Office of the Public Advocate

Submission to the Australian Law Reform Commission in Response to the Elder Abuse Discussion Paper 83

February 2017

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Abbreviations

ALRC	Australian Law Reform Commission
COAG	Council of Australian Governments
EPA	Enduring Power of Attorney
GAA	Guardianship and Administration Act 1986 (Vic)
IGUANA	Interagency Guide to Addressing Violence, Neglect and Abuse
NSWT&G	New South Wales Trustee and Guardian
OPA	Office of the Public Advocate
PGSP	Private Guardian Support Program
POAA	Powers of Attorney Act 2014 (Vic)
STL	State Trustees Limited
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission

Introduction

The Office of the Public Advocate (OPA) welcomes the opportunity to respond to the Australian Law Reform Commission's (ALRC) *Elder Abuse Discussion Paper 83*.

OPA commends the ALRC on the breadth of issues and responses proposed in the Discussion Paper and is pleased to have the opportunity to respond to the vast majority of the proposals and questions in it.

This submission is the second of OPA's submissions to the ALRC in its inquiry into protecting the rights of older Australians from abuse. OPA encourages anyone seeking a broad view of OPA's positions on elder abuse prevention and response to read this submission in conjunction with its previous one.[1]

This submission addresses the proposals and questions in order, under the chapter headings used in the Discussion Paper.

Proposals and questions

2. National Plan

Proposal 2–1 A National Plan to address elder abuse should be developed.

OPA supports the development of a National Plan to address elder abuse.[2] We believe it is a crucial step towards enhancing rights protections for older Australians —by creating agreed definitions, a coherent policy and action framework, building the evidence (including with regard to specific populations), and enhancing consistency of state and territory legislation through COAG discussions.

Proposal 2–2 A national prevalence study of elder abuse should be commissioned.

OPA supports the commissioning of a national prevalence study that incorporates "information about the prevalence of elder abuse perpetrated against people with cognitive impairment and about people living in supported accommodation settings".[3] Ideally, this would be part of a comprehensive and systematic research program[4] which will inform the development of clear agreed on definitions of elder abuse for the National Plan and prevalence study.

Without such leadership and definitional agreement, research findings will continue to be of limited use due to the lack of ability to compare findings or assess the impact of prevention campaigns and responses.

OPA is currently preparing a report for the Australian Guardianship and Administration Council (AGAC) in relation to elder abuse prevalence. The report will

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[1] Available to download from OPA's website: http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/abuse-neglect-and-exploitation/responding-to-abuse/367-submission-to-the-alrc-elder-abuse-issues-paper

[2] OPA, 2016, *Submission to the Australian Law Reform Commission in Response to the Elder Abuse Issues Paper, p. 23*

[3] Ibid, p.8

[4] For more information see OPA's response to Question 4 of the ALRC Elder Abuse Issues Paper (ibid).

identify a preferred method for assessing the prevalence of elder abuse among Australians 65 years old and over who have significant cognitive impairments by examining key research into elder abuse prevalence among people with dementia.

This piece of work will support current scoping work being undertaken by the Australian Institute of Family Studies concerning a national prevalence study of abuse. AGAC considers data on elder abuse of people with cognitive impairment a significant gap in national prevalence studies that have been conducted overseas.

3. Powers of Investigation

Proposal 3–1 State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:
(a) has care and support needs;
(b) is, or is at risk of, being abused or neglected; and
(c) is unable to protect themselves from the abuse or neglect, or the risk of it, because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion.

OPA is on record as supporting extended investigation powers for public advocates (and public guardians).[5] OPA would prefer to see these proposed new powers apply to all adults with impaired decision-making ability (which is more than temporary), as opposed to restricting the scope of the power to older people with care and support needs. But OPA understands that the inquiry's terms of reference mean this proposal has been crafted in the context of elder abuse.

It is also noted that others responding to this inquiry recommended (as did the VLRC previously) that such investigation powers be limited to 'circumstances where there is a reasonable suspicion that an older person may have impaired decision-making ability'.[6] OPA also sees the potential benefit of this more limited criteria in that it better aligns with the current legislative frameworks and roles of public advocates and public guardians.

OPA makes two additional points with regard to the specific details of this proposal. It is unclear why 'physical restraint' should be included in the definition of situations where this power of investigation may apply (see paragraph 3.32 of discussion paper). As OPA sees it, 'care and support needs' do not naturally arise from or relate to 'physical restraint'[7] in and of itself. Poor management of a person's care needs may generate the perception that a person requires physical restraint, but these care needs would have arisen from some form of mental or physical impairment or illness. If there was 'physical restraint' without underlying disability then police intervention would be sufficient. OPA suggests that this element of the definition is unnecessary.

