Payment within the 10-year disqualification period, must be contacted by a Department of Human Services officer, before the payment is granted, to ascertain whether the assurer is willing and able to provide support and whether it is reasonable for the assuree to accept that support.[43]

12.26 If the situation is considered as possibly involving domestic or family violence, the policy provides that the assurer should not be contacted, and a social worker should be involved.[44] Specifically:

- specialist Centrelink staff should interview the person with an independent interpreter present;[45]
- the person should be referred to a social worker if a risk of harm or abuse is identified;[46]
- the social worker may refer them to relevant services (eg, accommodation);[47] and
- the social worker should advise Centrelink when the situation has stabilised (eg, the person has been settled in alternative accommodation).[48]

12.27 Legal Aid NSW suggested that in AoS arrangements, Centrelink should specifically consider elder abuse before contacting the assurer when an older person applies for a Special Benefit Payment.[49]

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38 Department of Human Services (Cth), *Special Benefit* <www.humanservices.gov.au>.
39 Department of Social Services, *Guide to Social Security Law* (2014) [9.4.1.10].
40 Justice Connect Seniors Law, *Submission 362*; Disabled People's Organisations Australia, *Submission 360*; Legal Aid NSW, *Submission 352*; Seniors Rights Service, *Submission 296*; FECCA, *Submission 292*; National Welfare Rights Network, *Submission 151*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; National Welfare Rights Network, *Submission 151*; Legal Aid NSW, *Submission 140*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Social Work Department Gold Coast Hospital and Health Service, Queensland Health, *Submission 30*.
41 Welfare Rights Centre NSW, *Submission 184*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Service, *Submission 169*; ARAS, *Submission 166*; National Welfare Rights Network, *Submission 151*.
42 See eg, Disabled People's Organisations Australia, *Submission 360*; People with Disability Australia, *Submission 167*; ARAS, *Submission 166*.
43 Department of Social Services, *Guide to Social Security Law* (2014) [9.4.7].
44 Ibid [8.1.7.10], [9.4.7].
45 Ibid [8.1.8].
46 Ibid [9.4.7].
47 Department of Human Services (Cth), *Social Work Services* <www.humanservices.gov.au>.
48 Department of Social Services, *Guide to Social Security Law* (2014) [9.4.7].

12.28 Specific actions under the proposed elder abuse strategy that may address this concern include amending the *Guide to Social Security Law* to provide specific guidance on elder abuse, including, for example, about when a person should be referred to a social worker.[50]

12.29 Legal Aid NSW identified that the prospect of having a debt raised against their child may be a specific barrier to seeking support and assistance for older migrants on parent visas experiencing elder abuse. They noted that, while the parent can claim a Special Benefit Payment, 'many are reluctant to do so, as the child will need to repay the amount the aged parent receives under the Special Benefit in that first 10 years'.[51]

12.30 A debt under an AoS scheme may be waived if 'special circumstances' apply.[52] In determining whether special circumstances exist, the circumstances of the assuree can be taken into account. The assuree's circumstances must relate to the appropriateness of recovering the debt.[53] The *Guide to Social Security Law* states that special circumstances are 'unusual, uncommon or exceptional'. It does not provide any specific guidance on whether either elder abuse or domestic or family violence may constitute a special circumstance. In the context of family violence, in its 2011 Report the ALRC recommended that the *Guide to Social Security Law* should refer to family violence as an example of a 'special circumstance' for the purposes of waiving a debt.[54] A similar approach could be considered in relation to elder abuse.

12.31 There is scope for Centrelink to increase community awareness of AoS arrangements, and the circumstances in which an older migrant may access Centrelink payments. These are explored as part of the discussion of actions that may be included in Centrelink's elder abuse strategy.

Payment nominee scheme

Recommendation 12–2 Payments to nominees should be held separately from the nominee's own funds in a dedicated account nominated and maintained by the nominee.

12.32 A person in receipt of social security payments (the 'principal') can appoint another person to assist them to interact with Centrelink or to interact on their behalf. A principal may have a 'payment nominee' and a 'correspondence nominee'.[55] The payment and correspondence nominee may be the same person. A correspondence nominee receives any social security notice on behalf of the principal (including, for

49 Legal Aid NSW, *Submission 140*.
50 The Guidelines for Social Worker Involvement state that customers 'who are experiencing or at risk of domestic or family violence' should be offered a referral to a social worker. There is no specific reference to elder abuse: Department of Social Services, *Guide to Social Security Law* (2014) [8.1.7.10].
51 Legal Aid NSW, *Submission 140*.
52 *Social Security Act 1991* (Cth) s 1237AAD(2).
53 Department of Social Services, *Guide to Social Security Law* (2014) [6.7.1.30].
54 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, Report No 117 (2012) rec 9–9.
55 *Social Security (Administration) Act 1999* (Cth) pt 3A.

example, in relation to an obligation to report changes), and can make enquiries and attend appointments with Centrelink on behalf of the principal. A payment nominee receives payments on behalf of the principal. The payment is made into an account nominated and maintained by the nominee.[56]

12.33 Stakeholders identified the potential for elder abuse in the payment nominee scheme,[57] and some provided examples of misuse.[58] ADA Australia, for example, advised that it receives many complaints regarding payment nominees taking a person's pension. It noted that, while the 'pension is obviously necessary to the older person', the 'amount taken is often not sufficient to pursue through other legal means'.[59]

12.34 There are several statutory safeguards against financial abuse by payment nominees, including:

- oversight of nominee appointments—'particular scrutiny' of the appointment is to be given in certain circumstances;[60]
- the requirement for payment nominees to keep and supply records;[61]
- the statutory obligations of the nominee to act in the 'best interests of the principal';[62]
- revocation or suspension of nominee appointments following a written request or where the nominee has not provided records;[63]
- processes for allegations of misuse—including referral to a social worker;[64] and
- reporting requirements—a nominee is to advise of any matter that affects their ability to act as a nominee.[65]

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56 Ibid s 123F(2).

57 See, eg, Welfare Rights Centre NSW, *Submission 184*; Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Office of the Public Advocate (Qld), *Submission 149*; Legal Aid NSW, *Submission 140*; State Trustees Victoria, *Submission 138*; North Australian Aboriginal Legal Service, *Submission 116*.

58 Seniors Rights Victoria, *Submission 171*; Legal Aid NSW, *Submission 140*.

59 ADA Australia, *Submission 150*.

60 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [8.5.3]. 'Particular scrutiny' must be given to nominee requests where the proposed nominee runs a boarding or room establishment; where there are multiple voluntary nominee appointments for the same nominee; or where the nominee does not live in the same residence or in close proximity to the principal. A delegate can revoke an appointment where the delegate decides that the appointment is not in the best interest of the principal, and can direct payments to another person.

61 *Social Security (Administration) Act 1999* (Cth) s 123L. Where a review is undertaken, nominees must supply records, otherwise a fine may apply.

62 Ibid s 123O(1). In the *Equality, Capacity and Disability in Commonwealth Laws* Report, the ALRC recommended that 'best interests' standards should be replaced by a standard of 'will, preferences and rights': Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 10–1, [10.10].

63 Ibid s 123E. The Secretary can suspend or revoke appointments following a written request to the Secretary from the nominee; or where the nominee has not complied with a notice to produce records.

64 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [8.5.3]. The delegate may be able to revoke the arrangement under the above powers if a social worker is not immediately available.

12.35 There are clear policy reasons why a nominee should not be able to access the principal's account. The nominee arrangement does not grant the nominee an unconditional power of attorney. They act on behalf of the principal only in relation to the receipt and management of social security payments. The arrangement does not authorise the nominee to deal with other funds the principal may hold. The nominee's access to the principal's funds is restricted to the designated social security payments, which they are authorised to receive on behalf of the principal under the nominee arrangement unless other arrangements, such as an enduring power of attorney, are also in place.

12.36 However, the ALRC considers that a payment nominee should be required to keep their own funds separate from social security payments they receive on behalf of the principal. This can be achieved by inserting a default requirement that a payment nominee maintain a separate account on behalf of the principal. This would reiterate and emphasise the payment nominee's current duty to act in the 'best interests of the principal'.[66] It may also assist in investigating allegations of misuse by making it easier to track the source of funds for a given expenditure. The ALRC acknowledges that this places an additional burden on the nominee. However, the ALRC considers that a default requirement to hold social security payments received on behalf of the principal separate from the nominee's own funds strikes an appropriate balance. There is scope for Centrelink to vary the arrangement if the requirement would cause undue hardship to the nominee or the principal.

Actions under the recommended Elder Abuse Strategy

Staff training

12.37 Centrelink employs a number of categories of frontline service staff, including service staff and specialist staff, such as: financial information service officers; complex assessment officers; Indigenous specialist officers; and multicultural service officers. Financial information service officers can provide information to older people about planning for retirement, including in relation to when to seek independent expert advice. They can help older people understand the consequences of their financial decisions in the short, medium and long term.[67] Complex assessment officers process and assess complex claims for the Age Pension,[68] including claims that involve 'granny flat interests', and assets hardship.[69] Indigenous specialist officers help Aboriginal and Torres Strait Islander people access Centrelink payments and services.[70] Multicultural service officers help migrant and refugee communities to access government programs and services.[71]

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65 *Social Security (Administration) Act 1999* (Cth) s 123K.

66 Ibid s 123O.

67 Department of Human Services (Cth), *Financial Information Service* <www.humanservices.gov.au>. The service is available to all potential recipients of social security payments.

68 Australian National Audit Office, 'Administration of Complex Age Pension Assessments' (2007) 28.

69 Ibid 73. Asset hardship is where a person has assets which affect the assets test, but it would be unreasonable for them to sell or borrow against the assets to improve their financial position. It can apply where a person has breached the 'gifting' rules to entitle the older person to a social security payment.

