



Disabled  
People's  
Organisations  
Australia

Submission

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Australian Law Reform Commission

Discussion Paper: Protecting the Rights of Older Australians from  
Abuse

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## Contact for this Submission

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Therese Sands  
Director  
Disabled People's Organisations Australia  
Email: [director@dpoa.org.au](mailto:director@dpoa.org.au)  
Phone: (02) 9370 3100

Meredith Lea  
Policy Officer, Violence Prevention  
People with Disability Australia (PWDA)  
Email: [meredithl@pwd.org.au](mailto:meredithl@pwd.org.au)  
Phone: (02) 9370 3100

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## 1. Disabled People's Organisations Australia (DPO Australia)

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Disabled People's Organisations Australia (DPO Australia) is an alliance of four national DPOs in Australia. DPOs are organisations that are governed, led by and constituted of people with disability.

The key purpose of the DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes and strategic priorities and opportunities.

DPO Australia was founded by, and is made up of four national population specific and cross-disability DPOs that have been funded by the Australian Government to be the recognised coordinating point between Government/s and other stakeholders, for consultation and engagement with people with disability in Australia.

The four DPO Australia members are:

[Women With Disabilities Australia \(WWDA\)](#) is the national cross-disability DPO for women and girls with all types of disabilities in Australia. It operates as a transnational human rights organisation and is run by women with disabilities, for women with disabilities. WWDA's work is grounded in a human rights based framework which links gender and disability issues to a full range of civil, political, economic, social and cultural rights.

[First Peoples Disability Network Australia \(FPDNA\)](#) is the national cross-disability DPO representing Aboriginal and Torres Strait Islander people with disability and their families. FPDNA utilises a range of strategies in its representative role, including through the provision of high-level advice to governments, and educating the government and non-government sectors about how to meet the unmet needs of Aboriginal and Torres Strait Islander people with disability.

[People with Disability Australia \(PWDA\)](#) is the national cross disability rights and advocacy organisation run by and for people with disability. Working within a human rights framework, PWDA represents the interests of people with all kinds of disability. Its primary membership is made up of people with disability and organisations primarily constituted by people with disability. It also has a large associate membership of other individuals and organisations committed to the disability rights movement.

[National Ethnic Disability Alliance \(NEDA\)](#) is the national peak organisation representing the rights and interests of people from Culturally and Linguistically Diverse (CALD/NESB) people with disability, their families and carers throughout Australia. NEDA advocates at the federal level so that CALD/NESB people with disability can participate fully in all aspects of social, economic, political and cultural life.

## 2. Introduction

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DPO Australia welcomes the opportunity to contribute to the Australian Law Reform Commission's (ALRC) Inquiry into Protecting the Rights of Older Australians from Abuse.

This inquiry is significant given the recent national focus on violence prevention more broadly, but also with respect to the 2015 Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings.<sup>1</sup> We draw the ALRC's attention to the recommendations from this Inquiry, particularly the headline recommendations that we firmly support and call for a Royal Commission, the establishment of an independent, statutory, national protection mechanism, national workforce and workplace regulation and access to justice.<sup>2</sup>

DPO Australia's response to the discussion paper draws upon our member organisations' long history of advocacy around violence, abuse, neglect and exploitation of people with disability. Much of this experience is encapsulated in DPO Australia's submission to the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, and is attached to this submission.<sup>3</sup>

We also note that the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework has been adopted by the Council of Australian Governments (COAG) and publicly released.<sup>4</sup> While this Framework is only focused on people using NDIS supports and services, and does not comprehensively address all violence for all people with disability, it is critical that proposals and actions to protect older people from abuse should, at the very least be aligned and interconnected with this Framework.

The human rights of older people with disability must be recognised, promoted and upheld when discussing elder abuse and conceptualising responses to this issue. Intersectional discrimination has unique and specific impacts on people with disability, and in many cases, may lead to different or new forms of discrimination. Some older people will have experienced disability from a young age, others may have acquired disability as a result of ageing.<sup>5</sup> As such, many older people with disability will have experienced different forms of discrimination throughout their lives.

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1 The final report of this Senate Inquiry is available:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report)

2 Ibid. Chapter 10, p. 267

3 Frohmader, C. and Sands, T. 2015 *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*. Australian Cross Disability Alliance (ACDA); Sydney, Australia. Available: <http://pwd.org.au/documents/Submissions/ACDASubSenInquiryViolenceInstitutions.doc>

4 Department of Social Services, NDIS Quality and Safeguarding Framework, 9 December 2016, Commonwealth of Australia.

Available: [https://www.dss.gov.au/sites/default/files/documents/02\\_2017/ndis\\_quality\\_and\\_safeguarding\\_framework\\_final.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf)

5 PWDA, 2016. *ALRC Issues Paper: Protecting the Rights of Older Australians from Abuse Submission*, available:

[https://www.alrc.gov.au/sites/default/files/subs/167\\_people\\_with\\_disability\\_australia.docx](https://www.alrc.gov.au/sites/default/files/subs/167_people_with_disability_australia.docx)

While the Convention on the Rights of Persons with Disabilities (CRPD) is the main internationally recognised instrument outlining the application of human rights law to people with disability, it must nonetheless be read alongside the other human rights instruments to which Australia is a party.<sup>6</sup> Such a broad, human rights based approach to elder abuse would allow the unique experiences of all older people – including those with and without disability – to be understood, reflected and addressed throughout the development of violence prevention efforts, interventions or responses.

