STANDING REQUIREMENTS IN JUDICIAL REVIEW APPLICATIONS

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As the theme of this year's Australian Institute of Administrative Law National Conference recalls, in *McHattan v Collector of Customs,* Brennan J (as his Honour was then) observed:

> across the pool of sundry interests, the ripples of affection may widely extend. The problem … is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote.[1]

Standing requirements — the rules which determine who is entitled to pursue public law remedies in our courts — are an attempt to grapple with the problem identified by Brennan J. In *Bridgetown/Greenbushes Friends of the Forest v Executive Director, Department of Conservation and Land Management*[2] Murray J explained:

> [The rules of standing in the public law context seek to strike a] balance so as not to unduly fetter the capacity of interested citizens to bring public law issues before the courts, whilst at the same time, again in the interests of the community as a whole, preventing a multiplicity of actions for which no particular justification can be seen.[3]

The operation and content of the standing requirements which apply to applications for judicial review, in which the prerogative writs or equitable relief are sought, raise questions relating to the three sub-themes for this conference. Do standing requirements reflect community expectations of the extent to which administrative decision-makers should be required to comply with statutory limitations or conditions on the exercise of power or of the importance of certainty in administrative decision-making? Given that standing requirements limit the pool of persons able to participate in the review of the legality of executive decision-making, should standing requirements be broadly or narrowly defined? If standing requirements operate so that, in effect, some decisions in excess of jurisdiction cannot readily be challenged, is that a just outcome?

The thesis of this article is that:

- the standing requirements for the prerogative writs and for equitable remedies in public law (the equitable remedies), and for their equivalents under s 75(v) of the *Constitution* (the constitutional remedies), are 'far from coherent';[4]
- incoherence is unnecessary as a matter of principle and undesirable as a matter of practice;
- there is authority to support the adoption by the High Court of the same rule for standing for the prerogative writs of certiorari, prohibition and mandamus, for injunctions and declarations, and for the constitutional remedies; and
- that rule should be an open standing rule, but, in determining whether to grant any of those remedies in the exercise of its discretion, a court will take into account, as one of

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the factors relevant to that exercise of discretion, the nature and extent of the applicant's interest in the subject-matter of the decision or conduct under challenge.

In short, it is time to adopt an open standing rule, combined with discretionary relief which takes into account an applicant's interest in the decision or conduct under challenge.

In order to advance that thesis, in this article I discuss the following five matters:

- the present state of the law in relation to standing requirements for prerogative writs and for the equitable remedies;
- prospects for achieving greater uniformity in the standing requirements for the prerogative writs and for the equitable remedies;
- the implications of an 'open standing' rule for the prerogative writs and the equitable remedies;
- the role of the discretion to refuse the grant of relief to an applicant who does not have an interest in the decision or conduct under challenge; and
- legislative reform of standing requirements.

For the sake of simplicity, I propose to confine my discussion of the prerogative writs to the writs of certiorari, prohibition and mandamus and to confine my observations to those cases where the writs, or the equitable remedies, are sought on the basis of a jurisdictional error by the decision-maker.

The present state of the law in relation to standing requirements for prerogative writs and for the equitable remedies

Prior to the late 1990s, there had been relatively few cases in the High Court in which the requirements for standing to obtain prerogative relief were considered. The standing requirements for each of the prerogative writs, which could be discerned from other cases, were not entirely clear. Those requirements relied heavily on principles set out in English cases and were to some extent influenced by the requirements of the rules of court in each jurisdiction. There was authority, for example, which suggested that the person applying for a prerogative writ had to have some interest in the remedy, over and above that of a member of the public.[5] In other cases, it was recognised that a more liberal test applied for certiorari and prohibition and that even a 'stranger' could apply for those writs;[6] nevertheless, 'the court would not listen, of course, to a mere busybody who was interfering in things which did not concern him'.[7]

The writs of certiorari and prohibition

In a series of cases beginning in the late 1990s, however, various justices of the High Court made it clear that a 'stranger' could seek the writ of certiorari and confirmed a line of authority which established that a stranger could also seek the writ of prohibition.

Insofar as the writ of certiorari is concerned, in *Re McBain; Ex parte Australian Catholic Bishops Conference*[8] (*McBain*) McHugh J and Hayne J each expressed the view that a 'stranger' could apply for certiorari. So too did Kirby J and Callinan J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd.*[9] In *Australian Education Union v General Manager of Fair Work Australia*[10] (*AEU*), Gummow, Hayne and Bell JJ also noted that a 'stranger' to a decision may apply for a writ of certiorari to quash that decision. The absence of any requirement for an applicant for certiorari to establish standing was not endorsed by a majority of the Court in any of those cases. Nevertheless, it is apparent that the prevailing view in those cases was that an applicant for a writ of

certiorari need not establish standing to bring that application. That was the conclusion reached by the New South Wales Court of Appeal in *Motor Accidents Authority of New South Wales v Mills.*[11]

Insofar as the writ of prohibition is concerned, in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[12] (*Bateman's Bay*), Gaudron, Gummow and Kirby JJ noted that there was a line of authority that a stranger to an industrial dispute had standing to seek prohibition under s 75(v) of the *Constitution.* The issue was put beyond doubt in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*,[13] in which six members of the Court expressed the view that an applicant for prohibition did not need to demonstrate standing.

The approach taken by the High Court in relation to standing requirements for the writs of certiorari and prohibition has been criticised by the authors of *Judicial Review of Administrative Action and Government Liability.* Professor Groves (who has been responsible for writing the chapter on standing) has suggested that the 'modern cases have engaged in a selective history to propose that [these writs] were and are available to those without any stake in the matter whatsoever'.[14] That point need not be debated here. Irrespective of what the older cases may have said, the High Court's position is now clear. An open standing rule applies in relation to certiorari and prohibition (but the question of the applicant's interest arises for consideration in relation to the discretion to grant the writ, as I discuss below).

The writ of mandamus

The standing requirement for the writ of mandamus appears to be different.

There is a dearth of High Court authority on the standing requirement for mandamus. In *Graham Barclay Oysters v Ryan*,[15] and in *Bateman's Bay*,[16] McHugh J, in *obiter*, made some observations about the writ of mandamus and noted that an applicant for the writ must show a 'sufficient interest' in the performance of the duty in question, possibly even amounting to a legal right. In *McBain*, Hayne J noted that it would be incongruous if a stranger could seek to compel the re-exercise of jurisdiction if a party to the original decision (in that case, in the proceedings before the trial judge in the Federal Court) did not seek to compel that result.[17] In making that observation, his Honour was contrasting the standing requirement for mandamus with the standing requirement (or lack thereof) for certiorari and prohibition.

In some of the older cases, there were suggestions that an applicant for mandamus had to be within the ambit of the public duty which it is claimed was not performed.[18] However, there is other authority to the effect that it is not necessary for an applicant to show that the decision-maker owes a duty to the plaintiff directly and personally which is correlative to the plaintiff's right to have it performed but, rather, that standing may be grounded on a less direct interest.[19] More recently, in *Ruddock v Vadarlis*[20] (the *Tampa* case), the relief sought included mandamus and an injunction to compel the respondents to comply with a duty it was said arose under the *Migration Act 1958* (Cth) to bring the rescuees to Australia to be processed. Justice North equated the requirement for standing for mandamus with that for an injunction — namely, that the applicants had to show a 'special interest'.[21]

I note for completeness that, in some jurisdictions, the rules of court contain standing requirements. Under the *Rules of the Supreme Court 1971* (WA), a writ of mandamus or similar relief may only be granted on the application of a person who is 'interested' in the relief sought.[22] This has been equated with a 'sufficient interest',[23] or a 'special interest'.[24]

It thus appears that the content of the common law standing rule for mandamus is similar, if not identical, to the 'special interest' test for standing to seek the equitable remedies but possibly with an additional requirement that the applicant be within the ambit or scope of the legal duty which the person seeks to enforce. Whatever may be the precise content of the standing requirement for the writ of mandamus, it is apparent that it is different from that for the writs of certiorari and prohibition.

