



ADAA submission to the Australian Law Reform Commission's Elder Abuse Inquiry, Discussion Paper 83

February 2017

Proposal 2–1

ADA Australia supports the proposal that a National Plan to address elder abuse be developed.

Proposal 2–2

ADA Australia supports the proposal that a national prevalence study of elder abuse be commissioned.

Proposal 3–1

In Queensland the Office of Public Guardian (OPG) presently holds the legislative power to investigate elder abuse when perpetrated by an attorney, guardian or administrator, [1] and they are able to exercise this power on receipt of a complaint or referral. To add the ability to investigate on their own motion would be an increase of current Queensland legislation and we would support this, however, currently the OPG is insufficiently resourced to make an effective use of this power.

Queensland legislation currently requires a complaint and a finding by OPG that the person lacks capacity. This proposed change will be a large cultural shift, to include *all* older people. Currently, most people in Queensland would consider that once the OPG is involved the person has impaired capacity for decision making. Enlarging the jurisdiction of OPG could be discriminatory, as other interested parties may well presume incapacity. [2]

Queensland's OPG already has broad powers to receive complaints, inclusive of neglect and existing inadequate decision-making arrangements. What is not clear, is the obligations of the OPG to report to Age Care Complaints Commission, Police, or AHPRA, as to the role of various people and professionals involved in neglect and abuse, when they make adverse findings.

In line with the ALRC recommendations, Queensland's current legislation should be broadened to include the ability to investigate people acting against the adult's interests, *without a legally recognised authority*, e.g. a child or relative of the adult, who is not an appointed decision maker but may be acting informally; service providers.

[1] Public Guardian Act 2014 Qld s12.

[2] *Public Guardian Act 2014 Qld*, s17: **adult** means an adult with impaired capacity for a matter;

s19: The public guardian may investigate any complaint or allegation that an adult—
(a) is being or has been neglected, exploited or abused; or
(b) has inappropriate or inadequate decision-making arrangements.

Proposal 3–2

The recommendation that the OPG be guided by the principles listed in Proposal 3-2[1] should be broadened to apply to all organisations, employees, and any individuals or organisations dealing with older people, such as Aged Care Facility staff; medical and allied health professionals and employees; in home and community support; advocacy agencies; tribunals and state and federal government employees such as Centrelink, My Aged Care, Aged Care Assessment Teams; etc. The principles should be embedded in all associated codes of conduct, practice standards, and codes of ethics.

([1] PG Act s6)

Proposal 3–3

In Queensland the OPG already holds the legislative power to require that a person, other than the older person, furnish information, documents or participate in an interview. [1]

[1] *Public Guardian Act 2014 Qld*, ss22-25.

Proposal 3–4

ADA Australia supports the proposal that the OPG may refer the older person, or the perpetrator, to relevant services. This list should be broadened to include advocacy services, and The Aged Care Complaints Commission, Police or the Australian Health Practitioner Regulation Agency (AHPRA) .

Proposal 3–5

Current Queensland legislation provides protection from liability for people providing information, in good faith, to the OPG.[1]

[1] Public Guardian Act Qld 2014, s24.

Proposal 5–1

ADA Australia supports the recommendation of a national register for enduring documents, court and tribunal orders. It is possible that given the need for health services to readily identify substitute decision makers and any advance health directives, that electronic health records may well store this information first.

Proposal 5–2

ADA Australia agrees that the making or revocation of an enduring document should not be valid until registered, and that the new valid document automatically supersedes the previous document.

Proposal 5–3

The online register should include transitional arrangements to allow for pre-existing documents to be registered and for unregistered documents to remain valid for a prescribed period.

Question 5–1

It is ADA Australia’s view that the tribunals, statutory decision makers, Police, Land Title Office, Centrelink, Hospitals, Solicitors, JPs and Banks should have full access to the register. Indeed, Tribunals should have an “onus” to search the register before making an appointment. Currently the Tribunals are not actively enquiring as to the existence of an EPOA when receiving applications, or making interim or longer term orders, which may be unnecessary.