70 Department of Human Services (Cth), *Community Access* <www.humanservices.gov.au>.

71 Ibid.

12.38 Stakeholders suggested that Centrelink frontline staff, including specialist staff, are not specifically trained to deal with elder abuse. For example, the Eastern Community Legal Centre noted that, in their experience, 'identification of and response to elder abuse by Centrelink is either ad hoc or non-existent'.[72] State Trustees Victoria said that it had been contacted by social workers from Centrelink concerned about a client, and it is their experience that Centrelink staff do not have access to clear guidelines or procedures in how to respond to elder abuse.[73]

12.39 Stakeholders have observed that there is a need to train staff and 'develop tools and prompts to enable staff to identify signs' of elder abuse[74] and to respond with appropriate referrals.[75]

12.40 This could include, for example, the development of protocols and additional training for staff on identifying risks of elder abuse where the recipient of Carer Payment is caring for an older person. Protocols might also require staff to refer certain matters to a social worker or financial information service officer. They may also provide guidance on when staff should contact a person identified as at risk of elder abuse to confirm whether the care recipient is getting the appropriate level of care. Such measures may be an important safeguard against abuse by a carer.

12.41 The financial counselling service, Care Inc, noted that training to identify signs of elder abuse and make appropriate referrals is especially required in circumstances where staff are contacted by older persons enquiring about 'gifting', 'granny flat' arrangements or entry into aged care. Staff should be trained to pick up any 'red flags', and refer the person to the appropriate social worker or financial information service officer.[76]

12.42 The WRC suggested there is a need for training of specialist staff to provide support and referrals to older persons. Assessment officers, who deal with complicated financial arrangements, could be used to identify and refer situations that may involve financial abuse. Financial information service officers could inform and educate older people, families and carers about elder abuse and the steps needed to reduce it.[77]

12.43 Training under the elder abuse strategy should incorporate training multicultural service officers, to improve the identification of issues specific to culturally and linguistically diverse communities, including the potential for elder abuse suffered at the hands of extended family, and risk factors associated with communication barriers and the lack of access to culturally and linguistically appropriate services.[78] Stakeholders also noted that training should include the identification of issues specific to older Aboriginal and Torres Strait Islander people, including notions of reciprocity

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72 Caxton Legal Centre, *Submission 174*.
73 State Trustees Victoria, *Submission 138*.
74 Eastern Community Legal Centre, *Submission 177*. See also State Trustees Victoria, *Submission 138*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*.
75 ARAS, *Submission 166*; Carers Australia, *Submission 157*; National Seniors Australia, *Submission 154*.
76 Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.
77 Welfare Rights Centre NSW, *Submission 184*. See also National Welfare Rights Network, *Submission 151*.
78 FECCA, *Submission 292*; Welfare Rights Centre NSW, *Submission 184*.

and the boundaries of such notions, and risks associated with the appropriation of the person's Age Pension.[79]

Data collection and classification

12.44 Additional training for staff in identifying risks of elder abuse also provides an opportunity to collect data on the risks of elder abuse among different cohorts of older people. Ensuring this is properly captured improves the data available to Centrelink for fraud detection. In particular, access to additional data means Centrelink's fraud detection processes, which rely on data analytics, might be better calibrated to assist in early detection and intervention. This could include identifying trends or risk factors that may increase the likelihood that an older person engaging with Centrelink might be experiencing elder abuse. For example, data from better identification of whether recipients of Carer Payment might be providing inadequate care might be captured and analysed to identify common patterns of behaviour. This information could be used to further improve Centrelink's fraud detection systems.

12.45 The elder abuse strategy should therefore include a specific action focused on improving data collection and classification, particularly in the context of data collected through staff identifying people at risk of elder abuse. Such action to improve the evidence base for Centrelink's purposes could also sit within the National Plan discussed in Chapter 3.

Direct contact principle

Recommendation 12–3 Centrelink staff should speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

12.46 Many arrangements involving Centrelink that are entered into by older persons arise because the older person has limited, intermittent or diminishing decision-making ability or mobility. This is apparent in payment nominee arrangements when the principal is an older person, and when a carer for an older person qualifies for Carer Payment. The capacity or mobility of an older person may even be a driving factor to entering into a 'granny flat' arrangement. The vulnerability of older persons entering into these arrangements heightens the risk of abuse, and invites a discrete Centrelink response.

79 Seniors Rights Service, *Submission 296*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*; Top End Women's Legal Service, *Submission 87*.

12.47 A policy in favour of direct personal contact with people over Age Pension age could have wide application. There was broad support for this approach,[80] with stakeholders suggesting that greater involvement by Centrelink staff in processes involving older persons may reveal and potentially mitigate the risk of elder abuse.[81] The following case study provided by Seniors Rights Victoria illustrates where the direct contact principle might have been usefully applied in the context of abuse by the recipient of Carer Payment:

> An older woman had a stroke a number of years ago, and her son moved into her rental accommodation to assist her when she was discharged from hospital. He was unemployed at the time, and then obtained a Carers Payment to assist with her ongoing care needs. The client acknowledged that her son did provide considerable assistance to her at that stage, and facilitated her recovery. However over the course of several years, the son provided less and less assistance, struggled with alcohol problems, and regularly became aggressive towards her. A wall in her home was punched in by her son during an argument between them. The mother's health improved and she became more fearful of her son's unpredictable behaviour. She attended an appointment at Centrelink, to advise of her improved health, and that her son no longer provided any care for her. The Carers Payment to her son was suspended. He confronted her about this, but she declined to discuss the matter with him. At the time of contacting SRV for assistance she reported that her son had become more aggressive, and unexpectedly produced papers for her to sign. She signed these documents under duress as she had again been threatened by him, and had no opportunity to read them. She later realised the documents were to reinstate the Carers Payment.[82]

12.48 It could also be applied in the context of 'gifting' rules, and in relation to 'granny flat' exemptions. Legal Aid NSW suggested that, where a person in receipt of the Age Pension has transferred an interest in their home for little or no value, this should be a 'red flag' and trigger contact with the older person, possibly through a social worker. The Centrelink contact person could clarify the circumstances and make an assessment of the person's decision-making ability and whether the transfer was made knowingly. Centrelink could also use this contact to make it known to the person that they can seek Legal Aid.[83]

12.49 The direct contact principle is an important expression of respect for the autonomy and dignity of an older person. However, an appropriate balance must be struck between this principle and the potential burden it may place on the people contacted, as well as the resource implications, and workability of such a measure, particularly given the shift toward online interactions which have and will continue to

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80 National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*; Disabled People's Organisations Australia, *Submission 360*; COTA, *Submission 354*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; ADA Australia *Submission 283*; Alzheimer's Australia, *Submission 282*; The Benevolent Society, *Submission 280*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Lutheran Church of Australia, *Submission 244*; Carers Queensland, *Submission 236*; UnitingCare Australia, *Submission 216*.

81 See, eg, Welfare Rights Centre NSW, *Submission 184*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Legal Aid NSW, *Submission 140*.

82 Seniors Rights Victoria, *Submission 171*.

83 Legal Aid NSW, *Submission 140*.

result in reduced contact with Centrelink staff. As direct contact is a key safeguarding response in some situations, the ALRC considers targeted direct contact focused on situations of risk might be a more suitable approach. Centrelink must be able to accurately identify people who are experiencing, or are at risk of experiencing, abuse for a targeted direct contact principle to have the greatest impact. This requires the use of detection systems that rely on accurate data, collected by means including the improved identification of elder abuse by staff.

12.50 This recommendation does not stand alone. It would be one action of a broader elder abuse strategy which includes training for staff, improved data collection and classification, and increased community education and awareness raising.

12.51 An example of a class of persons where Centrelink might adopt a policy of making direct contact with all participants is the payment nominee scheme. Such arrangements are easily entered into and with minimal oversight, but have potentially wide-ranging consequences. Payment nominee applications are able to be completed online via the 'myGov' website, in person at a Centrelink service centre, or by post or fax. On approval of a payment nominee application, Centrelink sends letters to the principal and nominee confirming the nominee appointment. This may not be enough to safeguard a principal against coercion or fraud, especially where the payment nominee applicant is also the person's correspondence nominee.[84] Seniors Rights Victoria noted that

> older people can be seriously disadvantaged by the payment nominee system implemented by Centrelink, where elder abuse is at risk of occurring. In circumstances of financial abuse, or emotional or psychological abuse there is a strong likelihood that the authority to a payment nominee may not have been given freely by the older person. It is also likely that there has not been a detailed explanation of the operation or consequences of the authority to the older person. Often an older person will feel compelled to make this arrangement, particularly if they are impacted by health or mobility issues and reliant on the person nominated.[85]

12.52 There are sound policy reasons to make nominee appointments easily accessible. Easy access readily facilitates an arrangement that enables people with disability, or people who are experiencing difficulties to access and interact with Centrelink. The WRC observed that

> one of the key benefits of nominee arrangements is that they can provide and prolong independence. Having a nominee to manage complex Centrelink affairs or to respond to correspondence can in some circumstances delay a move to an aged care facility and allow people to continue to live independently at home.[86]

12.53 However, as noted by the WRC, if payment nominee arrangements are misused, the impact can be extreme—leaving older persons with no money, or at risk of losing their home or accommodation.[87] A case study provided by Seniors Rights Victoria

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84 Ibid.
85 Seniors Rights Victoria, *Submission 171*.
86 Welfare Rights Centre NSW, *Submission 184*.
87 Ibid.

shows the extreme impact of abuse, while also illustrating more broadly the intersection between social security payments and elder abuse:

> A son was operating his father's financial affairs using an enduring power of attorney (EPOA), but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him, and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a $12,000 overpayment against the father. As the son knew he would not be responsible for any debt under Centrelink legislation, he dropped his father off at his sister's house, emaciated and with only the clothes he was wearing. Before the administrator could get involved in the retrieval of the rent money and protecting the remaining assets the son sold his father's house and moved interstate. Both the nominee form and the EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.[88]

12.54 To protect against coercion or fraud, stakeholders suggested that Centrelink should:

- interview proposed principals to identify risk factors associated with undue influence;[89]
- contact the principal to verify the nomination is genuine and explain the effect of the arrangement and how to revoke it;[90] and even
- run compulsory background checks on proposed nominees.[91]

12.55 The ALRC considers that a requirement for direct personal contact with the parties to a payment nominee arrangement strikes an appropriate balance, retaining the accessibility of nominee applications for principals, while putting in place a simple preventative measure against abuse and misuse by nominees. Early and direct telephone or personal contact with principals could help to avoid forgeries or the appointment of inappropriate nominees.