Standing to seek the equitable remedies

That may be contrasted with the standing requirements for the equitable remedies. Historically, the Courts of Chancery would grant equitable relief by injunction to restrain public bodies from acting beyond their power. To do so, however, it was necessary that the Attorney-General either be the plaintiff or give his fiat to a private plaintiff.[25] An exception to that requirement developed, whereby a plaintiff could bring an action without joining the Attorney-General either where there was an interference with his or her private right at the same time as the interference with the public right or where the plaintiff suffered a special damage, peculiar to the plaintiff, as a result of the interference with the public right.[26]

From that historical foundation the law in Australia developed so that a plaintiff would have standing to seek equitable remedies to prevent or correct the violation of a public right, or to compel the performance of a public duty, if the plaintiff could show a 'special interest' in the subject-matter of the action.[27] It is not necessary that that interest be unique to the plaintiff.[28] However, a plaintiff will have no standing to bring an action for such relief if the plaintiffs have no interest in the subject-matter of the action beyond that of any other member of the public.[29]

A 'special interest' does not mean a mere intellectual or emotional concern about a particular issue.[30] Also, it does not mean that a belief, however strongly felt, that the law generally, or a particular law, should be observed or that conduct of a particular kind should be prevented will be sufficient to give rise to a 'special interest' for this purpose.[31] Having said that, intangible interests have been held to be sufficient to constitute a 'special interest' in some cases, such as where an applicant for an injunction to preserve Aboriginal relics had an interest in the preservation of relics of cultural and spiritual significance to the members of a particular Indigenous community.[32]

The requirement for a 'special interest' is a flexible one.[33] It is a matter of fact and degree and will depend on the nature and subject-matter of the litigation,[34] including the legislation relevant to the decision. It will involve an assessment of the importance of the concern held by the plaintiff with regard to the particular subject-matter and the closeness of the plaintiff's relationship to that subject-matter.[35] What is a sufficient interest in one case may therefore be less than sufficient in another.[36]

Consequently, the cases are replete with discussion about whether an individual or corporate plaintiff is able to demonstrate enough of a connection with the decision under challenge to amount to a 'special interest'. In the context of representative groups, it is common to see discussion about who the plaintiff is said to represent, whether those persons themselves have an interest in the decision under challenge, the history of the representative body and the purpose for which it was formed.[37] So, too, the fact that an organisation has been provided with government funding, and accorded recognition to speak in respect of particular issues, may be a factor that signals that the association has a special interest, beyond a mere emotional or intellectual concern, in that issue.[38]

Some factors will not, on their own, be sufficient to give rise to standing: the fact that a plaintiff is an incorporated body with particular objects,[39] the fact that an association has

voluntarily provided comments or concerns on a particular proposal[40] or the fact that some members of an incorporated body or unincorporated association have a special interest in the decision under challenge does not mean that the association itself will necessarily have a special interest in that decision.[41] However, those factors may still be relevant to an overall assessment of whether a plaintiff has standing.

Summary of the position in Australia

The position, in summary, therefore appears to be as follows. In relation to the writs of certiorari and prohibition, an open standing rule applies: anyone, including a person with no interest in the decision under challenge, can apply for the writs. In contrast, an applicant for the writ of mandamus must demonstrate a sufficient or special interest in the performance of the duty which is sought to be enforced and, perhaps, must also show that they are a person within the ambit or scope of the legal duty which they seek to enforce.

In actions for the equitable remedies, a plaintiff will need to show that they have a special interest in the decision or conduct under challenge, which interest is over and above that of other members of the community, although that requirement is applied flexibly.

Standing requirements under statutory judicial review

A range of approaches to the requirements for standing have been adopted in those jurisdictions where statutory judicial review is available. The prevailing approach is that an applicant needs to show that their interests are, or would be, affected by the decision or conduct under challenge.

Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), for example, a 'person aggrieved' by a decision, or by conduct engaged in for the purpose of making a decision, may seek judicial review.[42] A 'person aggrieved' is a person whose interests are adversely affected by the decision or whose interests are or would be adversely affected by conduct engaged in for the purpose of making, or failing to make, a decision or, in the case of a decision by way of a report or recommendation, a person whose interests would be affected if a decision were made in accordance with a report or recommendation.[43]

That model has been followed in some state jurisdictions, such as in the *Judicial Review Act 1991* (Qld)[44] and the *Judicial Review Act 2000* (Tas).[45]

Other jurisdictions have adopted variations of the 'adversely affected' requirement. The *Administrative Decisions (Judicial Review) Act 1989* (ACT), for example, imposes the 'adversely affected' standing requirement only for decisions concerned with heritage and planning.[46] In the case of all other decisions to which that Act applies, anyone may make an application for review. That open standing rule is subject to two exceptions — namely, where a statute precludes the person from pursuing relief and where the applicant's interests would not be adversely affected and their application does not raise a significant issue of public importance.[47]

Finally, some statutes contain an even broader or more flexible requirement for standing and, in some instances, adopt an 'open standing' rule.[48] Perhaps the most notorious of these is s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which expressly extended the meaning of the term 'person aggrieved' in the ADJR Act. An Australian citizen or resident, or an organisation or association incorporated or established in Australia, will be a 'person aggrieved' for the purposes of the ADJR Act if, in the two years prior to the decision under challenge, they have engaged in a series of activities in Australia for the protection or conservation of, or research into, the

environment.[49] That provision has generated considerable controversy because of a perception that that liberal standing rule has permitted unmeritorious applications for review to be made. I will return to that issue a little later in this article.

Prospects for achieving greater uniformity in the standing requirements for the prerogative writs and for the equitable remedies

Leaving to one side the possibility of legislative reform of standing requirements (to which I will return later in the article), achieving any greater uniformity in the standing requirements applicable to the writs of certiorari, prohibition and mandamus, and to the equitable remedies, would require that the High Court depart from existing authority. That having been said, the foundations for the adoption of a uniform open standing requirement (operating in conjunction with the exercise of a discretion whether to grant the relief sought, which would permit the extent of a plaintiff's interest in the decision or conduct under challenge to be taken into account) can be identified in a number of the judgments of the Court.

Various members of the High Court have expressed the view that the standing requirements for the equitable remedies should reflect the standing requirements for the writs of certiorari and prohibition. In *Victoria v Commonwealth (AAP Case)*, for example, Gibbs J remarked that earlier statements on the issue of standing 'made under the influence of principles of private law' are 'not entirely applicable to constitutional cases'.[50]

In *Bateman's Bay*, Gaudron, Gummow and Kirby JJ noted that the requirement that the plaintiff demonstrate a 'special interest' in the subject-matter of the application for a declaration or injunction to remedy a public wrong, or enforce a public duty, was an attempt to solve the problem that otherwise only the Attorney-General, or a party with the Attorney-General's fiat, could bring such an action but, at the same time, to keep at bay 'the phantom busybody or ghostly meddler'.[51] They concluded that 'the result [was] an unsatisfactory weighting of the scales in favour of defendant public bodies'.[52] That was because an applicant first had to demonstrate a special interest, in addition to demonstrating a basis for the relief sought. Justices Gaudron, Gummow and Kirby were sceptical about the prospect that an applicant could obtain an Attorney-General's fiat to challenge a government decision, given that, in Australia, Attorneys-General are members of the government.[53] For that reason, they suggested that:

> in a case where the plaintiff has not sought or has been refused the Attorney General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds.[54]

They pointed out that this approach would be no different from that where a stranger is entitled to seek the grant of prohibition under s 75(v), in which case the Court had a discretion to refuse the remedy.[55] In other words, Gaudron, Gummow and Kirby JJ supported the adoption of the same standing requirement for the equitable remedies as applied to the writ of prohibition (and of certiorari). However, as that course was not sought by the parties in *Bateman's Bay*, the need to determine the point did not arise.

Justices Gaudron, Gummow and Kirby were not the only members of the Court in *Bateman's Bay* to express dissatisfaction with the existing standing requirements. McHugh J observed that the law in respect of standing requirements was 'in need of rationalisation and unification'.[56] However, his Honour concluded that in view of the existence of divergent opinions as to whether the public interest was best served by maintaining the

Attorney-General as the primary protector of public rights, either as a party or by the grant of a fiat, it was preferable that the legislature modify or rationalise standing requirements.

