

# FRAMING LAW REFORM TO ADDRESS ELDER ABUSE

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*In the inquiry that led to the final report, Elder Abuse—A National Legal Response, the Australian Law Reform Commission (ALRC) had to balance two key ideas: the principle of autonomy – promoting and supporting older people’s ability to participate equally in their community and access services and advice – and the challenge of ensuring that laws and legal frameworks provide appropriate protections and safeguards for older Australians against misuse or advantage taken of informal and formal supporter or representative roles. This article provides insights into the challenges of framing law reform responses within this conceptual setting, and locating those solutions within a federal system where relevant laws sit either within the federal or state and territory domains. The article also provides a summary of the conclusions reached as reflections of the conceptual framework set for the inquiry.*

## I INTRODUCTION

The ALRC’s Elder Abuse Inquiry was most timely – given the problem, the challenge, and indeed the opportunity, of an ageing demographic. The Australian population, like other developed countries, is an ageing one. The statistics are quite confronting however they are approached: whether in terms of the numbers of workers that will be needed to support an ageing population, or the extent to which health services, aged care services and disability services will be needed, an ageing demographic presents an intense focus for public policy. It is not surprising that a 2007 parliamentary report referred to the ‘inescapable demographic destiny’ of an ageing population.<sup>1</sup>

In the Elder Abuse Inquiry, the ALRC was asked to consider reform to existing Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The main areas of interest concerned financial arrangements and superannuation, enduring documents and powers of attorney, aged care, guardianship, social security, and aged care arrangements.

The ALRC was also asked to examine the interaction and relationship of Commonwealth laws in areas such as aged care and social security with state and territory laws. This involved considering guardianship and administration, laws dealing with ‘private’ appointments of substitute decision makers through enduring powers of attorney and enduring guardians, as well as considering the adequacy of existing criminal laws for responding to elder abuse. A great deal of the work therefore involved state and territory bodies and agencies who were willing participants in shared aspirations for reform.

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<sup>1</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) vii.

On 15 June 2016, coinciding with World Elder Abuse Awareness Day, the ALRC released the first consultation document for the Inquiry, an Issues Paper, and on 15 June 2017 the Final Report was launched by the Attorney-General.

As stakeholders observed, elder abuse is ‘complex and multidimensional’ and thus requires a ‘multi-faceted response’. The ALRC contributed to that response with a set of 43 recommendations aimed at achieving a nationally consistent response to elder abuse. The ALRC also developed a conceptual template to guide future reform through a National Plan to combat elder abuse. In February 2018, the Attorney-General announced that the Australian Government would implement this key recommendation of the Inquiry, and develop/implement a National Plan to address elder abuse.<sup>2</sup>

The Australian Government has also announced that it will implement another set of key recommendations from the report: the introduction of a serious incident response scheme in aged care to respond to abuse and neglect of aged care recipients.<sup>3</sup>

Law reform writing is a particular form of policy work, the conclusions being expressed as recommendations for reform. Terms of Reference are often an expression of a particular policy objective, usually contained in the preamble words of the Terms of Reference themselves. Therefore, in working out what is required for a particular project – determining the scope of the Terms of Reference – one needs to know the public policy context. As the Law Commission of England and Wales observed in a 2011 report, ‘law reform must operate within the broader context of Government policy’.<sup>4</sup>

Nonetheless, in any Inquiry the ALRC must do considerable work in contemplating how its suite of reform recommendations represent a cohesive response to a policy issue, within the broad policy direction set by the Terms of Reference. An Inquiry also offers the opportunity to reflect critically on the principles underpinning policy objectives. In this case, the ALRC devoted particular attention to critically considering how best to achieve the broad goal of promoting the ‘autonomy’ of older Australians.

This essay provides a brief outline of a number of conceptual or framing issues for the Inquiry, all of which shaped the ALRC’s approach to reform. First, defining elder abuse. Second, the question of how to frame law reform responses to a problem with fragmented legal responsibilities. And third, how the ALRC conceptualised the principles underpinning the Inquiry – promoting the dignity and autonomy of older people, and protection and safeguarding of older people.