OPA recognises and accepts the concerns raised in the Discussion Paper about encroaching on people's rights to refuse intervention (paragraph 3.29). However, it does not think it follows that the criteria for eligibility impacts on these rights,

[5] Ibid, p. 22

[6] ALRC, 2016, *Elder Abuse Discussion Paper 83*, p. 68

[7] Definition provided in footnote 50, ibid, p. 69

especially where Proposal 3-2 relating to guiding principles specifically protects and highlights this right of refusal.

OPA believes a 'comprehensive model of protection and support'[8] is warranted to fill the current investigations gap.

Proposal 3–2 Public advocates or public guardians should be guided by the following principles:
(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.

OPA supports this proposal on the understanding that someone with significant cognitive impairment may not have the capacity to refuse assistance or protection.

Proposal 3–3 Public advocates or public guardians should have the power to require that a person, other than the older person:
(a) furnish information;
(b) produce documents; or
(c) participate in an interview relating to an investigation of the abuse or neglect of an older person.

OPA supports this proposal but thinks that the outcomes of investigations would be enhanced by providing additional powers to the public advocates and public guardians to those included here. In particular, OPA does not agree with the ALRC view that "it is appropriate for powers of entry and inspection without consent to be restricted to police agencies".[9] While it is valuable to preserve the "supportive and consent-based nature of the investigative function", in OPA's experience, the person who is likely to be the subject of abuse and neglect is not usually the person barring entry to the premises.

Under this proposal, the success of the investigation (and the safety of the older person) may hang on the ability of the public advocates and public guardians to convince the police that a welfare check is required.

It is unclear why this would be preferable to the model of judicial oversight proposed by the VLRC, where the Public Advocate "be permitted to apply to VCAT or to the Magistrates Court of Victoria for a warrant authorising entry to any premises when she believes that a person with impaired decision-making ability, due to disability, who is on the premises is being abused exploited or neglected".[10]

OPA believes judicial oversight would protect the rights of the older person to refuse investigation, support or assistance. The tribunal would only encroach on the person's ability to deny entry and refuse support where that was warranted by their right to safety and protection.

[8] Ibid

[9] Ibid, p. 72

[10] Victorian Law Reform Commission (VLRC), 2012, Guardianship Final Report, VLRC: Melbourne, p. 458

In OPA's experience, the circumstances of older people in private homes (even when they are under a guardianship order) are often difficult to ascertain. Where access to the person is blocked (usually by a co-resident relative), the older person is effectively out of reach and their living circumstances (including whether they are suffering abuse and neglect) hidden from view.

For these reasons, the recommendations of the VLRC in their final report on guardianship in relation to "Expanded Investigation Powers for the Public Advocate" (Recommendations 330–334)[11] are supported.

Of course, the police would play an essential role when and where an entry warrant is issued. To this end, it will be necessary to develop protocols between police and public advocates and public guardians in each state and territory.

Further, to give strength to these legislative changes, OPA proposes that it be made an offence not to provide requested information to an investigator (as recommended by the VLRC).[12]

[11] Ibid.

> "Expanded investigation powers
> 330. The Public Advocate should be able to exercise the following powers when conducting an investigation:
> (a) serve a written notice on a person requiring them to give the Public Advocate specified documents or other materials relevant to an investigation being undertaken by the Public Advocate
> (b) serve a written notice on a person requiring them to give written answers to questions
> (c) require a person to attend a conference for the purposes of seeking to resolve a matter being investigated by the Public Advocate
> (d) access the proposed online register as necessary.
> 331. Under new guardianship legislation, it should be an offence for a person to refuse or fail to provide information, or to attend a conference or interview, when directed by the Public Advocate to do so.
> 332. The Public Advocate's powers of entry and inspection under section 18A of the *Guardianship and Administration Act 1986* (Vic) should be retained in new guardianship legislation.
> 333. The Public Advocate should be permitted to apply to VCAT or to the Magistrates' Court of Victoria for a warrant authorising entry to any premises when she believes that a person with impaired decision-making ability due to a disability who is on the premises is being abused, exploited or neglected.
> 334. VCAT or the Magistrates' Court of Victoria should be permitted to issue a warrant authorising entry to any premises in these circumstances if they are satisfied that it is appropriate to do so."