12.56 However, in some cases, direct contact with the principal may not be the most appropriate approach. Carers Victoria, for example, cautioned against requiring direct contact with a person 'under care', noting that 'many carers are supporting people with significant communication and cognitive impairments'. They argued that 'it would be preferable if the treating health professional … was contacted to confirm the care relationship'.[92] Such concerns are best addressed by ensuring that access to appropriate supports for older people suffering cognitive impairment or other communication

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88 Seniors Rights Victoria, *Submission 171*.
89 Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*.
90 Legal Aid NSW, *Submission 140*.
91 Eastern Community Legal Centre, *Submission 177*; Australian Association of Social Workers, *Submission 153*; UNSW Law Society, *Submission 117*.
92 Carers Victoria, *Submission 348*.

difficulties is provided.[93] Similarly, access should also be provided to appropriately credentialed interpreters.[94]

Enhanced understanding of roles and responsibilities

12.57 Arrangements that involve Centrelink can transfer significant powers and responsibilities to parties to the arrangements. Payment nominees may receive all or part of a person's social security payment, and are trusted to use those funds only for the benefit of the principal. Carers in receipt of Carer Payment are responsible for a person's health and wellbeing, and can often be involved in decisions regarding medical care.

12.58 Older persons and third parties to arrangements involving Centrelink may not have a full understanding of their roles and responsibilities under the arrangement. For example, payment nominees may not be aware that they should not mix monies, or that the monies should be spent only on the principal; carers may not understand the scope of their role and responsibilities, including their entitlement to respite; and older persons may not understand their rights. An action under the elder abuse strategy should be to identify opportunities for Centrelink to enhance understanding by making clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments. This may, where appropriate, be accompanied by information on support and assistance that may be available. Stakeholders were broadly supportive of this approach.[95]

12.59 Centrelink could, for example, send SMSs or letters (electronically as well as by post where possible) to Carer Payment recipients about their obligations and include information about programs and support services such as the Carer Gateway established by the Department of Social Services (Cth), a national website and phone service providing carers access to information and support.[96] Other support services include the availability of counselling and respite services.[97] It could also institute regular SMS reminders of available supports.

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93 COTA, *Submission 354*; V Fraser and C Wild, *Submission 327*; W Bonython and B Arnold, *Submission 241*.

94 COTA, *Submission 354*; FECCA, *Submission 292*.

95 Office of the Public Guardian (Qld), *Submission 384*; Office of the Public Advocate (Qld), *Submission 361*; COTA, *Submission 354*; Law Council of Australia, *Submission 351*; V Fraser and C Wild, *Submission 327*; Institute of Legal Executives (Vic), *Submission 320*; Seniors Legal and Support Service Hervey Bay, *Submission 310*; Seniors Rights Service, *Submission 296*; FECCA, *Submission 292*; ADA Australia *Submission 283*; Alzheimer's Australia, *Submission 282*; The Benevolent Society, *Submission 280*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Lutheran Church of Australia, *Submission 244*; W Bonython and B Arnold, *Submission 241*; Carers Queensland, *Submission 236*; UnitingCare Australia, *Submission 216*; Advocare, *Submission 213*.

96 Australian Government, *Carer Gateway* <www.carergateway.gov.au/>. Carers Australia emphasised the need for Centrelink to proactively refer carers to support services, maintaining that many carers find out about the service after many years: Carers Australia, *Submission 157*.

97 Department of Social Services (Cth), *Carers* <www.dss.gov.au>. The Department of Social Services is also developing an Integrated Plan for Carer Support Services, which seeks to support and sustain the work of unpaid carers. The first phase was the development of the Carer Gateway. The government developed a draft service delivery model which included identifying carers early on in their carer journey, especially those who were considered 'high risk' carers, and providing ongoing support, counselling and

12.60 The Federation of Ethnic Communities' Councils of Australia recommended that older migrants on parent visas should be provided with materials modelled on the Family Safety Pack, which would provide information on what to do and where to go if the older person finds themselves in crisis and needs to leave their place of residence.[98] The material could be included with the grant letters issued by the Department of Immigration and Border Protection.[99]

12.61 Other examples include clear guidelines and standards for payment nominees and carers, outlining their roles and responsibilities.[100] These, and other Centrelink communications, should be made available in accordance with the government's *Multicultural Access and Equity Policy*, including by ensuring that material is available in community languages.[101] They should also be available in a number of formats, including, for example, in easy English.[102]

12.62 The design of Centrelink forms may also be improved to provide clearer information about roles and responsibilities. For example, the current design of the nominee authorisation application form places little emphasis on the responsibilities of the nominee.[103] Information regarding the obligations of a nominee is put two pages before the signed declaration of the nominee. Nominee obligations are directed toward the principal, and at no point does the form state in clear terms to the nominee what their obligations to the principal are. National Seniors suggested that greater use of the nominee application form could be made to inform and deter abuse. It proposed that the form explicitly state the penalty for not producing records (60 penalty points, equating to $10,800); the penalty at law for misuse of funds to the benefit of the nominee; and information about the review process.[104]

12.63 Community education to enhance older persons' understanding of their rights forms an important strategy in the proposed National Plan to combat elder abuse, which focuses on helping older persons in protecting their rights.[105] In particular, enhancing the financial literacy of older persons in agreements that involve Centrelink is critical to safeguarding against financial abuse.[106] Centrelink can play a key role in financial literacy education of older persons regarding the interaction of personal finances with social security laws and legal frameworks.

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assistance, including through peer support and coaching and mentoring: Department of Social Services (Cth), *Delivering an Integrated Carer Support Service: A Draft Model for the Delivery of Carer Support Services* (2016). Implementation of such a plan and ensuring that carers identified through Centrelink systems are given access to assistance under the plan would be key preventative strategies.

98 The Family Safety Pack provides information on domestic and family violence and, in particular family violence and partner visas, including in relation to access to support and services: Department of Social Services (Cth), *Family Violence and Partner Visas Factsheet* <www.dss.gov.au>.

99 FECCA, *Submission 292*.

100 ADA Australia, *Submission 150*; Office of the Public Advocate (Qld), *Submission 149*.

101 FECCA, *Submission 292*.

102 People with Disability Australia, *Submission 167*.

103 Authorising a Person or Organisation to Enquire or Act on Your Behalf (SS313): <www.humanservices.gov.au>.

104 National Seniors, *Submission 154*.

105 See ch 3.

106 V Fraser and C Wild, *Submission 327*; Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; National Welfare Rights Network, *Submission 151*; Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

12.64 The WRC specifically supported further education for older persons who are considering making gifts through loans or acting as guarantors to increase awareness of their social security obligations and to advise them where to seek help if needed.[107]

107 National Welfare Rights Network, *Submission 151*; Legal Aid NSW emphasised the need for Centrelink to advise clients that they may be able to receive Legal Aid: Legal Aid NSW, *Submission 140*. Some stakeholders raised concerns that an older person who has suffered financial abuse might face further financial strain because the 'gifting rules' might operate to deprive them of the Age Pension. They submitted that the operation of social security laws might further financially penalise older people who experience financial abuse. See, eg, Seniors Rights Service, *Submission 169*; Legal Aid NSW, *Submission 140*. 'Asset hardship rules' may provide some relief for an older person in this situation. Under the rules, a pensioner who has disposed of assets or income, and suffers severe financial hardship, may be eligible for a hardship pension even where such hardship is the result of the disposal. To qualify, they must demonstrate that they have less than $21,015.80 in readily available funds ($31,683.60 for couples) and cannot reasonably be expected to sell or borrow against their assets to improve their financial position. The ALRC considers that frontloading measures of the kind suggested by the WRC are a key safeguard against abuse.

13. Criminal Justice Responses

Contents

Summary

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

13.2 Key issues identified by stakeholders in respect of the criminal law and related processes and frameworks were: the need to create specific offences for 'elder abuse', 'elder neglect' and 'misuse of powers of attorney'; additional support for 'vulnerable witnesses'; and improved police responses. The ALRC considers that existing criminal laws generally adequately cover conduct which constitutes elder abuse, and does not recommend the enactment of specific offences.

13.3 In this chapter, the ALRC considers other avenues to improve the operation of the criminal law, including police responses and providing appropriate assistance for witnesses who require additional support to participate in the criminal justice system. In Chapter 14, the ALRC makes recommendations relating to adult safeguarding laws aimed at safeguarding and supporting adults 'at risk'.[1] These laws would provide adult safeguarding agencies a role that is complementary to police, and are aimed at improving responses to elder abuse.