More recently, in *Combet v Commonwealth*[57] (*Combet*), Kirby J again expressed his support for a more flexible approach to standing to seek the equitable remedies, at least in a case involving a challenge to a federal statute or some action by the federal executive. He considered that it would be a 'mistake to graft onto a claim for such relief [which involved the exercise of the jurisdiction in s 75(v) of the *Constitution*] the learning that was devised in respect of the provision of equitable relief in private litigation'.[58] His Honour's view was that 'in matters of public law, potentially there is an additional interest' — namely, 'the interest of the public generally to ensure the compliance of officers of the Commonwealth with the law, specifically the law of the *Constitution* and federal enactments that bind such officers'.[59] Ultimately, however, Kirby J was able to decide the issues in *Combet* without having to determine whether such an interest would suffice to entitle a taxpayer or an elector, or others more generally, to bring proceedings pursuant to s 75(v) of the *Constitution.*

Justifications for adopting the same test for standing for certiorari and prohibition, and for the equitable remedies

The adoption of the same standing requirement for the writs of certiorari and prohibition, and for the equitable remedies, may be justified on a number of bases. Some of these justifications have been articulated in the authorities, while others have a more practical foundation. They amount to a compelling case for the adoption of a uniform, open standing rule for the writs of certiorari and prohibition, and for the equitable remedies. The same arguments support the adoption of an open standing rule in the case of the writ of mandamus also.

Public interest — a single (more flexible) standing rule would facilitate the availability of judicial review to enforce the legal limits on the exercise of power

This justification for a uniform standing rule proceeds on the basis that, where a decision is made in excess of jurisdiction, it is in the public interest for that decision to be susceptible to judicial review, because that encourages better public administration. An argument of that kind was relied upon by a number of members of the High Court in *Bateman's Bay*, in *McBain* and in *AEU* in support of the conclusion that a stranger should have standing to seek the writ of certiorari.[60] By way of example, in *Bateman's Bay* McHugh J observed that:

> [i]t is hard to see how it could ever be contrary to the public interest to require a statutory corporation to spend its money and make contracts only in accordance with the statute which creates it and defines its powers and purposes.[61]

In *McBain*, McHugh J, with whom Callinan J agreed, explained that the rationale for the absence of a standing rule was that '[p]ermitting strangers to apply for certiorari helps to ensure that "the prescribed order of the administration of justice" is not disobeyed'.[62] To similar effect, Hayne J, in *McBain*,[63] and Gummow, Hayne and Bell JJ, in *AEU*,[64] each referred, with approval, to the following observation by Professor Wade:

> [C]ertiorari is not confined by a narrow conception of locus standi. It contains an element of the *actio popularis*. This is because it looks beyond the personal rights of the applicant: it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers.[65]

The argument for adopting an open standing rule, in the public interest, is equally applicable to the standing requirements for the equitable remedies in the public law context. After all, the rationale for equity's intervention in the public law context was to ensure 'the observance

by … statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed'.[66]

It is incongruous to require a plaintiff to show a 'special interest' to obtain equitable relief

The 'special interest' requirement for standing to seek the equitable remedies was developed to avoid the prospect that an equitable remedy would be denied for a decision made in excess of a decision-maker's statutory power, on the basis that the plaintiff did not have a personal interest in the subject of the decision under challenge.[67] The requirement that a plaintiff seeking an equitable remedy demonstrate a 'special interest' is at odds with that objective. That point was made by Gaudron, Gummow and Kirby JJ in *Bateman's Bay.* They observed:

> [t]here is an incongruity in a principle which takes as its starting point the proposition that the statute in question has stopped short of creating a personal right which equity may protect by injunction, but nevertheless enables an individual who suffers 'special damage peculiar to himself' to seek equitable relief in respect of an interference with the public interest.[68]

It is incongruous to have a different test for standing to seek the constitutional writs, and to seek equitable remedies, under s 75(v) of the Constitution

The purpose of each of the constitutional writs in s 75(v) of the *Constitution* (and for the prerogative writs more generally) is the same — namely, to ensure that decision-makers obey the law and do not exceed, or ignore the limits of, or refuse to exercise, any jurisdiction conferred on them by statute. In circumstances where they are directed to the same purpose, it is difficult to see any reason, in principle, why there should be a different test to determine whether an applicant has standing to seek a writ of mandamus, as opposed to a writ of prohibition or certiorari.

The remedy of injunction is available under s 75(v) of the *Constitution* and in equity. Injunctions are granted, and declarations are made, in the public law context for the same purpose as the grant of the constitutional or prerogative writs. That being the case, it is difficult to see any reason why a different standing requirement should apply to the equitable remedies.[69] As Leeming has argued, '[t]he current rules regulating standing [for injunctions] sit ill with the constitutional context and purpose'.[70]

The incongruity in the different standing requirements is even more pronounced when the practical effect of the remedies is taken into account. The effect of a writ of prohibition, or of an injunction, in the public law context will be the same — namely, to prevent a decision-maker from exceeding their jurisdiction.

It is incongruous to have different standing requirements for prerogative relief, or for the equitable remedies, when the basis for the grant of relief is the same in each case

In the public law context, the basis for the grant of a writ of certiorari or prohibition, or for the equitable remedies, is the existence of a jurisdictional error.[71] (I will leave to one side those cases involving an error of law on the face of the record.) Further, in deciding whether to grant either prerogative or equitable relief, the court will exercise its discretion. In those circumstances, it is difficult to see why a different standing requirement should apply for an applicant for prerogative relief, as opposed to an applicant who seeks an equitable remedy.

Different standing rules undermine equity's role in public law

Equitable remedies developed an important role in public law 'because of the inadequacies of the prerogative writs':[72] that of providing an alternative means to ensure that public power was exercised within its statutory limits in those cases where the technical requirements for the writs were not met.[73] There will be cases, such as *Ainsworth v Criminal Justice Commission*,[74] where a jurisdictional error is established, but the grant of prerogative relief would not be appropriate. If an applicant were unable to demonstrate a special interest in the decision under challenge, they would not be entitled to apply to the court for a declaration, with the result that an equitable remedy for the jurisdictional error would not be available.[75] That result would undermine the role of equity in public law.[76]

Convenience and practicality

It is very common to see applications for equitable relief made in addition, or in the alternative, to applications for prerogative relief. Under the *Rules of the Supreme Court 1971* (WA), for example, the prescribed form for a judicial review application[77] permits an applicant to select a remedy from a list of possible remedies the court may grant. The list includes the prerogative writs and the equitable remedies. Applicants will frequently seek both prerogative writs and equitable remedies, in the alternative.

In a case where an equitable remedy is sought, in the alternative to a prerogative writ, what test for standing must the applicant meet? Arguably, the applicant is entitled to establish standing according to the least rigorous standing requirement (namely, the open standing requirement applicable to the writs of certiorari and prohibition). If that is the case then the practical effect of any different standing requirement for the equitable remedies will be negated.

Other practical benefits of the same open standing rule for the writs of certiorari and prohibition, and for the equitable remedies

The adoption of an open standing rule for the equitable remedies as well as for the writs of certiorari and prohibition would have other beneficial consequences. One would be that time and cost would no longer need to be expended on dealing with the question whether an applicant for relief has standing. Objections to an applicant's standing are often raised, although not always resolved, as a preliminary issue.[78]

On the other hand, if the adoption of an open standing rule results in closer consideration of whether relief should be granted in the exercise of the court's discretion (in the event that jurisdictional error is established), the possibility exists that relief may be denied, because the applicant does not have an interest in the decision sufficient to warrant the grant of a remedy. It might be thought that that would amount to wasted time, resources and costs, for litigants and for the courts, and that that militates against an open standing rule. However, to reach that conclusion would be to ignore one of the benefits of an open standing rule when it is combined with a greater emphasis on discretionary considerations in relation to relief. An open standing rule enables an allegation of jurisdictional error to be examined and, if such an error has been made, for reasons to be given by the court which identify the basis for that error. If the applicant for relief does not have an interest in the decision under challenge then that factor (together with any other relevant discretionary considerations, which are considered below) can be taken into account in determining whether relief should be granted. Even if relief is ultimately denied, the decision-maker, and the community, will nevertheless have the benefit of the court's reasoning in relation to the jurisdictional error. In turn, that will facilitate compliance with applicable statutory limits in the future, even if relief is

denied in the case at hand. That outcome would encourage good public administration and enhance the lawfulness of administrative decision-making in other cases.

Is there a case for the adoption of the same standing rule for mandamus, as well as for certiorari and prohibition?

The focus of this article so far has been on the case for uniformity between the standing rules for certiorari and prohibition, on the one hand, and declarations and injunctions, on the other hand. However, many of the justifications (discussed above) for a uniform approach to the standing requirements for the writs of certiorari and prohibition, and for the equitable remedies, are equally apt to support an open standing rule in an application for the writ of mandamus. One counter-argument was identified by Hayne J in *McBain*.[79] His Honour observed that it would be incongruous for a stranger to be able to seek to enforce a law if persons actually affected by the law did not themselves seek to enforce it. However, that concern could be adequately addressed in the exercise of the Court's discretion to grant the relief sought, rather than by a different standing requirement for the writ of mandamus.