[12] Ibid, Recommendation 333

Proposal 3–4 In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:
(a) refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;
(b) assist the older person or perpetrator in obtaining those services;
(c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or
(d) decide to take no further action.

OPA supports proposal 3–4, noting that these potential responses are in addition to the existing power of public advocates to make an application for guardianship or administration.[13]

The supporting discussion presented by the ALRC in relation to this proposal indicates a misunderstanding of the function, role and benefits of additional protective orders, including assessment orders, removal orders and banning orders. In paragraph 3.4, the ALRC argues that "the introduction of assessment orders, removal orders and banning orders…may not be compatible with a consent-based 'support and assist' model of investigation".[14] However, these additional orders do not sit within an investigation (and so are not required to be compatible with a 'support and assist' model). These additional orders, if instituted, would simply expand the set of protective orders available to the tribunal (not the public advocate) when they are called on to respond to a matter involving suspected abuse or neglect of an older person.

OPA believes these orders should be made available to tribunals because they are less restrictive alternatives to guardianship orders.

Proposal 3–5 Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:
(a) liable, civilly, criminally or under an administrative process;
(b) found to have departed from standards of professional conduct;
(c) dismissed or threatened in the course of their employment; or
(d) discriminated against with respect to employment or membership in a profession or trade union.

OPA supports protections for whistle-blowers, as demonstrated by action point D in our Interagency Guideline for Addressing Violence, Neglect and Abuse (IGUANA): "ensure any person who reports an instance of violence, neglect or abuse is not thereby subject to adverse consequences".[15] Another benefit of this proposal highlighted in the discussion paper is that it will ensure whistle-blowers are not inadvertently breaching confidentiality and privacy laws.[16]

[13] ALRC, 2016, p. 72

[14] Ibid, p. 73

[15] OPA, 2013, *Interagency Guideline for Addressing Violence, Neglect and Abuse*, p. 6

[16] ALRC, 2016, p. 73

Section entitled *Collaboration and coordination*

OPA sees the benefit of having a lead agency to coordinate responses to elder abuse. In his presentation to the National Elder Abuse Conference in February 2016, OPA Director of Strategy, Dr John Chesterman, argued that leadership is currently unclear in matters that involve suspected elder abuse but do not involve an obvious crime or medical emergency.[17]

The expanded investigations function of public advocates and public guardians will help ensure that people with cognitive impairment identified as suffering abuse (including older Australians) are supported and protected. Investigators will be able to identify the supports and services required by the person, including which organisation is best placed to fulfil a crisis or ongoing case management role.

OPA does not see this as a solution to all of the gaps in leadership identified by Dr Chesterman above. Public advocates, for example, will not be involved in the set of matters where older people with decision-making capacity are self-presenting for assistance (for example, to support and advice agencies such as Seniors Rights Victoria).

4. Criminal Justice Responses

The ALRC made no proposals for additional offences to respond to elder abuse, arguing that existing laws adequately cover circumstances like fraud, theft and neglect that can arise in elder abuse matters. It also considers that new offences that apply only to 'elders' would be discriminatory and paternalistic.

OPA agrees that 'elder abuse' offences, with no reference to the self-protective abilities of the older person, would not be appropriate. However, it questions if there might exist a space for new offences that support effective criminal justice pathways for victims of elder abuse without automatically grouping all older people together. For example, they could apply only to people with vulnerability stemming from disability.

In relation to neglect offences, OPA remains of the view that current neglect offences could more clearly criminalise duty of care breaches involving failure to adequately care for older persons.

In relation to enduring powers of attorney, OPA is of the view that legal reform is warranted. The ALRC argues that recently created offences relating to dishonestly obtaining, revoking or misusing an enduring power of attorney in Victoria replicate existing offences.[18] OPA holds that these new offences are good initiatives enabling a crime to be established without waiting for evidence of theft. This improves access to justice for victims of financial elder abuse because it is well-known that financial crimes have low prosecution rates.

[17] Chesterman, J., 2016, *From recognition to reform: Planning the next generation of elder abuse response strategies*, presented at the 4th National Elder Abuse Conference in Melbourne on 24 February 2016

[18] *Powers of Attorney Act 2014* (Vic), Section 135

5. Enduring Powers of Attorney and Enduring Guardianship

Proposal 5–1 A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

OPA strongly supports this initiative and has long-supported the creation of a mandatory register for enduring powers of attorney, court and tribunal substitute decision-making orders. This was also a recommendation of the VLRC in its guardianship review.[19]

However, OPA is of the view that a national register would require nationally consistent substitute decision-making legislation across guardianship and administration and enduring powers of attorney. As an interim measure, it would be valuable for each jurisdiction to have its own register to ensure the benefits of registration are not significantly delayed awaiting new legislation.