1 See rec 14–2 for a definition of an 'at-risk adult'.

Offences

Specific offence of 'elder abuse'

13.4 Some overseas jurisdictions, including a number of states in the US, have enacted specific criminal offences for the abuse of older persons. These offences broadly encompass behaviour that causes or permits an older person to suffer, be injured, or be placed in a situation in which their health is endangered.[2]

13.5 Generally speaking, Australian state and territory laws have not enacted such offences. However a range of types of conduct, which might be described as 'elder abuse', are covered in all jurisdictions under offence provisions relating to personal violence and property offences. These include assault, sexual offences, kidnap and detain offences, and fraud and theft offences. Some jurisdictions have offences for neglect, although these are rarely utilised in respect of older people. There are also comprehensive family violence frameworks in all jurisdictions that provide for quasi-criminal protective responses, which may be relevant for older people experiencing elder abuse in domestic settings.

13.6 Some stakeholders supported new criminal offences that would proscribe certain types of conduct, including, for example, assault when perpetrated against an older person where there is a relationship of dependence.[3] It was suggested that specific elder abuse offences would: support 'effective criminal justice pathways for victims of elder abuse';[4] act as a deterrent;[5] recognise the increased vulnerability of older persons;[6] and serve an educative function and increase awareness of the issue.[7]

13.7 The ALRC considers that the existing criminal laws largely provide appropriate offences to respond to the types of conduct that might be understood to constitute 'elder abuse'. Where the type of conduct proscribed is already captured, new offences are unnecessary and risk duplicating existing offences. Some stakeholders also submitted that an 'elder abuse' offence risked being discriminatory.[8] The ACT Human Rights Commission submitted, for example, that 'offences limited to abuse against "elders" have the potential to be paternalistic and discriminatory'.[9]

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

3 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Eastern Community Legal Centre, *Submission 357*; R Lewis, *Submission 349*; Protecting Seniors Wealth, *Submission 312*; Office of the Public Advocate (Vic), *Submission 246*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*; Legal Services Commission SA, *Submission 128*; Office of the Public Advocate (Vic), *Submission 95*; Alzheimer's Australia, *Submission 80*.

4 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Office of the Public Advocate (Vic), *Submission 246*.

5 See, eg, Protecting Seniors Wealth, *Submission 312*; Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150*; Gadens Lawyers (Melbourne), *Submission 82*.

6 See, eg, Australian Research Network on Law and Ageing, *Submission 262*; R Lewis, *Submission 100*.

7 See, eg, Protecting Seniors Wealth, *Submission 312*; WA Police, *Submission 190*; People with Disability Australia, *Submission 167*.

8 ACT Human Rights Commission, *Submission 337*; Legal Aid ACT, *Submission 58*. See also the Law Society of NSW's views expressed in: Law Council of Australia, *Submission 61*.

9 ACT Human Rights Commission, *Submission 337*.

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

> [t]here is little value in developing a specific criminal offence of elder abuse. With the wide range of behaviours that might constitute elder abuse, the development of a definition that would effectively encompass all of those behaviours and the thresholds for criminality would be extremely difficult. In any event, there are already adequately tried and tested legal offences available to effectively prosecute a wide range of criminal behaviours that might constitute elder abuse.[10]

13.9 Stakeholders suggested that, even if new offences were not introduced, the law should be harmonised to ensure that a court can take into account the age of the victim in sentencing.[11] Courts in each of the states and territories are guided by a mix of statutory and common law principles. Many states and territories specifically recognise the circumstances of the victim when sentencing offenders.[12] In jurisdictions which do not specifically provide statutory guidance, the common law position applies. Under the common law, the elderly nature of a victim is an aggravating factor for the purposes of sentencing.[13]

Offences for misusing powers of attorney

13.10 In all Australian jurisdictions, there are offences that broadly relate to fraud, deceptive conduct, stealing and other property related offences. In certain circumstances, some of these may be applicable to cases of financial abuse of older people, including in respect of abuse of powers of attorney. In Victoria and Queensland there are a range of offences specifically relating to powers of attorney.[14] The ALRC is unaware of any prosecutions under these provisions.

13.11 The Law Institute of Victoria[15] and the Office of the Public Advocate (Vic),[16] welcomed new criminal offences relating to abuse of powers of attorney in that jurisdiction, and supported the creation of similar provisions in other states and territories.[17] The NSW Legislative Council subsequently recommended that NSW legislation be amended to be consistent with Victoria's *Powers of Attorney Act 2014*.[18]

13.12 The ALRC is not persuaded that there is a need for a specific offence for misusing powers of attorney. Where they exist, offences for misusing powers of

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

11 See, eg, ACT Human Rights Commission, *Submission 337*; National Seniors Australia, *Submission 154*.

12 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l); *Penalties and Sentences Act 1992* (Qld) s 9(3)(c); *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(f)(j); *Sentencing Act 1991* (Vic) s 5(2)(da); *Sentencing Act 1995* (WA) s 6(b).

13 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 129.

14 *Powers of Attorney Act 1998* (Qld) ss 26, 61; *Powers of Attorney Act 2014* (Vic) ss 135–136.

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

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

17 These provisions reflect the recommendations made in: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) rec 61.

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

attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences,[19] and risks increasing complexity,[20] without any assurance of increased prosecution of the conduct.

13.13 Criminal law requires a high evidentiary threshold to be met to sustain a prosecution. Financial offences, in particular, are often difficult and complex to prosecute, and will continue to be so irrespective of the existence of new specific provisions relating to powers of attorney. Moreover, a criminal prosecution does not always offer appropriate redress to the victim. To address the issue of redress, the ALRC recommends that state and territory civil and administrative tribunals be given a power to order compensation for the misuse or abuse of a power of attorney, and in relation to an attorney's failure to comply with their obligations.[21]

13.14 The other functions served by the creation of new offences, including increased awareness of the responsibilities of attorneys, can be delivered through other mechanisms, including through recommendations relating to additional safeguards for enduring documents,[22] and community education programs developed under the National Plan to combat elder abuse.[23]

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

Neglect offences

13.16 Many people voluntarily assume carer roles, and most make an invaluable contribution to those they care for, and to society more broadly. In some cases, however, the person in need of care may have their needs neglected. This may be because the carer may not have the 'necessary skills, capacity or knowledge to address the needs of the person being cared for, or the resources to access education, support and training in support of their caring role'.[24] It would be preferable to support carers in these circumstances. Criminal prosecution for neglect should be limited to the most grievous instances.

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19 This was recognised by the Victorian Parliamentary Committee that recommended the creation of new power of attorney offences in Victoria: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 209.

20 This view was supported in Law Council of Australia, *Submission 61*.

21 Rec 5–2. See also the discussion in ch 8 about the possible role of disinheritance provisions in the US as a mechanism to reduce the incentive to perpetrate financial abuse.

22 Rec 5–1.

23 Rec 3-3(b).

24 Carers Australia, *Submission 157*.

13.17 Stakeholders noted that offences for neglect resulting in something less than the death of the older person do not exist in all states and territories.[25] In the absence of specific offences for elder abuse, it is important to ensure that general 'neglect' offences exist in all states and territories.

13.18 All states and territories, except the ACT, have 'neglect' offences that may apply to older people. These are generally framed as 'fail to provide necessaries or necessities of life',[26] including adequate food, clothing, shelter and medical care. In Victoria, a broader offence framed as 'negligently causing serious injury' applies.[27] The offences are serious, attracting penalties that include terms of maximum imprisonment ranging from three to ten years, where serious harm is caused.

13.19 In broad terms, existing offences have a number of elements that must be established, including the existence of a legal duty of care,[28] and a threshold requirement for the likelihood of 'serious harm'.[29]

13.20 Some stakeholders suggested that 'neglect' offences should be amended to impose a specific duty on persons who care for older persons. They submitted that this would reduce barriers to prosecution arising from a need to establish the existence of a duty of care as an element of the offence.[30]

13.21 In NSW and Victoria, there must be 'a legal duty' to provide the necessities or necessaries of life.[31] Such provisions rely on a common law understanding of when a legal duty of care arises for the purposes of determining criminal negligence. One example of where such a duty arises is when a person 'has voluntarily assumed the care

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25 Office of the Public Guardian (Qld), *Submission 384*; Eastern Community Legal Centre, *Submission 357*; ACT Human Rights Commission, *Submission 337*; L Barratt, *Submission 325*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*; R Lewis, *Submission 100*.

26 *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1983* (NT) 1983 s 149; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Law Consolidation Act 1935* (SA) s 14; *Criminal Code Act 1924* (Tas) s 144; *Criminal Code Act Compilation Act 1913* (WA) s 262. In Victoria, while s 24 does not explicitly state this requirement, the prosecution must establish a duty of care as an element of the offence: *Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717.

27 *Crimes Act 1958* (Vic) s 24. This provision 'punishes conduct that, if the complainant had died would have constituted manslaughter by criminal negligence': Judicial College of Victoria, *Criminal Charge Book* (2011) [7.4.3.1]. This provision is mainly used to prosecute negligent driving offences: Ibid. However, it can apply to other circumstances of neglect, including, for example, neglect of a child: *Ignatova v R* [2010] VSCA 263.

28 *Crimes Act 1900* (NSW) s 44(1)(a); *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1899* (Qld) s 324; *Criminal Law Consolidation Act 1935* (SA) s 14 (1)(b); *Criminal Code Act 1924* (Tas) sch 1 cl 177; *Crimes Act 1958* (Vic) s 24; *Criminal Code Act Compilation Act 1913* (WA) app B cl s 262.

29 *Crimes Act 1900* (NSW) s 44(1); *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1899* (Qld) s 324; *Criminal Law Consolidation Act 1935* (SA) s 14(1)(b); *Criminal Code Act 1924* (Tas) sch 1 cl 177; *Criminal Code Act Compilation Act 1913* (WA) app B cl 262. This is variously referred to in state and territory laws as 'serious harm', 'or a person's health being 'permanently injured'. In Victoria, the threshold is higher, requiring that there is serious injury, rather than the likelihood of serious injury: *Crimes Act 1958* (Vic) s 24.

