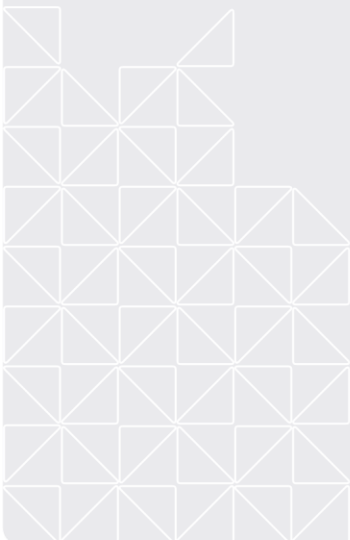


Review of the Guardianship Act 1987 (NSW)

Submission on Draft Proposals

February 2018



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Introduction

Justice Connect Seniors Law (**Seniors Law**) welcomes the opportunity to respond to the NSW Law Reform Commission's Draft proposals in its Review of the Guardianship Act 1987.

Seniors Law is a program of Justice Connect, a community legal centre that provides free legal assistance to disadvantaged people in Victoria and NSW, and to the community organisations that support them. Seniors Law assists vulnerable older people with legal issues associated with ageing, with a focus on the prevention of, and response to elder abuse. In making this submission we are therefore particularly focused on how the current laws in NSW on substitute decision-making impact on the rights of older people.

Australia's population is ageing: both the number of older people and their proportion of the nation's population are increasing. In 2014-15 approximately 15% of the population was aged 65 or over; this is projected to increase to 23% by 2055.¹ An increase in the incidence of age-related disability, in particular dementia, is expected to accompany the ageing of the population.² The ageing population together with the rising incidence of dementia amongst that population has led to a concerning rise in applications for guardianship and financial management appointments outside the more traditional scope of intellectual disabilities.³ Our client group is one which frequently interacts with guardianship law, policies and procedures.

Sadly, an increase in the incidence of elder abuse is a likely consequence of the increase of the number of Australians over the age of 60.

Elder abuse is defined by the World Health Organisation as⁴:

"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"

¹ Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report, May 2017, p. 18.

² Victorian Law Reform Commission, *Guardianship Consultation Paper No 10*, 48-49.

³ Victorian Law Reform Commission, *Guardianship: Final Report* (2012).

Elder abuse is any knowing, intentional or negligent act by a caregiver or any other person in a relationship of trust with the older person that causes harm (including physical, psychological, financial or social) or a serious risk of harm to a vulnerable adult.

Elder abuse takes many forms. The range of potential harms includes:

- physical (such as slapping, pushing, burning, physical restraint or inappropriate use of medication);
- financial (misuse of funds, forcing or forging signatures, denying access to funds or property, misuse of a power of attorney (POA), overcharging, promise of long-term care in return for money, and improper changes to legal documents such as wills or insurance policies);
- psychological (such as verbal intimidation, threats, shaming, loss of privacy, humiliation, loss of dignity, harassment, isolation, deprivation, and withholding of affection);
- sexual (such as rape, indecent assault and sexual harassment); and
- neglect (such as leaving the older person with no means to care for themselves and with poor hygiene and personal care which may result in bedsores etc. Neglect also includes a lack of social, cultural, intellectual or physical stimulation).

While some forms of elder abuse are obvious and involve criminal acts, in many cases the problem is subtle and hidden, occurring between older people, their families, neighbours, friends and carers. For this reason, elder abuse has been referred to as "a hidden problem, under-recognised and under-reported due to a stigmatisation and a lack of community awareness".⁵

Elder abuse is typically carried out by someone close to the older person, with whom they have a relationship implying trust. Perpetrators are often family members, such as a spouse, adult children, grandchildren, siblings or other family members, friends or carers. The abuse may be perpetrated as

⁴ World Health Organisation, *A Global Response to Elder Abuse and Neglect*, 2008.

⁵ Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

a result of ignorance, negligence or deliberate intent.⁶

In the context of the current review, it is important that the proposed recommendations address the potential for financial abuse to be perpetuated through the misuse of substituted or supported decision-making powers by those in positions of trust and confidence.

Financial abuse is defined by the World Health Organisation as "the illegal or improper exploitation or use of funds or resources of the older person".⁷ Financial abuse is associated with "greed leading to opportunistic or well-planned exploitation, family expectations around inheritance and cultural differences surrounding the use and management of older people's finances".⁸

There is limited data on the prevalence of elder abuse in Australia, but from the available data it appears that between 2% and 10% of older people may be the victims of elder abuse.⁹ The issue is probably under-reported. There are a number of reasons why victims are unlikely to report abuse, including isolation and reliance on the perpetrator for care and companionship.¹⁰

Whilst there are clear benefits to older Australians having arrangements in place for another person to make decisions on their behalf in the event that they are no longer able to make those decisions themselves, the powers conferred on substitute decision makers have also been used to perpetrate elder abuse. Similarly, whilst we support the introduction of the role of "supporter", we are concerned that this new role may also be used to perpetrate elder abuse. It will be necessary to ensure that adequate safeguards are in place to prevent misuse of the supporter role.

This submission addresses issues that Seniors Law has identified through the provision of legal services to older people in relation to elder abuse and other issues associated with ageing.

⁶ Office of Senior Victorians, *Victorian Government Elder Abuse Prevention Strategic Implementation Plan*, August 2007, Department of Planning and Community Development.

⁷ World Health Organisation/International Network for the Prevention of Elder Abuse (2002) *The Toronto Declaration on the Global Prevention of Elder Abuse*, Geneva, cited in the Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

⁸ Deborah Setterlund, Cheryl Tilse and Jill Wilson "Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse" (Queensland Law Society Incorporated, Brisbane, 2000).

⁹ Joosten, M., Vratsidis, F. and Dow, B. (2017) *Understanding Elder Abuse: A Scoping Study*, Melbourne: University of Melbourne and the National Ageing Research Institute.

The focus of this submission is on the legal, practical and procedural barriers that interfere with the right of people with a disability, particularly those experiencing or at risk of developing cognitive impairments associated with ageing, to enjoy legal capacity on an equal basis with others in all aspects of life.¹¹ In particular, this submission considers:

- the right to self-determination and presumption of legal capacity
- the role of protective authorities and officials
- a shift away from substituted decision-making towards a more supportive model of assisted decision-making
- features of the current law which tip the balance in favour of protectionism rather than individual autonomy,¹² including plenary orders, lack of review of a private guardian or financial manager's decisions, and the concept of "best interests"

The Honourable Michael Kirby, highlighted individual decision-making ability as follows¹³:

"Life, tears, death and a world of many wrongs have been companions to the law of guardianship over the centuries. Every society must have laws to protect the vulnerable. Even the earliest human societies recognised the need for this, when inborn or later-acquired disabilities impacted on the individual's capacity and competence to make decisions for themselves. When this happens, the law must step in with an answer."

The challenge is what that answer should be.

