

PROTECTING THE RIGHTS OF OLDER AUSTRALIANS FROM ABUSE—THE ALRC ELDER ABUSE INQUIRY

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INTRODUCTION

In February 2016, the Australian Law Reform Commission (ALRC) received [terms of reference](#) from the Attorney-General of Australia for an inquiry to look into how existing Commonwealth laws and legal frameworks could be improved to better safeguard and protect older Australian's from elder abuse. I am leading this Inquiry.

On 15 June, coinciding with Elder Abuse Awareness Day, the ALRC released the first consultation document for this inquiry, an Issues Paper, and called for submissions from the public on the 50 questions in that document.¹ We received over 200 submissions, and most of these are available for viewing on the [ALRC website](#). Shortly, in December, we will release a Discussion Paper, setting out law reform proposals for consideration. The Inquiry will conclude in the delivery of a Report to the Attorney-General in May 2017 with recommendations for how the government might change the relevant laws and legal frameworks. This is the standard pattern of work for the ALRC. The ALRC has been in the business of law reform as an independent Australian Government agency for over 40 years and has developed a very streamlined process for conducting inquiries.²

THE ELDER ABUSE INQUIRY

In the Elder Abuse Inquiry, as in all our work, the ALRC operates under Terms of Reference. We were asked to consider existing Commonwealth laws and frameworks which seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. These include, but are not be limited to, regulation of:

- financial institutions
- superannuation
- social security
- living and care arrangements, and
- health.

We were also asked to examine the interaction and relationship of these laws with state and territory laws.

Additionally, the ALRC was asked to identify and model best-practice legal frameworks and consider the National Disability Insurance Scheme and the Aged Care framework—both

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1 Available at <www.alrc.gov.au/publications/elder-abuse>. An enewsletter for the inquiry was also released at the same time: <<http://us1.campaign-archive1.com/?u=0ac682945224f85fa1d89d148&id=b2cb656eb9>>.

2 See a summary at: <www.alrc.gov.au/law-reform-process>.

areas of Commonwealth law. In addition to the focus on Commonwealth laws, which clearly fall within the authority of the ALRC to consider, as a federal law reform body, the ALRC is also well placed to conduct an umbrella examination of laws across the states and territories, such as guardianship and administration, and common law rules for the protection of older persons from abuse.

BACKGROUND

This Inquiry focuses on what has been called, in the shorthand expression, ‘elder abuse’. Australia’s population is ageing. In 1901, only 4% of the Australian population was aged 65 years and older. In 2011 it was 14% and by 2040 it is projected that the figure will be 21%; while those over 85 years will be up to 5% of the population by 2050.³ As the ALRC acknowledged in the report, [Access All Ages—Older Workers and Commonwealth Laws](#) (ALRC Report 120, 2013), an ageing population has implications for a wide range of public policy concerns. A parliamentary report in 2007 referred to this as the ‘inescapable demographic destiny’ of an ageing population.⁴

As the population ages, and the frailties of age and the vulnerabilities of older people increase, the potential reach of elder abuse may grow. The *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) stated that ‘[p]reventing elder abuse in an ageing world is everybody’s business’. While there are increasing anecdotal suggestions of improper exploitation and abuse of older people, there is limited evidence available about the prevalence and incidence of elder abuse in Australia. Internationally, the World Health Organization (WHO) has estimated that the prevalence rate of elder abuse in high- or middle-income countries ranges from 2% to 14%. Given the looseness of the data and available evidence this likely represents the tip of a very large iceberg.

In the background to this Inquiry are a number of reviews, already conducted, that concern issues of relevance to elder abuse. There are the recommendations of the Senate Standing Committee on Community Affairs in a 2015 report on violence, abuse and neglect against people with disability, the recommendations of the 2007 Commonwealth House of Representatives report, *Older People and the Law*, and the 2016 study by the Australian Institute of Family Studies, ‘Elder Abuse: Understanding Issues, Frameworks and Responses’.

The ALRC has also done several inquiries in recent years that have provided a rich resource, both in terms of conceptualising the issues, but also in a very practical sense, in the excellent relationships we have built with a number of stakeholders. In 2010, we produced a landmark

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

4 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, [Older People and the Law](#) (2007) vi..

report on Family Violence;⁵ the second one was an inquiry that looked at barriers for older people in the workforce;⁶ and the third one was the one on capacity and disability in Commonwealth laws,⁷ in which we went into moving the whole federal paradigm to reflect the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). In particular, the ALRC recommended National Decision-Making Principles as part of a Commonwealth model of supported decision-making, and set out principles and guidelines that can be applied to Commonwealth and state and territory laws—in particular, guardianship and administration laws. Key to the Principles is the paradigm shift signalled in the CRPD away from ‘best interests’ decision-making to a focus on ‘will, preferences and rights’, so that when people with disability are supported to make decisions, or have decisions made for them, it is their wishes and preferences that drive those decisions—not other people’s ideas about their best interests.

FRAMING THE INQUIRY

Looking at this current Elder Abuse Inquiry, there are the two key principles, as expressed in the Terms of Reference, that are informing our work, that:

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

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

In addition to framing principles, there is also the practical framework — of how you conceptualise in a practical way. We describe this as the ‘4-Rs’ approach, including issues related to:

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

⁵ Australian Law Reform Commission and NSW Law Reform Commission, [Family Violence—A National Legal Response](#), ALRC Report No 114, NSWLRC Report No 128 (2010). This inquiry was conducted with the New South Wales Law Reform Commission.