## II WHAT IS ELDER ABUSE?

### A *Description*

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 one is that of the World Health Organization (WHO), describing elder abuse as

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<sup>2</sup> Christian Porter, Attorney-General (Cth), ‘National Plan to Address Elder Abuse’ (Media Release, 20 February 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/National-Plan-to-address-elder-abuse.aspx>>.

<sup>3</sup> Ken Wyatt, Minister for Aged Care (Cth), ‘Powerful New Reforms to Ensure Safe, Quality Aged Care’ (Media Release, 18 April 2018) <<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2018-wyatto48.htm>>.

<sup>4</sup> Law Commission (UK), *Adult Social Care*, Report No 326 (2011) 4 [1.14].

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.<sup>5</sup>

This description is used across a range of government and non-government bodies in Australia.<sup>6</sup> Elder abuse may take a number of forms, including physical, psychological, financial and sexual abuse, as well as neglect.<sup>7</sup>

The definition of elder abuse does not include all abuse of older persons, but is limited by the relationship between the abuser and the older person – that is, when they are in a relationship where there is an expectation of trust. This will include an expectation of trust as a result of an ‘affective relationship’, such as family members, friends, and informal carers, and those in a ‘functional position of trust’, such as paid carers and some professionals.<sup>8</sup>

Throughout the course of the Inquiry, it became clear that abuse and neglect in the context of the provision of aged care was a particular concern. In this area, what is termed ‘institutional’ or ‘system’ abuse was also an issue that required consideration by the ALRC. Institutional abuse has been described as occurring when the ‘routines, systems and regimes of an institution result in poor or inadequate standards of care and poor practice which affects the whole setting and denies, restricts or curtails the dignity, privacy, choice, independence or fulfilment of individuals’.<sup>9</sup> A number of the concerns raised in the Elder Abuse Inquiry about aged care could be characterised as about this form of abuse, particularly in relation to adequate levels of staffing. Recognising systems or institutional abuse has consequences for how to ascribe responsibility and to prevent further abuse: ‘Accountability for system abuse lies in the organisation and culture of care ... A multilevel approach is needed in which the implications of people’s behaviour are seen as set in organisational practices’.<sup>10</sup>

While commonly used, the terminology of ‘elder abuse’ may not be appropriate, particularly for some communities. For example, in the Aboriginal and Torres Strait Islander community, in addition to referring to the age of a person, ‘elder’ is also a title of respect.<sup>11</sup> Similarly, in culturally and linguistically diverse communities there may be difficulties in translating the term elder abuse. Ethnic Communities’ Council of Victoria has developed material for particular communities that refers instead to what can go wrong in families, and to respect and dignity in ageing.<sup>12</sup>

## B Difficulties of Definition

A number of complexities exist in describing elder abuse, particularly in relation to the concept of ‘age’.<sup>13</sup> Additionally, a range of conduct is captured by the WHO definition, from intentional mistreatment and neglect to unintentional conduct that causes harm or distress to an older

<sup>5</sup> World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (17 November 2002).

<sup>6</sup> See, eg, My Aged Care, *Elder Abuse Concerns* (22 June 2015) <[www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns](http://www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns)>; Elder Abuse Prevention Unit, *Elder Abuse: Definition* <[www.eapu.com.au/elder-abuse](http://www.eapu.com.au/elder-abuse)>.

<sup>7</sup> Jolanda Lindenberg et al, ‘Elder Abuse an International Perspective: Exploring the Context of Elder Abuse’ (2013) 25 *International Psychogeriatrics* 1213, 1213.

<sup>8</sup> Thomas Goergen and Marie Beaulieu, ‘Critical Concepts in Elder Abuse Research’ (2013) 25 *International Psychogeriatrics* 1217, 1224.

<sup>9</sup> Rochdale Borough Safeguarding Adults Board, *Institutional Abuse* <<https://www.rbsab.org/the-public/what-is-abuse/institutional-abuse.aspx>>.

<sup>10</sup> Yuliya Mysyuk et al, ‘Listening to the Voices of Abused Older People: Should We Classify System Abuse?’ (2015) 350 *BMJ* h2697.