30 L Barratt, *Submission 325*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*.

31 *Crimes Act 1900* (NSW) s 44(1). In Victoria, the first element that must be established for an offence under s 24 of the *Crimes Act 1958* (Vic) is that the accused owed the complainant a duty of care: *Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717.

of another, and so secluded the helpless person as to prevent others from rendering aid'.[32] This duty has been codified in some states, which prescribe a duty to provide necessaries of life where a person assumes the responsibility 'of any person who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life'.[33]

13.22 Some stakeholders also suggested that the need to establish a causal link between the neglectful conduct and the serious harm caused should be removed, arguing that this may remove evidentiary barriers to establishing a criminal standard of neglect where the victim is an older person.[34]

13.23 State and territory laws vary in their treatment of causation. NSW, Victoria, Tasmania and the Northern Territory require that a causal link be established.[35] In Queensland and Western Australia,[36] the failure to provide the requisite care is deemed to have caused the serious harm.[37] In South Australia, it is sufficient that the perpetrator was 'aware or should have been aware that there was an appreciable risk that serious harm would be caused' by the neglect.[38]

13.24 Prosecutions in respect of neglect of older persons may be difficult, including because, in some instances, a legal duty may not exist, or because it is difficult or not possible to establish causation in circumstances where the victim is frail and weak. However, the ALRC does not recommend establishing a specific duty on persons who care for older persons. In the ALRC's view, existing approaches which focus on the victim's inability to care for themselves or remove themselves from the care of another are preferable. Similarly, the ALRC does not recommend deeming a causal connection between a failure to provide the requisite level of care and the harm caused to an older person. However, a broader review of 'neglect' offences might consider whether it is appropriate to deem a causal link between the failure to provide the requisite care and the harm caused.

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32 *R v Taktak* (1988) 14 NSWLR 226, 243–4. Here, Yeldham J quotes *Jones v United States*, 308 F.2d 307 (D.C. Cir. 1962) 310.

33 *Criminal Code Act 1924* (Tas) sch 1 cl 144. The duty is expressed in similar terms in: *Criminal Code Act 1983* (NT) 1983 sch 1 cl 149; *Criminal Code Act 1899* (Qld) s 285; *Criminal Code Act Compilation Act 1913* (WA) app B cl 262.

34 L Barratt, *Submission 325*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*.

35 In NSW and Victoria this is expressed as requiring that the failure 'causes' the serious harm or injury: *Crimes Act 1900* (NSW) s 44(1); *Crimes Act 1958* (Vic) s 24. In Tasmania and the Northern Territory, the requirement is stated in the following terms: the accused is guilty of a crime if they fail to fulfil their duty 'whereby' the person's health is likely to be permanently injured: *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1924* (Tas) sch 1 cl 177.

36 *Crimes Act 1900* (NSW) s 44(1); *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1899* (Qld) s 324; *Criminal Law Consolidation Act 1935* (SA) ss 14(c)–(d); *Criminal Code Act 1924* (Tas) sch 1 cl 177. The only exception to this requirement is in Western Australia, where it is sufficient to establish the existence of a duty and a failure to fulfil that duty. Where these elements are fulfilled, the accused 'is held to have caused any consequences which result to the life or health of the other person': *Criminal Code Act Compilation Act 1913* (WA) app B cl 262.

37 *Criminal Code Act 1899* (Qld) s 285; *Criminal Code Act Compilation Act 1913* (WA) app B cl 262.

38 *Criminal Law Consolidation Act 1935* (SA) s 14(1)(c).

Alternatives to specific offences

13.25 Stakeholders submitted that factors—other than the availability of offences—may limit the availability and efficacy of criminal justice responses. These include, for example, a lack of understanding of what elder abuse is, a reluctance to acknowledge and report elder abuse, and low rates of prosecution.[39] WA Police stated:

> Some of the reasons for under-reporting include that the victim is dependent on the perpetrator for their daily care and are fearful reporting may see them placed in a residential care facility, the shame associated with being a victim of elder abuse, fear of jeopardising relationships with family, and fear of retaliation. There may also be an inability of the older person to access police services to be able to report crime, and the ability to be able to communicate what has been happening to a police officer due to the abuser being the primary carer, the presence of cognitive impairment, or language and cultural barriers.[40]

13.26 The following case study provided by the Eastern Community Legal Centre is illustrative:

> 'Larry' was a client in the ECLC family violence duty lawyer list. He told the police that he didn't want to proceed with the intervention order application that the police had initiated on his behalf. The police referred Larry to the ECLC duty lawyer to talk about his rights.
>
> Larry told the ECLC duty lawyer that this was the third time that the police had attended at his home in the last six months due to his being subjected to assaults by his adult son (aged 30). The assault that precipitated the recent police attendance had rendered Larry unconscious. Larry refused to admit that his son had assaulted him and claimed that he fell down the stairs. Larry said that the second time that the police attended, they had warned him that they would make an intervention order application on his behalf if they were called out to his home again. He was immensely embarrassed and feared that his son would be rendered homeless if he agreed to exclude him from the home (as recommended by the police). Larry indicated that he understood that the police and ECLC were very concerned about his safety, but said that he loved his son too much to agree to exclude him from the home.
>
> When he appeared before the Magistrate, the Magistrate questioned Larry closely on his safety. In the questioning, the Magistrate deduced that even if Larry were to have a full intervention order excluding the son from the home, that Larry would still allow him to stay.[41]

13.27 The ALRC considers that, rather than creating a new elder abuse offence, other initiatives such as the establishment of specialist elder abuse units by police and improvements in support for vulnerable witnesses may better achieve improvements in criminal justice responses. Such initiatives should be combined with initiatives to enhance community awareness of elder abuse as part of a National Plan.[42] Advocare

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39 See, eg, Eastern Community Legal Centre, *Submission 357*; National Legal Aid, *Submission 192*; Justice Connect, *Submission 182*; Seniors Rights Victoria, *Submission 171*; Carers Australia, *Submission 157*; National Seniors Australia, *Submission 154*; Legal Aid NSW, *Submission 140*; Federation of Ethnic Communities' Councils of Australia, *Submission 89*; Law Council of Australia, *Submission 61*.

40 WA Police, *Submission 190*.

41 Eastern Community Legal Centre, *Submission 177*.

42 See ch 3.

supported this approach, stating that 'elder abuse is first and foremost a social problem that requires more education and exposure, which could occur through ongoing media strategies'.[43]

Improving police responses to elder abuse

13.28 Key concerns raised by stakeholders included that police did not always respond appropriately to 'low level' abuse, including neglect or financial abuse; and that ageist perceptions of older persons could affect police dealings, including that older people would not make reliable or competent witnesses.[44] A significant number of stakeholders were supportive of increased police training as a mechanism to enhance the criminal justice system response to elder abuse.[45] Some suggested that this could be best achieved through the training and deployment of specialist officers or specialist units.[46]

13.29 However, NSW Police, in evidence to the NSW Legislative Council's inquiry into Elder Abuse (NSW Elder Abuse Inquiry) cautioned that 'the constable on the street is not a walking encyclopaedia'.[47] Bearing this in mind, additional training and tools for frontline police might focus on further guidance on identifying elder abuse.

13.30 For example, NSW Police and the Elder Abuse Helpline and Resource Unit have worked together to prepare an 'aide memoire' that has been issued to all 'first responders'.[48] It sets out what may constitute elder abuse, and is produced in card form to fit in the inside cover of notebooks issued to all police officers.[49] Other initiatives that may be of assistance might be the development of a risk assessment and

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

44 See, eg, Women's Legal Services Australia, *Submission 343*; Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; NSW Ombudsman, *Submission 160*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian Bankers' Association, *Submission 84*.

45 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Women's Legal Services Australia, *Submission 343*; Speech Pathology Australia, *Submission 309*; Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; NSW Ombudsman, *Submission 160*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Macarthur Legal Centre, *Submission 110*; Australian Bankers' Association, *Submission 84*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

46 See, eg, Office of the Public Advocate (SA), *Submission 170*; Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*; Legal Services Commission SA, *Submission 128*; S Kurrle, *Submission 121*; Legal Aid ACT, *Submission 58*. See also, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 10; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 49.

47 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Superintendent Robert Critchlow, Commander, The Hills Local Area Command, NSW Police Force); Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Assistant Commissioner Denis Clifford, Corporate Spokesperson on Vulnerable Communities).

48 Robert Critchlow, 'NSW Police and the Abuse of Older People' (2016) 10 *Elder Law Review*.

49 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Assistant Commissioner Denis Clifford, Corporate Spokesperson on Vulnerable Communities).

management tool. For example, in Victoria, a 'Family Violence Risk Assessment and Management Report' is completed where there is a family violence incident. This report informs the action to be taken by Victoria Police. The report guides police through a risk assessment and risk management process, including:

- identifying and recording the most relevant evidence-based risk factors and indicators
- ensuring that decisions by police or others regarding the safety and welfare of affected family members are well informed
- making a structured assessment of the likelihood of future family violence
- determining the most appropriate strategy.[50]

13.31 Additional training and access to tools could be supplemented by the establishment of a network of specialist officers or units who could provide advice and support to frontline staff as necessary.[51] Stakeholders were supportive of this approach.[52] In a submission to the NSW Elder Abuse Inquiry, the Elder Abuse Helpline and Resource Unit noted that the level of police response 'varies from exemplary to less than adequate at times, risking the possibility of further unnecessary suffering of the older person'. It suggested that specialist positions should be rolled out across the state to support frontline staff to achieve a 'consistently high standard'.[53]

13.32 An illustrative example of how specialist officers can assist frontline staff was provided by Superintendent Robert Critchlow in evidence before the NSW Elder Abuse Inquiry:

> We had a matter recently in Ku-ring-gai where an abusive relative was appropriately charged with a domestic violence offence against an older person. The constables, in their keenness, removed the offender from the home—as they normally would—and left the older person alone. We relied upon the assistance of an inspector who worked in the command … who was able to step in, amend the bail conditions, intervene appropriately, remedy the situation and train the constables as to what better approach could have been taken.[54]

13.33 In 2016, Victoria Police began a three-year trial to embed and streamline specialist assistance in family violence matters. During the trial, police officers use a

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50 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 17.

