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ACT Justice and Community Safety Directorate
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Submission to Discussion Paper – Proposed Response to Elder Abuse in the ACT

Thank you for the opportunity to make a submission to the above consultation.

The attached submission is made on a whole of Commission basis, and we would be happy for it to be made available publicly.

Yours sincerely

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About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. The Commission includes:

- The President and Human Rights Commissioner
- The Discrimination, Health Services, Disability and Community Services Commissioner
- The Public Advocate and Children and Young People Commissioner; and
- The Victims of Crime Commissioner

Elder abuse is a complex and significant human rights issue and can, depending on the context in which it occurs, manifest as a type of family violence. Proposed responses are directly relevant to the four Commissioners' respective oversight functions, and to policy and community education functions of the **President and Human Rights Commissioner** and **Victims of Crime Commissioner**.

The proposed responses are also relevant to the frontline services that the Commission delivers to community through 'Victim Support ACT' including crisis support, therapeutic interventions, financial assistance and court support. As the ACT's Domestic Violence Project Coordinator, the Victims of Crime Commissioner also assists the Domestic Violence Prevention Council and ACT Government agencies in facilitating education, cooperation and the provision of best-practice service-level responses to family violence.

In her complaints-handling role, the **Discrimination, Health Services, Disability and Community Services Commissioner** (DHSDCSC) may handle complaints involving elder abuse across several jurisdictions. Complaints alleging unlawful discrimination in an area of public life or the inappropriate or inadequate provision of health services, disability services and services for older people may involve acts or omissions causing harm to an older person within a relationship of trust. Complaints of these kind aim to promote awareness of rights and responsibilities and recommend service improvements.

As Health Services Commissioner, the DHSDCSC may also deal with and investigate mandatory or voluntary notifications about conduct by individual registered health practitioners in the ACT. This complaint-handling role may be carried out in conjunction with the Australian Health Practitioner Regulation Authority (AHPRA) and may allege or reveal potential elder abuse.

The **Public Advocate** (PA) is authorised to undertake individual and systemic advocacy for vulnerable people, including those with impaired decision-making ability,¹ and must be notified by law in certain situations that involve a risk of harm to such people.² A court may also notify the PA where it considers an unrepresented party to a proceeding for a family violence order has impaired decision-making ability to enable their application for appointment as a litigation guardian.

¹ See *Human Rights Commission Act 2005*, s 27B(1)(a)(iv) and s 27B(1)(e).

² These include being notified of consent to medical treatment by attorneys under the *Powers of Attorney Act 2006* and consent to long-term medical treatment or participation in low-risk research by guardians under the *Guardianship and Management of Property Act 1991*.

Summary of our submission

- Though we appreciate the protective intent, the Commission strongly cautions against creating a discrete class of criminal offences for conduct directed toward older people for the following reasons:
 - The Australian Law Reform Commission did not recommend criminalisation given other offences already adequately apply;
 - Reactive criminal justice responses are inflexible and ill-adapted to addressing the complex and highly variable interpersonal dynamics that arise in elder abuse cases and dissuade reporting;
 - Prosecution of new specific offences is likely to face similar barriers to prosecution of existing offences (ie evidentiary difficulty, complex communication needs of witnesses, cost of financial auditing necessary to investigate and prosecute financial abuse);
 - Criminalisation on its own does not proactively address the underlying causes of elder abuse and there is no clear evidence that new offences, alone, will provide a deterrent to offending behaviour; and
 - Discrete offences do not suitably distinguish between elder abuse in institutional and private settings and are likely to fail to identify and address relevant systemic causes as well as the service delivery implications of individual prosecutions (eg as they may relate to staff supply/training in institutional settings etc)
 - Introduction of new offences at this time, particularly prior to the conclusion of the Royal Commission into Aged Care, Quality and Safety, may further embed an inconsistent national approach.
- The Commission is supportive in-principle of applying elder abuse as a circumstance of aggravation to relevant offences.
- The Commission supports in-principle including age and vulnerability of a victim as a consideration a sentencing court must consider in relation to specific offences only, however queries the extent to which this will extend any additional consideration beyond that mandated by s 33(1)(d),(u) and (v) of the *Crimes (Sentencing) Act 2005*.
- The Commission does not oppose the introduction of a criminal offence of neglect provided it is of general application, and suitably distinguishes between the causes of neglect within institutional and non-institutional settings (eg staff shortages / absence of training). We do not, however, support such an offence in isolation. A neglect offence must be situated within a continuum of graduated interventions (as detailed below) to ensure it is only employed after having considered other responses.
- Should the ACT Government choose to enact a neglect offence, the Commission recommends:
 - exploring opportunities for the Commission (including the PA) and, if considered appropriate in consultation with those entities, the Older Persons ACT Legal Advice Service ('OPALS') and ACT Public Trustee and Guardian, to be notified when a person is charged with neglect in an elder abuse context
 - that government be required by law to review its operation after two years to ascertain when and how it is being employed (eg to discern its utility and effects in both institutional and private settings); and