The recommendations made in this submission aim to make sure that the measure of giving the power to make decisions about a person's lifestyle, health,

¹⁰ Seniors Rights Victoria, *Submission to the Victorian Law Reform Commission Guardianship Paper 10*, (2011)

¹¹ See *United Nations Convention on the Rights of Persons with Disabilities*, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) (**Convention**) art 12.

¹² See *XYZ v State Trustees Limited* [2006] VSC 444 [66] in which Cavanough J stated: "there may be a need for VCAT to re-examine the exercise of its guardianship and administration jurisdiction generally to determine whether the balance has swung too far in favour of paternalism or protection as against individual autonomy".

¹³ Kirby, M. AC CMG, 'Adult Guardianship: Law Autonomy and Sexuality' Speech, *Second World Congress on Adult Guardianship* (15 Oct 2012) Melbourne, Australia.

accommodation, work or financial affairs to someone other than that person is a means of “last resort” in both theory and practice.¹⁴

Justice Connect Seniors Law

Justice Connect exists to help build a world that is just and fair – where systems are more accessible and accountable, rights are respected and advanced and laws are fairer.

Seniors Law has extensive experience working with the health and community sector to assist older people who are experiencing elder abuse. We have tried many ways to reach older people who are at risk of experiencing elder abuse, ranging from an outreach clinic model and sending lawyers in a bus to aged care facilities, to our current Health Justice Partnership (HJP) model. This submission is informed by our learnings from, and experience of these different ways of trying to reach people most at risk of elder abuse over nine years.

In pursuing this vision, Justice Connect:

- provides access to justice through pro bono legal services to people experiencing disadvantage and to the community organisations that support them
- builds, supports and engages a strong commitment to lawyers’ pro bono responsibility
- challenges and changes unjust and unfair laws and policies, using evidence from our case work and the stories of our clients to bring about reform
- undertakes legal education and law and policy reform aimed at improving access to justice

We provide free legal services to older people who are unable to afford legal help. Legal services are provided by Seniors Law lawyers and pro bono lawyers from Justice Connect member law firms. The objective of Seniors Law is to improve the ability of older Australians to age with dignity and respect.

¹⁴ See the declaration of the Australian government upon ratification of the Convention: “Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as

We assist clients with legal issues including guardianship and financial management matters, housing, credit and debt, grand parenting, powers of attorney (POAs) and making arrangements to live with family. While these legal issues are experienced by many older people, they also tend to arise in the context of elder abuse.

For example, POAs are commonly misused by perpetrators of elder abuse and elder abuse is often experienced by older people who live with their family, particularly when they exchange assets for the promise of care. Providing legal advice to older people in these matters empowers them to make informed decisions, ensuring that their rights are protected.

Collaboration with the health sector

In delivering its service, Seniors Law has developed a close connection with the health sector over nine years, initially in Melbourne but more recently also in Sydney.

Initially, pro bono lawyers provided free legal appointments at hospitals and health centres across Melbourne. Complementing this, Seniors Law delivered training on elder abuse and other legal issues associated with ageing to health and community professionals as well as to its pro bono lawyers. These sessions aimed to increase the capacity of health professionals and pro bono lawyers to work with older people experiencing abuse.

However, co-located legal clinics and ad hoc training sessions did not necessarily translate into enduring relationships with different professionals and the necessary change in practice to address elder abuse. We were not reaching the clients we were trying to assist early enough or at all.

Available literature and experience from the USA indicated that a more integrated service, like a HJP, could achieve better health and legal outcomes for clients.

Justice Connect has now established four HJPs in Victoria and NSW: with cohealth, a community health centre in Melbourne’s north and west suburbs; with St Vincent’s Hospital Melbourne; a pilot HJP with Alfred Health at Caulfield Hospital in Melbourne; and most recently at St Joseph’s

a last resort and subject to safeguards ... Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others...”: United Nations Multilateral Treaties Deposited with the Secretary-General – Status as at 1 April 2009, Volume 1, Part I, Chapters I to VII, ST/LEG/SER.E/26 p 461.

Hospital in Sydney's west with St Vincent's Health Network Sydney .

In undertaking this work, we receive generous funding support from the following organisations:

- Victorian Legal Services Board + Commissioner Grants Program
- Victorian Department of Justice and Regulation Community Legal Centre Assistance Fund
- Seniors Rights Victoria (Victorian Department of Health and Human Services and Victoria Legal Aid)
- H & L Hecht Trust

- Percy Baxter Charitable Trust
- Collier Charitable Fund
- Department of Family & Community Services NSW
- Equity Trustees

Through our casework, Seniors Law is well placed to identify laws that adversely impact the interests of older people and their access to justice. We undertake law reform and advocacy initiatives to advocate for the reform of those laws to make them fairer.

Recommendations

Personal Support Agreements

Recommendation 1

To protect a supported person under a personal support agreement, Seniors Law recommends that the relationship between a supported person and a supporter should be recognised as a fiduciary one.

Recommendation 2

To ensure that all people in need of decision-making assistance have access to a supporter if they would benefit from one, Seniors Law recommends that an independent body should be created or an existing independent body nominated to act as supporter where there are no other appropriate or available options for the person in need of support.

Enduring Representation Agreements

Recommendation 3

To protect represented persons under enduring representation agreements, Seniors Law recommends the introduction of a number of measures to safeguard against abuse, including:

- a mandatory online registration scheme for agreements
- requirements for separate account-keeping and the submission of an annual declaration of compliance
- random audits of representatives

Recommendation 4

To ensure that both representatives and represented persons alike have a better understanding of their rights and responsibilities under a representation agreement, Seniors Law recommends targeted community education on:

- financial literacy for older people
- the duties and obligations of representatives for people taking on that role

Support and Representation Orders

Recommendation 5

Seniors Law similarly recommends the provision of mandatory training for all non-professional Tribunal-appointed supporters and representatives, to ensure that they have a clear understanding of their obligations and responsibilities in taking on the role.

Recommendation 6

To improve the response to the abuse of representation orders, Seniors Law recommends the introduction of a range of additional powers and functions for the Tribunal, including:

- introduction of the option of merits review for decisions of all representatives
- expansion of the power of the Tribunal to order repayment of misappropriated funds
- introduction of civil penalties for the misuse of powers

Advocacy and Investigative functions

Recommendation 7

To better protect vulnerable older people from abuse, Seniors Law recommends an expansion of the powers of the Tribunal to make civil orders protecting vulnerable adults, including provision of service orders and banning orders.

Provisions of General Application

Recommendation 8

To better protect individuals in need of decision-making assistance, Seniors Law strongly recommends the establishment of a mandatory online register of assisted decision-making instruments, to be maintained by the Registry of Births, Deaths and Marriages.

1. A new framework

Seniors Law broadly supports the Commission's proposals to establish a new framework for decision-making laws in NSW, particularly around the introduction of supported decision-making mechanisms and a presumption of decision-making ability; the adoption of more streamlined processes; and the move away from the 'best interests' model towards one that upholds a person's will and preferences as the paramount consideration.