51 The NSW Legislative Council also recommended the establishment of vulnerable community support officers in each regional command: Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 10. The Royal Commission into Family Violence supported strengthening the role of specialist officers, recommending that career structures within Victoria Police reflect the role of specialist family violence liaison officers as core business: Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 49.

52 See, eg, Women's Legal Services Australia, *Submission 343*; Eastern Community Legal Centre, *Submission 177*.

53 NSW Elder Abuse Helpline and Resource Unit Submission No 33 to General Purpose Standing Committee No 2, NSW Legislative Council, *Elder Abuse in New South Wales* (November 2015).

54 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Superintendent Robert Critchlow, Commander, The Hills Local Area Command, NSW Police Force).

tiered screening tool to determine when a family violence incident should be referred to the family violence specialist team as well as the appropriate response by the specialist team. The tool includes two parts: Part A is to be completed by frontline police at the scene of the incident to determine whether to refer the matter on; and Part B is to be completed by the family violence specialist team to prioritise risk.[55]

13.34 Part A includes 14 questions that are scored by police. Six questions rely on interviewing the victim, three questions rely on police observation, and the remaining five questions rely on a review of crime databases to ascertain matters such as relevant criminal history. If the assessment results in a score of four or more, the matter is referred to a specialist team.[56] Part B includes 10 items, and a maximum possible score of 12. If the assessment results in a score of four or more, the specialist team will assign a more fine-grained risk prioritisation. Cases that are categorised as 'standard' will receive a 'standard police response'. Specialist teams will take carriage of risk management for cases prioritised as 'moderate' or 'high/very high'.[57]

13.35 Specialist staff or units may also be responsible for initiatives targeted at a more holistic response to elder abuse. WA Police suggested that this might include participating in interagency activities, developing proactive approaches which harness responses and resources available elsewhere within the government and community sector, and engaging in community awareness activities.[58] For example, NSW Police and the Elder Abuse Helpline and Resource Unit have also worked closely to establish referral pathways such that 'police are now common callers' to the NSW elder abuse helpline.[59] Similarly, police involvement in networks such as the Eastern Elder Abuse Network[60] and the Western Australia Alliance for the Prevention of Elder Abuse,[61] which bring together professional staff working with older people, provides further opportunities to develop and use referral pathways. Recognising the time constraints on frontline police, the establishment of specialist positions or units provides an opportunity for greater engagement in such networks.

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55 Jude McCulloch et al, 'Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)' (Final Report, School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, for Department of Health and Human Services (Vic), 2016) 45–46.

56 Ibid 46. Police also retain a discretion to refer a matter to a specialist team if the score falls below this threshold.

57 Ibid.

58 WA Police, *Submission 190*.

59 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Superintendent Robert Critchlow, Commander, The Hills Local Area Command, NSW Police Force).

60 Eastern Community Legal Centre, *Submission 177*.

61 WA Police, *Submission 190*.

Assisting 'vulnerable witnesses'

13.36 In addition to the factors above, the low rate of prosecutions for elder abuse may also arise from the high evidentiary threshold applicable under criminal law and the challenges it presents to all victims of crime, including older people. The grave consequences that flow from the criminal prosecution of a person warrant the need for such a high bar and there are, in most jurisdictions, a suite of mechanisms designed to assist 'vulnerable witnesses' who find themselves engaged in the criminal justice system. 'Vulnerable witnesses' are witnesses who require additional support. They are usually defined as witnesses with intellectual or cognitive impairment, children, or special classes of victims (such as victims of sexual assault). Stakeholders responding to the Discussion Paper suggested that such mechanisms be improved.[62] The Office of the Public Advocate (SA) pointed to reforms which:

- provide access to assistance for witnesses with complex communication needs;
- allow evidence to be taken in informal surroundings in circumstances where a vulnerable witness is involved; and
- allow alternative mechanisms for the presentation of evidence given by vulnerable witnesses at trial, including pre-recorded evidence.[63]

13.37 The use of witness intermediaries was suggested by Disabled People's Organisations Australia, referring to the successful use of intermediaries in the United Kingdom.[64] Speech Pathology Australia also supported this initiative, describing it as a best practice example of communication assistance.[65]

13.38 The ALRC recognises the need for adequate support and assistance to ensure 'vulnerable witnesses' can engage with the criminal justice system. Broader reviews of support provided to 'vulnerable witnesses' should specifically consider older people's needs.

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62 Office of the Public Guardian (Qld), *Submission 384*; Disabled People's Organisations Australia, *Submission 360*; Office of the Public Advocate (SA), *Submission 347*; Speech Pathology Australia, *Submission 309*.

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

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

65 For a summary of vulnerable witness provisions across the states and territories, see: Department of the Attorney General and Justice (NT), *Consultation Results Report: Consultation Regarding Application in the Lower Courts of Recorded Statement Protections for Vulnerable Witnesses: Section 21B of the Evidence Act* (2014) 16–17.

14. Safeguarding Adults at Risk

Contents

Summary

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

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

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

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

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

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

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

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

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

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

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

Adult safeguarding laws

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

A duty to protect

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

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

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

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

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

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

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

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

4 Ibid 182.

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

from abuse, Herring writes, requires 'a clear set of duties' on relevant government agencies to 'investigate, intervene and protect older people who are being, or are at risk of, abuse'.[6]

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

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

Current measures

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

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

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

6 Herring, 'Elder Abuse: A Human Rights Agenda for the Future', above n 1.

7 See also ch 2.

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

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

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

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

Police and the criminal law

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

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

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

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

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

10 See ch 13.

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

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

13 Legal Aid ACT, *Submission 223*.

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

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

> A recurring theme … is the view that if an allegation is withdrawn or does not result in criminal charges or a conviction, social work has no locus to act. This attitude fails to take account of social work authorities' duty to assess need, to provide services and to protect, regardless of whether criminal behaviour has been established in accordance with a criminal standard of proof. …
>
> Sexual abuse allegations are very often retracted, particularly when the complainant is put under pressure, is not offered effective support, remains in the same household as the abuser and does not feel that protection will be provided as a result of the allegation. Social work staff showed insufficient understanding of this dynamic of sexual abuse. The result of this lack of understanding was ill-informed assumptions about the truth of the allegations and a failure to base service provision on a comprehensive assessment of need and risk in relation to each incident or allegation.[15]

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

Helplines and advocacy services

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

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

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

16 See ch 13.

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

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

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

Aged care providers

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

Public Advocates and Public Guardians

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

14.29 In Victoria and Western Australia, abuse is investigated where it would be appropriate to make or change a guardianship or financial administration order.[24] The Victorian Law Reform Commission has recommended that the powers of the Office of the Public Advocate (Vic) should be expanded to allow investigations of the abuse, neglect or exploitation of 'people with impaired decision-making ability due to a disability'.[25]

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19 See chs 2 and 4.

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

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

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

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

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

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

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

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

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

Need to fill the gaps

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

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

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

27 Ibid s 27B(2).

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

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

> Public Advocate, with that body being responsible for both investigating allegations and facilitating their resolution.[30]

14.34 The committee said it 'strongly supports the establishment of a Public Advocate in New South Wales with the power to investigate complaints about abuse and also to initiate its own investigations'.[31]

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

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

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

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

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

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

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

31 Ibid [8.80].

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

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

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

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

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

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

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

Adult safeguarding agencies

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

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

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

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

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35 Law Council of Australia, *Submission 351*.
36 Disabled People's Organisations Australia, *Submission 360*.
37 Different agencies might even investigate different types of abuse.
38 ACT Human Rights Commission, *Submission 337*.
39 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.

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

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

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

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

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

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

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

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

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

41 ADA Australia, *Submission 283*.

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

43 Seniors Rights Service, *Submission 296*.

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

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

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

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

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

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

Duty to make inquiries

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

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

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

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46 Office of the Public Advocate (Qld), *Submission 361*.
47 Office of the Public Advocate (SA), above n 14, 26.
48 As discussed below, in most cases, the adult's consent should be obtained before family members or others are approached about the concerns.
49 *Care Act 2014* (United Kingdom) s 42(2).

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

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

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

At-risk adults

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

(a) have care and support needs;

(b) are being abused or neglected, or are at risk of abuse or neglect; and

(c) are unable to protect themselves from abuse or neglect because of their care and support needs.

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

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

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

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

52 Law Council of Australia, *Submission 351*.

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

54 ADA Australia, *Submission 283*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61 Ibid s 3(2).

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

63 R Lewis, *Submission 349*.

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

65 E Davidson, *Submission 239*.

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

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

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

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

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

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

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

Abuse or neglect

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

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66 Legal Aid NSW, *Submission 352*.
67 National Older Persons Legal Services Network, *Submission 363*.
68 Legal Aid ACT, *Submission 223*.
69 Office of the Public Advocate (SA), above n 14, 23.
70 In submissions, stakeholders commented on the definition of elder abuse, but few commented on the meaning of abuse in the more specific context of adult safeguarding legislation.

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

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

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

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

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

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

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

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

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

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

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

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

Relationship of trust

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

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

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

Consent

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

(a) in serious cases of physical abuse, sexual abuse, or neglect; or

(b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or

(c) if the adult lacks the legal capacity to give consent, in the circumstances.