- that the offence be eligible for restorative justice.
- The Commission strongly supports authorising the ACT Civil and Administrative Tribunal to order any remedies available to the Supreme Court, provided tribunal members receive specialised training and that available remedies are not subject to any jurisdictional monetary limit.
- Responses to elder abuse must be practical, preventive, accessible and effective. In addition to the proposed responses already listed in the discussion paper, the Commission considers the following policy settings should be implemented as key initiatives to protect older people in the ACT from elder abuse:
 - Enabling the Community Services Commissioner (who has responsibility for older persons) to investigate allegations of abuse, neglect and exploitation of older persons regardless of the context in which those allegations have occurred (ie in people’s homes as well as institutions), akin to the NSW Ageing and Disability Commissioner model.
 - Continuing to implement the National Code of Conduct for Health Care Workers in the ACT, which provides a more tailored means of responding to allegations of elder abuse against unregistered aged care workers.
 - Extending the ACT Official Visitors Scheme to residential aged care settings, which would provide greater independent monitoring of respect for rights within these facilities and referral pathways for potential regulatory and criminal justice responses.
 - Greater resourcing for the OPALS to employ a social worker, and for both the Public Trustee and Guardian, and PA to undertake investigations in matters concerning the alleged abuse of older persons.

Background and relevant principles

The Commission welcomes the opportunity to provide input to the consultation on possible reforms to strengthen frontline responses for older people experiencing or, at risk of experiencing, abuse, violence and exploitation. The discussion paper seeks community views on:

- i) The introduction of offences targeting elder abuse
- ii) Introducing elder abuse as an aggravating factor in sentencing
- iii) Giving the ACAT power to remedy the misuse of powers of attorney, and wrongdoing by guardians or financial managers
- iv) Expanding family and personal violence provisions to cover abuse by non-family members.

This submission emphasises that elder abuse manifests in a range of forms, contexts and settings, both familial and institutional. Prioritising criminal justice responses to address elder abuse is ill-adapted to addressing a suite of multidisciplinary, educative and restorative approaches. References to ‘elder abuse’ throughout this submission adopt the definition of the World Health Organisation³ – ‘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.’

Relevant human rights principles

Elder abuse is not only a significant social and health issue. Depending on the circumstances in which it occurs, it also often reflects a violation of fundamental human rights. Everyone is entitled to enjoy their human rights without distinction or discrimination of any kind, including older persons. Conduct

³ World Health Organization, *The Toronto Declaration on the Global Preventions of Elder Abuse* (2002).

constituting elder abuse, which can include physical violence, neglect and emotional, psychological, social and financial exploitation, may breach one or more of the rights protected in the *Human Rights Act 2004* (HR Act), including:

- The right to equality before the law and non-discrimination, including on the bases of age and disability (s 8);
- The right to life (s 9);
- The right to protection from torture and cruel, inhuman and degrading treatment (s 10);
- The right to privacy and reputation (s 12);
- The right to freedom of movement (s 13); and
- The right to liberty and security of person (s 16).

At the national level, Australia has ratified a range of human rights treaties that (other than the Convention on the Rights of the Child) guarantee protection to all older persons equally with other persons. Although Article 25(1) of the Universal Declaration of Human Rights declares a right of all persons to security in old age, there are presently no binding international instruments that relate specifically to the rights of older persons. The United Nations Convention on the Rights of Persons with Disabilities (CPRD), to which Australia is a State party, provides relevant standards and guidance insofar as a person's physical or cognitive impairment or mental ill-health places them at risk of violence, abuse or exploitation. Although the 1991 *UN Principles for Older Persons* recognise that protective measures and the dignity and autonomy of older persons must not be mutually exclusive,⁴ it would be preferable for the UN to have a new international human rights treaty protecting older persons.

Options for elder abuse criminal law reforms

As a standalone offence

The Commission appreciates and supports the underlying intent in proposing a discrete offence of elder abuse – that being, to raise awareness of and deter criminal conduct against older people occurring within a relationship of trust. We also acknowledge the symbolic value in making a clear statement that the ACT regards any form of abuse against older persons as serious and unacceptable. Nevertheless, we have serious concerns about the introduction of a standalone elder abuse offence or suite of offences covering conduct directed at and causing harm to an older person.

In May 2017, the Australian Law Reform Commission (ALRC) published its final report, *Elder Abuse – A National Legal Response*.⁵ The ALRC concluded that existing criminal offences adequately cover conduct that constitutes elder abuse and, accordingly did not recommend enactment of new specific offences for 'elder abuse', 'elder neglect' or 'misuse of powers of attorney.' As observed in our submission to the ALRC report, there is presently wide variation in the functions and powers of oversight and complaint handling agencies to deal with elder abuse. Although we maintain that state and territory governments should retain flexibility to determine local responses to elder abuse in accordance with available resources, enacting one or more discrete 'elder abuse' offences in the ACT risks further fragmentation of regulatory responses among Australian jurisdictions and may dilute a nationally consistent approach to elder abuse. Introducing a discrete offence further risks presupposing outcomes of the Royal Commission into Aged Care Quality and Safety, which is due to

⁴ *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [17]–[18].