### 3. Recommendations

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DPO Australia makes a number of key recommendations that respond to the issues we raise in this submission. We recommend that:

1. the headline recommendations from the 2015 Report from the Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings are restated or incorporated into the ALRC recommendations for protecting the rights of older Australians from abuse.
2. the ALRC's proposed National Plan to address elder abuse outlines a clear and nationally consistent and internationally recognised definition and response to elder abuse. The National Plan must also be developed in collaboration with stakeholders, including older people with disability and their representative organisations, in order to ensure it is reflective of the intersectional experiences of women, including women with disability, and other diverse groups, such as Aboriginal and Torres Strait Islander people with disability, and people with disability from non-English speaking and culturally and linguistically diverse backgrounds.
3. the proposed National Plan incorporates robust governance measures, such as those provided in the National Framework for Protecting Australia's Children 2009-2020, whereby a tripartite system comprised of Commonwealth, State and Territory governments and non-government organisations advise on the operation of the Framework, and a designated body is responsible for implementation.
4. the proposed National Plan is closely aligned with recommendations to remove barriers to access to justice outlined in the 2015 Report from the Senate Inquiry into Violence Abuse and Neglect against People with Disability in Institutional and Residential Settings, including progressing the establishment of a system of witness intermediaries.
5. a comprehensive national, disaggregated data collection strategy and framework is developed, to capture the prevalence, extent, nature, causes and impact of all forms of violence against people with disability in all their diversity, including elder abuse, in the

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<sup>6</sup> Australia is a party to the seven key international human rights treaties: The *International Covenant on Civil and Political Rights* (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); the *Convention on the Rights of the Child* (CRC); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD); the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); and the *Convention on the Rights of Persons with Disabilities* (CRPD).

range of settings in which older people with disability reside or receive support services.<sup>7</sup>

6. a bystander responsibility 'no wrong door' approach be implemented nationally, to improve the identification of and response to elder abuse across Australia.<sup>8</sup>
7. the Federal Government implement the recommendations from the Australian Law Reform Commission's (ALRC) *Equality, Capacity and Disability* report, in particular the recommendation for the introduction of a supported decision making model that is consistent with the National Decision-Making Principles.<sup>9</sup>
8. a nationally consistent framework be developed to guide the processes and principles relevant to the full spectrum of ways to exercise legal agency, including the different ways a person may be provided with, or utilise support.<sup>10</sup>
9. an independent, statutory, national protection mechanism be established, with broad functions and powers to protect, investigate and enforce findings in relation to all forms of violence against people with disability, regardless of the setting in which it occurs and regardless of who perpetrates it.<sup>11</sup>
10. all proposals, regulatory mechanisms and legislative provisions to address elder abuse are strongly aligned and interconnected with the NDIS Quality and Safeguarding Framework, and are supported by government funded programs of independent individual and systemic advocacy and representation of people with disability.
11. a Public Advocate be established in all states and territories with the capacity to undertake systemic and own motion investigations.
12. Official Visitors across Australia be granted physical access to boarding houses and similar insecure residences in which older people with disability reside, and be granted access to information about boarding house payments to ensure social security payments such as the

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7 As outlined in Frohmader, C. and Sands, T. 2015, op cit. p15.

8 Ibid, p.69. For more information, see: PWDA's 2016 submission to the ALRC Elder Abuse Issues Paper

9 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws, Final Report*, (2014) Commonwealth of Australia, 2014.

10 As discussed in Bevan, N. 2016. *NSW Law Reform Commission Review of the Guardianship Act 1987*, People with Disability Australia, March 2016, p4. Available: [http://pwd.org.au/documents/Submissions/SUB\\_180316\\_Law\\_Reform\\_Commission\\_Guardianship\\_Act\\_1987.pdf](http://pwd.org.au/documents/Submissions/SUB_180316_Law_Reform_Commission_Guardianship_Act_1987.pdf); and Finch, K. 2016. *NSW Law Reform Commission Review of the Guardianship Act 1987, Question Paper 1: Preconditions for Alternative Decision Making Arrangements*, People with Disability Australia, October 2016, p10. For more information, see: NGO Coalition, 2015, *Australia's UPR 2015: Fact Sheet Legal Capacity*, available: <http://www.pwd.org.au/documents/Word/AusUPRFactSheetSupportedDecisionMaking.docx>; People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre). 2014 *Australian Law Reform Commission (ALRC): Equality, Capacity and Disability in Commonwealth Laws Discussion Paper*, Available: <http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc>

11 As recommended by Frohmader, C. and Sands, T. 2015, op cit. pp12-13; People with Disability Australia (PWDA), 2014. 'Consideration of the 4<sup>th</sup> and 5<sup>th</sup> Reports of Australia by the Committee to the Convention Against Torture', p9. Available: <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc>

Disability Support Pension are not being appropriated by boarding house proprietors.

13. Official Visitor programs, and other types of community oversight, be sufficiently resourced for a substantial number of visits, to facilitate rapport building with residents in institutional settings.
14. the use of restrictive practices in aged care be eliminated, as they constitute a violation of the right of older people with disability to be free from torture or cruel, inhuman or degrading treatment or punishment. In consultation with people with disability and their representative organisations, the Australian Government must conduct an audit of laws, policies and administrative arrangements that underpin forced treatment and restrictive practices.<sup>12</sup>
15. an evidence-based national plan is developed that outlines actions for the development of human rights based positive behaviour support strategies that acknowledge and respect the physical and mental integrity of the person; and for the elimination of environments and treatment approaches that have been shown to exacerbate behaviour that leads to the application of inappropriate behaviour modification and restraint practices.<sup>13</sup>
16. measures to eliminate restrictive practices should, at the very least align with the NDIS Quality and Safeguarding Framework, and include a regulatory role for a Senior Practitioner. In addition, laws or legislative provisions directed at the elimination of restrictive practices should be rigorous and include provisions that prohibit particular practices; that provide that all forms of positive behaviour support must be subject to explicit approval, monitoring and review arrangements, and in line with human rights; and that failure to comply is evidence of unlawful conduct for the purpose of civil and criminal proceedings.
17. the National Disability Strategy (NDS), National Disability Insurance Scheme (NDIS) and Aged Care reforms be progressed in tandem, to ensure that people with disability receive the full and equitable supports and protections to which they are entitled, regardless of their age.
18. the NDS, NDIS and Aged Care reforms prioritise and provide specific, targeted measures to advance the human rights of women with disability, Aboriginal and Torres Strait Islander people with disability, and people with disability from non-English speaking and culturally and linguistically diverse backgrounds.

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<sup>12</sup> As discussed in Bevan, N. 2016, op cit. and Frohmader, C. & Sands, T. 2015, op cit.

<sup>13</sup> As recommended by People with Disability Australia in PWDA, 2014, op cit. p25.

