

REFLECTIONS FROM THE ALRC'S ELDER ABUSE INQUIRY

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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 care¹¹

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 Ombudsman²⁰ — 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 risk³¹

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;

- (b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care; and
- (c) the will, preferences and rights of the older person must be respected.³⁵

These principles attempt to strike a balance between respecting people's autonomy and protecting people from abuse, but they give greater 'weight' to respecting autonomy. The principles acknowledge people's right to take risks and make decisions that some others may regard as poor ones. The principles also seek to ensure that people are involved in decisions about how the agency will respond to elder abuse and suggest that safeguarding agencies should play a supportive role. Similar principles also appear in adult safeguarding legislation in other countries, such as in the legislation in British Columbia, Canada; in England and Wales; and in Scotland.

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

Where someone accepts safeguarding services, the policy justification for providing the support is relatively unproblematic. Questions will remain about the coercive powers the agency should have when dealing with other people, such as the person suspected of committing the abuse. But, as far as the victim of the abuse is concerned, where they give consent, the policy justification for providing support is more straightforward.³⁶

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

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

National Plan to combat elder abuse

The capstone recommendation of the report is the development of a National Plan to combat elder abuse to provide the basis for a longer-term approach to the protection of older people from abuse. The plan will provide the opportunity for integrated planning and policy development. We suggest a conceptual template for a National Plan and provide a wide range of examples from stakeholders, drawn from over 450 submissions — sharing ideas, illustrations, suggestions and urgings. In a practical sense, much work already undertaken and in train, both at the Commonwealth level and in states and territories, together with recommendations throughout the report, may be seen to constitute strategies in implementation of a commitment to combat elder abuse. As St Vincent's Health Australia observed, the significant attention already on issues concerning family violence has provided 'a climate of opportunity' for a national consideration of elder abuse.³⁷ Where child abuse and family violence are now 'firmly at the centre of public policy debates', said the Welfare Rights Centre (NSW), '[p]lacing elder abuse on the national agenda must also be a priority. Elder abuse is an issue that, finally, has come of age'.³⁸

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

The Australian Government has already committed to a prevalence study,³⁹ and steps have been taken in this direction with the completion of a scoping study by the Australian Institute of Family Studies in May 2017. This is a significant step towards improving the evidence base to inform policy responses.

A national planning process would help to ameliorate the problems of the distribution of powers in a federal system in which many issues that arise in a consideration of 'elder abuse' sit across federal–state jurisdictional lines. Developing a National Plan will also provide the opportunity to continue and focus national conversation and engagement. AnglicareSA suggested that a national approach would 'promote improved governance through consistent practice' and would lead to 'increased awareness and improved response to elder abuse through the embedding of a consistent supportive framework'.⁴⁰

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

The ALRC suggests that the National Plan should identify goals, including:

- (a) promoting the autonomy and agency of older people;
- (b) addressing ageism and promoting community understanding of elder abuse;
- (c) achieving national consistency;
- (d) safeguarding at-risk adults and improving responses; and
- (e) building the evidence base.

These goals are not completely discrete areas, and they are suggested as indicative of key objectives of the National Plan. The National Plan should then identify a range of strategies and actions in pursuit of these goals. The ALRC's recommendations in the report are situated within this framework and mapped under them, together with many initiatives identified by stakeholders, to provide a 'working draft' for the plan.

Crucial to the success of any national planning process is clear leadership. We suggested that this should be led by a steering committee. The Law, Crime and Community Safety Council (LCCSC) of COAG has established a working group to discuss current activities to combat elder abuse in Australian jurisdictions, consider potential national approaches and consider the findings of this inquiry.⁴¹ The LCCSC is well placed to take a lead role in coordinating a planning process. The important role that COAG can play, expressing a commitment of all governments at a senior level, was identified by stakeholders.⁴² The Age Discrimination Commissioner, the Hon Dr Kay Patterson AO, is well placed to lead a number of strategies and actions of the plan, involving key stakeholder groups, and will be a fine champion of our work, having served on our advisory committee as well.

Outcomes

When it came to drawing together all the various recommendations and analysis throughout the report, in the Executive Summary we summarised the overall effect as being to safeguard older people from abuse and support their choices and wishes through:

- improved responses to elder abuse in aged care;