We also strongly support the introduction of general principles to guide those exercising functions under the new Act, as these would have the effect of setting expectations and providing guidance and support to people providing decision-making assistance as they carry out what can be a complex and demanding role.

We further support the move towards framing the new legislation around ability rather than disability, to firmly place the emphasis on what a person is able to do if provided with the right support rather than what they cannot do, and to protect against the discriminatory associations around the language of disability. We therefore support the adoption of the term 'decision-making ability' to replace 'capacity' in the new Act, and the removal of any reference to 'disability'.

In this section we have limited our feedback to the draft proposals around the introduction of general principles.

General principles

The proposed general principles for the new Act are comprehensive and appropriately highlight our obligations under the Convention on the Rights of Persons with a Disability. Seniors Law strongly supports the proposed move away from a 'best interests' model to a model that prioritises the will, preferences and rights of a person who may require decision-making support, and endorses that the obligation to give effect to a person's will and preferences where possible is the first-mentioned of these principles.

One concern with appointing a supported or substitute decision maker is the level to which that person is able to divorce themselves from their own bias and concerns, and act in accordance with the will and preferences of the supported person. For example, a UK study of support workers found that

decisions were typically made in accordance with the personal values and goals of the supporter.¹⁵ A survey conducted by ACT organisation 'Advocacy for Inclusion' (in relation to substitute decision-making) determined that "there are cases where people feel decisions are being made for them without consideration of their expressed wishes."¹⁶

The inclusion of the proposed principles will hopefully assist to guide the conduct of supporters and representatives to focus on the will and preferences of the person they are supporting or on whose behalf they are making decisions. This would be further aided by a requirement that Tribunal-appointed supporters and representatives undertake mandatory training on their responsibilities in those roles, discussed further in this submission at Sections 3 and 4.

2. Personal support agreements

Seniors Law strongly supports the proposal to introduce a legal framework that upholds the principle that a person who may require support in decision-making must be provided with the support

necessary for them to make, communicate and participate in decisions that affect their lives.

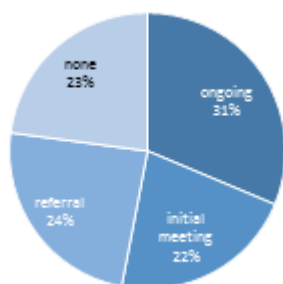
¹⁵ Dunn, M. C. et. al., 2010, A Life Like Ours?, Journal of Social Welfare and Family. 54(2):144-160.

¹⁶ Advocacy for Inclusion, Supported Decision making, Legal Capacity and Guardianship (2012).

In our experience, when an individual is unable to make a decision, carers and family members will often support them to make decisions without any formal authority.¹⁷ Barbara Carter of the Office of the Public Advocate points out that there is a high level of dependence on the expertise and knowledge of those with special qualifications and that it is a rare incidence that any person will make a decision entirely in isolation.¹⁸

For instance, older people seeking assistance from our services often request that a child, trusted friend or caseworker communicate with our service on their behalf.

Within the HJP model, health professionals play a particularly important role in supporting clients to seek legal help. The following graph comes from the two year evaluation report of our partnership with cohealth in Melbourne’s west, and illustrates the range of support provided by health professionals to clients in engaging with our service. In year two, about three out of four clients received support from the referring professional in the form of either a warm referral; attendance at the initial meeting; or – the most common type – ongoing support.



We note that ‘support is the central theme in the CRPD’¹⁹. Justice Dixon of the Victorian Supreme Court highlights the shift in attitudes towards models of assisted decision-making particular to the individual involved. In the case of *Erdogan v Ekici*²⁰ Dixon J recommended that:

“the contemporary approach to balancing the need to protect persons under disability whilst giving proper recognition to their basic human rights now requires greater emphasis on tailored outcomes beyond substitute decision-making arrangements, which may extend to concurrent responsibility by supported decision making and co-decision making arrangements with regular reviews.”

The Office of the Health and Community Services Commissioner in South Australia advocated for supported decision-making on the basis that “many of the complaints they deal with involving the care of people with disability could be avoided, if the person with a disability had been given a greater voice.”²¹

We therefore agree that, subject to the provision of adequate resources and safeguards, a mechanism for the appointment of support decision-makers may act as a valuable (and less restrictive) alternative to substitute decision-making arrangements.

Creation of a fiduciary relationship between supporter and supported person

As with any substitute decision-making arrangement, there is a risk that the supporter will abuse or exploit the supported person.²² Appropriate safeguard mechanisms should be implemented to reduce the incidence of abuse by people in support roles. The potential for elder abuse in the context of supported or representative decision-making derives from the following factors:

- The person has a cognitive impairment and may be unable to effectively monitor the activities of the supporter or representative;
- Family members, who are highly trusted by the person requiring support, are most likely to be appointed in the role of supporter or representative decision-maker; and
- There is often limited understanding of the roles and responsibilities of guardians and attorneys.

¹⁷ Seniors Rights Victoria, above n 10.

¹⁸ Carter, B. Supported Decision-making: Background and Discussion Paper, Office of the Public Advocate, Victoria.

¹⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*; Discussion Paper 81 (2014), 36.

²⁰ [2012] VSC 256.

²¹ OPA Annual Report (2012-2013): *Promoting Rights and Interests*, 51.

²² Seniors Rights Victoria, above n 10, 11.

Seniors Law therefore considers it appropriate that the relationship of supporter and supported person is fiduciary in nature.

In the experience of our clients, it is not uncommon for people who owe fiduciary obligations to them to breach those obligations. For example, a common form of financial elder abuse is misuse of a power of attorney. This tends to occur when the attorney takes a benefit for him or herself not authorised by the power in breach of his or her fiduciary relationship with the donor.

Case study

An older man signed over an enduring power of attorney to his daughter and over a short period of time she emptied his bank account. Although legally competent to make his own decisions, he felt unable to confront his daughter about the situation or refuse her demands, particularly as she had threatened to refuse him access to his grandchildren if he did so.

Breaches are not confined to instances of the attorney acting without regard to the principal's interests however, and include situations where the attorney was misguided or failed to properly understand his or her role.

The relationship of supporter to supported person and similarly, representative and represented person, may be subject to abuse or exploitation. Regarding the relationship as a fiduciary one may help to reduce instances of abuse and provide a “full range of equitable remedies that are available in those circumstances”.²³

While we support the view that a “supported person should be responsible for the consequences of any decisions made within a supported arrangement because they retain decision-making authority,”²⁴ it is also the case that the supported person will frequently be in a position of vulnerability to their supporter²⁵. In light of this, it is therefore vital that there are appropriate mechanisms for accountability, including provision that the supporter relationship is fiduciary.

A range of other safeguards will also be necessary to ensure that supporters do not breach their obligations to the person being supported. This is discussed further in Section 4.

Recommendation 1:

Recognition of the relationship between supported person and supporter as fiduciary.