<sup>11</sup> National Aboriginal and Torres Strait Islander Legal Services, Submission No 135 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, August 2016, 2.

<sup>12</sup> See, eg, Health Translations, *Abuse* <<http://healthtranslations.vic.gov.au/bhcv2/bhcht.nsf/PresentEnglishResource?Open&cx=&s=Abuse>>.

<sup>13</sup> However, it has been argued that ‘definitional conformity’ of elder abuse has developed: Lindenberg et al, above n 7, 1213.

person. It has been said that the term elder abuse ‘does not represent a single problem, but many different problems’.<sup>14</sup>

## 1 Age

There are some difficulties in designating old age as a distinguishing feature for a form of abuse. As the ALRC also noted in its 2013 Report into barriers to work for older Australians, the concepts of ‘old age’ and ‘ageing’ are not self-evident, but have different meanings according to their social and historical contexts.<sup>15</sup> Broader shifts, such as the normalisation of a ‘retirement age’ and subsequent disengagement from the labour market have contributed to understandings of old age, and of older persons as a definable social group – that is, to the assumption that older persons are in some way separate from those who are not yet old.<sup>16</sup> Withdrawal from the labour market also contributed to an assessment of older people as of declining capability and increased dependency,<sup>17</sup> with ‘particular characteristics of helplessness, vulnerability and frailty assigned to the older population’.<sup>18</sup>

With increasing diversity over the life course, distinguishing older people as a distinct group and experiencing a distinct form of abuse has some challenges. Elder abuse may also overlap with or share similarities with the mistreatment of other groups, such as people with disability.

However, some factors associated with ageing, and particularly with entering into very old age, mean that a person is more at risk of a specific kind of abuse although it may be that this elevated risk is the result of an interrelationship between ‘personal, interpersonal and systemic factors’.<sup>19</sup>

Some of these distinct risks have been summarised by Thomas Goergen and Marie Beaulieu: while the very old ‘generally have a reduced exposure to risks of becoming a victim of violent acts in public spaces and by strangers’, the increased prevalence of functional limitations, and the need for assistance with activities of daily living, may heighten the risk of abuse by those in a relationship of trust with an older person.<sup>20</sup>

There are advantages to retaining a focus on elder abuse as a distinctive social problem that requires targeted research, prevention and response strategies. However, overall, the ALRC generally avoided making recommendations for legal reforms that were targeted *solely* at ‘older’ people in this Inquiry. Instead, it recommended that a National Plan be developed to combat elder abuse. This broader policy document would provide a vehicle for national leadership and coordination of strategies, including legal reform, to prevent and respond to elder abuse.

## 2 Relationship with Family Violence

Elder abuse is often committed by a family member of the older person, notably by adult children but also the older person’s spouse or partner. The essence of elder abuse in the WHO

<sup>14</sup> Joan Harbison et al, ‘Understanding “Elder Abuse and Neglect”: A Critique of Assumptions Underpinning Responses to the Mistreatment and Neglect of Older People’ (2012) 24 *Journal of Elder Abuse & Neglect* 88, 89.

<sup>15</sup> Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013) 40.

<sup>16</sup> Martha Fredvang and Simon Biggs, ‘The Rights of Older Persons: Protection and Gaps under Human Rights Law’ (Social Policy Working Paper No 16, Brotherhood of St Laurence and University of Melbourne Centre for Public Policy, August 2012) 6.

<sup>17</sup> Harbison et al, above n 14, 90–1.

<sup>18</sup> *Ibid* 91.

<sup>19</sup> Simon Biggs and Ariela Lowenstein, *Generational Intelligence: A Critical Approach to Age Relations* (Routledge, 2013) 100.

<sup>20</sup> Goergen and Beaulieu, above n 8, 1222.

definition is the harm or distress caused by a person in a position of trust. The WHO definition is wider than the concept of 'family violence', in that the relationships of trust extend more widely than 'family'.