A request could be made for access by other parties such as appointees, family, friends, Aged Care Facilities and service providers, based on demonstration of requirement (Codes of Conduct and Practice Standards need to address issues such as Privacy and understanding how the substitute decision maker framework becomes operational).

Question 5–2

Random checks are only feasible if there is a register in place. It would then be appropriate that the OPG or the Public Trustee could conduct random checks.

Proposal 5–4

Witnessing documents should be by two (2) independent witnesses, as listed in the proposal, with the additional protection:

1. That both witnesses must also be free from a conflict of interest between the principal and appointees; and witnesses must be independent of all proposed attorneys eg. the Doctor must not be the doctor for any of the attorneys.
2. That the principal and witnesses sign the document without the attorney(s) present.

The proposal is unclear in relation to whether the attorney(s) and the adult must sign the document at the same time. Current Queensland legislation provides that an enduring document is valid upon the witnessed signature of the principal, and is not reliant on the signature of the attorney.

If the proposal is that the document is not valid until both the principal and attorney(s) have signed it there needs clear guidelines. In addition to points 1. and 2. above, add:

1. That the attorney(s) and witnesses sign the document without the principal present. Requiring completion by the attorney introduces a complication as the principal is then reliant on the attorney completing and returning the document in a timely manner or being at hand to complete the document, in order for the document to be valid (for example, a principal who wishes to appoint a child that lives in another city or country).

Proposal 5–5

ADA Australia supports the principle that tribunals have the power to order compensation. Please note, however, arguably, the current state legislation provides for this but the tribunal appears reluctant to use it. Currently, an Order from the tribunal then requires an adult to pursue the remedy through the civil court system, an onerous and unaffordable option for many, with often futile results. Practice directions are required to be developed for people seeking to enforce a QCAT Order for compensation through the courts.

ADA Australia suggests the tribunal should be compelled to report findings of elder abuse by any party to Age Care Complaints Commission, Police, or AHPRA.

Proposal 5–6

ADA Australia supports this view. However, for it to be implemented fairly for attorneys, there has to be better community and witness understanding of conflict transactions. We have certainly witnessed attorneys who consider it within the scope of their powers under an EPOA to “pool” assets, and are inadvertently entering into conflict transactions. Their role is often then overridden by a guardianship appointment, which has stemmed from lack of knowledge and not a deliberate attempt to financially “abuse” the older person. ADA

Australia are facilitating a community and government EPOA project, and we certainly see education of the general community, principals and witnesses as key components of improved use of an EPOA

Witnesses to an EPOA require a deep understanding of the conflict transaction authorisation clauses, and other such clauses, in order to assess the **principal's** capacity on such matters. It would be ADA's recommendation that witnesses be required to undertake specific relevant training.

Proposal 5–7

ADA Australia supports this approach.

Proposal 5–8

ADA Australia supports this approach, in particular consenting to the marriage or divorce of a principal. Also, ADA Australia is often contacted when attorneys are attempting to socially isolate the individual from phone, mail and personal contact with the friend and family network of the principal. ADA Australia would like to see a transaction related to "contact ban" added to this list as well.

Proposal 5–9

Appointees must be informed of their obligation to keep assets separate. If tribunal made the appointment, the tribunal is to be responsible for providing this information; if enduring document is completed, the witness is then responsible. The witness could also be declaring that this information has been provided at the time of execution of the document.

There needs to be better community understanding of the obligations of an attorney, more broadly.

Proposal 5–10

ADA Australia supports this proposal.

Proposal 5–11

ADA Australia supports this proposal.

Proposal 5–12

ADA Australia supports this proposal.

Proposal 5–13

ADA Australia supports this proposal.

Proposal 6–1

ADA Australia suggests that there needs to be clarity of who is responsible for informing the appointee of their obligations. See above 5.9.