Is there any impediment to the adoption of the same open standing requirements for the prerogative writs and the equitable remedies?

If uniform standing requirements for the prerogative writs and for the equitable remedies are considered justified on the basis of principle, and on practical grounds, the question then arises as to whether there is any impediment to the adoption by the High Court of the same standing requirement when a suitable case arises. There does not appear to be any such impediment.

It is not infrequently observed that questions of standing are intertwined with the requirement for the existence of a 'matter' in federal jurisdiction. Fundamental to the existence of a 'matter' is that there be a 'justiciable controversy'.[80] No question arises as to the existence of a 'matter' simply by virtue of the fact that an applicant for relief does not have a 'special interest' in the subject-matter of the proceedings.[81] However, questions of standing can overlap with questions relating to the existence of a 'matter' in federal jurisdiction — for example, if a plaintiff seeks a declaration in relation to what is, in effect, a hypothetical question.[82] Provided that the relief sought is actually directed to rectifying a 'public wrong',[83] an open standing rule appears unlikely to give rise to any difficulty in cases in federal jurisdiction.

The implications of an 'open standing' rule for the prerogative writs and the equitable remedies

So far, this article has focused on the justifications for adopting the same open standing rule for the prerogative writs and the equitable remedies. However, in the past, proposals to abolish standing rules have been met with considerable opposition on several bases. In this section of the article, I turn to consider the merits of some of these competing arguments before considering whether standing requirements are the best way to deal with the concerns which underlie those arguments.

Justifications for retaining standing requirements for prerogative writs and the equitable remedies

The argument that standing rules are essential to prevent a flood of unmeritorious claims by 'busybodies' and 'meddlers'

This argument amounts to an assertion that standing rules are essential to prevent 'busybodies' from putting other people to cost and inconvenience by having to defend legal proceedings[84] and to discourage actions which are not justified.[85] The argument assumes that, in the absence of standing rules, there would be a flood of unmeritorious applications for judicial review.

A report published by the Australian Law Reform Commission (ALRC) in 1985 doubted the force of the 'floodgates' argument. The report analysed empirical evidence from jurisdictions overseas and concluded that the 'high costs are a strong disincentive to litigation, even when there is no barrier in the form of a requirement of standing'.[86]

Similarly, in a report published in 1996, the ALRC confirmed its view that relaxing the law of standing was 'unlikely to lead to a significant increase in litigation'.[87]

Other researchers have cast doubt on claims that abolishing standing rules risks a flood of unmeritorious claims. It has been argued, for example, that there is no evidence to suggest that the liberal standing rule under s 487 of the EPBC Act has resulted in inappropriate litigation or an inappropriately high number of review applications[88] and that 'none of the cases brought under s 487 has been challenged as frivolous or vexatious or an abuse of process, nor have indemnity costs been awarded'.[89]

The argument that an open standing rule will produce greater uncertainty for decision-makers and for the community

In theory, any exercise of a statutory power gives rise to the possibility that a review of that decision may be sought, whether by judicial review or merits review (if available). But the impact of that possibility on public administration must be kept in perspective. The impact of uncertainty about the finality of a decision depends on the likelihood of a challenge to it. As I have already noted, the empirical evidence suggests that an open standing rule is unlikely to produce a marked increase in the number of applications for judicial review. In addition, the argument tends to overlook the impact of time limits for bringing judicial review applications. Time limits for judicial review applications are commonly imposed by statute or the rules of court[90] and, in any event (as I note below), delay in bringing an application for judicial review is a factor relevant to the exercise of discretion to grant relief.

Finally, this argument also assumes that more applications for judicial review (if there are any) will necessarily result in more decisions being set aside, which in turn would produce greater uncertainty for decision-makers. To that extent, the argument overlooks the benefits for public administration of the process of judicial review itself. Scrutiny of a decision through the lens of judicial review will either confirm the legality of the decision and the decision-making process adopted by the decision-maker or will identify jurisdictional errors so that any failure to observe the limits of statutory powers can be avoided in the future. Either outcome will clarify what is required for future decisions of the same kind.

The argument that open standing would undermine the reliable and predictable administration of the law

This argument is that standing rules enhance the reliable and predictable administration of the law because they exclude the possibility of unexpected challenges brought by parties with no relationship to the decision or subject-matter.[91] This argument overlaps, to a considerable extent, with the arguments already discussed. It also appears to assume that challenges by third parties will be unmeritorious. There is no logical basis for that conclusion. Further, narrow standing requirements do not discriminate between applicants whose claims are meritorious and those whose claims have no prospect of success. As I discuss below, other mechanisms than standing requirements are available to screen out unmeritorious claims.

The argument that increased scope for review by strangers adds to increased delay and cost for all concerned

The potential additional costs for litigants, other parties affected by a decision, courts and, thus, the community of increasing the avenues for challenging administrative decisions by relaxing standing requirements is a legitimate concern. However, the extent of that potential impact needs to be carefully and realistically assessed. If, as the empirical evidence suggests, open standing rules do not result in a flood of litigation then the additional costs overall are unlikely to be significant. Further, to focus solely on the burden of any additional costs and delay which an open standing rule might cause is to ignore the benefits for public administration that judicial review brings.

The argument that it is not always in the public interest to enforce all laws on the statute books or to permit all interests to be vindicated

In *Bateman's Bay,* McHugh J observed that the public interest of a society may not be best served by attempting to enforce a particular law.[92] A somewhat similar argument which is sometimes advanced is that not all 'interests' should be able to be vindicated through judicial review. By way of example, the latter argument was sometimes used in relation to the question whether judicial review should be available to those seeking only to protect their competitive advantage.[93] These arguments tend to involve subjective views about the intrinsic value or importance of an applicant's interest and of the proper role of judicial review. If those arguments have any legitimate role in this context, it lies in the court's discretion to grant or refuse relief. That would ensure transparency in the value judgment being made about the applicant's claim and enable the merits of that judgment to be evaluated against other competing claims and interests relevant to the grant of relief.

Are standing requirements the best way to discourage unmeritorious claims?

One of the strongest themes underlying the various arguments in favour of the retention of standing requirements is that those requirements are important in order to weed out unmeritorious claims. However, it must be borne in mind that there are a variety of other means available to the courts to dismiss claims with no merit at an early stage or to discourage frivolous or vexatious litigation.[94] These include applications for the summary dismissal or strike-out of hopeless cases at an interlocutory stage, the potential for costs orders against an applicant in the event that an application for judicial review is unsuccessful, orders for the payment of security for costs, and the prospect that relief will be refused in the exercise of the court's discretion. It has also been suggested that lawyers would have a role to play in screening out possible abuses of any open standing rule, in that unmeritorious claims would be unlikely to attract pro bono assistance.[95]

The practical impact of these avenues should not be overlooked. If the key concern is to exclude unmeritorious claims then one or more of these avenues is the preferable means to achieve that objective, unlike standing requirements, which focus solely on the identity and interest of the applicant in the decision under review.

Conclusion

None of the arguments discussed above, either individually or collectively, amount to a compelling case against the adoption of the same standing rule for the prerogative writs and for the equitable remedies. That is especially so in light of the fact that alternative avenues exist to deal with unmeritorious claims for relief.

The role of the discretion to refuse the grant of prerogative relief or the equitable remedies to an applicant who does not have an interest in the decision under challenge

The adoption of the same open standing rule for applications for the writs of certiorari, prohibition and mandamus, and for the equitable remedies, would not mean that an applicant's interest (or lack thereof) in the decision under review would be irrelevant. That is because both the prerogative writs[96] and the equitable remedies are discretionary.[97]

It is well established that an applicant's interest in a decision is a factor to be taken into account in determining whether relief should be granted. However, perhaps because of the role played by standing requirements, that factor has not ordinarily attracted much attention. The typical approach of the courts has been that, if the basis for relief has been established, relief will be granted 'unless circumstances appear making it just that the remedy should be withheld'.[98]

The stage at which the grant of relief arises for consideration, rather than the standing stage, is the appropriate juncture at which to consider the applicant's interest in the decision, because it can then be weighed against all other factors relevant to the exercise of the discretion to refuse relief. Furthermore, that evaluation will only take place in the event that a jurisdictional error has been established. In that context, the implications of the jurisdictional error in the decision itself, and the importance of rectifying that error, can also be taken into account.