However, elder abuse is closely related to family violence and therefore abuse of an older person may often also be considered family violence.<sup>21</sup> The Victorian Royal Commission into Family Violence specifically examined violence against older people and noted that elder abuse and family violence are often used interchangeably in policy documents and statistics.<sup>22</sup>

'Elder abuse' is usually committed by a family member and available research suggests that women are more likely to experience elder abuse than men.<sup>23</sup> Some instances of elder abuse may be a continuation of family violence that began when the perpetrator and victim were not old. In other cases, while the abuse may occur within a family relationship, other factors such as attitudes toward older people, social isolation or a relationship of dependence may be relevant.<sup>24</sup>

An Australian Institute of Family Studies (AIFS) Report into elder abuse has noted that

[p]rogress towards understanding elder abuse and developing effective response and prevention measures, are recognised to be considerably less well developed than in other areas of interpersonal violence, including family violence and child abuse.<sup>25</sup>

Moreover, the nature and dynamics of abuse experienced by older people may be influenced by their being part of one or more particular communities. This may be the case, for example, for Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, and people with disability.<sup>26</sup> However, there has been limited research about the dynamics of abuse in particular communities.

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

[G]enerational attitudes and expectations in relation to asset transfers before or after death, and the broader question of attitudes and expectations in relation to mutual or non-mutual intergenerational support in terms of material resources and care, form an important part of the backdrop to the social and economic dynamics that may influence the conditions in which elder abuse occurs.<sup>27</sup>

Whether abuse of an older person is described as elder abuse or family violence can have an impact on services available to the older person to respond to the abusive behaviour. For instance, family violence services such as crisis accommodation that largely cater for women and children may not be suitable for older people who have experienced abuse.<sup>28</sup>

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<sup>21</sup> John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69 *Australian Social Work* 115, 117.

<sup>22</sup> Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 68.

<sup>23</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016) 5.

<sup>24</sup> *Ibid* ch 3.

<sup>25</sup> *Ibid* 4.

<sup>26</sup> *Ibid* 12–13.

<sup>27</sup> *Ibid* 19.

<sup>28</sup> Victoria, above n 22, 92.

### 3 *Definition and Measurement*

Consensus on a definition of elder abuse is important for developing an evidence base about it. A 2007 report on a study of prevalence of elder abuse in the UK noted that '[v]ariation in prevalence estimates is heavily influenced by differences in methodology', including differences in definition.<sup>29</sup>

Since the conclusion of the Inquiry, progress towards both an accepted definition and an estimate of prevalence in Australia has been made. AIFS is leading an Elder Abuse National Research project, to be completed in June 2018, to develop an Australian definition of elder abuse, to develop and test instruments to measure elder abuse against the Australian definition and to develop a data analysis plan and conduct secondary data analysis to answer key research questions on elder abuse.<sup>30</sup>

## III FRAMING LEGAL RESPONSES

### A *Federal and State Responsibilities*

Laws relating to elder abuse exist across Commonwealth, state and territory jurisdictions. The Commonwealth makes laws relating to financial institutions, social security, superannuation and aged care.<sup>31</sup> Laws relating to substitute decision-making, including guardianship, powers of attorney and most criminal laws, lie with the states and territories.

This poses some challenges for responding to elder abuse in a cohesive fashion, as

responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations.<sup>32</sup>

The ALRC was well placed to consider reforms in this fragmented legal landscape, given that its legislative functions include considering proposals for uniformity between state and territory laws, as well as proposals for complementary Commonwealth, state and territory laws.<sup>33</sup> In the ALRC's 2010 Family Violence Inquiry, the ALRC considered the complex interactions across the federal landscape, particularly between the *Family Law Act 1975* (Cth) and state and territory family violence and child protection laws.<sup>34</sup> In that context the ALRC identified the aspiration of 'seamlessness' as a key policy goal. In the Elder Abuse Report too, the ALRC made recommendations directed at both Commonwealth, state and territory laws and legal frameworks, in order to comprehensively address the range of legal mechanisms available to safeguard older people from abuse.

<sup>29</sup> Madeleine O'Keeffe et al, 'UK Study of Abuse and Neglect of Older People: Prevalence Survey Report' (Research Report, National Centre for Social Research and King's College London, June 2007) 11.