ADA Australia would also like to note that there is a link between EPOA and Tribunal appointments. Tribunals must have a process where they ask the applicant and adult, then check the registry before they make an interim or longer lasting order. This currently does not happen, and as a result, unnecessary orders are made.

Question 6–1

ADA Australia supports compulsory training or certifications for all newly appointed guardians and financial administrators.

Additionally, at review hearings Tribunal members should seek confirmation that continuing decision makers have received formal training and refresher courses, and where appropriate order or recommend such training.

Proposal 6–2

ADA Australia suggests that an undertaking should be recorded at the central register.

Question 6–2

ADA Australia supports the use of Bonds in certain circumstances, such as:

- • Where the appointee is a non-statutory body and is able to make personal gain that may influence decision making – ie inheritance per Succession Act, or current financial dependency;
- • Where a professional, non-statutory, decision maker is willing to be appointed a bond may be suitable as a form of insurance (eg family solicitor, accountant);
- • Where there are reasonable financial resources (eg assets beyond full pension eligibility).

The opportunity to inherit should be vulnerable to Supreme Court assessment and scrutiny and criminal proceedings when a decision maker has been found to breach their fiduciary duty.

Question 6–3

Compulsory attendance at QCAT hearings of both the adult and/or an advocate. Greater flexibility for attendance over video-link or phone. Greater flexibility for hearing venues to be in the community.

Where the adult cannot/will not attend a Separate Representative must be appointed to independently represent the adult's will, preference and circumstances.

The tribunal should not rely upon an applicant to inform the adult of the hearing details. We are aware of many circumstances where the notice of hearing was never received by the adult, and the hearing and appointment went ahead without the adult having any awareness of their own matter.

The tribunal must do all that is possible to ensure an adult knows about, and participates in, their hearing. This includes providing appropriate logistical support that takes into account the circumstances of the adult – eg hearing, vision, mobility, location, language, culture, etc.

Proposal 7–1

ADA Australia supports this proposal.

Proposal 7–2

ADA Australia suggests that the principal should be required to sign the forms without the appointee present.

Question 7–1

Question 7–2

Proposal 8–1

ADA Australia suggest that as per Family Law matters, families should be required to attend specialist mediation or alternative dispute resolution prior to applications being accepted by the tribunal.

Question 8–1

ADA Australia suggest there must be evidence that the relationship was close and continuing and there has to be a history of recent involvement and contact with the adult.

For the purpose of monitoring elder abuse and given the breadth of the jurisdiction, there may be some failure to act or neglect in order to preserve their inheritance. Definitions in the Succession Act of **member of family** should be adopted.[\[1\]](#)

Consideration as to who is appropriate as a decision maker and/or interested party should also bear in mind a close and continuing relationship

5A child or issue

A reference in this Act to a child or issue of any person includes a child or issue *en ventre sa mere* at the death, provided such child or issue is born alive and remains alive for a period of 30 days.

5AA Who is a person's spouse

- (1) Generally, a person's **spouse** is the person's—
- (a) husband or wife; or
 - (b) de facto partner, as defined in the *Acts Interpretation Act 1954* (the **AIA**), section 32DA; or
 - (c) civil partner, as defined in the AIA, schedule 1.

35 Distribution of residuary estate on intestacy

- (1A) For the purposes of this Act—
- (a) the brothers and sisters of the intestate; and
 - (b) the grandparents of the intestate; and
 - (c) the brothers and sisters of a parent of the intestate; and
 - (d) the children of any brothers or sisters of an intestate who predecease the intestate; and
 - (e) the children of any brothers or sisters of a parent of an intestate who predecease the intestate; are the next of kin of the intestate.

40A Meaning of stepchild

- (1) A person is a **stepchild** of a deceased person for this part if—
- (a) the person is the child of a spouse of the deceased person; and
 - (b) a relationship of stepchild and step-parent between the person and the deceased person did not stop under subsection (2).