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

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

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

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

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

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

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

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

> (a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;
>
> (b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care; and
>
> (c) the will, preferences and rights of the older person must be respected.[78]

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

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

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

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76 See ch 2.
77 Dunn, Clare and Holland, above n 59, 244.
78 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 3–2.

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

14.86 In England and Wales, and Scotland, guiding principles also require the investigating body to have regard to the adult's wishes, and ensure that the adult participates in decisions about investigation, support and assistance. The support and assistance provided should be least restrictive.[80]

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

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

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

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

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

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

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

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

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

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

83 Law Council of Australia, *Submission 351*.

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

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

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

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

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

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

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

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

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

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

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

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

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

89 Aged Care Steps, *Submission 340*.

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

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

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

14.95 Other stakeholders expressed their concerns with the proposed principles, and emphasised that abuse itself undermines people's autonomy and that abused people may refuse support because they are 'scared, bullied or suffering cognitive impairment'.[93]

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

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

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

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

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

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

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

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92 Ibid.
93 G Arnold, *Submission 279*.
94 Name Withheld, *Submission 290*.
95 Ibid.
96 GRC Institute, *Submission 358*.
97 P Greenwood, *Submission 304*.

The recommended consent provision, set out above, is intended to give more concrete effect to the principles proposed in the Discussion Paper.[98]

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

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

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

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

Serious physical or sexual abuse or neglect

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

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

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

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

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

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

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

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

Autonomy

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

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

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

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

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

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

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

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

sometimes 'require and deserve the protection of the authorities and the law so that they may regain … [their] autonomy'.[104]

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

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

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

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

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

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

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

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

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

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

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

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

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

Limited ability to consent

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

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

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

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

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

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

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

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

Unable to contact adult

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

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

Other countries

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

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

111 Office of the Public Advocate (Vic), *Submission 246*.
112 Name Withheld, *Submission 215*.
113 Legal Aid NSW, *Submission 352*.
114 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 35(1).

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

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

(a) that harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust, and

(b) that the adult at risk would consent if the adult did not have confidence and trust in that person.[116]

14.126 A refusal to consent to participate in an interview or a medical examination cannot be ignored.[117]

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

(a) the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interests, or

(b) the adult is experiencing, or is at risk of, abuse or neglect.[118]

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

Actions

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

(a) coordinate legal, medical and other services for the adult;

(b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;

(c) report the abuse to the police;

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115 Ibid s 35(3).
116 Ibid s 35(5).
117 Ibid s 35(6).
118 *Care Act 2014* (United Kingdom) s 22.
119 *Adult Guardianship Act 1996* (British Columbia) s 52. 'The designated agency must involve the adult, to the greatest extent possible, in decisions about how to: (a) seek support and assistance, and (b) provide the support and assistance necessary to prevent abuse or neglect in the future.'
120 Ibid 56(3)(a).

(d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or

(e) decide to take no further action.

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

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

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

Multi-agency, multi-disciplinary

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

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

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

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

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

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

14.134 In England and Wales, Safeguarding Adults Boards are established to 'help and protect' at-risk adults.[124] They should seek to achieve this objective by 'co-ordinating and ensuring the effectiveness of what each of its members does'.[125] In British Columbia, the investigative body may report the case to another agency, including the Public Guardian, refer the adult to available services, or prepare a support and assistance plan specifying the services the adult requires if, for instance, the adult has complex needs that require case management and ongoing coordination.[126]

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

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

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

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

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

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

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

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

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

128 Carers NSW, *Submission 321*.

129 NSW Ombudsman, *Submission 160*.

130 Ibid.

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

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

Other actions

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

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

14.141 In some jurisdictions, safeguarding agencies can remove an at-risk person from their home for a period of time, to remove them from danger or to assess their health and safety. For example, in Scotland, a safeguarding agency may apply to the sheriff for assessment, banning and removal orders.[134] Assessment orders permit it to take a person suspected to be an adult at risk from the premises for an interview in private, or for a medical examination conducted by a nominated health professional.[135] Removal orders authorise it to remove the adult at risk from their premises to protect them from harm.[136] Banning orders restrict access to the adult at risk, or require the

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

132 Ibid.

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

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

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

136 Ibid s 14.

preservation of moveable property owned or controlled by the person subject to the order.[137]

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

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

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

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

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

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

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137 Ibid s 19.
138 *Adult Guardianship Act 1996* (British Columbia) s 51.
139 *Care Act 2014* (United Kingdom) s 46.

Coercive powers

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

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

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

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

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

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

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

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

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

143 Ibid s 22.

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

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

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

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

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

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

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

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

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145 Ibid explanatory note to s 45.

146 Ibid s 45(6).

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

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

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

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

151 Law Council of Australia, *Submission 351*.

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

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

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

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

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

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

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

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

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

the purposes of the relevant legislation'[154] and, when used in connection with a specific investigation,

> the minimum statutory trigger for using the power should be that the person exercising it has 'reasonable grounds' for the belief or suspicion that is required before the power can be exercised.[155]

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

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

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

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

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

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

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

155 Ibid.

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

157 Seniors Rights Service, *Submission 296*.

158 Except in limited circumstances: see above.

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

Powers of entry

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

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

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

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

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

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

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

161 Ibid s 49(1).

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

163 Justice Connect, *Submission 182*.

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

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

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

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

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

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

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

Reporting abuse

Recommendation 14–7 Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of their report, be:

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

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

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

165 Ibid.
166 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.80].
167 Legal Aid ACT, *Submission 223*.

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

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

Protections

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

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

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

14.177 A number of stakeholders also raised fears of reprisals from employers for reporting concerns about abuse in residential aged care facilities and other supported accommodation.[170]

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

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

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

169 Law Council of Australia, *Submission 351*.

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

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

who reports an instance of violence, neglect or abuse is not thereby subject to adverse consequences'.[172]

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

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

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

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

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

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

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

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

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

175 A Salt, *Submission 278*.

176 Name Withheld, *Submission 240*.

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

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

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

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

Protocols

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

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

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

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

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

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

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

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

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

184 Ibid 132.

185 Ibid 133.

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

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

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

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

> Approaches to elder abuse need to be based on an empowering approach, respecting the older person's autonomy, right and ability to made decisions for themselves. It is important that paternalistic and stereotypical views of older people as being frail, dependent and cognitively impaired do not highjack the agenda, treating elder abuse in the same way as child abuse, but rather recognise its greater similarities with other forms of family or domestic violence.
>
> It is important not to take away the right of the older person to make their own decision thus further disempowering them at a time when they may already be feeling vulnerable. Mandatory reporting can lead to older people not seeking help for fear of a report being made whether they want it to be or not.[192]

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

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

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

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

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

189 State Trustees Victoria, *Submission 138*.

190 Relationships Australia, Victoria, *Submission 125*.

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

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

> problematic if there were inadequate resources available to field and investigate high volumes of reports.[193]

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

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

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

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

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

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193 National Seniors Australia, *Submission 154*.

194 Legal Services Commission SA, *Submission 128*.

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

Appendix 1

Appendix 1: Witnessing Requirements—jurisdictions where enduring powers are combined

Jurisdiction	Signatory	Combined enduring power of attorney (or equivalent)
Vic	Principal	Two witnesses—one person must be either authorised to witness affidavits or a medical practitioner.[1] The witnesses must certify that the principal appeared to freely and voluntarily sign the enduring document and that the principal appeared to have decision-making capacity in relation to making the enduring document.[2]
	Attorney	Any person over 18 years. No witness required if attorney is a trustee company.
Qld	Principal	One witness being a justice, commissioner for declarations, notary public or lawyer.[3] Witness must certify that the principal appeared to have the legal capacity necessary to make the enduring document.[4]
	Attorney	No witness required.
NT	Principal	One witness being a JP, Commissioner for Oaths, police officer, legal practitioner, health professional, accountant, CEO of a local government authority, social worker or school principal. Witness must certify the identity of the principal, that the principal understands the nature and effect of the advance personal plan; and that in making the plan, the principal adult is acting voluntarily without coercion or other undue influence.[5]
	Substitute decision maker	No witness required.
ACT	Principal	Two witnesses—one who must be authorised to witness statutory declarations. One witness may be a relative of the principal or the attorney.[6] Witnesses must certify that the principal signed the power of attorney voluntarily, and appeared to understand the nature and effect of making the power of attorney.[7]
	Attorney	No witness required.

1 *Powers of Attorney Act 2014* (Vic) ss 33–36. Witnesses cannot be a relative of the principal or attorney, or a care worker or an accommodation provider for the principal.
2 *Powers of Attorney Act 2014* (Vic) s 33.
3 *Powers of Attorney Act 1998* (Qld) s 31. The eligible witness cannot be the attorney of the principal, a relative of the principal or attorney and, if the power is for a personal matter, not be a paid carer or health provider of the principal.
4 *Powers of Attorney Act 1998* (Qld) s 44.
5 *Advance Personal Planning Act 2013* (NT) s 10(3).
6 *Powers of Attorney Act 2006* (ACT) s 19.
7 Ibid, s 22.