<sup>30</sup> Australian Institute of Family Studies, *Elder Abuse National Research Strengthening the Evidence Base—Stage One* <aifs.gov.au/projects/elder-abuse-national-research-strengthening-evidence-base-stage-one>.

<sup>31</sup> The Commonwealth's powers to make laws relating to aged care arise from its legislative power to make laws regulating corporations providing aged care, funding programs administered by states and territories, and its powers relating to age pensions, carer pensions and other welfare regimes: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 102. The Commonwealth's powers in relation to taxation, financial institutions, social security and superannuation arise from the banking, social welfare and powers respectively: *Australian Constitution* s 51(ii), (xiii), (xxiii), (xxiiiA). The Commonwealth does not have an enumerated power to legislate with regard to the welfare of adults generally.

<sup>32</sup> Kaspiew, Carson and Rhoades, above n 23, 1. See also Lacey, above n 31.

<sup>33</sup> *Australian Law Reform Commission Act 1996* (Cth) ss 21(1)(d)–(e).

<sup>34</sup> Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).

In the Elder Abuse Inquiry, the ALRC recommended that a National Plan to combat elder abuse be developed to establish a national policy framework, act as a vehicle for coordination, and to promote a long-term approach for the protection of older people from abuse.<sup>35</sup> The Australian Government has accepted this key recommendation, and signalled that it will develop a National Plan with the goals identified by the ALRC:

- promoting the autonomy and agency of older people;
- addressing ageism and promoting community understanding of elder abuse;
- achieving national consistency;
- safeguarding at-risk adults and improving responses; and
- building the evidence base.<sup>36</sup>

A draft is expected by the end of 2018.<sup>37</sup> The Age Discrimination Commissioner, the Hon Dr Kay Patterson AO, has also indicated that implementation of the recommendations from the Elder Abuse Report will be one of her advocacy priorities.<sup>38</sup>

## B Framing Principles for this Inquiry

The ALRC used two key principles to frame the recommendations in the Elder Abuse Report: dignity and autonomy, and protection and safeguarding. Elder abuse clearly undermines dignity and autonomy. Concerning autonomy and intimate partner violence, Professor Marilyn Friedman has written that ‘abuse denies to the abused person ... the safety and security she needs to try to live her life as she thinks she ought to’ or ‘according to her values and commitments’.<sup>39</sup>

However, protection from abuse is sometimes seen as infringing on autonomy – that is, protection and autonomy are sometimes seen as opposing considerations that need to be balanced or traded off against each other when issues of whether and how to intervene to protect a person from abuse arise.

There is particular concern about overly interventionist or paternalist approach to protecting older people. In its 2014 Report, *Equality, Capacity and Disability in Commonwealth Laws*, the ALRC had cause to consider how to effect, for people with disability, the shift toward full recognition of their equal right to make decisions that affect their lives. This shift, from others making decisions based on a judgement about a person’s ‘best interests’ to recognising that a person’s will, preferences and rights should guide decisions that affect their lives, was operationalised through the National Decision-Making Principles.<sup>40</sup> This also involved conceiving of autonomy as not only involving a sphere of non-interference, but also in terms of considering what support is needed for a person to exercise their autonomy and decision-making ability.<sup>41</sup>

In a related sense, protecting older people from abuse can be seen to support and enable their ability to live autonomous and dignified lives. Jonathan Herring has expressed this as meaning that any intervention to protect a person should occur with the aim to ‘restore or support

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<sup>35</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 9 [rec 3-1].

<sup>36</sup> Ibid [rec 3-3].

<sup>37</sup> Porter, above n 2.

<sup>38</sup> Kay Patterson, Age Discrimination Commissioner, ‘Rights of Older Australians: Ageing and Advocacy’ (Speech, 13 February 2018).

<sup>39</sup> Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) 142.

<sup>40</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 11 [rec 3-1].

<sup>41</sup> See Martin Stevens et al, ‘Social Workers’ Power of Entry in Adult Safeguarding Concerns: Debates over Autonomy, Privacy and Protection’ (2017) 19 *Journal of Adult Protection* 312, 318–19; Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 34–5.

autonomy'.<sup>42</sup> Where possible, in the Elder Abuse Inquiry, the ALRC sought to recommend changes to the law that both uphold autonomy and provide protection from harm. Where this was not possible, greater weight was generally given to the principle of autonomy. However, in limited cases, where there is serious abuse of vulnerable people, protection was given additional weight.