Further, OPA advocates for an accessible and low-cost register. Ideally, as recommended by the VLRC with regard to a state register, "There should be no fee for registering a personal appointment"[20] lest it discourage the registration of an enduring power and increase the workload of tribunals. The VLRC proposed that the cost of the register be met, at least in part, by annual fees paid by regular users/viewers of the register (for example, banks and hospitals).

Proposal 5–2 The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.

OPA supports this proposal.

Proposal 5–3 The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered and that unregistered enduring documents remain valid for a prescribed period.

OPA supports this proposal, and notes that this provision could apply to interim state-based registers.

Question 5–1 Who should be permitted to search the national online register without restriction?

OPA refers the ALRC to the VLRC recommendations on this topic in relation to a Victorian state register.[21]

The VLRC proposes the principal and their representative be given electronic access to the relevant part of the register via a PIN, which they can then share with a third party as they wish (for example, other family members or their accountant), avoiding

[19] VLRC, 2012, Recommendation 259, p. 364

[20] Ibid, Recommendation 268, p. 369

[21] Ibid, Recommendations 275–280, p. 372–3

the need to specify which family members have a right to view the principal's appointments.

The VLRC recommended a tiered approach to access to the register, with the level of access granted to a particular organisation, regular user, or other one-off applicant to be decided by a gatekeeper (they proposed that the Public Advocate take that role). The gatekeeper would decide what parts of the register the organisation had access to and the level of detail they reasonably required.

The VLRC also recommended that an offence be created for accessing parts of the register that the user did not have a 'legitimate interest in viewing'. See recommendation 279 for further information:

> "Licensed regular users should have access to those parts of the register and to a level of detail concerning particular personal appointments that the Public Advocate considers they have a legitimate interest in viewing. The register should operate in such a way that it generates an electronic record whenever licensed regular users access any part of the register. It should be an offence for a licensed regular user to access any part of the register that they do not have a legitimate interest in viewing."[22]

Question 5–2 Should public advocates and public guardians have the power to conduct random checks of enduring attorneys' management of principals' financial affairs?

OPA believes that random checks of attorneys' management of funds could help prevent and redress financial elder abuse (see OPA submission to ALRC p. 19). While it is open to the possibility of public advocates and public guardians being given the power to undertake these checks, it is noted that this would be a significant change to current practice in most parts of Australia and would have significant resource implications for OPA and those of its counterparts.

Proposal 5–4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:
(a) legal practitioner;
(b) medical practitioner;
(c) justice of the peace;
(d) registrar of the Local/Magistrates Court; or
(e) police officer holding the rank of sergeant or above.

Each witness should certify that:
(a) the principal appeared to freely and voluntarily sign in their presence;
(b) the principal appeared to understand the nature of the document; and
(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

OPA supports this proposal. OPA suggests that the phrase 'independent witness' be explicitly defined to exclude relations of the principal or of the attorney, paid carers and health providers of the principal, and beneficiaries under the principal's will.

[22] Ibid, Recommendation 279, p. 373

OPA agrees with the ALRC that "stringent witnessing requirements are a necessary and important protection against misuse"[23] of enduring powers.

Proposal 5–5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.

OPA supports this proposal, which is modelled on a similar provision in the recent *Powers of Attorney Act 2014* (Vic) (POAA).[24] OPA holds that other states and territories will benefit if this proposal is enacted in their jurisdictions.

In principle, OPA has no objection to broadening those potentially subject to this legislation to include tribunal appointed guardians and administrators. OPA sees 'loss…caused by that person's failure to comply with their obligations under the relevant Act' as a suitably high threshold which would appropriately prevent compensation orders arising solely from a person's disagreement with a guardian's or administrator's decision.

Proposal 5–6 Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:
(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
(b) a tribunal has authorised the transaction before it is entered into.

OPA recognises this proposal is closely based on section 64 of the Victorian *Powers of Attorney Act 2014* relating to 'conflict transactions'.

It supports this proposal, noting that drafting should also include an anti-ademption clause.

Proposal 5–7 A person should be ineligible to be an enduring attorney if the person:
(a) is an undischarged bankrupt;
(b) is prohibited from acting as a director under the Corporations Act 2001 (Cth);
(c) has been convicted of an offence involving fraud or dishonesty; or
(d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

OPA supports this proposal.