The question that arises is the impact which an applicant's interest (or lack thereof) in the decision under review is likely to have in the discretion to grant relief. In considering that question, it is appropriate to begin by recalling the factors that may be relevant in assessing whether to grant relief before turning to consider more closely the interaction of a 'stranger's' lack of interest in the decision with those other factors.

Discretionary factors relevant to the grant of the prerogative writs or the equitable remedies

Although the categories of case in which relief might be refused on discretionary grounds are not closed,[99] there are numerous factors that may be taken into account in determining whether relief should be granted if a jurisdictional error is made out. These include:

- whether the party seeking prerogative relief could have pursued some other relief, such as an appeal, instead,[100] although if the prospects of obtaining other relief were uncertain then that factor will not carry any weight;[101]

- whether a more convenient and satisfactory remedy exists than that which is sought;[102]
- whether the argument which is the basis for the jurisdictional error was not raised before the decision-maker at first instance;[103]
- whether there would be any utility in the grant of the relief.[104] If the relief would be futile, it will not be granted;[105]
- if the applicant was not a party to the decision under review, whether the applicant could have applied to be joined in the proceedings before the decision-maker;[106]
- bad faith on the part of the applicant;[107]
- undue delay in bringing the application for judicial review,[108] which will often be raised in conjunction with arguments about prejudice to other parties as a result of the grant of relief;[109]
- prejudice to a third party[110] — for example, if a third party may be exposed to the risk of prosecution or disciplinary sanctions for acts done in reliance on the correctness of the decision under challenge[111] or has acted on the correctness of the decision and done work, entered contracts or expended funds;[112]
- the attitude of parties to the decision under challenge. If those parties do not seek to disturb the decision under review, that will be a factor that weighs against the grant of relief (such as certiorari) which would disturb that decision;[113] and
- the fact that the applicant for relief has no interest in the decision under review.[114]

I turn next to consider the role that the latter factor might have in the overall exercise of discretion.

How is the discretion to be exercised if a 'stranger' seeks judicial review and establishes a jurisdictional error?

There is no doubt that the discretion whether to grant relief to remedy a jurisdictional error must not be exercised capriciously but, rather, must be exercised in a reasonable manner according to the circumstances.[115] Consequently, a court will not, in the exercise of its discretion, refuse to grant relief simply because the applicant was not a party to the decision under challenge.[116] Instead, the fact that an applicant for relief has no interest in the decision under challenge falls to be weighed up, together with all of the other factors at play in the case. But, in a case where those factors boil down to the competing interests (or lack thereof) of the applicant, on the one hand, and of the parties to the decision under challenge, on the other hand, and where a jurisdictional error has been established, how is the discretion to be exercised?

It seems very likely that the exercise of discretion in this context will be affected by the court's view of the importance of remedying the jurisdictional error, having regard to the nature and significance of the breach of the law involved and 'perceptions of matters of public policy'.[117] Judicial minds may differ on this issue. By way of example, in *McBain,* Kirby J expressed the view that, as a foundation for the exercise of the Court's jurisdiction had been established, there would need to be 'substantial reasons' of a discretionary kind to refuse relief.[118]

Some judges may regard the potential for prejudice to third parties, or to a party to the decision under challenge (which may be no more than that the parties to that decision did not seek to disturb it), as compelling reasons to refuse relief. In *McBain*, McHugh J observed:

> [A]lthough a stranger to the proceedings may apply for certiorari or prohibition to issue, a stranger's lack of standing will *frequently* result in the Court refusing to issue either writ on discretionary grounds. If the applicant is not a person aggrieved, the court will consider 'whether the interest of the applicant

> is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to leave no sufficient ground for the issue of the writ'.[119]

Similarly, as I have already noted, Hayne J thought it would be odd to grant mandamus to compel the exercise of a public duty when the person to whom the duty was owed did not seek that outcome.[120]

Legislative reform of standing requirements for judicial review

The focus of this article has been on reform of the standing requirements for the prerogative writs and the equitable remedies, by the evolution of the case law. An alternative means by which reform might be achieved is, obviously, through legislation. Indeed, some judges (such as McHugh J) have expressed the view that legislative reform is the most desirable course.

In this last section of the article I propose to discuss, rather more briefly, first, the prospects for reform of standing requirements for judicial review through legislation; and, secondly, whether there are any impediments to that reform being pursued.

Prospects for legislative reform of standing rules

The prospects of legislative reform to remove or liberate standing requirements for judicial review seem to be poor, having regard to two matters.

First, the liberal standing rule in s 487 of the EPBC Act has generated considerable controversy, culminating in an attempt to repeal it in 2015.

Secondly, on two occasions (in 1985 and 1996) the ALRC recommended reform to relax standing rules for judicial review, and those recommendations were not acted upon. In 1985, the ALRC recommended an open standing approach but with the proviso that the courts should still be able to exclude an applicant who was 'merely meddling'[121] by denying standing if the applicant had no personal stake in the subject-matter of the litigation and clearly could not adequately represent the public interest.[122]

In 1996, the ALRC revisited the question of standing and made a somewhat similar recommendation. On that occasion, the ALRC considered that 'the wide range of tests for standing for both general law remedies and statutory relief should be replaced with a single test', that that new test 'should not require a person to have a 'special interest' in order to commence public law proceedings' and that 'the new test should be simple, with as few threshold criteria as possible, and should facilitate, not impede, public law proceedings'.[123] The ALRC's recommendation in 1996 was that:

> any person should be able to commence and maintain public law proceedings unless:
>
> - the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
> - in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.[124]

One reason for reconsidering legislative reform of standing rules, however, is that there is now a clear dichotomy between, on the one hand, the open standing rule applicable to applications for the writs of prohibition and certiorari and, on the other hand, the standing requirements imposed by the various judicial review statutes (both Commonwealth and state) to which I have already referred. In other words, the statutory standing requirements

are now more restrictive than the standing rule for the writs. One of the objectives behind the enactment of statutory avenues for judicial review was to establish a simpler avenue for judicial review than recourse to the prerogative writs, with their technical requirements. That being the case, it might be thought a little odd that a more restrictive standing rule is applied to statutory judicial review than applies in the case of applications for the prerogative or constitutional writs.

Given the reaction to s 487 of the EPBC Act, it might be thought that the more likely objective of any legislative reform of standing rules would be to tighten, rather than to relax, those rules. That warrants consideration of whether there are any impediments to legislative reform of that kind.

Are there any potential impediments to legislative reform of standing rules?

Standing rules are not normally considered an aspect of the jurisdiction of a court.[125] Rather, standing rules form part of the procedure pursuant to which the jurisdiction of the court is exercised. As a general rule, then, the position is that 'subject to constitutional limitations, Parliament can confer and remove either or both standing and jurisdiction in respect of a given controversy or species of controversy'.[126]

Subject to the observations made earlier in this article, there does not appear to be any reason why it would not be open to a legislature to adopt more liberal standing rules or to adopt an open standing rule for judicial review. The same conclusion applies to legislation which would refine or limit standing rules, but with one reservation. For state Supreme Courts, that reservation derives from the implications of the decision of the High Court in *Kirk v Industrial Court of New South Wales*[127] (*Kirk*).

Amongst other things, the joint judgment (of French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ) in *Kirk* established that the supervisory jurisdiction, which is exercised through the grant of the prerogative writs, or orders in the nature of that relief, is a defining characteristic of state Supreme Courts; that to deprive a state Supreme Court of its supervisory jurisdiction would create islands of power immune from supervision and would remove one of the defining characteristics of a state Supreme Court; and that a privative provision which sought to take from a state Supreme Court the power to grant relief on account of jurisdictional error would be beyond state legislative power.[128] Were a legislature to enact a very narrow standing rule, questions might arise as to whether that rule would render some decisions beyond the scope of judicial review or would so circumscribe the pool of applicants entitled to seek judicial review as to effectively deprive a state Supreme Court of its ability to exercise its supervisory jurisdiction.