⁵ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report No 131, May 2017).

report in November 2020, and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

As the current discussion paper acknowledges, the broad range of activity captured under the definition of elder abuse does not lend itself to the specificity and high thresholds required of the criminal justice system. Risks, therefore, of criminalising 'elder abuse' include that a uniform statutory definition may inadvertently fail to recognise differing cultural contexts, ages and forms in which abuse manifests (including in local Aboriginal and Torres Strait Islander and CALD communities) and the level of severity. In this regard, a criminal justice response is, alone, likely to offer only a blunt and reactive means of responding to the array of forms and circumstances in which elder abuse occurs.

The Commission strongly cautions against specifically criminalising conduct directed at or significantly affecting groups of people based on a shared personal attribute. In our submission to the ALRC inquiry, we observed that specific offences limited to abuse against 'elders' have the potential to be paternalistic and discriminatory.⁶ As a range of confluent personal factors (eg disability, gender, education, accommodation status) influence a person's experience of, and vulnerability to, abuse, enacting and prosecuting specific 'elder abuse' offences may artificially distinguish such conduct from other offences and, by doing so, affect data capture. Specific offences premised on conduct against people over certain ages, including those in the United States states of California, Missouri and Florida, conflate the differing levels of agency and vulnerability of older people. Unlike in the ACT, each of these jurisdictions also maintain dedicated Adult Protective Services agencies tasked with receiving and investigating reports of suspected elder abuse, which provides established pathways for referrals to prosecution.⁷

Accordingly, absent clear evidence of incidence or special vulnerability sufficient to justify greater protection under ACT criminal law, specifically criminalising certain conduct directed at or causing harm at any older person may engage the right to equality and non-discrimination (s 8, HR Act). This may be especially acute if an age-specific offence attracts higher penalties than existing offences which protect all members of the community.

The Commission views that responses to elder abuse must be practical, accessible and effective. In this vein, we consider criminal justice responses on their own are ill-suited to address the underlying causes of offending and vulnerability to elder abuse in a timely and critical manner. Many matters involving elder abuse that have come to our attention are, in our experience, commonly attributable to inadvertence or misunderstanding of obligations. Others are clear acts of predatory violence, exploitation or abuse. As the ALRC has noted, an automatic criminal response may, counterintuitively, discourage reporting of possible abuse by close family members or carers and deter access to other early supports, like family conferencing. As in the United States, we project that enacting a discrete offence in the ACT would likely face similar barriers to prosecution as presently affect existing offences, including high evidentiary thresholds, difficulty obtaining expert testimony and the vulnerability of witnesses with complex communication needs and varying degrees of cognitive

⁶ ACT Human Rights Commission, Submission No 337 to Australian Law Reform Commission, *ALRC Discussion Paper 83: Elder Abuse* (27 February 2017), 5.

⁷ Adria E Navarro, Zachary D Gassoumis and Kathleen H Wilber, 'Holding Abusers Accountable: An Elder Abuse Forensic Center Increases Criminal Prosecution of Financial Exploitation' (2013) *The Gerontologist* 53(2), 303-312.

impairment.⁸ Additionally, matters alleging financial exploitation often, due to their complexity, require greater resources, which can contribute to lower rates of prosecution.⁹

Prosecutions occurring in isolation are also likely to fail to appreciate their broader systemic implications. In particular, we are concerned that placing an additional legal burden on care providers or organisations may inadvertently cause a chilling effect among private carers, unregistered health workers and health professionals that compound existing pressures (eg staff shortages, lack of appropriate skills training etc). Depending on their circumstances, prosecutions may lack visibility of other tailored regulatory schemes. Accordingly, we strongly recommend that government prioritise consideration of a suitable regulatory response instead of or, at minimum in conjunction, with any potential criminal justice response. Though we agree those who wilfully or recklessly engage in elder abuse ought to be held liable for their conduct, in the absence of a continuum of proactive, graduated, coordinated and educative interventions that includes prosecution as a last resort, it is unlikely such prosecutions would always reflect a proportionate response.

As an aggravating feature of certain offences

The Commission supports in-principle establishing elder abuse as an aggravating feature, akin to the approach taken in the *Crimes Act 1900* in relation to pregnant women. In our view, this approach would satisfactorily hold to account those whose conduct targets older persons due to their apparent or actual vulnerability. Reflecting elder abuse as an aggravating feature also allows for its deliberate application to existing and future offences (eg assaults, wounding with intent, false imprisonment, choking, suffocation and strangulation, sexual assault, larceny, robbery or stealing from the person, obtaining money/financial advantage by deception). Depending on how it is defined, attaching elder abuse as an aggravating circumstance may be preferable in that it would mandate the court's critical consideration of whether each offence at issue took advantage of an older victim's age-related vulnerability. To ensure consistency, this assessment could be informed by guidelines and/or specialised training. However, we note that related prosecutions may still face similar evidentiary challenges as noted above.