[23] ALRC, 2016, p. 102

[24] POAA 2014 (Vic), section 77

Proposal 5–8 Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:
(a) making or revoking the principal's will;
(b) making or revoking an enduring document on behalf of the principal;
(c) voting in elections on behalf of the principal;
(d) consenting to adoption of a child by the principal;
(e) consenting to marriage or divorce of the principal; or
(f) consenting to the principal entering into a sexual relationship.

OPA supports this proposal.

Proposal 5–9 Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.

OPA supports this proposal.

Proposal 5–10 State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.

OPA has long advocated for nationally consistent laws for enduring powers of attorney. It strongly supports this proposal.

Proposal 5–11 The term 'representatives' should be used for the substitute decision makers referred to in proposal 5–10 and the enduring instruments under which these arrangements are made should be called 'Representatives Agreements'.

OPA appreciates the arguments for moving from 'attorneys' to 'representatives' but argues that 'enduring powers of attorney' is a widely understood term that should be retained.

Proposal 5–12 A model Representatives Agreement should be developed to facilitate the making of these arrangements.

OPA's experience with developing community education resources in relation to Victoria's new *Powers of Attorney Act 2014* suggests that a set of illustrative examples of 'model Representatives Agreements' may be more useful than one model, given that a range of powers encompassed by a single agreement is possible.

Proposal 5–13 Representatives should be required to support and represent the will, preferences and rights of the principal.

OPA supports this proposal in its moves towards embedding the Convention on the Rights of Persons with Disability in Australian legislation.

OPA would like to highlight the fact that circumstances may arise where the representative could not reasonably know the will and preferences of the principal,

and, in these cases, it might be difficult to know what it means to uphold the "rights" of the principal through their substitute decisions.

OPA notes that Victoria's *Medical Treatment Planning and Decisions Act 2016* (s. 61) provides for substitute decision making according to the 'preferences and values' of the person and, where this is unable to be known, the substitute decision maker must act in a way that 'promotes the personal and social wellbeing of the person'.

6. Guardianship and Financial Administration Orders

Proposal 6–1 Newly-appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.

OPA holds that education and training for non-professional guardians and administrators would likely reduce instances of elder abuse that are the result of ignorance.

Question 6–1 Should information for newly-appointed guardians and financial administrators be provided in the form of:
(a) compulsory training;
(b) training ordered at the discretion of the tribunal;
(c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or
(d) other ways?

OPA ran the Private Guardian Support Program (PGSP) until 2008, and, since then, has offered support to private guardians through the OPA Advice Service. Through these program areas, OPA has found that few private guardians seek OPA's support or advice.[25] Further, OPA's experiences with providing advice to private guardians suggest that they are largely uninformed about the scope of their role.[26]

This suggests that if training is not made compulsory, the relevant tribunal should be encouraged as standard practice to require the newly-appointed guardian or financial administrator to undertake training, unless there is a good reason for them not to do so.

Online training should be made available as an alternative to face-to-face training sessions to ensure greater access for regional and remote participants and others.

[25] In 2006/07 only 28 per cent of private guardians contacted the PGSP and, of those contacts, only 12 per cent related to advice about the role of guardian.

[26] In the last half of 2016, the Advice Service received a total of 64 calls from private guardians and administrators (26 from private guardians and 38 from administrators), this is of the thousands of orders that would have been in effect in Victoria during the time. Anecdotally, the private guardians who do call are 'very unclear about what powers they have under the order or how to carry out their role' (personal correspondence from Coordinator of OPA's Advice and Education Service).

Proposal 6–2 Newly-appointed guardians and financial administrators should be required to sign an undertaking to comply with their responsibilities and obligations.

OPA supports this proposal in principle, acknowledging that it was also a recommendation in the VLRC's *Guardianship Final Report* in 2012. While it, by itself, may not result in improved understanding by the appointee, OPA agrees that it may be useful in 'any subsequent proceedings concerning failure of a decision maker to comply with their obligations'. [27]

OPA urges the ALRC to consider the value of requiring professional guardians and administrators of last resort to sign an undertaking for each individual appointment. In Victoria, the Public Advocate was appointed guardian of last resort for 862 new matters in 2015–16.

Question 6–2 In what circumstances, if any, should financial administrators be required to purchase surety bonds?