## 4. Overarching Comments

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Mirroring PWDA's submissions to the 2014 ALRC review of equal recognition before the law and legal capacity for people with disability,<sup>14</sup> DPO Australia believes that legislation regarding elder abuse must be disability neutral, yet disability responsive, with a firm focus on promoting, protecting and upholding the human rights of all older people. A critical underpinning factor to address elder abuse is the recognition of legal capacity for older people with disability and the provision of supports to enable legal agency.

### Legal Capacity<sup>15</sup>

The current legal capacity framework in Australia denies or limits the exercise of legal capacity for many people with disability, including many older people with disability.<sup>16</sup> This framework has significant, far-reaching implications and places older people, including older people with disability at increased risk of violence, exploitation and abuse.

Within this framework, the rights of older people with disability are routinely violated, as decisions are taken out of their hands and made on their behalf by third parties deemed to have the 'authority' to do so. These third parties may be non-legally appointed guardians, such as family members, or other actors legally appointed under the current substitute decision-making or guardianship frameworks.

Far too many older people with disability are unnecessarily placed under guardianship orders, and other measures that limit their self-determination and personal autonomy, rather than having their rights protected and promoted in the first instance through the provision of support that enables them to have control over their decisions and their own lives. The substitution of decision-making and legal capacity by others often provides heightened risk of financial, physical and emotional violence against older people with disability.<sup>17</sup>

The CRPD has required a significant shift in legislation and policy in recent years, and the ALRC report, *Equality, Capacity and Disability in Commonwealth Laws*<sup>18</sup> provides critical recommendations towards the significant reform needed to be undertaken in Australia to achieve

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14 People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre), 2014, op cit. p6.

15 The contents of this section have been informed by: People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre), 2014, op cit.

16 As discussed in: Australian Law Reform Commission (ALRC), 2014. *Equality, Capacity and Disability in Commonwealth Law: Final Report*, available: <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>; CRPD Civil Society Parallel Report Project Group, 2012, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p70. Available: <http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html>

17 Frohmader, C. and Sands, T. 2015, op cit. pp26, 45.

18 Australian Law Reform Commission (ALRC), 2014, *Equality, Capacity and Disability in Commonwealth Laws*, (ALRC Report 124, 2014). Available: [https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc\\_124\\_whole\\_pdf\\_file.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf)

a CPRD compliant legal capacity framework.

DPO Australia is therefore extremely concerned that whilst the recommendations in the ALRC Report are referenced throughout this discussion paper, including the role of supported decision-making, the proposals remain framed within the existing substitute decision-making framework that presumes a lack of legal capacity for older people with disability. Whilst the discussion paper states that the proposals are to be framed by the principles of dignity and autonomy, and protection and safeguarding, the appropriate shift for these principles to be framed as human rights principles and obligations has not been made.

For example, question 7-1 (b) refers to circumstances when a trustee ‘loses capacity’; point 1.114 discusses the circumstance that pre-emptive arrangements are put in place around ‘anticipat[ed] loss of legal capacity’ and circumstances where a guardian or advocate ‘make decisions on an individuals behalf’; point 1.127 discusses circumstances whereby an assessment of ability is required: and point 10.13 refers to Nominees having a duty to act in ‘the best interest of the principal’. This rhetoric remains within the current framework, whereby a person is perceived to lack capacity and is therefore in need of someone to make decisions on their behalf, and within a ‘best interests’ context.<sup>19</sup>

Confining the proposals of this discussion paper to the existing substitute decision-making framework, and neglecting to engage with the fundamental reforms that are required in relation to legal capacity ultimately undermines the effectiveness of these reforms and recommendations. The proposals outlined throughout the discussion paper must therefore be reconceptualised. In particular, the proposals and discussions provided in sections 5, *Enduring Powers of Attorney and Enduring Guardianship*; 6, *Guardianship and Financial Administration Orders*; and 9, *Wills*, must all be reconceptualised within a robust, human rights understanding of legal capacity.

A CRPD compliant legal capacity framework recognises that everyone has the right to equal recognition before the law. That is, all people have rights equally (legal capacity), have the capacity to act on those rights (legal agency), and to have those acts (and the decisions that lead to those acts) recognised and respected in law.<sup>20</sup>

Put simply, in policy and practice, people should not be assumed to ‘lack capacity’ to make their own decisions. There should be a presumption of legal capacity for all people as an inherent right, regardless of their cognitive capacity, and that some people may require support to exercise their legal agency and express their will and preferences.<sup>21</sup> This may include formal or informal decision-making support. The Committee on the Rights of Persons with Disabilities (CRPD Committee) provides comprehensive guidance on legal capacity, and the distinction between legal and

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19 The CRPD offers a shift from a ‘best interests’ approach to providing sufficient supports to enable a person to express their will and preference.

20 Finch, K. 2017. ‘NSW Law Reform Commission Review of the Guardianship Act 1987, Question Paper 2: Decision Making Models’, People with Disability Australia, February 2017

21 People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre), 2014, op cit. p3.

cognitive capacity, and we strongly suggest that this guidance is utilised when reconceptualising proposals to address elder abuse.<sup>22</sup>

Understanding that people with disability have legal capacity as an inherent human right enables the focus to be on the supports that are required for a person to exercise their legal capacity. It is the quality of the support, therefore, that is the measure of decision-making capacity, not the individual:

“the onus is on the support to facilitate the expression of a person’s will and preference and hence their legal agency. Any test of a person’s ability to exercise their legal agency is actually a test of whether the supports provided to the person are adequate and appropriate to the task in hand. If not they should be altered until will and preference can be expressed, or it becomes apparent that this is not possible. The CRPD does not provide for a circumstance whereby a person is tested on their ability or impairment type.”<sup>23</sup>

For instance, in the current substitute decision-making framework, a diagnosis of dementia may often automatically lead to an application for a substitute decision-maker or guardian, or the acquirement of a brain injury may automatically lead to an administration order. However, in a supported decision-making framework, ‘emphasis should remain on what supports can be put in place to ensure that the person is able to participate fully in all aspects of their lives without restrictions, including making their own decisions.’<sup>24</sup>

A nationally consistent framework must be developed to guide the processes and principles relevant to the full spectrum of ways to exercise legal agency, including the different ways a person may be provided with, or utilise support.<sup>25</sup> Such a national shift towards genuine recognition of legal capacity, and provision of support around its exercise, is particularly important in light of the National Disability Insurance Scheme (NDIS) and recent reforms to Aged Care, and the unprecedented choice, control and decision-making opportunities that these changes involve.