As an aggravating factor in sentencing

We are not, in-principle, averse to the Government explicitly requiring, under the *Crimes (Sentencing) Act 2005*, that a sentencing court consider the age and vulnerability of the victim in determining an appropriate sentence for an offence. It is, however, unclear the extent to which this will increase protection for older persons in the ACT as we understand that, in practice, these factors are already considered, as required in section 33(1)(d) (ie personal circumstances of the victim if known to the offender), section 33(1)(u) (ie whether the offender was in a position of trust or authority when they committed the offence) and section 33(1)(v) (ie the reason or reasons why the offender committed the offence).

Of relevance, the *Crimes (Sentencing Procedure) Act 1999* (NSW) does specifically contemplate as an aggravating factor in sentencing the vulnerability of the victim of the offence, including as examples where the victim was very old or had a disability.¹⁰ In February 2018, the New South Wales Court of

⁸ Ibid; Kendon J Conrad, Madelyn Iris, John W Ridings, Kate Langley and Georgia J Anetzberger, 'Self-report measure of financial exploitation of older adults' (2011) *The Gerontologist* 51(3), 758-773; Georgia Anetzberger, Bonnie Brandl, Carmel Bitondo Dyer, Candace J Heisler, Joanne Otto, Lori Stiegl, Randolph Thomas, *Elder Abuse Detection and Intervention: A collaborative approach* (Springer, 2007).

⁹ Marie-Therese Connolly JD, 'Where elder abuse and the justice system collide: Police power, *parens patriae*, and 12 recommendations' (2010) 22(1-2) *Journal of Elder Abuse & Neglect* 37, 37-93; Jeanette M Daly and Gerald J Jogerst, 'Statute definitions of elder abuse' (2003) 13(4) *Journal of Elder Abuse & Neglect* 39, 39-57.

¹⁰ *Crimes (Sentencing Procedure) Act 1999* No 92, s 21A(2)(l).

Criminal Appeal held, in relation to the murder and sexual assault of a 66 year-old woman living in relative isolation in housing commission, that such vulnerability does not arise from a victim's advanced age alone, but a range of concomitant and complementary factors.¹¹ The Court considered the examples in section 21A(2)(l) illustrate the genre of people who society may consider vulnerable, including older persons living alone without support and exhibiting poor self-care. This broadening judicial recognition of elder abuse in sentencing practice, and corresponding potential for increased sentences, and has also since been applied to a corporation's contravention of a work health safety duty resulting in an older person's death.¹² Though only of persuasive bearing in the ACT, we do not think the current construction of the *Crimes (Sentencing) Act 2005* would preclude this principle's application to offences in the ACT.

As an offence of neglect

As recognised in both the discussion paper and ALRC report, criminal laws in all other Australian jurisdictions proscribe neglect as an offence of general application. These offences, which can apply to neglect of older persons, include serious penalties, such as imprisonment, where a carer or someone having responsibility for another's welfare fails to provide necessities of life (eg adequate food, shelter, clothing and medical care) in a way that endangers, harms or injures that other person's life or health. In the ACT, section 39(1)(b) of the *Crimes Act 1900* establishes an offence of neglecting a child for whom one has parental responsibility, which is punishable by 200 penalty units, imprisonment for 2 years or both. Section 39(2) contemplates a relevant defence whereby the accused failed to provide a thing for the child only because they could not afford to do so.

The Commission views that, in the context of complex familial dynamics, a restorative approach should be prioritised over reactive criminal justice measures. Recognising the presence of 'neglect' offences in other jurisdictions, the Commission is not opposed to the ACT introducing a general application offence of neglect as one potential option for responding to elder neglect. We would not, however, support a neglect offence in isolation and recommend that any proposed offence occupy a continuum of graduated policy and regulatory interventions, and that its operation be tailored specifically to private and industry settings (as detailed below).

Existing regulatory schemes provide alternatives to criminal prosecution in cases of alleged elder abuse. For example, the National Disability Insurance Scheme (NDIS) Quality and Safety Commission handles complaints about registered residential aged care providers and workers in relation to any issue arising out of, or in connection, with their provision of supports or services in a manner contrary to the NDIS Code of Conduct. This explicitly includes taking all reasonable steps to prevent and respond to all forms of sexual misconduct and violence, exploitation, neglect, and abuse of people with disability. It also enables complaints in relation to provision of supports and services in a safe and competent manner as well as dishonest behaviour. Should a complaint be confirmed, the NDIS QSC can issue ban orders in relation to the worker or providers' registration.