In OPA's experience, financial mismanagement and fraud are much more likely to be perpetrated by an attorney acting under an Enduring Power of Attorney (Financial), or someone with informal access to the represented person's accounts, than by a financial administrator.[28] OPA believes the tribunal oversight of financial administrators serves as significant disincentive to theft and financial mismanagement.

OPA notes the data presented by State Trustees Limited (STL) and NSWT&G that suggests around 9 to 20 per cent of identified financial abuse is perpetrated by a financial administrator. It is important to note that the data presented involves just 30 or so cases across both states where administrators were suspected of financial abuse. This is far less than one per cent of the thousands of administration orders that are in force in a given year[29]: for example, 9034 orders were made in Victoria in the last 12 months.[30] Of course, there may have been numerous other cases of abuse that were undetected or which were not pursued due to a lack of evidence. However, it is unclear that surety bonds would assist either of these groups of people.

To benefit from a surety bonds scheme, a person would need to have been a victim of financial abuse or mismanagement by their administrator, have had someone identify and act to address this abuse, and have sufficient evidence of the abuse to make a case.

Surety bonds may also be of benefit in matters where legal action is not pursued because there is little prospect of recovering the stolen or misused funds despite

[27] ALRC, 2016, p. 123

[28] This perception aligns with State Trustee Limited findings as reported in the ALRC Discussion Paper 83 (p. 119): "49% of abusers had no authority to act for the victim, 27% held an EPA and 20% were administrators".

[29] Orders in force in a given year include new orders, reappointments, and those orders made in recent years that have not yet expired.

[30] Data from VCAT for period 1 January 2016 to 31 December 2016 (new orders and reassessements). Personal communication with Benjamin Fenton, Deputy Registrar, 17/02/2017.

strong evidence of wrongdoing. Potentially, some part of the reimbursed funds could then be used to pursue justice through the legal system.

The person in the following case study may have benefited from a surety bond. However, existing tribunal oversight did catch and prevent further financial abuse.

Case study

In 2015, OPA was appointed guardian of 'Mrs K', an elderly woman with dementia who had likely suffered financial abuse and neglect at the hands of her carers.

Her godson had been appointed administrator two years prior and he had approved payments for personal care services at home for Mrs K. The carers he paid were his relatives and they were charging fees well above market rates and living in Mrs K's house rent-free.

The tribunal member who appointed both OPA as guardian and State Trustees Limited (STL) in 2015 was concerned about the rapid depletion of around $500,000 from Mrs K's account (among other things).

STL found good evidence of financial abuse perpetrated by the carers but determined there was little prospect of recovering the funds and so did not pursue the matter further.

The guardian ultimately decided to change Mrs K's care providers due to numerous concerns about the quality of care they were providing and the level of the fees charged. In 2016, the tribunal appointed family members as guardian and administrator and STL and OPA involvement ceased.

Discussion

The facts of this case suggest that Mrs K would likely have been a good candidate for reimbursement of funds through a Surety Bond scheme. As it stood, tribunal oversight, and the interest of other family members in Mrs K's wellbeing, combined to prevent further financial losses.

Overall, OPA questions whether the potential benefits of surety bonds would be worth the significant costs imposed on thousands of people each year.

OPA submits that there is another potential problem with regard to surety bonds. The requirement that a surety bond is paid **from the person's estate** to protect them from mismanagement or theft by a private administrator (who is appointed by the court or tribunal) disadvantages people who would prefer a private administrator over the Public Trustee. The surety bond scheme in place in NSW is not required when the estate is administered by the Public Trustee.

Please note that there is a mistake in the Discussion Paper that presents the fees required to be paid as equating to 0.04 per cent of the estate per annum (for those estates large enough to require annual fees). The rate is actually 0.4 per cent.[31] This represents an annual fee of $4000 per year for an estate of $1 million (not $400).

[31] NSWT&G website: http://www.tag.nsw.gov.au/surety-bond-scheme.html, accessed 17 February 2016.

Question 6–3 What is the best way to ensure that a person who is subject to a guardianship or financial administration application is included in this process?

Practices in relation to ascertaining the views and wishes of the person subject to an application, and the extent to which people are included in the process, have varied quite significantly between states and territories and seem to reflect structural, historical and geographical peculiarities.

Clearly, natural justice principles should be applied to these applications. In Australia, different jurisdictions have used different processes to try to ensure natural justice for the person who is subject to the application. These have ranged from compulsory independent legal representation for the potential represented person to having a tribunal member at least see the person concerned before making any order.