The presumption of capacity is written into NDIS legislation,<sup>26</sup> and this must be replicated in other areas, including aged care legislation. To fully enable this presumption, support to exercise legal capacity must be freely available. Many people for the first time are getting access to the quality

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22 Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), Article 12: Equal recognition before the law, 11th sess, UN Doc CRPD/C/GC/1, 19 May 2014. Available: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>

23 People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre), 2014, op cit., p5.

24 Finch, K., 2016, op cit. p15.

25 For more information about this proposed national framework for equality before the law, see: People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre), 2014, op cit.; Bevan, N. 2016, op cit. p4.; Finch, K., 2016, op cit. p10.; and NGO Coalition, 2015, op cit.

26 Despite this, there are inconsistencies within the NDIS legislation that retains a focus on ‘nominees’ which largely act as substitute decision-makers. The ALRC made 5 recommendations for reform of the NDIS Act with the aim of achieving more compliance with the CRPD.

supports they require to take control over decisions that affect their lives.<sup>27</sup> With adequate supports in place, including decision making supports, many older people who are currently under guardianship orders, could instead exercise their own legal agency.<sup>28</sup> This is a development that must be celebrated, encouraged and recognised as pivotal to the rights of older people and the prevention of elder abuse.

Substantial legislative and institutional reform of all arrangements relating to legal capacity, including guardianship and substitute decision-making mechanisms is required across Australia, to ensure conformity with human rights standards. By embedding a presumption of legal capacity across legislation, older people would not be subject to circumstances that limit their self-determination and autonomy, and therefore putting them at heightened risk of abuse and exploitation.

### **Restrictive Practices**

The use of restrictive practices and involuntary treatments, such as seclusion, solitary confinement, and physical, mechanical or chemical restraint, violate the right of people to be free from torture or cruel, inhuman or degrading treatment or punishment.<sup>29</sup> Such restrictive practices are commonly used in aged care and disability services, such as nursing homes, hospitals, mental health facilities, residential institutions, group homes, boarding houses and home care.<sup>30</sup>

Older people with disability are routinely subjected to unregulated and under-regulated restrictive practices which can cause physical pain, discomfort and trauma, deprivation of liberty, prevent freedom of movement, and alter thought and thought processes.<sup>31</sup> The use of restrictive practices is often justified through the operation of regimes that fail to recognise and engage with the legal capacity of people with disability and older people.<sup>32</sup> A new model for recognising legal capacity, as outlined above, would provide a mechanism through which the use of restrictive practices could be challenged.

Human rights instruments are not mutually exclusive. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the CRPD, alongside other mechanisms and documents, outline an obligation to ensure that people with disability are not subject to a range of practices that are seen to constitute torture, violence, abuse, cruel, inhuman or degrading treatment or punishment. Restrictive practices are understood to be included within

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27 Finch, K., 2016, op cit. p3.

28 Ibid, p3.

29 CRPD Civil Society Parallel Report Project Group 2012, op cit. p91.; French, P., Dardel, J. and Price-Kelly, S. 2009. *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment*, People with Disability Australia pp 72, 80.

30 Women with Disabilities Australia (WWDA), 2011. Submission to the UN, *Analytical Study on Violence against Women and Girls with Disabilities*, December 2011, p25.

31 People with Disability Australia (PWDA) and NSW Mental Health Coordinating Council, 2009. 'Submission to the NSW Legislative Council: 'Substitute Decision-Making: Time for Reform'', *Inquiry into Substitute Decision-Making for People Lacking Capacity*, p. 27. See also: Frohmader, C. and Sands, T. 2015, op cit. pp45-47.

32 For more information, see PWDA and NSW Mental Health Coordinating Council, 2009, op cit. p28.

this.<sup>33</sup>

The current National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector places emphasis on how and when restrictive practices may be used, rather than seeking to prevent their use.<sup>34</sup> In addition, efforts to prevent and eliminate restrictive practices should be premised on changing services, systems and environments as the starting point for changing individual behaviour.

Efforts to eliminate and/or reduce restrictive practices must be extended to all service sectors, as restrictive practices can be used in a range of mainstream services, such as aged care facilities and hospitals. The move to the NDIS is also likely to result in people with disability receiving fewer formal disability services, so legislation around the use of restrictive practices must encompass the variety of unregistered or mainstream services that people with disability may engage for accommodation or support.<sup>35</sup>

As a matter of urgency, Australia should establish CRPD and CAT complaint nationally consistent frameworks for the protection of people with disability, and older people, from behaviour modification and restrictive practices that cause harm and punishment.<sup>36</sup> This would involve developing an evidence-based national plan which outlines actions to uphold human rights. The University of New South Wales (UNSW) is currently running an Intellectual Disability Behaviour Support Program<sup>37</sup> which could help form the basis of this research, and in consultation with people with disability, move towards the development of best practice guidelines on supporting older people, people with disability and people with complex support needs. Developing an evidence-base around positive behaviour support would contribute to the elimination of restrictive practices, and would thus decrease the risk of violence experienced by people with disability and older people.

### **Independent Advocacy and Representation**

Although not the subject of the ALRC discussion paper, the role of independent advocacy and representative organisations of people with disability (or DPOs) should be recognised as critical to violence prevention and response for people with disability, including older people with disability. Regardless of the rigour of legislation, policy and mechanisms to prevent and respond to violence and abuse, independent disability and aged care advocacy and DPOs will be the preferred

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33 See, for instance: Mendez, J. E. Special Rapporteur, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 22<sup>nd</sup> session, UN Doc A/HRC/22/53 (1 February 2013); Nowak, M. Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63<sup>rd</sup> session, UN Doc A/63/175 (28 July 2008).