Nomination of independent body to act as supporter

While it is always preferable for family members and friends with a longstanding relationship and knowledge of the person's wishes and preferences to act as a supporter, there will be instances where a person has no such support available. One of the key risk factors of elder abuse is isolation.²⁶ In our experience, many vulnerable older people do not have family members or friends willing to take up the role of supporter or representative.

It is in these situations that Kirby J suggests that “independent, dispassionate, neutral and professional public office holders can be especially useful and even necessary.”²⁷

We note the Commission's proposal at 2.3 that the Public Representative and the NSW Trustee be ineligible for the role of supporter, under both support agreements and support orders, though it is not clear why from the explanatory notes. In order for Kirby J's principle to be meaningful in the context of support agreements, we recommend that the Commission removes this bar to the Public Representative and the NSW Trustee acting as supporter, or alternatively that it proposes the creation of a new independent body or nomination of another existing body to provide assistance to people requiring decision-making support in the absence of available alternatives. Ideally, an

²³ Victorian Law Reform Commission, *Guardianship*, Final Report No. 24 (2012) [8.128-8.130] quoted in the Australian Law Reform Commission, above n 19, 88.

²⁴ Australian Law Reform Commission, above n 19, 87.

²⁵ *Ibid.*

²⁶ Seniors Rights Victoria, above n 10.

²⁷ *Holt v Protective Commissioner* (1993) 31 NSLR 227 per Kirby J.

independent body would be provided with sufficient resources and funding to “employ suitably qualified people to take on the role”, equivalent to the operation of the Public Representative or the NSW Trustee. Volunteer support programs could be an option if funding does not support this.

Recommendation 2:

Nomination of an independent body to act as supporter where there are no other appropriate or available options.

3. Tribunal support orders

Seniors Law supports the Tribunal being empowered to make support orders. While it would be preferable that the person requiring decision-making assistance enter into a support agreement themselves in the interests of promoting autonomy, we recognise that there may be situations in which the person did not know that this was an option, or found themselves the subject of an application to the Tribunal for a representation order without their consent. Where this occurs, giving the Tribunal the power to make a support order where appropriate is an important measure to ensure that adoption of a less restrictive option is possible.

It will, however, be necessary to ensure that the entry criteria for the appointment of a supporter remains the same as for the appointment of a representative so that the addition of the new roles does not expand the reach of the representation order regime. Rather, we support the introduction

of the new role as a less restrictive alternative for older people who would otherwise require the appointment of a representative.

Seniors Law further submits that support agreements and orders should be subject to the same safeguard scheme as for representation agreements and orders, discussed further in section 4.

To ensure that supporters properly understand their role and responsibilities, and to guard against the danger that they will in fact make decisions for the supported person rather than assist them to make their own, Seniors Law recommends the introduction of mandatory training for all Tribunal-appointed supporters. The role that education can play in safeguarding against abuse and in protecting the decision-making ability of a person in need of assistance is looked at further in Section 4.

4. Enduring representation agreements

Seniors Law is in favour of the Commission’s proposal to replace the current system of separate arrangements for enduring powers of attorney and enduring guardianship with one mechanism, an enduring representation agreement. This will simplify and streamline current processes, and will allow the represented person to pick and choose which functions they wish to invest in whom. We believe however that the Commission does not go far enough in the safeguard mechanisms it proposes to protect against the possibility of financial abuse.

Evidence of elder abuse committed by appointed decision makers

In seeking assistance with financial affairs, older people generally prefer informal arrangements between family members in whom they vest complete trust. This may be attributed to a limited understanding of formal substitute decision-making.²⁸

While these informal arrangements may work for some families, there are many benefits to formalising decision-making arrangements in the event of legal incapacity:²⁹ For example, execution (currently) of an enduring POA:

²⁸ Deborah Setterland, et al, above n 8; Peteris Darzins, Georgia Lowndes and Jo Wainer, *Financial Abuse of elders: a review of the evidence* (Monash Institute of

Health Services Research, Faculty of Medicine, Nursing and Health Sciences, 2009) 72.

²⁹ Human Rights and Equal Opportunity Commission, Submission to the House of Representatives Standing

- provides continuity of management of the older person’s affairs, subject to limitations
- safeguards the best interests of the donor
- enables confidentiality to be maintained
- avoids a subsequent application to the Tribunal for a guardianship or financial management order

While there are benefits to formalising substitute decision-making authority, the use of representation agreements cannot completely prevent financial abuse.³⁰ In fact, research suggests financial abuse occurs in relation to 10 to 15 percent of executed POAs.³¹ Seniors Law has assisted a number of clients, like Terry, whose substitute decision-maker used their appointment to perpetrate financial abuse.

Terry* was devastated to have discovered that the daughter he trusted enough to give his power of attorney to had abused that trust. She told him that she had purchased a home on his behalf but instead registered the property in her own name. She also used the power to misappropriate funds in excess of \$20,000. After a lifetime of hard work, Terry was left with nothing except terrible grief at the loss of his relationship with his daughter. He couldn’t believe that his daughter could do this to him.

*name has been changed

When executing a representation agreement giving a representative a financial function, older people should be made aware of the obligations of the appointed representative and how the power can be used, and misused.

In addition, it is our view that “increased accountability of the conduct of decision-makers is essential in order to reduce the incidence of abuse associated with these powers.”³² We acknowledge that striking the balance between appropriate safeguard mechanisms and over-excessive regulation of supporters and representatives is a delicate one. Any new obligations must not be so onerous as to dissuade ordinary people from taking on the role of supporter or representative. This may lead to “perverse outcomes, such as driving people to use informal, unregulated approaches, which could increase rather than decrease the occurrence of financial elder abuse”.³³

It is also important that the substituted decision-making measures are accessible and understandable to enable those people who proposed represented people trust to assume the role of representative.

Safeguard scheme against abuse: mandatory registration, record-keeping and audits

With this in mind, we propose a system which reflects the recommendations in the Seniors Rights Victoria (SRV) submission to the Victorian Law Reform Commission (VLRC) in its review into guardianship laws in Victoria in 2011.³⁴ We are of the view that this system should apply to both supporters and representatives, whether appointed pursuant to an agreement or by a Tribunal order.

These measures propose:

- (a) The introduction of a mandatory online registration scheme;
- (b) the supporter or representative to sign a statement agreeing to comply with their responsibilities before they undertake their role (consistent with the Commission’s Proposals 2.9, 3.10, 4.9 and 5.12);
- (c) the supporter or representative to keep accurate separate records of all decisions made;

Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 70-71.

³⁰Ibid

³¹ Victoria Law Reform Commission, above n 3, 30 citing Lush, 1998.

³² Ibid.

³³ Darzins et al, above n 28.

³⁴ Above n 10.

- (d) the supporter or representative to submit an annual declaration of compliance with their obligations during the previous year; and
- (e) random audits of the records of a percentage of all representative decision-makers³⁵

In our view, the requirement to lodge annual declarations is not too onerous for supporters and representatives. Whilst the lodgment of annual declarations alone is unlikely to prevent abuse, the annual declarations form part of an overall regime which we believe will reduce the incidence of abuse without being overly onerous.