## 1 *Dignity and Autonomy*

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

Reforms related to enduring documents – that is, enduring powers of attorney, enduring guardianship and advance care directives – focus on improving safeguards against misuse of an appointment by a substitute decision maker. Such reforms would promote people's ability and confidence in planning for a time in the future when they may require substantial decision-making support. The ALRC recommended reforms that would ensure that a person can determine the scope and extent of their enduring appointments and not be required to give broader or unlimited powers to be able to effect certain transactions. It also recommended that appointed decision makers be required to support and represent the will, preferences and rights of the principal.<sup>43</sup> In a similar vein, the ALRC also recommended safeguards in relation to wills and superannuation. It recommended reviewing the rules in relation to binding death benefit nominations in APRA-regulated superannuation funds<sup>44</sup> and planning for the possibility of cognitive impairment in the context of self-managed superannuation funds.<sup>45</sup> The ALRC also recommended that national best practice guidelines be developed for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to improve the understanding of legal practitioners of the dynamics of elder abuse, risk factors for undue influence, and safeguards against them in the making of wills and other advance planning documents.<sup>46</sup>

In relation to court and tribunal appointed decision makers, recommendations were directed towards maximising the possibilities for involving the person who may be the subject of a guardianship and administration order in the application process, and ensuring that guardians and financial administrators understand their obligations to promote the autonomy and wellbeing of a person who is subject to a guardianship and administration order.<sup>47</sup>

The ALRC also sought to promote autonomy by making avenues for redress easier and more accessible. It recommended that the jurisdiction of state and territory civil and administrative tribunals be expanded to allow it to deal with misuse of powers by enduring attorneys/guardians, as well as guardians and financial administrators appointed by a court or tribunal, and to enable them to order any remedy that the Supreme Court could order in relation to this.<sup>48</sup> It also recommended that civil and administrative tribunals be given jurisdiction to deal with family disputes involving residential property under an 'assets for care' arrangement.<sup>49</sup> The ALRC also made a recommendation designed to encourage formalisation of these agreements, and thus aid enforceability, and concluded that, for the purposes of calculating an entitlement to the Age Pension, the *Social Security Act 1991* (Cth) should be amended to require that a 'granny flat interest' be expressed in writing.<sup>50</sup>

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<sup>42</sup> Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 35.

<sup>43</sup> Australian Law Reform Commission, above n 35, 12 [rec 5-1].

<sup>44</sup> *Ibid* 13 [rec 7-1].

<sup>45</sup> *Ibid* [rec 7-2].

<sup>46</sup> *Ibid* 14 [rec 8-1].

<sup>47</sup> *Ibid* [rec 10-1], [rec 10-2].

<sup>48</sup> *Ibid* 12 [rec 5-2].

<sup>49</sup> *Ibid* 13 [rec 6-1].

<sup>50</sup> *Ibid* [rec 6-2].



## 2 *Protection and Safeguarding*

Two areas of the Inquiry particularly engaged with questions of protection and safeguarding – aged care and adult safeguarding.

The ALRC's recommendations in aged care focused on buttressing the move towards greater consumer control for older people in aged care with suitable regulatory oversight to ensure accountability and transparency in the provision of quality care, including protections and safeguards against abuse or neglect.

In relation to aged care, the ALRC needed to reflect on how the issues raised that could be classified as 'institutional' or 'system' abuse overlapped with systemic considerations about the quality of care. The line between an issue that goes to quality assurance and one that goes to elder abuse was at times difficult to draw – after all, gross quality failures arguably produce outcomes that are abusive or neglectful. But, overall, the ALRC did not see its role in the Inquiry as one of systematically reviewing the adequacy of quality standards and processes for auditing quality in aged care in our Inquiry. Instead, the ALRC concentrated on safeguards against abuse. Since the ALRC Inquiry, there has been considerable interest in inquiring into quality processes in aged care, including:

- a review of aged care quality regulatory processes;<sup>51</sup>
- a Senate Standing Committee on Community Affairs Inquiry into quality assessment and accreditation framework (to report in November 2018); and
- a Senate Standing Committee on Health, Aged Care and Sport Inquiry into the Quality of care in residential aged care facilities in Australia (ongoing at the time of writing).