Ideally, the person would be both informed of the hearing by someone capable of explaining the ramifications of such a process, and supported to attend the hearing (or have an independent representative attend) to ensure their voice was heard (wherever this is possible). The tribunal could then be confident that the person had been included in the process.

In Victoria, VCAT can request that OPA conduct an investigation into the potential represented person's view and preferences where they did not attend the hearing. This does not happen where the member is confident that they have heard an accurate report of the person's views (for example, by a family member) or where they believe that it would be impossible to know them.

There are occasionally good reasons why the person subject to the application will not benefit from attending the hearing. OPA holds that the best, inclusive, practice would have the tribunal require the person subject to the application to be present or alternatively that the applicant provide a good, verifiable reason for why they are not present. Tribunals should also ensure (or continue to ensure) that their hearings are as accessible as possible.

Where a good reason is provided for why the person cannot attend the hearing, and the tribunal is not able to address these issues by relocating the hearing, OPA submits that a skilled independent person should be engaged to present the views of the proposed represented person to the tribunal. In Victoria, OPA would be well-placed to fulfil this role.

7. Banks and superannuation

Proposal 7–1 The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

OPA supports this proposal, acknowledging the benefits that would be gained from creating binding obligations on banks in relation to preventing and addressing financial abuse where possible.

Proposal 7–2 The Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness

the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

OPA supports this recommendation.

8. Family Agreements

Proposal 8–1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.

OPA supports this proposal.

Question 8–1 How should 'family' be defined for the purposes 'assets for care' matters?

OPA agrees that the definition used to determine the tribunals' jurisdiction in 'assets for care' matters should be broad enough to cover both same-sex relationships and other family-like relationships including situations such as where 'the surviving spouse [enters an]…agreement with their deceased partner's child or niece/nephew'.[32]

OPA refers the commission to the definition of family member contained in Victoria's *Family Violence Protection Act 2008* (s. 8). This example ensures all family-like relationships are covered by the legislation. However, OPA recognises that this definition may be too broad for the purposes of defining an 'assets for care' jurisdiction for an administrative tribunal.

9. Wills

Proposal 9–1 The Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:
(a) common risk factors associated with undue influence;
(b) the importance of taking detailed instructions from the person alone;
(c) the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and
(d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.

OPA supports this proposal.

[32] ALRC, 2016, p. 157

Proposal 9–2 The witnessing requirements for binding death benefit nominations in the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be equivalent to those for wills.

OPA supports this proposal.

Proposal 9–3 The *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.

OPA supports this proposal.

10. Social Security

Proposal 10–1 The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.

OPA supports this proposal. There is definite benefit in highlighting the potential for elder abuse of people receiving the age pension. OPA also supports training staff and establishing processes to mitigate and respond to instances of suspected abuse.

Proposal 10–2 Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

OPA supports this proposal. The potential for a third person to change payment nominees without the approval of the older person is a very real danger. Face-to-face contact would give Centrelink staff an opportunity to assess the true wishes and decision-making capacity of the older person.

Proposal 10–3 Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.

OPA supports this proposal.

Proposal 10–4 Centrelink staff should be trained further to identify and respond to elder abuse.

OPA supports this proposal.

11. Aged care

Proposal 11–1 Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider's investigation of and response to those incidents.

OPA supports this proposal but queries how such a requirement would be enforced.

Proposal 11–2 The term 'reportable assault' in the Aged Care Act 1997 (Cth) should be replaced with 'reportable incident'. With respect to residential care, 'reportable incident' should mean:
(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;
(b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or
(c) an incident resulting in an unexplained serious injury to a care recipient.

With respect to home care or flexible care, 'reportable incident' should mean a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient.

OPA would prefer the term 'reportable violence and abuse' as a replacement for the narrower 'reportable assault'. OPA supports the expansion of the types of violence that are reportable.

In regard to the proposed definition for part (b), OPA suggests that violence or exploitation 'that is part of a pattern of abuse when committed by a care recipient toward another care recipient' should focus on the perpetrator's pattern of behaviour, whether or not the abuse is directed against the same co-resident each time. It also supports the inclusion of staff-to-resident incidents occurring in home-care settings under this mandatory reporting scheme.

Proposal 11–3 The exemption to reporting provided by s 53 of the Accountability Principles 2014 (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, should be removed.

OPA strongly supports this proposal. It highlighted its concerns about this clause in its response to the ALRC's Issues Paper in 2016.[33]

Proposal 11–4 There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of:
(a) a person's national criminal history;
(b) relevant reportable incidents under the proposed reportable incidents

[33] OPA, 2016, p. 14

scheme; and
(c) relevant disciplinary proceedings or complaints.