We note that the Commission has decided against recommending for the introduction of a mandatory registration scheme on the basis that it would not adequately protect against the possibility of abuse, and therefore the anticipated disadvantages outweigh the benefits. With respect, we disagree. A mandatory register of all support and representation agreements and orders would provide a central database of all appointed supporters and representatives, allowing NSW agencies to quickly and efficiently check the status of someone purporting to be a supporter or representative. It would also facilitate the random auditing of representatives, enabling important oversight of the representation scheme and in so

doing, guarding against abuse. This recommendation is discussed in further detail at 10.2.

As with any new system, it will be necessary to devote significant resources to provide training and support for supporters and representatives to ensure they understand their role and can effectively fulfil their responsibilities.

Recommendation 3:

Introduce measures to safeguard against abuse, including:

- a mandatory online registration scheme for agreements
- requirements for separate account-keeping and submission of an annual declaration of compliance
- random audits of representatives

Education as a safeguard against abuse

Targeted community education campaign

Evidence suggests that people executing POAs have a limited appreciation of how they can be misused.³⁶ Further, attorneys may not understand their obligations, which can lead to inadvertent financial abuse through mismanagement of finances. To guard against misuse, representatives with financial functions must have a full understanding of their role in order that they can be more accountable in fulfilling it.

Seniors Law supports the introduction of a targeted community education campaign directed at older people, promoting financial literacy and understanding of formal substitute decision-making.

Financial literacy for older people

Literature suggests that improving the financial literacy of older people, and promoting their

confidence in managing their finances could be a successful strategy to preventing financial abuse.³⁷ Professor P Darzins et al distinguished between the benefits of a general financial abuse awareness campaign and building financial literacy:³⁸

“...while large sums of money can be spent on educating people to become more aware that they may become victims of financial abuse, this may not lead them to report the abuse. In contrast educating persons on how to best manage or protect their finances may allow them to avert being abused in the first place, or may enable them to remove themselves from situations wherein they are at risk of being abused.”

³⁵ See Seniors Rights Victoria, above n 10, for further information.

³⁶ Setterland et al, above n 8.

³⁷ Ibid; Human Rights and Equal Opportunity Commission, above n 29.

³⁸ Setterland, et al, above n 8, 32.

Furthermore, there is evidence that older people often require assistance managing their assets.³⁹ For example, the University of Queensland surveyed older people on the financial management of their assets. The older people surveyed cited that they received help with:⁴⁰

- paperwork – 72.4%
- paying bills – 54.6%
- accessing money and banking – 41%
- pensions and management – 36.9%
- property management – 30.8%

One of the major reasons older people required assistance was a lack of confidence in doing it themselves.

By investing in financial literacy programs, older people will be more confident to manage their own affairs and to respond to abuse in the event that it occurs.

Education for representatives

Seniors Law additionally recommends the introduction of training for those taking on the role of a representative detailing their duties and obligations, particularly for those given financial functions. While the introduction of mandatory training for all representatives appointed pursuant to an agreement may be too onerous, unwieldy and difficult to regulate, we submit that educational resources such as information sessions and facts sheets should be readily available for those representatives keen to learn more about their role and responsibilities.

Recommendation 4:

Targeted community education on:

- financial literacy for older people
- the duties and obligations of representatives for people taking on that role

5. Representation orders

Seniors Law also supports the proposal of abolishing the current system of separate guardianship and financial management orders in favour of a scheme that simply creates one representation order under which a representative can be given one or more functions. We are also in support of abolishing the Tribunal's power to make plenary orders, as this forces the Tribunal to consider the person's individual needs,

circumstances, and decision-making ability in relation to each function and to order accordingly.

We recommend the introduction of mandatory training for representatives appointed pursuant to a representation order; the expansion of the Tribunal's powers to order compensation for misappropriated funds; and the introduction of civil penalties for misuse of powers under the new Act.

Mandatory training for representatives appointed pursuant to an order

Seniors Law supports mandatory training for all non-professionals appointed to the role of supporter or representative by the Tribunal.

Whilst the NSW Trustee & Guardian and the Public Guardian currently provide support where requested to guardians and financial managers, we agree with the VLRC that supporters and representatives should be provided with more

training and ongoing support to carry out their role.⁴¹

Whilst we recommend mandatory training for non-professional representatives, in the absence of that, we would support an expansion of the powers of the Tribunal to enable a condition that the proposed representative undertake training be included on any order.

³⁹ Ibid, 28.

⁴⁰ Human Rights and Equal Opportunity Commission, above n 29, 19.

⁴¹ Victorian Law Reform Commission, above n 3, 413.

Recommendation 5:

The provision of mandatory training for non-professional Tribunal-appointed supporters and representatives

Responding to the abuse of representation orders

We recommend the introduction of the following proposed measures to improve the response to abuse:

- the introduction of merits review for decisions of all representatives
- expansion of the power of the Tribunal to order repayment of misappropriated funds
- the introduction of civil penalties for the misuse of powers by representatives

Merits review

The current substitute decision-making scheme only provides for merits review of decisions made by the NSW Trustee & Guardian where it is acting as a person's financial manager⁴² or by the Public Guardian where it is acting as guardian⁴³. There is no mechanism for merits review of decisions made by private guardians or financial managers.

In our submission, it is vital that there is a quick, easy and accessible means of challenging the decisions of all representatives. We often receive inquiries from people under guardianship and financial management orders who do not want the order revoked, but who are unhappy about a particular decision that their guardian or financial manager has made. Under the current system, the only way this can be addressed is by applying for a review of the entire order, which is an inefficient response to the problem and which can be potentially damaging to the relationship, as it may signal a loss of faith in the representative which is not necessarily the case.

Given the vulnerability of people under an order, there must be a mechanism for them or their advocate to have a voice when this occurs that does not require a review of the entire representation order. A system of merits review for particular decisions would have the advantage of bringing the issue in dispute into clear focus, while

better preserving the relationship between the represented person and the representative.

We submit that the Administrative & Equal Opportunity Division at the Tribunal should be empowered to hear applications for merits review of a decision of any representative, not just those made by the NSW Trustee or the Public Guardian.

The represented person and people with a special interest in their affairs should be entitled to apply.

Expanded powers

Seniors Law submits that the Tribunal should be empowered to make orders requiring representatives with financial functions to repay funds that have been misappropriated. Without these powers, older people are required to initiate separate proceedings in a different, more formal jurisdiction, creating additional costs and stress.

Recommendation 6:

- Introduction of merits review for decisions of all representatives
- Expansion of the power of the Tribunal to order repayment of misappropriated funds
- Introduction of civil penalties for the misuse of powers

We propose the introduction of a power similar to that provided in section 77 of the Victorian POA Act in respect of personally appointed attorneys. This power would alleviate the need to commence new proceedings, avoiding further stress and expense for the represented person.

⁴² s. 62(1) *NSW Trustee and Guardian Act 2009* (NSW).