[1] *Succession Act 1981* (Qld) ss 5A, 5AA, 35.

Proposal 9–1

Proposal 9–2

Proposal 9–3

Proposal 10–1

ADA Australia supports this proposal.

Proposal 10–2

ADA Australia supports this proposal.

Proposal 10–3

ADA Australia supports this proposal.

Proposal 10–4

ADA Australia supports this proposal.

Proposal 11–1

ADA Australia agrees with the proposal for the establishment of a reportable incident scheme which would bring together the aged care complaint function and an oversight function for reportable incidents under the jurisdiction of the Aged Care Complaints Commissioner (ACCC).

ADA Australia also supports the suggestion that reportable incidents be responded to as 'complaints' under this scheme with the ACCC investigating and making recommendations to approved providers about best practice in the management and prevention of incidents. ADA Australia maintains that this approach would increase approved provider accountability, transparency and organisational responses to serious incidents.

ADA Australia suggests that the resources and training provided to the ACCC would need to be addressed in light of their additional responsibilities.

Proposal 11–2

ADA Australia welcomes the introduction of the term reportable incident and the expanded scope associated with this term. ADA Australia is particularly pleased to see the inclusion of fraud/financial abuse and neglect and ill treatment.

ADA Australia recommends that clear examples of these new reportable incidents be clearly documented within approved provider guidelines. ADA Australia suggests that these examples could be modelled on the examples utilised by the Disability Reportable Incidents Scheme (DRIS).

ADA Australia suggests that Approved Providers receive formal training on the updated scope of reportable incidents. This training could be an extension of the current ACCC education program.

ADA Australia agrees with the inclusion of the reporting of care recipient to care recipient incidents within residential care setting, but questions what the requirements would be for 'care recipient to care recipient' incidents that occur within the community care setting i.e. group social support/outings under the Commonwealth Home Support Program (CHSP). Similarly, ADA Australia questions why the reportable incidents scope does not include incidents resulting in an unexplained serious injury to home care recipients. ADA Australia would maintain that unexplained serious injury can occur within the community setting and these incidents warrant an appropriate response to prevent any reoccurrences.

Proposal 11–3

ADA Australia supports the proposal to remove 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.

ADA Australia notes that the ALRC is reconsidering the requirement for approved providers to inform the Department of a reportable incident within 24 hours of the incident occurring (11.127 -11.130). ADA Australia does not support the suggestion that the reporting timeframe be expanded to 30 days from when the approved provider becomes aware of the allegation.

With the proposed reportable incident scheme moving underneath the jurisdiction of the ACCC, approved providers should be supported to put immediate measures in place to protect the safety and rights of potential victims. For example, where an alleged or suspected assault committed by a care recipient with a pre-diagnosed cognitive impairment occurs towards another care recipient, immediate notification to the ACCC could assist in ensuring that victim receives immediate access to advocacy support and referrals are made to appropriate support services such as the Severe Behaviour Response Teams which can assist in preventing future reoccurrences.

Proposal 11–4

ADA Australia agrees with the proposal of a national employment screening process for Australian Government funded aged care.

ADA Australia recommends that the screening and assessment processes for Australian Government funded aged care aim to achieve national consistency across all sectors where staff are working with vulnerable people.

ADA Australia would suggest that this recommendation be broadened to also include disability service provision under the NDIS given its scope to provide services to people post 65 years. This would have the added advantage of reducing duplication and red tape through the provision of a single national employment screening scheme.

Proposal 11–5

ADA agrees with the proposal that a national database be established to record the outcome and status of employment clearances.

ADA Australia supports the suggestion that the national database and employment clearances should be managed and assessed by an independent Commonwealth agency.

Question 11–1

ADA Australia suggests that the following reportable incidents should automatically exclude a person from working in aged care:

- Confirmed cases of sexual offences and/or sexual misconduct
- Confirmed cases of assault and ill treatment
- Confirmed cases of fraud and financial abuse.
- Cases where the health worker or service provider or care worker has become the person's attorney, guardian or financial decision maker.