An issue of that kind arose in *Haughton v Minister for Planning*.[129] In that case, the applicant sought declaratory relief, and relief in the nature of certiorari, in respect of decisions by a Minister to approve concept plans for two power stations which were declared to be critical infrastructure projects under the *Environmental Planning and Assessment Act 1979* (NSW) (the EPA Act). One of the arguments advanced against the applicant was that he had no standing to challenge those decisions because he had not obtained the approval of the Minister to bring the proceedings. The Minister's approval was required under s 75T of the EPA Act,[130] which provided that proceedings in the Court to remedy or restrain a breach of the EPA Act in respect of a critical infrastructure project could not be taken except on an application made or approved by the Minister. The Minister had refused to approve the applicant's proceedings.[131]

Justice Craig refused to construe s 75T as enabling the Minister to refuse approval, and thereby to exclude the applicant's standing, because that construction would mean that it

was open to the Minister to deny the Land and Environment Court, or the Supreme Court, the power to review, for jurisdictional error, a substantive decision pertaining to critical infrastructure development. Justice Craig concluded that to construe the section in that way would be contrary to the principles established by *Kirk*.[132] Legislative attempts to unduly restrict standing to pursue the remedies in s 75(v) of the *Constitution* would be likely to encounter similar difficulties.[133]

Conclusion

Standing requirements continue to pose questions which go to the heart of administrative justice. Different standing requirements for the prerogative writs and the equitable remedies are not warranted, either as a matter of principle or having regard to practical considerations. While some commentators have suggested that the adoption of an open standing rule would be a 'radical reform',[134] I am unable to agree. In view of the views expressed by members of the High Court in *Bateman's Bay, McBain* and *AEU,* the adoption by the High Court of the same open standing rule for the prerogative writs and the equitable remedies would be a sensible, incremental development of the law. The development of the law appears unlikely to be achieved by legislative reform.

If the same open standing rule applied to the prerogative writs, and to the equitable remedies, greater attention would be required to whether that relief should be granted in the exercise of the Court's discretion in a case where an applicant had no interest in the decision or conduct under challenge. To consider that issue at the discretion stage would permit all factors relevant to the exercise of the discretion to be weighed up, including the interests of third parties, the extent (if any) of the applicant's interest, and the importance of remedying the jurisdictional error identified in the particular case.

Endnotes

1 *McHattan v Collector of Customs* (1977) 18 ALR 154, 157 (Brennan J).
2 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126.
3 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 133 (Murray J).
4 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [91] (McHugh J).
5 See, generally, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 275 (McHugh J) (discussion of certiorari, prohibition and mandamus); *State Planning Commission and Beggs; Ex parte Helena Valley / Boya Association (Inc)* (1990) 2 WAR 422, 431 (Rowland J), 434–7 (Ipp J) (an application for certiorari and prohibition); *West Australian Field and Game Association v Minister for Conservation and Land Management and the Environment* (1992) 8 WAR 64, 70 (Malcolm CJ, Ipp J agreeing) (application for mandamus); *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138, 161 [100] (McLure JA, Pullin JA agreeing) (application for certiorari and prohibition).
6 *Master Retailers' Association of New South Wales v Shop Assistants Union of New South Wales* [1904] HCA 39; (1904) 2 CLR 94, 98 (Griffith CJ); *R v Ludeke; Ex parte Customs Officers' Association of Australia* [1985] HCA 31; (1985) 155 CLR 513, 525 (Mason J), 528 (Brennan J); *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 468–9 (Mahoney JA); *Re Smith; Ex parte Rundle* (1991) 5 WAR 295, 305 (Malcolm CJ, Pidgeon and Walsh JJ agreeing); *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, 163 (Malcolm CJ), cf 190 (Nicholson J).
7 *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, 163 (Malcolm CJ), citing *R v Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380, 400 (Lord Denning).
8 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [89] (McHugh J, Callinan J agreeing), [260] (Hayne J).
9 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591, 652–3 [162] (Kirby J), 669–70 [211] (Callinan J).
10 *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117, 147–8 [70]–[71] (Gummow, Hayne and Bell JJ).

11 *Motor Accidents Authority of New South Wales v Mills* [2010] NSWCA 82; (2010) 78 NSWLR 125 [82] (Giles JA, Tobias and Handley JJA agreeing).
12 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 263 [40], citing *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* [1956] HCA 31; (1956) 96 CLR 317, 327; *R v Watson; Ex parte Australian Workers' Union* [1972] HCA 72; (1972) 128 CLR 77, 81; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 201–2.
13 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591, 599–600 [2] (Gleeson CJ and McHugh J), 611 [44] (Gaudron J), 627–8 [95] (Gummow J), 652–3 [162] (Kirby J), 670 [211] (Callinan J).
14 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Lawbook Co, 2017) 818 [11.210].
15 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540, 574–5 [79] (McHugh J).
16 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 275 [77] (McHugh J), citing *R v Lewisham Union* [1897] 1 QB 498.
17 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372, 461 [251] (Hayne J).
18 *West Australian Field and Game Association v Minister for Conservation and Land Management and the Environment* (1992) 8 WAR 64, 70–1 (Malcolm CJ, Ipp J agreeing). A similar approach appears to have underlined the decision in *Federal Commissioner of Taxation v Biga Nominees Pty Ltd* (1988) 85 ALR 463, 473 (the Court).
19 *Ettingshausen v Lal* [1981] 1 NSWLR 503, 513 (Mahoney JA).
20 [2001] FCA 1329; 110 FCR 491; 183 ALR 1; 66 ALD 25.
21 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297; (2001) 110 FCR 452 [123]–[137], [149] (North J).
22 *Rules of the Supreme Court 1971* (WA) O 56 r 15(1).
23 *Re Environmental Protection Authority; Ex parte Tallott* [2016] WASC 190 [7] (Le Miere J).
24 *Martin v Nalder* [2016] WASC 138 [39] (Tottle J).
25 For a discussion of the history of the equitable remedies in the public law context, see *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [92]–[93] (McHugh J).
26 *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 (Buckley J).
27 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 527 (Gibbs J).
28 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 74 (Brennan J).
29 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 526 (Gibbs J), 537 (Stephen J), 547 (Mason J); *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 36 (Gibbs CJ); *Robinson v Western Australian Museum* [1977] HCA 46; (1977) 138 CLR 283, 292–3 (Barwick CJ), 301–2 (Gibbs J), 327 (Mason J).
30 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 530 (Gibbs J).
31 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 530 (Gibbs J), 539 (Stephen J), 548 (Mason J).
32 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27.
33 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 36 (Gibbs CJ), 42 (Stephen J).
34 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).
35 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 42 (Stephen J).
36 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 528 (Gibbs J), referring to *Robinson v Western Australian Museum* [1977] HCA 46; (1977) 138 CLR 283, 327–8 (Mason J).
37 See, for example, *Ex parte Helena Valley / Boya Association (Inc); State Planning Commission and Beggs* (1990) 2 WAR 422, 437 (Ipp J, Pidgeon J agreeing); *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* [2005] WASCA 109; (2005) 30 WAR 138 [96]–[101] (McLure JA, Pullin JA agreeing).
38 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 162 (Templeman J); cf *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138 [3] (Wheeler JA); *Re Western Australian Planning Commission; Ex parte Leeuwin Conservation Group Inc* [2002] WASCA 150 [1] (Anderson J); *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 102, 114 (Wheeler J); *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 134 (Murray J).

39 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 531 (Gibbs J), 539 (Stephen J).
40 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 531 (Gibbs J), 539 (Stephen J); *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 74 (Brennan J).
41 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 531 (Gibbs J); cf *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* [2005] WASCA 109; (2005) 30 WAR 138 [6]–[8] (Wheeler JA).
42 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 6.
43 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(4).
44 *Judicial Review Act 1991* (Qld) s 7.
45 *Judicial Review Act 2000* (Tas) s 7.
46 *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 4A(2), (5).
47 *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 4A(3).
48 See, for example, the *Environmental Planning and Assessment Act 1979* (NSW) s 123.
49 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487(2), (3).
50 *Victoria v Commonwealth (AAP Case)* [1975] HCA 52; (1975) 134 CLR 338, 383 (Gibbs J).
51 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [34].
52 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [34] (Gaudron, Gummow and Kirby JJ).
53 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [38] (Gaudron, Gummow and Kirby JJ).
54 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [39] (Gaudron, Gummow and Kirby JJ).
55 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [40] (Gaudron, Gummow and Kirby JJ).
56 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [91] (McHugh J).
57 [2005] HCA 61; (2005) 224 CLR 494.
58 *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 [306], [321] (Kirby J).
59 *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 [306] (Kirby J).
60 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [90] (McHugh J, Callinan J agreeing), [260] (Hayne J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [104] (McHugh J); *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 [70] (Gummow, Hayne and Bell JJ).
61 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [104] (McHugh J). See also M Leeming, 'Standing to Seek Injunctions Against Officers of the Commonwealth' (2006) 1 *Journal of Equity* 3, 3.
62 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [89] (McHugh, Callinan J agreeing).
63 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [260] (Hayne J).
64 *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 [70] (Gummow, Hayne and Bell JJ).
65 HRW Wade, 'Unlawful Administrative Action: Void or Voidable? Part 1' (1967) 83 *Law Quarterly Review* 499, 503.
66 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [50] (Gaudron, Gummow and Kirby JJ).
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69 *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 [97] (McHugh J).
70 Leeming, above n 61, 4.
71 Cf *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
72 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [57]–[58] (Gaudron J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 257 [25] (Gaudron, Gummow and Kirby JJ).
73 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [50] (Gaudron, Gummow and Kirby JJ).
74 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
75 Cf *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
76 See also Leeming, above n 61, 3.