34 For more information, see: Frohmader, C. and Sands, T. 2015, op cit. pp46-47.; PWDA 2014, op cit. pp24-25.

35 NGO Coalition, 2015, *Australia's UPR 2015: Fact Sheet Restrictive Practices*, available: <http://www.pwd.org.au/documents/Word/AusUPRFactSheetRestrictivePractices.docx>; Women With Disabilities Australia (WWDA) and People with Disability Australia (PWDA), 2015. *Submission: Consultation Paper- Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework*, p8, available: [http://wwda.org.au/wp-content/uploads/2015/06/NDIS\\_QSF\\_PWDA\\_WWDA\\_Final.pdf](http://wwda.org.au/wp-content/uploads/2015/06/NDIS_QSF_PWDA_WWDA_Final.pdf)

36 PWDA, 2014, op cit. pp7-8.

37 Information available: <https://www.arts.unsw.edu.au/research/intellectual-disability-behaviour-support-program/>

safeguard and responder for many people with disability.

Many of the failures of the disability, aged care, health and mainstream support systems that result in significant human rights violations, have only been brought to the attention of specialist and mainstream complaints and oversight bodies by DPOs and independent advocates.<sup>38</sup> On a number of occasions inaction from these complaints and oversight bodies has required strong advocacy to pursue justice for people with disability.<sup>39</sup>

The NDIS Quality and Safeguarding Framework recognises formal individual and systemic advocacy as a critical component of the Framework, and that this advocacy should be funded outside of the NDIS to retain its independence.<sup>40</sup> The Framework notes the safeguarding principles of independent advocacy: “access to independent individual and systemic advocacy is an essential component of a quality and safeguarding system, assisting to identify and act on concerns, and protect people with disability from abuse, neglect and discrimination.”<sup>41</sup>

Legislative, policy and program mechanisms to address elder abuse must not be viewed as replacing the critical need for independent disability and aged care advocacy and representation of people with disability; and current funding for these functions must be retained and enhanced.

## 5. Responses to Specific Proposals and Questions

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### ***Proposal 2: National Plan***

The proposed National Plan should be developed to work alongside and in conjunction with existing frameworks and plans, including the National Disability Strategy (NDS), the National Disability Insurance Scheme (NDIS) and its Quality and Safeguarding Framework,<sup>42</sup> as well as the National Plan to Reduce Violence against Women and their Children 2010-2022.<sup>43</sup> The proposed National Plan must intersect and build on the approaches in these frameworks and, most critically, fill the gaps that exist in relation to elder abuse.

The Plan needs to include a nationally consistent, clear and inclusive definition of elder abuse, as the definition will set the scope for what is covered by elder abuse intervention and prevention strategies. This definition must be broad, and must be developed with people with disability and representative organisations of people with disability, as many definitions of violence do not extend to their unique and specific experiences of violence. For example, domestic and family

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38 Women With Disabilities Australia (WWDA) and People with Disability Australia (PWDA), 2015, op.cit. p14.

39 See case examples in Women With Disabilities Australia (WWDA) and People with Disability Australia (PWDA), 2015, op. cit. p14.

40 Department of Social Services, op. cit. p15 & 35.

41 Ibid. p35.

42 The NDIS Quality and Safeguarding Framework will only cover people who are receiving supports from NDIS registered services. This means that most older people over the age of 65 will not be covered by this Framework (unless they entered the Scheme prior to turning 65) as they are not eligible for the NDIS.

43 For further information about how national plans and frameworks need to intersect to address violence against women with disability, see: Frohmader, C. 2014. *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia (WWDA), pp1-2. Available: [https://www.pwd.org.au/documents/temp/FS\\_Violence\\_WWD's.pdf](https://www.pwd.org.au/documents/temp/FS_Violence_WWD's.pdf)

violence is understood in the context of ‘intimate partner violence’, excluding violence that may occur in service settings, and consequently this limits recourse for responses that are available to women with disability experiencing violence.<sup>44</sup>

In addition, consistent definitions around the age range of the group referred to as ‘older people’ should be established and implemented across jurisdictions and within government and non-government agencies. This definition must reflect commonly held understandings about ‘older people’ from different backgrounds or Aboriginal and Torres Strait Islander communities.<sup>45</sup> Further work must be performed to ensure that elder abuse is understood within different cultural contexts, in order to capture the intersectional experiences of different population groups. In addition, consistent definitions would assist in the collection of disaggregated data around elder abuse, as discussed below in relation to proposal 2-2.

The definition of elder abuse within the National Plan must also make reference to the unique experiences of violence caused by intersectional discrimination, such as the types of discrimination routinely experienced by women with disability, Aboriginal and Torres Strait Islander people with disability, and people with disability from non-English speaking and culturally and linguistically diverse backgrounds.<sup>46</sup> In developing this definition, questions must also be asked about why older people are considered to experience ‘elder abuse’, when the perpetration of similar violence against other people in the community is seen as precisely that: violence. In the same way, violence against people with disability is often ‘detoxified’ or downplayed as ‘abuse’, ‘neglect’ or ‘service incidents’ rather than crimes.<sup>47</sup> It is important to note that within a criminal context, terms such as ‘abuse’ are often used in relation to children, thus exacerbating the tendency to infantilise people with disability and older people and deny them access to justice and appropriate service responses.<sup>48</sup>

The proposed National Plan must be developed in collaboration with stakeholders, including older people with disability and their representative organisations, in order to ensure it is thoroughly inclusive and responsive to the diversity of older people. It must also include a national public awareness campaign and the implementation of a bystander responsibility ‘no wrong door’ approach, to improve the identification of and response to elder abuse across Australia.<sup>49</sup> DPO Australia believes these elements would complement and help achieve the key goals of the National Plan as outlined in the discussion paper.<sup>50</sup>

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44 Ibid.

45 PWDA, 2016, op cit. p16.

46 For more information, see: Frohmader, C. and Sands, T. 2015, op cit. pp16-18.

47 For more information, see: Murray, S. and Powell, A. 2008. *Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response* (Issues Paper No 9, Australian Centre for the Study of Sexual Assault, 2008) 9–10 [http://www.aifs.gov.au/acssa/pubs/issue/acssa\\_issues9.pdf](http://www.aifs.gov.au/acssa/pubs/issue/acssa_issues9.pdf), as referenced in PWDA, 2014, op cit. p48.