Appendix 2

Appendix 2: Witnessing Requirements—jurisdictions where enduring powers of attorney and enduring guardianship (or equivalent) are separate

Jurisdiction	Signatory	Enduring Power of Attorney	Enduring Guardianship (or equivalent)
NSW	Principal	One witness being either a registrar of the Local Court, a barrister or solicitor, a conveyancer, certain employees of the NSW Trustee and Guardian or a trustee company, or certain foreign qualified lawyers.[1] The witness must certify that the person explained the effect of the instrument to the principal before it was signed and that the principal appeared to understand the effect of the power granted.[2]	One or more eligible witnesses being either a registrar of the Local Court, a legal practitioner, certain employees of the NSW Trustee and Guardian or Service NSW, or certain foreign qualified lawyers.[3] Witness(es) must certify that the signing was voluntary and that the person signing appeared to understand the effect of the instrument.[4]
	Attorney/Guardian	No witness required.	Same requirements as for the principal.
SA	Principal	One or more witnesses, one of whom must be qualified to sign affidavits[5] (being either a JP, certain police officers, certain judicial officers, certain court registrars and deputy registrars, and legal practitioners).	One suitable witness. A suitable witness is broadly defined.[6] Witness must certify that: they explained to the person giving the advance care directive the legal effects of giving an advance care directive of the kind proposed; and in their opinion the person giving the advance care directive appeared to understand the information and explanation given by the witnesses; and did not appear to be acting under any form of duress or coercion.

Jurisdiction	Signatory	Enduring Power of Attorney	Enduring Guardianship (or equivalent)
	Attorney/ Substitute decision maker	No witness required.[7]	No witness required.
WA	Principal	Two witnesses with at least one eligible to take declarations.[8]	Two witnesses and at least one must be eligible to take declarations.[9]
	Attorney/ Guardian	No witness required.	Two witnesses and at least one must be eligible to take declarations.[10]
Tas	Principal	Two witnesses neither of whom is a party to the document or a close relative of a party.[11]	Two witnesses neither of whom is a party to the document or a close relative of a party.[12] Witnesses must certify that the principal signed freely and voluntarily and that the principal appeared to understand the effect of the instrument.
	Attorney/ Guardian	No witness required.[13]	No witness required.[14]

1 *Powers of Attorney Act 2003* (NSW) s 19(2).
2 Ibid, s 19(1)(c).
3 *Guardianship Regulations 2016* (NSW) reg 4.
4 *Guardianship Act 1987* (NSW) s 6C.
5 *Powers of Attorney and Agency Act 1984* s 6(2)(a).
6 For example, it includes: certain agents and employees of Australia Post; certain bank, building society and credit union employees; clerks of courts; members of Engineers Australia; members of the accounting professions; MPs; certain public servants; lawyers; police officers; teachers and vets. A person cannot be a suitable witness if: they are appointed under the advance care directive as a substitute decision-maker; they have a direct or indirect interest in the estate of the person; they are a health practitioner responsible for the health care of the person; or they occupy a position of authority in certain facilities at which the person resides.
7 See, eg, *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) sch 2.
8 *Guardianship and Administration Act 1990* (WA) ss 104(2), 110E(1)(c). Who may witness declarations is set out in the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA). This is a broad list of professionals similar to, but broader than, the list in South Australia.
9 *Guardianship and Administration Act 1990* (WA).
10 *Guardianship and Administration Act 1990* (WA).
11 *Powers of Attorney Act 2000* (Tas) s 9(1).
12 *Guardianship and Administration Act 1995* (Tas) s 32(2).
13 *Powers of Attorney Act 2000* (Tas) s 30(c).
14 *Guardianship and Administration Act 1995* (Tas) s 32.

Appendix 3. Consultations

Name	**Location (some conducted by teleconference)**
Aboriginal Women's Consultation Network, Indigenous Women's Legal Program, Women's Legal Service NSW	Sydney
Advocare Incorporated	Perth
Aged Care Crisis	Melbourne
Aged and Community Services Australia	Sydney
Aged Rights Advocacy Service	Sydney
Alzheimer's Australia	Canberra
Attorney-General's Department (Cth)	Sydney
Australian Aged Care Quality Agency	Sydney
Australian Bankers' Association Incorporated	Sydney
Australian College of Nursing	Sydney
Australian Medical Association	Sydney
Australian Nursing and Midwifery Federation	Sydney
Australian Securities and Investments Commission	Sydney
Dr Catherine Barrett, Australian Research Centre in Sex, Health and Society, La Trobe University	Sydney
Dr Maree Bernoth, Lecturer in Nursing, School of Midwifery and Indigenous Health, Charles Sturt University	Sydney

Maria Berry	Sydney
Associate Professor Fiona Burns, Sydney Law School, University of Sydney	Sydney
Daniel Butler, Director, DBA Lawyers	Melbourne
Carers Australia	Canberra
Emeritus Professor Terry Carney AO, Sydney Law School, University of Sydney	Sydney
Caxton Legal Centre	Sydney
Dr John Chesterman, Office of the Public Advocate (Vic)	Sydney Melbourne
Commonwealth Ombudsman	Sydney
COTA	Sydney
Kathleen Cunningham, Executive Director, British Columbia Law Institute, Canadian Centre for Elder Law	Sydney
Professor Gino Dal Pont, School of Law, University of Tasmania	Sydney
Department of the Attorney General (WA); Public Trustee and Public Advocate (WA)	Sydney
Department of Family and Community Services (NSW)	Sydney
Department of Health (Cth)	Canberra Sydney
Department of Human Services (Cth)	Canberra
Department of Local Government and Communications (WA)	Sydney
Department of Social Services (Cth)	Canberra
Paul Drum, Head of Policy, CPA Australia	Melbourne

Professor Pat Dudgeon, School of Indigenous Studies, University of Western Australia; Dr Victoria Hovane, Managing Director, Tjallara Consulting Pty Ltd; Chontel Gibson, Indigenous Academic Fellow, Charles Sturt University	Sydney
Eastern Elder Abuse Network	Melbourne
Elder Abuse Helpline and Resource Unit	Sydney
Elder Rights Advocacy	Melbourne
Ethnic Communities' Council of NSW	Sydney
Ethnic Communities' Council of Victoria	Melbourne
Federation of Ethnic Communities' Councils of Australia	Canberra
Sue Field, Adjunct Fellow in Elder Law, School of Law, Western Sydney University	Sydney
Financial Counselling Australia	Melbourne
Financial Services Council	Sydney
Financial Services Institute of Australasia	Sydney
Krista Fitzgerald, Principal and Michael Labiris, Associate, Moores Legal	Melbourne
Jordan George, Head of Policy, Financial Services Council	Sydney
Magistrate Anne Goldsbrough, Magistrates' Court of Victoria	Melbourne
Lindy Harland, Guardianship Advocate, ADA Australia	Townsville
Brian Herd, Partner, CRH Law	Sydney
Dr Philomena Horsley, Research Fellow, Gay and Lesbian Health Victoria, Australian Research Centre in Sex, Health & Society, La Trobe University	Melbourne
Professor Joseph Ibrahim, Head, Health Law and Ageing Research Unit, Department of Forensic Medicine, Monash University Victorian Institute of Forensic Medicine; and others	Melbourne

Justice Connect	Sydney
Dr Rae Kaspiew, Australian Institute of Family Studies	Sydney
Professor Susan Kurrle, Sydney Medical School, University of Sydney	Sydney
Professor Wendy Lacey, Dean and Head of School, School of Law, University of South Australia	Sydney
Rae Lamb, Aged Care Complaints Commissioner	Sydney
Law Council of Australia	Canberra Perth
Leading Age Services Australia	Sydney
Legal Aid NSW	Sydney
Rodney Lewis, ElderLaw	Sydney
Gerard Mansour, Commissioner for Senior Victorians	Melbourne
Alastair McEwin, Disability Discrimination Commissioner, Australian Human Rights Commission	Sydney
Multicultural and Rural Programs Branch, Department of Human Services (Cth)	Sydney
National Aboriginal and Torres Strait Islander Legal Service	Melbourne
National Ageing Research Institute Ltd	Melbourne
National Disability Insurance Agency	Sydney
National LGBTI Health Alliance	Sydney
National Seniors	Sydney
NSW Civil & Administrative Tribunal	Sydney
NSW Law Reform Commission	Sydney
NSW Ombudsman	Sydney

NSW Police Force	Sydney
NSW Trustee & Guardian	Sydney
Meghan O'Brien, Social Work Team Leader, St Vincent's Hospital Melbourne; Abby Clarke, Public Affairs, St Vincent's Health Australia	Melbourne
Office of the Public Advocate (Vic)	Melbourne
Office for Veterans and Seniors Affairs (ACT)	Sydney
Older People's Rights Service	Perth
Older Persons Legal Services Network	Sydney
The Hon Dr Kay Patterson AO, Age Discrimination Commissioner, Australian Human Rights Commission	Sydney
Associate Professor Carmelle Peisah, Sydney Medical School, University of Sydney	Sydney
People with Disability Australia	Sydney
Sabine Philips, Partner, Gadens Lawyers	Melbourne
Public Guardian (NSW)	Sydney
Public Guardian and Trustee, British Columbia	Sydney
Queensland Aged and Disability Advocacy Inc	Sydney Brisbane
Relationships Australia	Canberra
Jonathan Rudin, Aboriginal Legal Service, Toronto	Sydney
The Honourable Susan Ryan AO, Age and Disability Discrimination Commissioner	Sydney
Seniors Carers and International Branch, Department of Human Services (Cth)	Sydney
Seniors Rights Service	Sydney

Seniors Programs & Participation, Ageing & Aged Care Branch, Department of Health and Human Services (Vic)	Melbourne
Seniors Rights Victoria	Sydney
Seniors Rights Victoria and Eastern Community Legal Centre	Melbourne
Teresa Somes, PhD candidate, University of South Australia	Sydney
Magistrate Pauline Spencer, Magistrates' Court of Victoria	Sydney
State Administrative Tribunal (WA)	Perth
Pamela Suttor and Emma Liddle, Elder Law and Succession Committee, Law Society of New South Wales,	Sydney
Townsville Community Legal Service	Sydney
United Voice	Sydney
Victorian Civil and Administrative Tribunal	Melbourne
Welfare Rights Centre NSW	Sydney
The Hon Ken Wyatt AM MP, Minister for Aged Care and Minister for Indigenous Health	Sydney