Along similar lines, we are also conscious that the implementation of the National Code of Conduct for Health Care Workers in the ACT will provide another means of taking complaints and disciplinary action against unregistered aged care workers (eg nursing assistants, personal care workers) whose continued practice presents a serious risk to public health or safety. As in other jurisdictions that have already implemented the National Code, its implementation offers greater monitoring and accountability of those who provide direct care and services to vulnerable older persons. The National Code will enable responsive interventions in the form of interim and final prohibition orders, either by placing conditions or limitations on an incompetent, inappropriate or impaired worker or prohibiting their practice outright. We consider this jurisdiction, which is intended to come within the

¹¹ *Katsis v The Queen* [2018] NSWCCA 9

¹² *Safework NSW v Proflow Plumbing and Maintenance Pty Limited* [2019] NSWDC 593.

remit of the Health Services Commissioner, would complement expanded powers for the Community Services Commissioner (who has responsibility for older persons) to investigate and conciliate allegations of abuse, neglect and exploitation and provide support to vulnerable adults (discussed below).

Given the potential for ‘neglect’ prosecutions to disproportionately impact workers in the health and residential and institutional aged care sectors, we recommend that the operation of any prospective offence be reviewed within two years of commencement. This review should, however, be vigilant not to identify individuals, given the impact allegations or charges may have on a person’s present and future employment. In the interim, we would additionally suggest, as a related protection, that an appropriate statutory officeholder (eg the PA, Public Trustee and Guardian or the Community Services Commissioner) be routinely notified whenever this offence is charged. Equally recognising the intersection of elder abuse and complex personal or family dynamics, we would see value in making restorative justice available for prosecutions of any elder neglect offence (albeit noting our preferred approach would be to promote parties’ earlier access to conciliation).

Strengthening ACAT power to address misuse of powers of attorney and wrongdoing of guardians or managers

The Commission welcomes greater access to timely and effective remedies for people affected by the misuse of powers of attorney or management or guardianship orders. Above all, we consider that, to be effective, responses must be proactive, coordinated, educative and restorative and build-in opportunities to collect and evaluate relevant data to inform future revisions or updates to the law.

The Commission appreciates that financial abuse (or abuse by a guardian that causes loss) can have as significant an adverse impact on older persons as violent crime and psychological abuse. We therefore strongly support expanding the powers of the ACT Civil and Administrative Tribunal (ACAT), to enable it to order all remedies as are available to the ACT Supreme Court in situations of misuse of a power of attorney or mismanagement by a guardian or financial manager. We anticipate this jurisdiction to offer a quicker, more accessible and less formal method of resolution that reduces cost barriers that court fees, legal representation and delays may pose in accessing redress. Vesting authority in ACAT to order compensation and deal with real property provides a practical, prompt and accessible pathway for older persons who are unable or unwilling to take action in the Supreme Court to raise concerns about financial abuse.

We acknowledge this proposal, reflecting Recommendation 5-2 of the ALRC Report, is premised on equivalent powers of the Victorian Civil and Administrative Tribunal (VCAT).¹³ Though not empirically evaluated, we note these facilities have been broadly welcomed in Victoria as promoting consistency of remedies available to those who experience elder abuse regardless of how the conduct arises (ie under a power of attorney or guardianship or financial management arrangements). Key advantages of adopting this jurisdiction, from our perspective, include mediation for applications (where appropriate), broad standing to make applications including for anyone whom the tribunal considers has a special interest in the affected person’s affairs,¹⁴ and that compensation may be ordered posthumously to an estate provided the application is made within six months of a person’s death (although the Supreme Court or VCAT may grant extensions). ACAT’s ability to inform itself as it sees fit is likely to also offer important flexibility to tailor its processes to vulnerable witnesses and those presenting with communication difficulties.

¹³ *Powers of Attorney Act 2014* (Vic), s 77; *Guardianship and Administration Act 2019* (Vic).

¹⁴ See, for example, *Powers of Attorney Act 2014*, s 78.

Section 18 of the *ACT Civil and Administrative Tribunal Act 2008* presently limits civil dispute applications to those claiming amounts not more than \$25,000, except where parties agree otherwise (s 21). As elder financial abuse can, and may often, pursue the recovery of greater sums than \$25,000 we recommend that, to provide effective relief, compensation be discretionary and not subject to this jurisdictional limit as in VCAT. Extended powers to order compensation may also be partly frustrated by tracing unregistered or misappropriated funds that have been re-invested into real property without the older person being recognised on the certificate of title. Such challenges can commonly arise in ‘assets for care’ arrangements in which an older person’s family (often an adult child) receives a financial benefit in exchange for a promise to provide accommodation for, and in some cases, care of, the older person as he or she ages.¹⁵ Empowering ACAT to order any remedy available to the Supreme Court therefore, by implication, warrants consideration of extending ACAT the ability to the order the sale of, and determine co-ownership in, real property. In this regard, we appreciate and support the discussion paper’s intention to explore ACAT jurisdiction, as under s 228 of the *Property Law Act 1958* (Vic), to make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs (including in relation to equitable co-owners), consistent with Recommendation 6-1 of the ALRC report.