48 Frohmader, C. and Sands, T. 2015, op cit. p19.

49 For more information about what a no wrong door approach would entail, see: Frohmader, C. and Sands, T. 2015, op cit. p69.; PWDA, 2016, op cit. pp30, 38, 42.

50 As per pages 49-50 of the discussion paper.

The proposed National Plan must also have robust governance measures and strategies for implementation. DPO Australia therefore suggests that the proposed National Plan emulate the governance and implementation measures of the National Framework for Protecting Australia's Children 2009-2020. This Framework involves a tripartite system of Commonwealth, State and Territory governments and non-government organisations working together to provide insight on the progress and operation of the Framework.<sup>51</sup> In addition, a designated body has responsibility for the implementation of the Framework, reporting directly to the Council of Australian Governments (COAG). Such an integrated and responsive approach is required to address elder abuse.

A national prevalence study into elder abuse, as outlined in proposal 2-2, is welcomed by DPO Australia. There is a serious lack of disaggregated data and underreporting of elder abuse, as well as violence against people with disability more broadly. Updated and reliable quantitative, disaggregated data around the violence, abuse and neglect of older people and people with disability is critical and urgently required.

It is vital that prevalence studies regarding elder abuse are performed in the wide range of settings and places in which older people with disability reside or receive services, such as aged care facilities, respite services, group homes, mental health facilities and boarding houses. Currently, these settings and the people receiving services within them are often systematically excluded from data collection due to exclusionary survey methodologies and a failure to disaggregate data.<sup>52</sup> Data should therefore be disaggregated by a number of categories, including disability, gender, ethnicity, race and age, to ensure thorough consideration of intersectional discrimination and violence. Recent research that shows that 75 percent of reported cases of elder abuse involve older people with cognitive impairment<sup>53</sup> would likely indicate a higher prevalence if such inclusionary and accessible data collection methodologies were utilised.

In addition, a national prevalence study into elder abuse must be aware of the barriers to reporting that are often experienced by older people with disability. This is due to a range of factors, including the closed nature of institutional settings, fragmentation between sectors, barriers in the justice system, a lack of external oversight, cultures of ableism, sexism, racism and ageism, and conflicting understandings of disability and violence against people with disability and older people.<sup>54</sup>

### ***Proposal 3: Powers of Investigation***

DPO Australia acknowledges that there is an investigation gap that limits the identification of, and response to violence against older people with disability. However, we do not recommend the provision of investigatory powers within a guardianship context. Granting investigation powers to Public Guardians further embeds the substitute decision-making paradigm and the protectionism

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<sup>51</sup> More information about the governance arrangements can be found on pp35-36 of the Framework, available: [https://www.dss.gov.au/sites/default/files/documents/child\\_protection\\_framework.pdf](https://www.dss.gov.au/sites/default/files/documents/child_protection_framework.pdf)

<sup>52</sup> For more information, see: Cadwallader, J. 2015. *Letter to Senate Inquiry into Violence, Abuse and Neglect against People with Disability from more than 30 leading Australian academics regarding violence data*, available: [http://pwd.org.au/documents/Submissions/LT\\_Senate\\_Inquiry\\_into\\_Violence\\_Abuse\\_and\\_Neglect\\_of\\_People\\_with\\_Disability\\_Re\\_data.doc](http://pwd.org.au/documents/Submissions/LT_Senate_Inquiry_into_Violence_Abuse_and_Neglect_of_People_with_Disability_Re_data.doc)

<sup>53</sup> French, P., Dardel, J., and Price-Kelly, S. 2010, op cit.

<sup>54</sup> Frohmader, C. and Sands, T. 2015, op cit.

and violation of human rights that this entails. It may also lead to unnecessary guardianship for individuals who are currently not under guardianship or administrative arrangements, as a strategy for responding to violence.

In line with the headline recommendations from the 2015 Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, we support the establishment of an independent, statutory, national protection mechanism.<sup>55</sup> This mechanism should have broad functions and powers to protect, investigate and enforce findings in relation to all forms of violence against people with disability, including older people with disability, regardless of the setting in which it occurs and regardless of who perpetrates it.<sup>56</sup> This mechanism would have a 'no wrong door' complaint handling function, the ability to initiate 'own motion' complaints and the power to make and enforce recommendations to relevant respondents.<sup>57</sup>

Complementing a national mechanism, and to address specific State and Territory jurisdictional responsibilities, a Public Advocate role should be established in all States and Territories (where they don't already exist). These Public Advocates must have a strong human rights culture, and be granted the capacity to undertake systemic and own motion investigations as outlined in proposal 3-1. Importantly, the principles of supported decision-making must be implemented within and throughout this systemic approach. This is necessary to ensure that the powers of investigation do not impede the autonomy, dignity and rights of older people and people with disability.

DPO Australia supports the will, preferences and rights based guidelines provided in proposal 3-2, including the right for older people experiencing violence to refuse assistance or support, and that they have the right to make their own decisions about their care. This should form the basis of any investigations around elder abuse and violence against people with disability, as individuals are entitled to make their own decisions and have their legal capacity upheld. Proposal 3-2 would be strengthened by the removal of guardianship arrangements in this area, and the implementation of recommendations from the ALRC *Equality, Capacity and Disability* report, as this would overcome the substitute decision-making and 'best interests' context inherent in the guardianship framework.

With respect to proposal 3-3, and the power to require that a person furnish information, produce documents or participate in an interview in relation to investigations into abuse and neglect, it is important that any such investigations do not replace a criminal justice system response where this is identified as an avenue the older person wishes to pursue. Information sharing protocols may thus need to be established between the national protection mechanism, the Public Advocate and the police, to ensure the investigations do not undermine any evidence collection or investigations initiated by the police.