OPA supports this proposal.

OPA suggests that this proposed employment screening process be extended to ensure any reportable incidents from the person's prior employment in children's and disability services are captured. OPA notes that the ALRC considers a national screening approach across aged care, disability and children's services may have merit: promoting safeguards for vulnerable persons and potentially delivering cost-savings.[34]

Proposal 11–5 A national database should be established to record the outcome and status of employment clearances.

OPA supports this proposal.

Question 11–1 Where a person is the subject of an adverse finding in respect of a reportable incident, what sort of incident should automatically exclude the person from working in aged care?

Adverse findings in relation to allegations of physical assault, sexual misconduct or assault, theft and financial abuse should automatically exclude the person from working in aged care.

Question 11–2 How long should an employment clearance remain valid?

As long as the employment screening process involves a continuous monitoring of criminal databases, and access to new notifications under the proposed reportable incidents scheme, OPA would support the clearance remaining current for a five-year period.

If the name of someone with an employment clearance was subsequently red-flagged by the criminal database, OPA would anticipate that the onus would be on the screening body to notify the person's current employer.

Question 11–3 Are there further offences which should preclude a person from employment in aged care?

Currently the *Aged Care Act 1997* (Cth) precludes non-executive staff from employment in aged care if they have been convicted of murder, sexual assault or other assault where the sentence included a term of imprisonment. OPA holds that convictions for physical assault and fraud should also prevent a person from working in the sector.

[34] ALRC, 2016, p. 233

Proposal 11–6 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

OPA supports this proposal.

Proposal 11–7 The Aged Care Act 1997 (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:
(a) when necessary to prevent physical harm;
(b) to the extent necessary to prevent the harm;
(c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and
(d) as prescribed in a person's behaviour management plan.

OPA strongly supports this proposal, having long advocated for such a change.[35] Further details of the benefits of the Victorian *Disability Act 2006* model of regulation can be found in its previous submission (Question 16). The expert advice provided to services by the Senior Practitioner on behaviour support options, as well as the ability of VCAT to review behaviour support plans, are among the most crucial aspects of the regulations framework in ensuring restrictive interventions are only used when absolutely necessary.

OPA suggests the ALRC consider extending its recommendations in relation to regulation of restrictive interventions in aged care to include the establishment of an independent national oversight body (headed by the Senior Clinician), which has the capacity to provide advice and support to aged care practitioners to help them comply with the new legislation. On this topic, it is worth noting that the recently released *NDIS Quality and Safeguarding Framework* contains the new role of Senior Practitioner.[36] It would make sense for the ALRC to consider whether this role should be extended to cover the aged-care sector.

Proposal 11–8 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

OPA supports this proposal.

Proposal 11–9 The Department of Health (Cth) should develop national guidelines for the community visitors scheme that:
(a) provide policies and procedures for community visitors to follow if they have concerns about abuse or neglect of care recipients;
(b) provide policies and procedures for community visitors to refer care recipients to advocacy services or complaints mechanisms where this may

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[35] See article by Williams, Chesterman and Laufer, 2014, 'Consent versus scrutiny: Restricting liberties in post-Bournewood Victoria', Journal of Law and Medicine, Vol 21, pp 641–60, and, more recently, OPA's Submission in Response to the ALRC Issues Paper, 2016.

[36] Australian Government Department of Social Services, December 2016, *NDIS Quality and Safeguarding Framework*, p. 71

assist them; and
(c) require training of community visitors in these policies and procedures.

OPA supports this proposal.

Proposal 11–10 The Aged Care Act 1997 (Cth) should provide for an 'official visitors' scheme for residential aged care. Official visitors' functions should be to inquire into and report on:
(a) whether the rights of care recipients are being upheld;
(b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and
(c) concerns relating to abuse and neglect of care recipients.

OPA strongly supports this proposal, as it has seen many benefits for residents of other forms of supported accommodation arising from Victoria's volunteer Community Visitors Program.

It is unclear whether the 'official visitors' scheme detailed in this proposal is intended to be a volunteer program or if the 'official visitors' are to hold paid positions. The benefit of a volunteer scheme is the coverage it can provide, while paid staff could be expected to undertake more rigorous assessments of rights protections but on a significantly more limited scale.

Proposal 11–11 Official visitors should be empowered to:
(a) enter and inspect a residential aged care service;
(b) confer alone with residents and staff of a residential aged care service; and
(c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.

OPA supports this proposal.

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