⁶ Australian Law Reform Commission, [Access All Ages—Older Workers and Commonwealth Laws](#), Report No 120 (2013).

⁷ Australian Law Reform Commission, [Equality, Capacity and Disability in Commonwealth Laws](#), Report 124 (2014)

- Redress—what forums can people go to for redressing elder abuse, and what legal remedies are available?

When the ALRC was looking at the difficult challenges of making recommendations to improve laws and legal frameworks in responding to family violence, the goal we identified was to make the various systems as seamless as possible, from the perspective of those who engaged with them. We are taking a similar approach in working towards best practice responses to elder abuse, to close any gaps and to develop a seamlessness of approach. We recognise that there are differences of approach in dealing with adults, as distinct from children within the child protection framework. The respect for the autonomous adult strongly comes into play here. But the need for a response that enshrines dignity and the right to live free from abuse is also strong.

DEFINITIONS

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

In the *Toronto Declaration on the Global Prevention of Elder Abuse*, the WHO described elder abuse as ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’.⁸ It also acknowledged that elder abuse can take various forms such as physical, psychological or emotional, sexual and financial abuse.

This description is used across a range of government and non-government bodies and we used it as a starting point in our Inquiry. We asked a number of questions in our Issues Paper about how to define elder abuse and whether, for example, it should require there to be ‘intention’ and/or ‘harm’. There were also questions around the relationship between elder abuse and family violence and the dynamics within particular contexts.

AN ILLUSTRATION

On the limited data available, it seems that financial abuse is a growing area of concern—particularly by adult sons of their elderly mothers.⁹

There is what might be described as a ‘perfect storm’ of possibilities, where a person may build up a modest pool of assets, including real estate (a home) and financial resources, in bank accounts and superannuation. The ‘superannuation guarantee’ of compulsory superannuation in Australia since 1993 has increased the amount of potential assets. You add

⁸ World Health Organization, [The Toronto Declaration on the Global Prevention of Elder Abuse](#) (2002).

⁹ Kaspiew, Carson and Rhoades, above n 3, 7.

in a dash of ‘inheritance impatience’ and a bit of moral pressure may turn into emotional blackmail and actual fraud. In a way, misuse of an older person’s financial assets may be seen to sit at the fault line of understandings of property and expectations of family.

The following scenario is a hypothetical example to illustrate the kinds of problems that may arise. Mum moves in, providing money towards a granny flat or other renovation. The understanding is that she will be able to stay, be near to her grandchildren there, and be looked after for the remainder of her days. Or at least that’s what *she* thinks. The arrangement goes ‘south’. Son and daughter-in-law are not happy with mum’s increasing demands. Their own family is growing, and they are thinking of buying a bigger house—minus mum. What can she do?

We can add some more into this: Mum has signed a power of attorney instrument in favour of her son. He starts using it. He wants to access her bank account; to make lump sum withdrawals from her superannuation. He thinks, in justification, ‘she doesn’t need it; I do’. What can she do?

Mum is dependent on certain prescription medications. They need to be taken at specific times and in prescribed doses. She is getting increasingly forgetful and increasingly reliant on daughter-in-law to give them to her. Daughter-in-law is getting fed up of caring for her mother-in-law. The pharmacist that has regularly supplied Mum’s medication notices that the daughter-in-law is slow to fill the scripts and hasn’t seen Mum for a while. He’s worried. What can he do? What should he do?

TOWARDS IMPROVED LAWS

The ALRC is looking at banking and superannuation—both within the Commonwealth sphere. We are also looking at aged care, both residential and in-home care. In the domain of state and territory laws we are looking at things like: what happens when family agreements break down; the role of appointed decision-makers, both under instruments like powers of attorney and by tribunals who appoint guardians and administrators; and criminal laws.

For the ALRC, the Elder Abuse Inquiry to date has been another deeply reflective and respectful process and we embrace our task as the opportunity to make a singular contribution in this crucial field. And while we recognise that changes in law, of themselves, may be slow to effect change, they are important and can play a normative role.

The next milestone for the Inquiry is the release of a Discussion Paper, with a call for submissions from the public, in early December. We will then conduct further consultations around the country, encouraging people to make submissions in response to law reform proposals set out in the Discussion Paper. We will complete the Inquiry with a report in May 2017, setting out our final recommendations for law reform. At this point, the report is tabled, within 15 sitting days, and it becomes a public document.

In a speech in 2008, the ALRC's first Chairman, the Hon Michael Kirby AC CMG, remarked about the role of permanent law reform bodies in keeping 'the flame of ideas' alight.¹⁰ Effective and thoughtful law reform is dependent on the involvement of as many as possible to help to fan the flames and to develop effective law reform solutions for government.

Once released, the Discussion Paper will be available online at www.alrc.gov.au/publications. Submissions will close late February 2017.

10 Michael Kirby, 'Law Reform—Past, Present and Future', [Address to the Alberta Law Reform Institute](#), Monday 2 June 2008, 30.