⁴³ s. 80A(1) *Guardianship Act 1987* (NSW).

Civil penalties

We also support the introduction of civil penalties in assisted decision-making legislation for the abuse,

neglect or exploitation of a represented person by representatives. We endorse the recommendations made by the VLRC on this point.⁴⁴

6. Healthcare decisions

Seniors Law makes no comment on the draft proposals under this section.

7. Medical research procedures

Seniors Law makes no comment on the draft proposals under this section.

8. Restrictive practices

Seniors Law is particularly concerned about the use of restrictive practices in aged care facilities. While we note such facilities are regulated by the Commonwealth and therefore any proposals to regulate restrictive practices within them may not appropriately fall within the scope of this review, we nonetheless make the following comments.

In 2014, Seniors Law and Seniors Rights Victoria made a joint submission to the Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws Inquiry*⁴⁵. The submission referred to the Victorian Law Reform Commission (VLRC), *Guardianship: Final Report (2012)*, which noted:

- a. “many people who lack capacity to make decisions about their accommodation and restrictive practices live in facilities such as nursing homes with the informal consent of a family member or friend;
- b. there is no common law or statutory authority permitting this practice;
- c. there is no oversight of these decisions or scrutiny of restrictive practices.”⁴⁶

The joint submission noted that:

“Based on our casework, Seniors Law has identified two key decisions where regulation is required to clarify the person responsible for making the

decision and safeguards and oversight of those decisions”:

- the decision to enter the aged care facility; and
- the decision to use restrictive practices while the person resides at the aged care facility.

These decisions may result in the deprivation of liberty of vulnerable older people in aged care facilities, many of whom have no means of seeking independent advice. In response to the VLRC review, Aged Care Crisis submitted that⁴⁷:

“older people who are perceived to have cognitive impairment are the only group of people who can be placed in locked facilities, against their will, without any reasonably accessible procedures for appeal. Clearly, people must be kept safe but we are aware of several instances where the basic human right, not to be kept locked away or otherwise restrained without due process, has been disregarded. We can think of no other group of people where this situation would be regarded as acceptable.”

⁴⁴ Victorian Law Reform Commission, above n 3, 422.

⁴⁵ Justice Connect Seniors Law and Seniors Rights Victoria, Submission No 120 to the Victorian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Inquiry*, June 2014.

⁴⁶ Victorian Law Reform Commission, above n 3, 318.

⁴⁷ Victorian Law Reform Commission, above n 3, 329 [15.81].

Given the potential for grave breaches of human rights in this area, we regard the development of a national or nationally consistent regulatory approach for the use of restrictive practices in aged care facilities as imperative. Seniors Law also supports the Australian Law Reform Commission's recommendation that the Commonwealth

regulate restrictive practices in residential aged care. We endorse the framework⁴⁸ proposed by the Victorian Office of the Public Advocate for such regulation, and submit that this is an issue requiring urgent attention.

9. Advocacy and investigative functions

Seniors Law supports the expansion of the investigatory powers of the Public Representative to ensure that concerns about the possible abuse of vulnerable people are adequately investigated. Whilst we do not support mandatory reporting, it is important that there is a body charged to follow up concerns expressed in relation to vulnerable members of our community.

We understand that currently organisations and individuals are able to seek assistance from NSW Police to conduct "welfare checks" on individuals who may be at risk of abuse. While this can be effective, it appears that the power to conduct safety checks is not prescribed by statute but rather is based on a discretionary power that the police can exercise when they determine it is appropriate. Further, concerned members of the community may not wish to invoke a police response, particularly for what might be seen as less serious cases.

Given the lack of clarity over when welfare checks will be undertaken and the potential reluctance of members of the community to approach the police, we strongly support the proposal that the Public Advocate should have clearly identified powers to investigate cases of suspected abuse of vulnerable people, both on its own motion or in response to a complaint. The legislation should set out clear guidelines on when the use of such powers are appropriate and ensure appropriate records are kept regarding the use of the powers.

A further benefit of widening the mandate of the Public Representative around the protection of vulnerable people is to provide members of the community with a central point for complaints around the mistreatment and abuse of older adults⁴⁹:

"One important side effect of broadening OPA's investigatory powers will be the social capital of providing members of the general community with a place where they can register concerns about people in their own communities..."

To encourage cooperation and assistance with the investigation of potential abuse, neglect or exploitation, we recommend that anonymity be provided to people who report concerns about the potential abuse of a vulnerable person. This would increase the likelihood of members of the community reporting instances of suspected abuse, and protect people who do report concerns from adverse consequences.

Engagement with the vulnerable person

Any proposed framework must seek to empower the person who is the subject of the investigation, to promote their right to choose interventions, if any, and must respect those choices. The appropriate balance between autonomy and protection is difficult but important to strike. For these reasons, we support the proposal that any powers of investigation would only be available in circumstances where the person's care and support needs prevent them from protecting themselves from abuse.

With this in mind, Seniors Law believes that any investigation into a suspected case of elder abuse should seek at first instance to establish the position of the older person.

We note that the draft proposals do not go so far as requiring that the person who is the subject of the investigation take part in an interview. In our

⁴⁸ Office of the Public Advocate, *Designing a deprivation of liberty authorization and regulation framework*, Discussion Paper, August 2017.

⁴⁹ John Chesterman, *Responding to Violence, abuse, exploitation and neglect: improving our protection of at-risk adults*, Churchill Fellowship Report, Office of the Public Advocate, 30 July 2013, 81.

submission, it is important that an investigator make every attempt to engage with the person as a starting point, and accordingly that the investigator should be required to speak to the person to attempt to ascertain their wishes before taking any

further action. This goes also to the interests of the safety of the person, enabling the investigator to establish their fears in terms of any likely response by the alleged perpetrator.

Enforcement of investigatory powers

Powers of Entry

A number of the health professionals that we work with have indicated the importance of being able to visit a person at their home to establish the existence or extent of abuse.

There are existing provisions in Victoria that enable certain professionals to access, or attempt to access an older person.

For example, section 26 of the *Guardianship and Administration Act 1986* (Vic) allows for emergency enforcement of a guardianship order where a represented person does not comply with that order. In circumstances where a person is deemed to be at risk, as an option of last resort an application can be made to the Victorian Civil and Administrative Tribunal (VCAT) to enforce an existing order, to allow entry to a premises, and removal of a person, or access to services. This order must be reviewed within 42 days.⁵⁰ However, this provision only applies to an older person who is the subject of a guardianship order.

Similarly, as part of an Aged Care Assessment Services (ACAS) assessment, an assessor will attend at a person's property and knock on their door with the intention of visiting and assessing the circumstances at home. There is no power for the assessor to be able to enter the home if entry is denied by the older person or a third party.

Our health partners have relayed experiences where a need for assessment has been clearly identified and planned for by workers but the patient has been unexpectedly discharged from hospital. Concerns have arisen where patient follow-up is needed, but the patient is uncontactable because they or a third party refuse entry to the older person's home.