In our view, ACAT’s existing jurisdiction in relation to orders under the *Mental Health Act 2015* indicates its members will, in general, have relevant experience and confidence in considering questions of capacity and impairment. Notwithstanding, given the vulnerability of older persons whom expanded remedies are intended to benefit and the complex and varied situations in which elder abuse can manifest, we strongly recommend that all members receive recurring specialised training in this jurisdiction and that ACAT is resourced accordingly. As recommended by the ALRC and in Victoria, ACAT ought to nevertheless have discretion to refer an application for compensation to the ACT Supreme Court where the matter is complex or raises questions of law.

Options for improving protection for older people experiencing elder abuse

The Commission supports the underlying intent of examining the application of the *Family Violence Act 2016* and *Personal Violence Act 2016* to ascertain any potential gaps in protection of those experiencing, or at risk of, elder abuse (eg where not within a close relationship of dependence). As above, however, we recognise that amending the definition of ‘personal violence’ (and considering discretion to make longer orders without establishing special or exceptional circumstances) may have unintended uses or effects, in both private and institutional settings, that merit caution.

Additional recommended policy settings

New South Wales Ageing and Disability Commissioner

The New South Wales Government recently established an independent Ageing and Disability Commissioner (ADC) to investigate allegations of abuse, neglect and exploitation and provide support to vulnerable adults. The creation of the ADC was informed by several reviews and reports into issues such as the implementation of the National Disability Insurance Scheme (NDIS), the provision of disability services, and the abuse and neglect of vulnerable adults including older persons, as well as community requests for a Commissioner. The NSW ADC formally commenced its functions on 1 July 2019.

The NSW ADC legislation deliberately did not set limits on who can make a report of abuse, neglect or exploitation, about whom a report can be made, and the type of conduct that is eligible for reporting. This was to ensure that no one in need of protection was inadvertently excluded from the ambit of

¹⁵ Teresa Somes and Eileen Webb, ‘What role for real property in combatting financial elder abuse through assets for care arrangements?’ (2016) *Canterbury Law Review* 22, 120-152.

the ADC. It was also in recognition that it is not always easy to determine who might be at risk and who might cause harm, and that abuse, neglect and exploitation can take many forms, both obvious and subtle, and occur in different settings.

The role of the NSW ADC is to deal with allegations of abuse, neglect and exploitation of adults with disability and older adults by investigating such allegations and taking any further action the ADC considers necessary. The role also includes public awareness and advice functions for the public regarding matters relating to the abuse, neglect and exploitation, including providing referrals to independent advocacy services. The ADC can inquire into and report on systemic issues relating to the protection and promotion of rights, or of abuse, neglect or exploitation, and advise and make recommendations to the Minister on such matters. The ADC's role also includes the monitoring and reporting on the implementation in NSW of the National Disability Strategy.

The NSW ADC will refer matters to the NSW Health Care Complaints Commission, the Aged Care Quality and Safety Commission or the NDIS Quality and Safeguards Commission if the complaints can be addressed by those bodies. This is because the stated purpose of establishing the ADC in NSW was to improve protections for vulnerable people who do not come within the ambit of other complaints mechanisms. The ADC must also refer matters to NSW Police or the Director of Public Prosecutions if any reports made to the ADC may provide evidence of the commission of a criminal offence. NSW also introduced Specialist Elder Abuse Officers in each NSW Police Command to undertake crime prevention and investigate matters that involve a criminal offence.

The powers of the NSW ADC include the power to:

- require the production of documents;
- initiate investigations on its own motion, or following a referral or complaint;
- apply for and execute a search warrant, and seize evidence, as part of an investigation;
- conduct public inquiries (with the functions, protections and immunities conferred on a commissioner by the *Royal Commissions Act 1923*);
- provide reports to Parliament on any matter relating to their functions; and
- oversee and coordinate Official Community Visitors.

Currently in the ACT, the Commission's Disability and Community Services Commissioner (who has responsibility for older persons) has the power to receive complaints about the provision of children and young people services, disability services and older people services. A service for older people is defined as a service that provides services specifically for older people or their carers, and includes services such as home help, personal care, home maintenance of medication, food services, respite care, transport, assessment or referral of support needs, case management and brokerage, advocacy, community access, accommodation support. Complaints may be made to the Commission if the service is not being provided appropriately (or not at all) or if the service provider has acted inconsistently with certain standards. Excluded from this are complaints that may relate to the abuse, neglect and exploitation of older people outside of a service provision context, such as where a person may be experiencing financial exploitation or neglect or abuse by family members.

Case examples, reflecting elder abuse matters that have been raised with or referred to the DHSDCSC, are included at [Appendix 1](#). These examples underscore the need for greater access to informal dispute resolution to promote greater prevention, information and education. The majority of these examples would not, in our view, easily lend themselves to criminal justice responses. It appears some of these examples would be able to be dealt with under the NSW Ageing & Disability Commissioners functions and we would support further review of the application of that model in the ACT context.