ADA Australia has hesitations in adding neglect to this list of exclusions because in ADA Australia's experience neglect, particularly within residential care setting, is often the result of organisational shortfalls such as inadequate staffing ratios.

ADA Australia recommends employees being investigated for the above mentioned incidents, be under direct supervision or be removed from direct care roles until the outcome of the investigation has been determined.

Question 11–2

ADA Australia recommends that an employment clearance should remain valid for 3 years.

ADA Australia would not like to see employment clearances for Australian Government funded aged extended beyond this timeframe without considerable investment into a system that continuously monitors criminal history records of aged care employees.

Question 11–3

ADA Australia suggests that if Public Guardians are to have their powers of investigation broadened; then, following an investigation, if there are findings of abuse or negligence against an employee in aged care by the Office of the Public Guardian or similar body, then these should preclude a person from employment in aged care.

Proposal 11–6

ADA Australia supports the proposal for unregistered aged care workers providing direct care to be subject to the planned National Code of Conduct for Health Care Workers.

Proposal 11–7

ADA Australia supports this proposal and recommends that training on new restrictive practice regulations be delivered to approved providers.

Proposal 11–8

ADA Australia agrees with this proposal.

ADA Australia has been involved in a number of cases of this nature and agrees with the ALRC's suggestion that "the requirement of that a person has a decision maker appointed before entry into aged care is an inappropriate encroachment on the decision making rights of older people".

Proposal 11–9

ADA Australia supports this proposal and would welcome the opportunity to formalise arrangements with providers of the Community Visitor Scheme (CVS) where by National Aged Care Advocacy (NACAP) services deliver regular education sessions to CVS program coordinators and volunteers on the role of advocacy services and the rights of Commonwealth funded aged care recipients.

Proposal 11–10

ADA Australia agrees with this proposal in principle, but is concerned about the potential for an "official visitor's scheme" to duplicate the functions of other established agencies such as the Australian Aged Care Quality Agency (AACQA).

ADA Australia notes that the AACQA already conducts annual unannounced visits in all residential care facilities across the nation. These unannounced visits are intended to monitor a facilities performance against the accreditation standards and should include the monitoring of residents rights and the identification of neglect and abuse.

ADA Australia recognises that there are opportunities for AACQ's unannounced visits function to be strengthened. For example, increased consumer consultations, randomly selected visits i.e. not visiting all the facilities in one regional area at the same time as approved providers often inform other local providers about expectant visit.

ADA Australia suggests that consideration be given to the potential of the AACQ to take on the proposed functions of a "official visitor". ADA Australia recommends that a review of the AACQ's function and processes be reviewed as part of this process.

Proposal 11–11

ADA Australia supports this proposal. ADA Australia recommends that the proposed official visitors be empowered to enter and inspect a residential aged care service on an unscheduled basis.

ADA Australia considers it essential that the proposed official visitors have a primary focus on consultations with residents and their representatives as opposed to simply seeking evidence of policy and procedures and relevant documentation.

ADA Australia suggest that the proposed official visitors function would play a role in informing and connecting residents with the National Aged Care Advocacy Program.

ADA Australia notes that the ALRC has acknowledged the review of NACAP and does not propose any changes to aged care advocacy services provided under the program.

ADA Australia would like to advise the ALRC that the proposed redesign of NACAP does present implications for a number of well-established elder abuse supports and education programs such as those provided by ARAS in South Australia and Advocare in Western Australia.

The Draft National Aged Care Advocacy Framework (December, 2016) clearly indicates that advocacy on issues of elder abuse do not fall within the scope of the new NACAP. ADA Australia has concerns that this limitation of scope will see state based advocacy services that have historically provided elder abuse advocacy supports and education programs through Home and Community Care/Commonwealth Home Support Program (HACC/CHSP) will cease to exist as CHSP advocacy services transition to the NACAP.