For these reasons, we support the proposal that the Public's Representative's investigatory powers are coupled with a power of entry. Without such a power of entry, arguably the proposed investigatory powers do not add anything to the existing powers or role of those completing an ACAS assessment - or in indeed those of any interested member of the public - when assessing the risk to a person whose safety is of concern.

It may be that police presence is required as part of a power of entry, particularly where there is likely to be aggressive behaviour from any party. Alternatively, a clear power of entry may also persuade otherwise uncooperative parties to comply in the absence of police presence.

A power of entry conferred on the investigator, either by way of a Tribunal order, or as a mandated part of the investigatory process, would play an important part of an investigation where an investigator was unable to otherwise speak to the older person themselves.

Where third parties refuse to cooperate

In order for this investigatory power to properly function, there must be some method by which to enforce the proposed powers. It is conceivable that where there is family conflict and abuse, that a third party might be reticent to cooperate with an investigator. Where a third party is told to provide information or participate in an interview, but refuses to do so, how then does an investigation proceed?

Seniors Law submits that there must be some method of enforcement where a third party refuses to cooperate.

⁵⁰ Office of the Public Advocate, *Good Guardianship: A guide for guardians appointed under the Guardianship*

and Administration Act (February 2011), 13 <http://www.publicadvocate.vic.gov.au>.

Introduction of civil protection order regime

To complement the proposed expansion of the Public Representative's new investigative powers, Seniors Law also recommends consideration of the introduction of a dedicated regime of protection orders, alongside the existing apprehended violence order system.

Where protective and health concerns are not able to be addressed by way of investigation by the Public Advocate, Seniors Law proposes that the Public Advocate be empowered to apply to the Tribunal for one of a series of civil orders to engage the provision of service and/or protect the vulnerable person.

Adult protection orders v apprehended violence orders

Along with guardianship orders, apprehended violence orders (including both Apprehended Domestic Violence Orders (ADVOs) and Apprehended Personal Violence Orders (APVOs)), are one of the key protective orders currently used in NSW. An apprehended violence order prohibits conduct constituting violence or abuse, a proven breach of an order resulting in criminal penalties. It is an important tool in protecting vulnerable people from positive acts of abuse.

Seniors Law recognises the limitations of the apprehended violence order, however, in its inability to address omissions leading to the neglect of a protected person. As it stands, the apprehended violence order regime is designed to protect a protected person from positive acts constituting violence. Seniors Law asserts that where a respondent subject to an apprehended violence order does nothing (that is, omits to do an act), there is no (or at least no effective) mechanism for breach.

Under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), the Local Court can make an apprehended violence order to protect a person from personal violence offences, intimidation and stalking. Section 4 of the Act sets out the meaning of 'personal violence offence' as including various offences under the *Crimes Act 1900* (NSW) and *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Relevantly to the protection of vulnerable adults, the only one of those offences that does not require some form of positive act on the part of the offender to constitute the offence is that under s. 44 of the *Crimes Act 1900* (NSW), which states that

a person who is under a legal duty to provide another person with the necessities of life and who fails to do so is guilty of an offence if the failure causes a danger of death or serious injury to that person.

In theory therefore, an apprehended violence order may be put in place to protect a vulnerable adult against an omission to act on the part of an offender that results in a failure to provide the 'necessities of life' (a term which is not defined in the *Crimes Act 1900* (NSW)). In practice however, Seniors Law recognises difficulties in the notion that an apprehended violence order could be proactively used to provide protection from omissions to act, and submits further legislative reform is needed to address this gap.

The appropriate judicial body

Seniors Law submits that an apprehended violence order is not designed to impose positive obligations on parties but rather, to prohibit the respondent's abusive conduct — that is, to *stop* the respondent from doing certain things. Section 35 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) gives the Court the power to impose "such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court... to ensure the safety and protection of the person in need of protection." Where the law governs an obligation to do a positive act towards another person, it must generally be established that a duty of care is owed.⁵¹

Whilst it might be possible to amend apprehended violence order legislation to allow for the imposition of positive obligations, it would be complicated.

The apprehended violence order regime relies heavily on parties resolving matters, with respondent parties often consenting to orders on the basis that they do not admit to allegations made in the application. Such resolution would be far less likely, certainly on legal advice, where consent to an order requires positive actions. What those actions would be would also require a much more in-depth and complex approach than can generally be offered in the apprehended violence order duty list in a busy Local Court.

Civil and administrative tribunals, by contrast, have developed expertise in dealing with situations

⁵¹ David Lanham, et al, *Criminal Laws in Australia*, Federation Press, 2006, 3.

where one person has positive obligations towards another through their work in the guardianship lists.

In NSW, although the Tribunal cannot force an unwilling carer to complete tasks, it works with willing carers and family members to allocate tasks, and has the expertise to impose services where there is a gap in care. To empower the Tribunal to make civil orders would act to extend such powers, rather than introduce them to a completely new decision-making body. Given their wider jurisdiction, Seniors Law submits the Tribunal is the appropriate body to make orders around the protection of vulnerable people.

Seniors Law submits orders protecting older people should be tailored to their needs. Following his investigation of Adult Protection regimes internationally in 2012, John Chesterman recommended the introduction of further powers to VCAT to make protective orders specifically for vulnerable older people, namely:

- orders enabling entry and assessment
- removal and placement orders
- provision of service orders; and
- banning orders⁵²

Seniors Law submits that while apprehended violence orders have a role in protecting vulnerable people from violent behaviour, the addition of a more tailored regime of orders, and appropriate penalties for breach of those orders, is needed in the protection of vulnerable older people.

In conjunction with expanded powers of investigation for the Public Representative, Seniors Law proposes the Tribunal be given the power to impose orders to protect vulnerable people creating a more defined system of adult protection. In line with a rights-based approach, however, Seniors Law recommends adopting legislative provisions that “recognise the ability of individuals to object to the placing of protective orders on them” as seen in Scotland.⁵³ To give effect to this, individuals should be given the support they may require to communicate their objection.

Provision of service orders

Seniors Law proposes the Tribunal be empowered to make orders for the provision of services to a vulnerable older person. Nova Scotia’s adult protection regime allows the court to order that the ‘Minister’ provide a form of care plan relating to the

implementation of services, where an adult is found to be in need of protection.

Section 9.3 of the *Adult Protection Act* provides:

“Where the court finds, upon the hearing of the application, that a person is an adult in need of protection and either

- (a) is not mentally competent to decide whether or not to accept the assistance of the minister; or,
- (b) is refusing the assistance by reason of duress,

the court shall so declare and may, where it appears to the court to be in the best interests of the person, make an order authorising the Minister to provide the adult with services including placement in a facility approved by the Minister which will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect.”⁵⁴

Banning orders

Similar to the apprehended violence order’s power to exclude persons from an area or premises, and NCAT’s power to make orders regarding ‘access to persons’ under the guardianship regime, Seniors Law submits that the Tribunal be empowered to make banning orders, stopping certain persons from contacting and seeing the vulnerable adult.