The NSW model provides a useful approach for the ACT to consider in relation to ensuring we provide a comprehensive response to elder abuse occurring in the ACT, in particular, enabling the Older Persons Commissioner to be able to investigate allegations of abuse, neglect and exploitation of older persons regardless of the context in which those allegations have occurred. Similar provisions could be drafted to ensure that if the complaint can be investigated by existing complaints mechanisms, then the Commissioner would refer the matter to those bodies instead. Situating these responsibilities within the Commission would enable the Commissioner to use the existing complaint and own-motion investigation powers, and the Commission's existing complaints resolution process.

In addition, we consider the following policy settings offer other complementary avenues to critically identify elder abuse and tailor appropriate and effective responses based on the circumstances, forms and settings in which it arises:

- Providing greater resourcing for the ACT Public Trustee and Guardian (PTG) to investigate complaints or allegations about guardians, managers or a person acting under an enduring power of attorney¹⁶ and to refer these for prosecution under existing deception offences may provide a less restrictive alternative by which to publicise and deter elder abuse locally.
- Research in the United States suggests that, absent a considered multidisciplinary approach to elder abuse prosecutions, financial elder abuse offences across all states are rarely prosecuted.¹⁷ In this regard, we encourage government to, as a matter of priority, appropriately resource the OPALS to include a full-time social worker to work in conjunction with the OPALS solicitor.
- The PA's appointment as a litigation guardian, and investigation and advocacy in suspected cases of elder abuse is constrained by available resources and other competing statutory obligations. Greater resourcing for the PA to undertake individual advocacy for vulnerable older persons and investigations in cases of suspected elder abuse, as contemplated by section 27B(e) of the HRC Act (see examples in [Appendix 2](#)). As in our submission to the ALRC Report, we would not support prescribing an investigative approach in this space due to the increasing regulatory burden this would impose.
- As proposed in the ALRC Discussion Paper,¹⁸ though not specifically recommended by the ALRC Report, we encourage government to explore extending the ACT Official Visitor Scheme to cover residential aged care settings. We consider this would provide greater visibility and independent referral of issues and conduct of concern and support Australia's human rights and procedural obligations under the Optional Protocol to the Convention Against Torture (OPCAT). Should government progress one or more discrete 'elder abuse' offences, Official Visitors may provide a useful point of referral.

Finally, we reiterate the ALRC's overarching view, albeit in the context of the National Plan to combat elder abuse, that extensive evidence and evaluation in relation to elder abuse and associated responses is required. Although we agree the ACT provides an ideal setting to trial world-leading responses to reducing elder abuse, we are acutely wary that a comprehensive local prevalence study has not informed the responses proposed by the discussion paper and that, accordingly, the ACT is likely to face difficulty in reliably adverting to their potential implications. We therefore strongly recommend government prioritise responses that develop a holistic picture of how, why and the extent to which elder abuse manifests in the Territory and that commit to timely evaluation of whether those responses are effective.

¹⁶ See *Public Trustee and Guardian Act 1985*, s 19B(1)(b).

¹⁷ Sheri C Gibson and Edie L Greene, 'Assessing knowledge of elder financial abuse: A first step in enhancing prosecutions' (2013) *Journal of Elder Abuse & Neglect* 25(2), 162-182.

¹⁸ Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No. 83, December 2016).

Appendix 1 – Case examples identified by DHSDCSC

The following examples recall elder abuse matters in which people have contacted the Commission for information or intervention. The Commission is contacted by concerned family members and staff or providers who have identified concerns about abuse or neglect and are seeking assistance to support the older person. The Commission can handle complaints or initiate own motion investigations in some circumstances or, where we do not have jurisdiction, make internal referrals to the PA team, or external referrals to OPALS, ADACAS, or other agencies that may be able to assist. Facility to assist with informal dispute resolution would be an appropriate in many cases, especially where people are concerned about formal legal action impacting relationships with family or service providers.

Discharge from hospital

A social worker called seeking advice to assist a patient at a hospital. She reported she was seeking to organise for the patient to move to supported independent living. The interstate guardianship agency responsible for the patient had declined to support her being moved, having based their decisions on the wishes of the patient's partner. The patient's partner had had several convictions of domestic violence related offences against the patient, and there was evidence of neglect while she was in his care. The patient, who was deteriorating in a hospital environment, did not have the ability to consent or provide instructions. The social worker reported she had organised for funding and placement in appropriate accommodation for the patient, however had been unable to secure the interstate guardian's consent to discharge the patient from hospital. The patient died in the hospital before the issue was resolved.

Concerns about family members

A patient in a mental health unit called with concerns her daughter was attempting to organise the distribution of her assets while she was in hospital. She reported she had organised for her daughter to be her enduring power of attorney (EPOA) after she attempted to take her own life some months prior. She said she attempted suicide again recently and her daughter took that as meaning she does not currently have legal capacity. The patient said her daughter now intends to manage the distribution of her assets without seeking the patient's input. The patient also said her daughter has told her she is unable to return to her own house. She does not believe she has had an assessment of her decision making-capacity and is unsure whether the EPOA is currently in effect.