These reviews are opportune, in that they have allowed the ALRC's recommendations to be situated within a broader examination of aged care quality processes, and provided added momentum for government action to implement reform. The ALRC's recommendations for a serious incident response scheme in aged care involved rethinking the aged care system's response to abuse and neglect. In doing so, the emphasis was shifted from requiring aged care providers to *report* the occurrence of an alleged or suspected assault, to requiring an *investigation and response* to incidents by providers, along with independent oversight of that investigation and response. The ALRC also made recommendations in relation to a range of other safeguarding strategies, including enhanced employment screening processes, regulating the use of restrictive practices in aged care, and national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.<sup>52</sup>

The ALRC's recommendations about adult safeguarding involved perhaps the finest negotiation of the relationship of autonomy and protection. The ALRC recommended that adult safeguarding agencies have a role in safeguarding and supporting 'at-risk' adults.<sup>53</sup>

Protecting these people from abuse will serve to support their autonomy and show respect for their dignity, because living in fear of abuse can prevent a person from making free choices about their lives and pursuing what they value.

Most state and territory public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability by their guardians, financial administrators or those with powers of attorney. However, there exists a cohort of vulnerable adults, many of whom are old, who do not fall within the purview of this

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<sup>51</sup> Kate Carnell and Ron Paterson, 'Review of National Aged Care Quality Regulatory Processes' (Report, Department of Health (Cth), 25 October 2017).

<sup>52</sup> See Australian Law Reform Commission, above n 35, ch 4.

<sup>53</sup> *Ibid* 15 [rec 14-1].

investigative function. The ALRC recommended that these other vulnerable adults should be better protected from abuse.

Rather than extending the jurisdiction of state and territory public advocates or guardians to all older adults, the ALRC made two decisions:

1. It recommended that adult safeguarding laws be introduced, without recommending that they be situated in a particular body. The ALRC did not suggest that the recommended adult safeguarding function should necessarily be given to public advocates, but rather that the states and territories decide which of their agencies might perform this role, or whether a new agency might need to be created.
2. It recommended that safeguarding laws apply not to older people, but to ‘at-risk adults’, defined as 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.<sup>54</sup> The ALRC concluded that this ‘functional’ approach to vulnerability was preferable to providing safeguarding services to all people over a certain age. This allows recognition that most people over 65 are not particularly vulnerable and will not need safeguarding services, while some people under 65 will need these services.

Adult safeguarding is envisaged as an intervention to support autonomy, operating in the main with the person’s consent. Most often, safeguarding and support would 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, the ALRC considered that adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect at-risk adults from abuse.

However, in particularly serious cases, the safety of an at-risk person may need to be secured, even against their wishes. The ALRC concluded that, although consent should always be sought, it should not be required in serious cases of physical abuse, sexual abuse or neglect.<sup>55</sup> This may be necessary to secure people’s long-term autonomy interests and their immediate dignity. The ALRC also recommended that consent should not be necessary where safeguarding agencies cannot contact the at-risk adult, despite extensive efforts to do so, or where an adult lacks the decision-making ability to give this consent.<sup>56</sup>

#### IV CONCLUSION

The Elder Abuse Inquiry is one of a series of inquiries the ALRC has completed that have required it to consider how the law can respond to complex social policy issues – these include inquiries into family violence, barriers to work for older people, decision-making for people with disability, and incarceration rates of Aboriginal and Torres Strait Islander people. Comprehensive responses to all of these issues require broader changes than simply legal reform, but, in this Inquiry, as in the others, the ALRC has produced a blueprint for reform that can support and shape broader social change.

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<sup>54</sup> Ibid 15 [rec 14-3].

<sup>55</sup> Ibid [rec 14-4].

<sup>56</sup> Ibid.