77 *Rules of the Supreme Court 1971* (WA) Form 67A.
78 R Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22, 34.
79 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [251] (Hayne J).
80 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 [43] (Gaudron J) and cases there cited.
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88 A Macintosh, H Roberts and A Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39 *Sydney Law Review* 85; C McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3, 12.
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90 See, for example, *Rules of the Supreme Court 1971* (WA) O 56 r 2(4).
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94 See, for example, Douglas, above n 78, 26.
95 McGrath, above n 88, 13–14.
96 *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* [1924] HCA 61; (1924) 34 CLR 482, 517 (Isaacs and Rich JJ) (discussion of certiorari); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court) (mandamus); *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 [71] (Gummow, Hayne and Bell JJ) (certiorari); *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [95] (McHugh J, Callinan J agreeing), [224] (Kirby J), [260] (Hayne J) (certiorari).
97 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [54]–[58] (Gaudron J).
98 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court).
99 *Sasterawan v Morris* [2008] NSWCA 70 [73] (Tobias JA, Beazley JA and McClellan CJ at CL agreeing).
100 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [120] (McHugh J), [280] (Hayne J); *Dranichnikov v Minister for Immigration and Multicultural & Indigenous Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 [33] (Gummow and Callinan JJ).
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108 See, for example, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court); *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [232] (Kirby J); *Savage v Teck Explorations Ltd* (Unreported, Full Ct Sup Ct of WA, Lib No 7285, 1988) 9–11 (Malcolm CJ), 9 (Wallace J).

109 See, for example, *Savage v Teck Explorations Ltd* (Unreported, Full Ct Sup Ct of WA, Lib No 7285, 1988) 10 (Malcolm CJ).
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113 See *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [124] (McHugh J), [229] (Kirby J), [251] (Hayne J); *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson* [1924] HCA 61; (1924) 34 CLR 482, 499, 501 (Isaacs and Rich JJ).
114 *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson* [1924] HCA 61; (1924) 34 CLR 482, 517 (Isaacs and Rich JJ); *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [95] (McHugh J).
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116 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [96], [116] (McHugh J, Callinan J agreeing).
117 *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd* [1989] 2 Qd R 512, 523 (Thomas J).
118 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [219] (Kirby J).
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121 Australian Law Reform Commission, above n 86, 138 [252].
122 Ibid [253].
123 Australian Law Reform Commission, above n 87, 47 [4.50].
124 Ibid 57, Recommendation 2.
125 See, for example, *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [64] (Craig J).
126 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [64] (Craig J).
127 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.
128 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 [97]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
129 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [7] (Craig J).
130 Section 75T has since been repealed.
131 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [7] (Craig J).
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133 Cf *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651, 672–673 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
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REFLECTIONS FROM THE ALRC'S ELDER ABUSE INQUIRY

Rosalind F Croucher AM*

In 2002, the World Health Organization said that preventing elder abuse in an ageing world is 'everybody's business'.[1] In finishing the report *Elder Abuse — A National Legal Response*, with 43 recommendations for law reform, the Australian Law Reform Commission (ALRC) sought to make this 'everybody's responsibility'.

One set of the recommendations concerns a new scheme for reportable incident responses, based on the New South Wales Disability Reportable Incidents Scheme (DRIS), managed by the NSW Ombudsman's Office.

An inquiry most timely

The ALRC Inquiry into Elder Abuse has been most timely given the problem, the challenge and the opportunity of an ageing demographic. The Australian population, like that of other developed countries, is an ageing one due to the combination of increasing life expectancy and lower fertility levels.[2] Approximately 15 per cent of the population was aged 65 or over in 2014–15, and this is expected to rise to around 23 per cent by 2055 — that is, within 40 years. A female child born in 1900 could expect to live to 59, but in 2017 she can expect to live to 85.

The statistics are quite confronting, however you look at them: whether it is in terms of the numbers of workers that will be needed to support an ageing population or the extent to which health, aged care and disability services will be needed in future, an ageing demographic provides a very intense opportunity for public policy concern.

The experience of ageing is not uniform across Australian communities, however. Overall, 'healthy life expectancy' — that is, the extent to which additional years are lived in good health — is increasing.[3]

By way of personal reflection, my parents turn 96 this year and are living independently. My father still drives — retaining a full unrestricted licence — but also loves the ride-on lawnmower, a new career of sorts after being one of the longest-serving judicial officers in New South Wales.

So, overall, 'health' and 'ageing' are in an improving relationship.

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There are, however, 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).[4]

What is elder abuse?

Elder abuse usually refers to abuse by family, friends, carers and other people where there is a relationship or expectation of trust. While there is not a universally accepted definition, a widely used description is that of the World Health Organization:

> [Elder abuse 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.[5]

Commonly recognised categories of elder abuse include psychological or emotional abuse, financial abuse, physical abuse, neglect and sexual abuse. These types of abuse overlap, and the very nature of the abuse, in trusted relationships, makes it difficult to identify and respond to. The World Health Organization has estimated that the prevalence rate of elder abuse in high- or middle-income countries ranges from 2 per cent to 14 per cent. So, while increasing longevity may be seen to represent triumphs for modern medicine and health care, elder abuse perhaps is the nasty underside of an ageing population.

There are many case studies that can be drawn upon to gain an understanding of the elder abuse landscape. The 2016 report by the Australian Institute of Family Studies (AIFS), *Elder Abuse: Understanding Issues, Frameworks and Responses*, commissioned as part of the background to the ALRC inquiry, provided many examples drawn from Queensland elder abuse helpline information. The most commonly reported type of abuse in 2014–15 was financial abuse, accounting for 40 per cent of the reports; and adult children were the largest group of offenders.

Children in their 50s may be the biggest group of abusers — but many of these may also be carers. And for the few 'bad eggs' there are many angel sons and angel daughters out there. One of the personal submissions cautioned against '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'.[6]

In 2017 there were 2.7 million unpaid carers in Australia. Their average age was 55, most were female and 96 per cent were caring for family members. And in 2011 the Productivity Commission noted that, of the group aged 65 and over who were needing care, 24 per cent of primary carers were adult sons or daughters.[7] Many of these may well have held enduring documents in their favour. Indeed, for most people in such circumstances, this is an important exercise of autonomy: they have 'got it in black and white'.[8]

There is also a difference between 'coercion' — forcing someone to do something against their wishes — and what I describe as 'acquiescent exploitation', where a person knows that others may think what they are doing is unwise but they decide to do it anyway for a whole range of often very personal, self-sacrificing reasons.

Clearly, however, there are no bright lines.

What can law do?

In the Inquiry into Elder Abuse we looked at Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The Commonwealth laws included banking, superannuation, social security and, of growing interest, aged care. But we were also asked to examine the interaction and relationship of Commonwealth laws with state and territory laws. This clearly took us into the realm of guardianship and administration; and into laws dealing with 'private' appointments of substitute decision-makers through enduring powers of attorney and the appointment of enduring guardians. A great deal of our work therefore involved state and territory bodies and agencies. The crossing of state and federal borders makes responding to elder abuse a complex issue — from the perspective of laws and also in terms of practical responsibility.

As stakeholders observed, because elder abuse is 'complex and multidimensional', it requires a 'multi-faceted response'. The focus of the ALRC's recommendations was on achieving a nationally consistent response to elder abuse.