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55 Senate Community Affairs References Committee, *'Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability'*, November 2015, Commonwealth of Australia., p. 268. Available: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report)

56 Frohmader, C. and Sands, T. 2015, op. cit. pp12-13.; PWDA, 2014, op cit. p9.

57 Frohmader, C. and Sands, T. 2015, op cit. pp12-13.

Proposal 3-4 (a) must be expanded to include explicit mention of referrals to psychological support. It is vital that proposal 3-4 is implemented with a firm grasp of proposal 3-2, to ensure that no forced interventions or plans are made for, and without consultation with, the older person, and to ensure the right of provision of support for that person to make that decision themselves. Additionally, proposal 3-5 is vital to ensuring the protection of whistleblowers, and this would be strengthened by the inclusion of a bystander responsibility approach within the proposed National Plan.

In terms of what should be investigated by the Public Advocate, the discussion paper makes reference to cases in which older people are unable to protect themselves due to: 'care and support needs arising from impaired decision-making ability, a physical disability, or due to physical restraint'.<sup>58</sup> DPO Australia suggests that the narrow term, 'physical restraint' is changed to the broader term, 'restrictive practices' that would include the variety of service practices that constitute restrictive practices, such as medical and chemical restraint, mechanical restraint and seclusion. In addition, using the term 'physical disability' is problematic in this context, as the ability to protect oneself may not relate to a specific impairment, such as physical disability, but rather the situations and environments that make people with disability vulnerable to violence.

DPO Australia recommends additional consultation with people with disability and their representative organisations with respect to whether this proposal should be extended beyond older people to all adults with care and support needs. In particular, the merits of extending the powers of Public Advocates should be considered in light of the independent national prevention mechanism outlined above.

#### ***Proposal 4: Criminal Justice Responses***<sup>59</sup>

The final Report from the 2015 Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings noted considerable concern regarding the significant barriers to justice for people with disability, and one of the Senate Committee's headline recommendations related to the removal of these barriers.<sup>60</sup>

DPO Australia broadly supports the three recommendations (summarised below) under this headline recommendation, noting that they reflect a number of recommendations made by DPO Australia to the 2015 Senate Inquiry. We strongly suggest that the ALRC fully consider these recommendations as critical to ensuring that the proposed National Plan is closely aligned with the justice system and justice responses to elder abuse:<sup>61</sup>

- that the Australian Government work with State and Territory governments to implement recommendations from the reports: ALRC's *Equality, Capacity and Disability in*

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58 As outlined on page 68 of the discussion paper.

59 The discussion regarding witness intermediaries in this section has been extracted from PWDA, 2016, op cit. p18.

60 Senate Community Affairs References Committee, op. cit., Chapter 10. P. 268.

61 For more information about the range of barriers to justice experienced by people with disability, see: Australian Human Rights Commission (AHRC) 2014. *Equal Before the Law*, available: <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>

*Commonwealth Laws: the Australian Human Rights Commission's Equal Before the Law; and Productivity Commission's Access to Justice Arrangements.*<sup>62</sup>

- that each State and Territory implement a Disability Justice Plan.<sup>63</sup>
- that there is further investigation of access to justice issues, such as on the SA model of evidence provision; supported decision-making; the UK system of registered intermediaries; the needs of specific groups such as women, culturally and linguistically diverse communities and Aboriginal and Torres Strait Islander peoples.<sup>64</sup>

One such element of best practice legal response to elder abuse would be the use of witness intermediaries, as noted by the Senate Committee in its access to justice recommendations (third dot point above). Witness intermediaries are currently being used across the UK to assist children and people with disability to participate in criminal processes. They are usually highly skilled and experienced professionals in the area of communication, and are typically available from the beginning of the investigative process. Ideally, the intermediary would be called in before a first interview to conduct an assessment of any communication needs, including the person's differentiation between truth and untruth.

The intermediary then provides advice to the police, and helps them plan the interview, from the set-up of the room, to rapport building and how to pose questions. The intermediary is then present for the police interview to assist if communication breaks down. Prior to the case reaching court, the intermediary produces an extensive report outlining their findings, assessment and any recommendations. The judge, on the basis of that report, develops a sense of what is required in the courtroom to enable a witness to give their best possible evidence. In most circumstances, the intermediary is present at the ground rules hearing, in which the judge decides which of the intermediary's recommendations are to be followed. Counsel will be given direction in regard to their questioning. Intermediaries are also allowed, during the trial, to alert the judge to potential communication breakdowns if they feel a certain question is beyond the comprehension of the witness.<sup>65</sup>

The use of witness intermediaries in the UK has been highly effective in facilitating access for children and people with disability in the justice system and processes. DPO Australia believes that the introduction of witness intermediaries in an Australian context would significantly improve the support that is available for people with disability throughout court processes, and would ultimately improve justice outcomes.

### ***Proposal 7: Banks and superannuation***

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62 Senate Community Affairs References Committee, op. cit., recommendation 6, 10.32, p. 272.

63 Ibid. recommendation 7, 10.33, p. 273

64 Ibid. recommendation 8, 10.34, p. 273

65 For more information, see evidence provided to the Royal Commission into Institutional Responses to Child Sexual Abuse on 23<sup>rd</sup> and 24<sup>th</sup> March 2016, Case Study 38. Transcript (days 177 and 179) available at: <http://www.childabuseroyalcommission.gov.au/case-study/1c1a2449-93cd-4268-86da-7dd7e3272797/case-study-38,-march-2016,-sydney>

Banks are well placed to detect financial abuse and to provide information to their customers about available financial abuse preventative measures. As outlined in proposal 7-1, banks and banking staff should be trained around elder abuse and how to report suspected elder abuse. In addition to this, staff of financial institutions must also be trained in supported decision-making to ensure they are aware of the supports to which their clients may be entitled, as well as the limitations of supporters in this area.

DPO Australia is concerned that co-decision makers, nominees or third party authorisation agreements may currently be put in place for the benefit of third parties, such as financial institutions, who require additional authorisation from someone who is deemed to have more 'capacity'. They perpetuate the processes to deny legal capacity. If a person can be adequately supported to co-sign a document, co-make a decision, or appoint someone as their nominee, these individuals can surely be supported to make the decision or sign for themselves.

Ideally, older people with disability would be supported to decide whether or not third parties can be authorised to access their bank accounts. As outlined in proposal 7-2, this would involve supporting the individual and ensuring they are aware of the authority and access they are permitting the third party. The individual, and the third party, must be fully aware of the responsibilities this entails, and it should be made clear that these arrangements may be revoked at any time.