Again, Nova Scotian courts are empowered to make a “protective intervention order directed to any person who, in the opinion of the court, is a danger to the adult in need of protection”⁵⁵ as can the Sheriff under s19 of the *Adult Protection and Support (Scotland) Act 2007*.

The imposition of a banning order, rather than an apprehended violence order, allows a decision-making body familiar with the jurisdiction, and armed with complementary powers, to intervene and ban contact in a less formal setting than the Local Court.

In the context of delicate family relationships, consequences of breach are also relevant, with breach of an apprehended violence order not uncommonly attracting a term of imprisonment. Those protected by such an order may be more likely to report a breach where prison was not a threat, though a breach might be penalised by a civil penalty.

As a caveat to this power, however, Seniors Law submits that any legislation must take a rights based approach, and as per the Scottish

⁵² Chesterman, above n 49, 84.

⁵³ Ibid, 48, citing s35 of the *Adult Support and Protection (Scotland) Act 2007*.

⁵⁴ *Adult Protection Act*, RSNS 1989, c 2, s 9(3).

⁵⁵ *Adult Protection Act*, RSNS 1989, c 2, s 9(3)(d).

Legislation, that a protection order must not be made if the affected adult opposes it. (See ‘consent to orders’ below).

Removal and placement orders

Seniors Law notes that s. 11 of the *Guardianship Act 1987* already makes provision for orders of this type, whereby the Tribunal may order for the removal of a person who is the subject of an application for a guardianship order from any premises.

Consent to orders

As a caveat to any application for a civil order, Seniors Law recommends that the Tribunal be required to consider the wishes of the vulnerable adult before making a civil order.

Section 35 of Scotland’s *Adult Protection and Support (Scotland) Act 2007* recognises the ‘ability of individuals to object to the placing of protective orders over them’:⁵⁶

- “(1) The sheriff must not make a protection order if the sheriff knows that the affected adult at risk has refused to consent to the granting of the order.
- (2) A person must not take any action for the purposes of carrying out or enforcing a protection order if the person knows that the affected adult at risk has refused to consent to the action.
- (3) Despite subsections (1) and (2), a refusal to consent may be ignored if the sheriff or person reasonably believes—

- (a) that the affected adult at risk has been unduly pressurised to refuse consent, and
 - (b) that there are no steps which could reasonably be taken with the adult’s consent which would protect the adult from the harm which the order or action is intended to prevent.
- (4) An adult at risk may be considered to have been unduly pressurised to refuse to consent to the granting of an order or the taking of an action if it appears—
- (a) that harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust, and
 - (b) that the adult at risk would consent if the adult did not have confidence and trust in that person.”

The Scottish legislation recognises the importance of maintaining a balance between the rights of a vulnerable person and the community’s responsibility to protect those most vulnerable. Seniors Law submits that new legislation must take this approach.

Recommendation 7:

Expand the powers of the Tribunal to make civil orders protecting vulnerable adults

10. Provisions of general application

Registration of assisted decision-making instruments

As outlined above, Seniors Law supports the introduction of a mandatory online registration system for all assisted decision-making instruments. Whilst we acknowledge concerns that a register of itself may not reduce the incidence of elder abuse, we believe that mandatory registration of all enduring instruments as part of a broader system of protections could lead to a reduction in the incidence of elder abuse in a number of ways.

Registration could prevent people from purporting to rely on powers that have subsequently been revoked and discourage former supporters and representatives from attempting to rely on powers that have been revoked.

An easily searchable register may make it less likely that institutions like banks rely on their own third party documents, which in most cases have less robust witnessing requirements and protections.

Finally, registration is a necessary foundation for the implementation of a suite of safeguards that together would work to decrease the incidence of

⁵⁶ Chesterman, above n 49, 48.

elder abuse. This suite of safeguards should include a requirement to notify when a representation agreement has been activated, a requirement to submit annual declarations of compliance, together with a regime of random audits. The prospect of being audited may act as an incentive for supporters and representatives to comply with their obligations, without requiring them all to submit annual reports or statements.

We submit that these proposals balance the need for oversight with the need to ensure that the role does not become so onerous that members of the community will be reluctant to accept the appointment.

Hosting and management of the register

Ultimately, Seniors Law recommends the establishment of a national register of substitute decision-making instruments, to enable easy checking of the validity of instruments made in other jurisdictions. We support the recommendation of the Commonwealth Standing Committee on Legal and Constitutional Affairs in the *Inquiry Into Older People and the Law* Report however, for the introduction of state-based registers as a precursor to the establishment of a national register for enduring instruments.⁵⁷

Similar recommendations were made in the Final Report of the Australian Law Reform Commission inquiry into Elder Abuse in 2017⁵⁸, the Final Report of the Victorian Parliamentary Law Reform Committee Inquiry into Powers of Attorney in 2010⁵⁹ and by the Victorian Law Reform Commission in the Guardianship Final Report in 2012.⁶⁰

Seniors Law submits that the initial register in NSW should be hosted and managed by an existing agency which has expertise in managing registers containing sensitive information. As recommended by the Victorian Parliamentary Law Reform Committee⁶¹ and VLRC⁶², we submit that the Registry of Births, Deaths and Marriages in NSW would be an appropriate body to host and manage the register of assisted decision-making instruments.

Recommendation 8:

Establish a mandatory online register of assisted decision-making instruments, maintained by the Registry of Births, Deaths and Marriages.

11. Tribunal procedures and composition

Seniors Law makes no comment on the draft proposals under this section.

12. Supreme Court

Seniors Law makes no comment on the draft proposals under this section.

13. Search and removal powers

Seniors Law supports the expansion of the search and removal powers as proposed by the Commission. As discussed above in Section 9 however, we believe that powers of this type should

be complemented by a range of other protective orders that the Tribunal ought to be empowered to make, to best protect vulnerable adults including older people experiencing or at risk of abuse.

⁵⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, (2007), 103.

⁵⁸ Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Final Report, May 2017, 181.

⁵⁹ Victorian Parliamentary Law Reform Committee, *Inquiry into Powers of Attorney Final Report* (2010) 233.

⁶⁰ Victorian Law Reform Commission, above n 3, 362.

⁶¹ Victorian Parliamentary Law Reform Committee, above n 58, 248.

⁶² Victorian Law Reform Commission, above no 3, 366.

14. Interaction with mental health legislation

Seniors Law makes no comment on the draft proposals under this section.

15. Adoption information directions

Seniors Law makes no comment on the draft proposals under this section.

16. Recognition of interstate appointments

Seniors Law supports the proposals under this section.

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United Nations Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) (**Convention**) art 12

E Other

See the declaration of the Australian government upon ratification of the Convention: “Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards ... Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others...”: United Nations Multilateral Treaties Deposited with the Secretary-General – Status as at 1 April 2009, Volume 1, Part I, Chapters I to VII, ST/LEG/SER.E/26 p 461.