The recommendations in the report seek to balance two framing principles: dignity and autonomy, on the one hand, and protection and safeguarding, on the other. Autonomy and safeguarding, however, are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.

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 in Commonwealth Laws* report.[9] It reflects the paradigm shift towards supported decision-making embodied in the United Nations *Convention on the Rights of Persons with Disabilities* and its emphasis on the autonomy and independence of persons with disabilities, so that it is the will and preferences of the person that drives decisions they make or that others make on their behalf, rather than an objective notion of 'best interests'.

In the Inquiry into Elder Abuse we needed to respond to the plea running through many of the personal submissions that 'someone's got to do something!'. But, at the same time, we needed to resist overzealousness, otherwise the balance between the principles is pushed too much to the 'protective' side.

In thinking about my own parents, and what I would expect when I am their age, it is not to be infantilised or treated as a child but to be *respected*. This was a guiding mantra for me in leading the Inquiry into Elder Abuse: a combination of 'honour thy father and thy mother' and 'do unto others as you would have them do unto you'. The United Nations *Principles for Older Persons* express such commitments thus:

> 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.[10]

What the ALRC recommends

In addition to our framing principles, our recommendations embody what I describe as 'the 3 Rs': reducing risk; ensuring an appropriate response; and providing avenues for redress.

There are also recommendations that look to the longer horizon, to inform policy change into the future. The report presents two of these longer-horizon ideas as 'book-ends': first, the National Plan to combat elder abuse; and, secondly, the introduction of state and territory legislation for safeguarding adults 'at risk'.

With respect to the specific areas of law identified in the Terms of Reference, the report begins with a consideration of aged care: a large and growing area of Commonwealth responsibility and an area on which there is much attention at the time of writing the report. The next set of chapters and recommendations focus on advance planning by a person, including enduring documents, family agreements, superannuation, wills and banking. The remaining set of chapters looks at safeguarding against elder abuse in various settings: tribunal-appointed guardians and administrators; social security; health and the National Disability Insurance Scheme (NDIS); and criminal justice responses. It ends with recommendations about new legislation in states and territories for safeguarding 'at-risk' adults.

I will focus on two particular areas: aged care and safeguarding agencies.

Aged care[11]

Older people receiving aged care — whether in the home or in residential aged care — may experience abuse or neglect. The newspapers and other media give attention to particularly egregious examples. Abuse may be committed by paid staff, other residents in residential care settings, family members or friends.

The aged care system is in a period of reform, largely in implementation of work of the Productivity Commission in 2011, and there is a legislated review underway now (reporting in August), as well as the independent review of the Commonwealth's aged care quality regulatory processes commissioned by the Australian Government Minister for Aged Care, the Hon Ken Wyatt AM MP (and, behind it, the report of the Oakden Older Persons Mental Health Service, which operated as a Commonwealth-regulated residential aged care facility).[12] There are also concerns that will need to be addressed about how the move to home care will be covered in the consumer-driven demand model of aged care service delivery.

The ALRC recommends reforms to enhance safeguards against 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.

The serious incident response scheme builds on the existing requirements for reporting allegations of abuse in the *Aged Care Act 1997* (Cth) and draws on existing and proposed schemes for responding to abuse in the disability sector. Our concern was to focus on *response* and not just reporting for other purposes — for example, accreditation. The latter is important, but response cannot be overlooked. There is both a systemic and an individual issue.

As the National Older Persons Legal Services Network submitted, 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.[13]

Stakeholders had a lot to say about the existing reporting arrangements, which require providers to report an allegation of a 'reportable assault' to police and the Department of Health within 24 hours. These include 'unlawful sexual contact, unreasonable use of force, or assault specified in the *Accountability Principles* and constituting an offence against a law of the Commonwealth or a State or Territory'.[14]

Some thought this was just 'red tape' and made little or no difference to the safety of residents.[15] In particular, the provisions place no responsibility on the provider other than to report an allegation or suspicion of assault. We also heard conflicting reports about subsequent action taken by the provider or the department. No obligation is placed on the provider to record any actions *taken* in response to the incident; and, while the department submitted 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',[16] there is no further publicly available information regarding how the department makes an assessment about the suitability of any strategies implemented by the provider.[17]

A telling example was given by the Aged and Community Services Association (ACSA). They considered 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.[18]

While the number of notifications is captured in a bulked-up sense, the outcome of the reports is not known. As Leading Age Services Australia 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.[19]

We considered 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. In addition, this investigation and response should be *monitored* by an independent oversight body. The recommended design of the scheme was informed by the DRIS for disability services in New South Wales — overseen by the NSW Ombudsman[20] — and the serious incident reporting scheme planned for the NDIS.[21]

We recommended 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.[22] The appropriate response will vary according to the specific incident, but in all cases it will require a process

of information gathering to enable informed decisions about what further actions should be taken.[23] Significantly, we did not recommend that providers be *required* to report an incident to police.[24] In part, this is due to the expanded scope of the definition of 'serious incident'. It also reflects an approach that requires an approved provider to turn its mind to the response required in the circumstances. If the systemic side is working well, because accredited providers are being kept up to appropriate standards, then they may need room to exercise their discretion in good decision-making, involving the person who is the subject of the incident in assessing the appropriate action to be taken and responding accordingly.

With respect to overseeing the new scheme, we said that the oversight body's role should be to monitor and oversee the approved provider's *investigation of* and *response to* serious incidents. The oversight body should also be empowered to conduct investigations of such incidents. While it is important that the oversight body have powers of investigation, we anticipated 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.

We suggested that the Aged Care Complaints Commissioner is the most appropriate oversight body but did not make a specific recommendation about this. There had been a mixed response to this proposal in the discussion paper, so in the report we identified our conclusion that the function should sit with an independent body but without making a specific recommendation about where the oversight responsibility should lie, given that none of the current 'regulatory triangle' agencies are an ideal fit for the proposed scheme.

We identified that combination of such functions 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.[25] The Australian Health Practitioner Regulation Agency (AHPRA) handles both voluntary complaints and mandatory notifications about health practitioners.[26]

The Department of Health currently receives reports of reportable assaults, but it 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 the report.[27] The Australian Aged Care Quality Agency accredits and audits aged care providers, but it is focused on *systemic* issues in aged care. A serious incident may not be an indicator of systemic risk, but it should still be investigated and responded to by the provider with appropriate oversight.

The Aged Care Complaints Commissioner is focused on conciliation and resolution of complaints as well as educating service providers about responding to complaints.[28] The Aged Care Complaints Commissioner can exercise a range of powers when working to resolve complaints and may commence own-initiative investigations.[29] The Aged Care Complaints Commissioner may also appoint 'authorised complaints officers' who may exercise a range of powers.[30] Hence it appeared to be the most amenable in the current triangle to take on the proposed oversight role.

The aged care workforce received a lot of comment. We addressed this in part through recommending enhanced screening, like the 'working with children' checks that are conducted; and also through recommending that unregistered aged care workers should be subject to the planned National Code of Conduct for Health Care Workers. We also recommended that the Department of Health should commission an independent evaluation of research on optimal staffing models and levels in aged care. (Nurses had a lot to say on this score — and many groups are quoted).

Safeguarding adults at risk[31]

In the final chapter of the report, 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. I acknowledge the work of Professor Wendy Lacey, a co-author of the report *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* and the co-convenor of the Australian Research Network on Law and Ageing, who urged 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.[32]

(Professor Lacey also served on the Advisory Committee for the ALRC inquiry.)

What is the current situation for vulnerable adults? For older people experiencing abuse, support and protection is often provided by family, friends, neighbours and carers. Also, support and protection is currently available from a number of government agencies and community organisations, including:

- the police and the criminal justice system — the primary state protection against elder abuse;
- medical and ambulance services;
- elder abuse helplines, 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);[33]
- 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.

Despite this, the protection and support available to adults at risk of abuse may be inadequate.

No government agency in Australia has a clear statutory role of safeguarding and supporting adults. Most public advocates and guardians 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.

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. However, many vulnerable and older people do not have such limited decision-making ability but nevertheless also need support and protection.

The ALRC recommended that adult safeguarding services be provided to other 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.

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.

Existing public advocates and public guardians have expertise in responding to abuse and may be appropriate for this broader safeguarding function if they are 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.

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, but not powers of entry.

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.

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. We therefore recommended 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.

In determining a person's need for greater protection from abuse, the person's subjective feeling of vulnerability may be as important as objective risk factors:

> 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.[34]

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;