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

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

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

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

Endnotes

- 1 World Health Organization, *Toronto Declaration on the Global Prevention of Elder Abuse* (2002).
- 2 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia’s Older People?* cat no 2071.0 (2012). Population ageing is also a global phenomenon. In 1950, 8 per cent of the world’s population was 60 years or older. In 2011, this rose to 11 per cent, and it is projected to rise to 22 per cent by 2050: World Economic Forum, *Global Agenda Council on Ageing Society, Global Population Ageing: Peril or Promise?* (2011) 5.
- 3 Australian Institute of Health and Welfare, *Australian Trends in Life Expectancy* (2012) 82. See also Australian Institute of Health and Welfare, *Australia’s Welfare 2015* (2015) 237.
- 4 Australian Institute of Health and Welfare, *Life Expectancy* <www.aihw.gov.au/deaths/life-expectancy/>.
- 5 World Health Organization, *Toronto Declaration on the Global Prevention of Elder Abuse* (2002).
- 6 Y Lawrence, Submission No 202 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 7 Productivity Commission, *Caring for Older Australians*, Report No 53 (2011) 326–7.
- 8 As urged by the NSW Trustee and Guardian in the campaign, ‘Get it in black and white’: write a will, prepare a power of attorney and an advance health directive.
- 9 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (24 November 2014).
- 10 United Nations, *Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [17]–[18].
- 11 I acknowledge the crucial work of Dr Julie MacKenzie, Senior Legal Officer, in having the principal carriage of this section of the report, and the contribution of Vanessa Viaggio, Principal Legal Officer, in aspects of the chapter for the discussion paper.
- 12 A Groves, D Thomson, D McKellar and N Procter, *The Oakden Report* (Department for Health and Ageing (SA), 2017).
- 13 National Older Persons Legal Services Network, Submission No 363 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 14 *Aged Care Act 1997* (Cth) s 63-1AA(9).
- 15 Leading Age Services Australia, Submission No 104 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 16 Department of Health (Cth), Submission No 113 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 17 The online form for reporting reportable assaults requires providers to indicate action taken to ensure the safety of care recipients and minimise risk of recurrence. Given the required timeframe for reporting, this can only document actions taken within the first 24 hours: *Compulsory Reporting Forms* <www.agedcare.health.gov.au>.
- 18 Aged and Community Services Association, Submission No 217 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 19 Leading Age Services Australia, Submission No 377 to Australian Law Reform Commission, Inquiry into Elder Abuse.

- 20 *Ombudsman Act 1974* (NSW) pt 3C. Part 3C is modelled on pt 3A of the Ombudsman Act, which has provided for a reportable conduct scheme since 1999. From 1 July 2017, Victoria and the ACT will implement reportable conduct schemes in relation to children, and COAG has agreed, in principle, to harmonise reportable conduct schemes: Department of Health and Human Services (Vic), *Creating Child Safe Organisations* <www.dhs.vic.gov.au>; ACT Ombudsman, *Reportable Conduct Scheme* <www.ombudsman.act.gov.au/reportable-conduct-scheme>; Council of Australian Governments, *Communiqué* (1 April 2016).
- 21 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 49–53.
- 22 The reporting systems in place for the DRIS provide instructive guides for how a system could be operationalised: NSW Ombudsman, *Disability Reportable Incidents Forms and Guidelines* <www.ombo.nsw.gov.au>.
- 23 For examples of how these investigations are expected to be carried out under the DRIS and New South Wales reportable conduct scheme for children, see further NSW Ombudsman, *Planning and Conducting an Investigation* (Child Protection Fact Sheet 4, 2014); NSW Ombudsman, *How We Assess an Investigation — Employee to Client Incidents* (Disability Reportable Incidents Fact Sheet, 2016); NSW Ombudsman, *Risk Management Following an Allegation against an Employee* (Disability Reportable Incidents Fact Sheet, 2016).
- 24 Nonetheless, some criminal laws may require the reporting of suspicion of serious offences to the police: see, for example, *Crimes Act 1900* (NSW) s 316.
- 25 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 47.
- 26 State and territory health complaints entities may also be involved in investigating complaints about health practitioners: Australian Health Practitioner Regulation Agency, *Other Health Complaints Organisations* <www.ahpra.gov.au>.
- 27 COTA supported notifying the department: COTA, Submission No 354 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 28 Aged Care Complaints Commissioner, Submission No 148 to Australian Law Reform Commission, Inquiry into Elder Abuse; *Aged Care Act 1997* (Cth) pt 6.6.
- 29 Aged Care Complaints Commissioner, *ibid*.
- 30 These include the power to search premises, take photographs, inspect documents and ask people questions: *Aged Care Act 1997* (Cth) s 94B-2.
- 31 I acknowledge the work of Jared Boorer, Principal Legal Officer, in this chapter of the final report; and of Shreeya Smith, Legal Officer, in relation to it for the discussion paper.
- 32 Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 105.
- 33 *Human Rights Commission Act 2005* (ACT) s 27B; *Guardianship of Adults Act 2016* (NT) s 61; *Guardianship and Administration Act 2000* (Qld) sch 4; *Public Guardian Act 2014* (Qld) s 19; *Guardianship and Administration Act 1993* (SA) s 28; *Guardianship and Administration Act 1995* (Tas) 1995 s 17; *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97.
- 34 Michael C Dunn, Isabel CH Clare and Anthony J Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Public Policy' (2008) 28(2) *Legal Studies* 234, 244.
- 35 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 3–2.
- 36 Whether the support should be provided may then become largely a question of cost.
- 37 St Vincent's Health Australia, Submission No 345 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 38 Welfare Rights Centre NSW, Submission No 184 to Australian Law Reform Commission, Inquiry into Elder Abuse.
- 39 The Coalition's Policy to Protect the Rights of Older Australians <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>; Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).
- 40 AnglicareSA, Submission No 299 to Australian Law Reform Commission, *Inquiry into Elder Abuse*.
- 41 Law, Crime and Community Safety Council, Communiqué, 19 May 2017. See also The Coalition's Policy to Protect the Rights of Older Australians <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>.
- 42 See, for example, Eastern Community Legal Centre, Submission No 357 to Australian Law Reform Commission, Inquiry into Elder Abuse; Financial Planning Association of Australia (FPA), Submission No 295 to Australian Law Reform Commission, Inquiry into Elder Abuse.