Older person concerns about family

The Commission received a referral from the ACT Ambulance Service with concerns about an older woman who may be vulnerable to elder abuse, and who may require additional home help services. We contacted the woman who reported she had a difficult relationship with her children after a history of abuse by their father. She said her son stole \$10,000 from her and told her he will not return it unless she promises to no longer gamble. She stated she needs this money but does not want to harm her relationship with her children as they are the only family she has. She also reported a number of concerns relating to her home care, including competency of staff, communication breakdown when her schedule is changed, organising support that she did not request including 'social support', and not feeling like they care about her as a human being.

Cross border issues

A social worker at a hospital contacted the Commission with concerns about a patient in an acute aged care ward. The patient came from NSW originally and has been residing in an aged care facility with his wife. Since being admitted to hospital, the aged care facility is now refusing to take him back due to behavioural issues. The caller said that they have also stopped engaging in conversations about

putting in place supports. The caller said that the patient was under guardianship with the NSW Public Trustee and Guardian, but that they have said that they cannot help because it is an ACT facility. The caller said that the patient's son has recently been in contact and there has been discussion about moving the patient to NSW, however the man wishes to be reunited with his wife.

Assistance with financial abuse

A woman called on the advice of a social worker and geriatrician at a hospital where her mother is a patient. The woman indicated that she is the appointed EPOA for her mother who has dementia. The woman expressed concerns about financial elder abuse by a grandson, who has been taking sums of money from the patient, sometimes without permission. The grandson has also moved into the patient's house while she has been at the hospital.

Concerns about conditions of an EPOA

A social worker at a hospital called raising concerns about a patient. She reported her concerns were shared by clinical staff and the patient's friends. The patient is 95 years of age and his godson has EPOA. The godson lives overseas and has not been actively involved in the patient's care. The staff at the hospital are concerned that this man will have a very high level of control of the patient's financial assets once the EPOA commences. The EPOA states that the godson will have control over several bank accounts and the patient's car 'for his personal use'. The godson has already received large sums of money from the patient and manages the patient's two properties overseas.

Aged care concerns

An elderly male with dementia was living in a residential aged care facility. The man was noted to have fast-growing skin cancer lesions on his head. While he was living in residential care, and his GP recommended regular wound dressings, the man was subsequently found to have an infection in his wound. The matter was dealt with by the Health Services Commissioner and a referral was also made to the Aged Care Quality Agency. Both the facility and registered healthcare practitioners involved were subject to a comprehensive review:

- The facility was audited and it was determined that the facility did not meet all expected outcomes of the Accreditation Standards. Based on this the accreditation period was varied from 2 years down to 6 months.
- The Australian Health Practitioner Regulation Agency was notified about the involvement of two individual registrants.
- Changes were made to facility procedures and protocols.

Financial abuse by in-home service provider

A man made a complaint to the Commission about his former in-home aged care service provider. He complained that a carer had taken advantage of him, including asking him for money (around \$3000) and asking him to sign off that the carer had attended his home and provided services when she had not, so that she could receive payment from the provider. The carer also received numerous valuable items from him. The Commission contacted the service provider and, upon being notified of the complaint, the provider conducted its own investigation where it found that the carer had engaged in serious misconduct and terminated her employment.

Appendix 2 – Case examples identified by Public Advocate

The following examples reflect advocacy and support by the PA in instances of alleged elder abuse and resultant outcomes.

AT

Mr T, aged in his seventies and experiencing dementia, was collected by his daughter from his home in Melbourne and brought to live in Canberra. It was referred to the PA that Mr T and his daughter had initially been living in a car and, subsequently, in one-room student accommodation, with Mr T sleeping on the floor.

Though Mr T's daughter had been supported to access respite care for her father, she advised that her father was unable to access such care due to lack of funds. The PA and an ADACAS advocate arranged to accompany Mr T to Centrelink to help him query his lack of funds. Centrelink provided the contact details of Mr T's VCAT-appointed financial manager, his daughter's son (ie Mr T's grandson). His grandson advised that his mother had experienced poor mental health and had not been in contact with him over the years.

Accordingly, he had not been made aware of his grandfather's whereabouts. He agreed that he required care and arranged for funds to be transferred into Mr T's nursing home account. Mr T has settled into his nursing home placement. His grandson continues to ensure his bills and any necessary funds are provided as necessary to support his welfare.

LC

L was referred to the PA in relation to a guardianship and financial management matter. Her sibling, who was her guardian, was very ill and unlikely to survive. The Public Advocate was asked to assist her in identifying a suitable person for appointment as her new guardian. In working with L to ascertain her views, it became clear she could make supported decisions and that she no longer required a guardian (although the ACT Public Trustee was appointed to support her in managing her finances).

Having recovered, L's sister was unhappy with this outcome and has consistently questioned L's decisions to spend money. L has enjoyed her ability to make decisions with the support of her advocate and has planned and executed a significant birthday celebration. She has grown more comfortable in raising concerns and challenging decisions with which she disagrees.