### ***Proposal 8: Family Agreements***

With respect to proposal 8-1, DPO Australia agrees that tribunals offer a low cost and less formal way of addressing family agreement disputes. However, older people and people with disability must not be denied access to criminal justice responses, civil litigation or other legal actions if this is the avenue they choose to pursue. Older people with disability have right to access whichever justice system responses they believe to be most appropriate for their needs, and this proposed approach must not undermine the provision of these responses.

In terms of question 8-1, it is difficult to assess how 'family' should be defined in these matters, as some older people and people with disability may regard their carers as their friends, or part of their family. Many people with disability may be disconnected from family so is important that definitions of 'family' thus take into consideration the perspective of the individual and who they define as 'family' that may include relationships of care and trust. Understandings of 'family' must be flexible enough to consider a wide range of non-traditional family and family-type arrangements, including cultural understandings of extended family and kinship arrangements, and how these may differ between various groups and communities.

Broad definitions of 'family' are also necessary due to the differences across jurisdictions in regards to which relationships are included in domestic and family violence legislation.<sup>66</sup> In NSW, for instance, formal and informal carers are included as potential perpetrators of domestic and family violence. In Victoria, on the other hand, there is an acknowledgement that a perpetrator of domestic and family violence may be a formal or informal carer, but only where the relationship has changed to be more significant or familial.

### ***Proposal 10: Social Security***

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<sup>66</sup> Frohmader, C. 2014, op cit.

DPO Australia broadly agrees with the proposals in this section, especially that the wider elder abuse strategy should include the training of Centrelink staff to identify and respond to elder abuse. We propose that this education of Centrelink staff extend to the provision of disability awareness training, and training on supported decision-making.

With regard to the payment nominee scheme, and the roles of 'payment nominees' and 'correspondence nominees', this must be considered in the context of the discussion above under legal capacity. While the scheme outlines that the 'principal', (the person receiving social security payments) can appoint these different types of nominees, it is problematic that within this scheme, the nominees 'have a duty to act in the best interests' in the principal.<sup>67</sup> Additionally, online information about payment nominees focuses on the principal's 'capability' to consent to the appointment of a nominee, and where they are found to be 'not capable', a delegate may appoint a nominee on their behalf.<sup>68</sup>

This use of nominee provisions within Commonwealth legislation demonstrates the extent to which the concept of full legal capacity for people with disability remains unrealised by law and policy makers. These nominee provisions are already being duplicated in other Commonwealth legislation, such as in the *NDIS Act (2013)*,<sup>69</sup> but they limit participation of people with disability in decision-making about their rights, specifically people with cognitive impairment.<sup>70</sup>

DPO Australia agrees with the recommendation from the ALRC inquiry into legal capacity that focused on amendments to social security legislation that would include provisions to make it consistent with the National Decision Making Principles.<sup>71</sup> In addition, we agree with the recommendations of the ALRC that the NDIS nominee provisions be replaced with a model of supported decision-making.<sup>72</sup> Finally, 'provisions in the NDIS Act providing for the NDIA CEO to appoint substitute decision makers outside State and Territory guardianship processes should be repealed.'<sup>73</sup>

Individuals must be provided with the necessary and appropriate supports for them to manage their own finances, make their own financial decisions and manage their own funding (such as an NDIS funding package), if this is what they choose to do. The roles and responsibilities of supporters must therefore be clearly defined and communicated, both to the supporter and the individual receiving support. Among other things, this would help ensure that all people involved

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67 Australian Government, 2017. *8.5.3 Responsibilities of Nominee*, Guide to Social Security Law, available: <http://guides.dss.gov.au/guide-social-security-law/8/5/3>

68 Australian Government, 2017. *8.5.1 Payment Nominee*, Guide to Social Security Law, available: <http://guides.dss.gov.au/guide-social-security-law/8/5/1>

69 Available: <https://www.legislation.gov.au/Details/C2013A00020>

70 PWDA, 2014, op cit. pp16-17.

71 Australian Law Reform Commission, 2014, op cit. recommendation 6-1, p16.

72 As outlined in Chapter 5 of *Equality, Capacity and Disability in Commonwealth Laws*. For more information see: WWDA and PWDA, 2015, op cit. pp6-7.

73 Bevan, N, 2016, op cit. p5.; see also: PWDA, 2014, op cit. pp16-17.

in this process are aware and committed to the rights, will and preferences of the person receiving social security payments.

Finally, changes must be made to residency requirements and waiting periods for social security payments to ensure that all residents of Australia have access to adequate income support.<sup>74</sup> This is vital, as access to the NDIS is restricted to citizens and those under 65 years of age, with permanent residents not receiving any support through the scheme. The combination of these elements may mean that migrants with disability, and older migrants in particular, are disproportionately dependent upon informal supports, including those provided by family.<sup>75</sup> This can contribute to a higher risk of experiencing violence, including financial exploitation.

### **Proposal 11: Aged care**

#### *Equity of support for older people*

As people with disability over the age of 65 are not eligible for the NDIS, unless they entered into the NDIS prior to this age, it is vital that the aged care system is equipped to provide appropriate and necessary specialist disability supports. This is key to ensuring that older people with disability are guaranteed equity of support in the aged care system, and are protected from potentially abusive ad hoc or informal disability support arrangements.<sup>76</sup>

The aged care system is not specifically designed for older people with disability and does not have substantial experience in providing specialist disability supports.<sup>77</sup> For those people aged 65 and over and Indigenous people aged 50 and over, who are currently in receipt of specialist disability services, there is a Continuity of Support<sup>78</sup> program to maintain these specialist disability supports given older people with disability are not eligible for the NDIS. However:

“concerns remain that Continuity of Support will not assist people with disability in the aged care system whose disability support needs will increase over time. In addition, many older people with disability who acquire disability or who need specialist disability support and are not currently receiving this support, will be reliant on an aged care system not designed for them.”<sup>79</sup>

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74 For more information, see National Ethnic Disability Alliance (NEDA) 2009, *Migrants with Disability and the 10 year Qualifying Residence Period for the Disability Support Pension*, available: <http://www.neda.org.au/index.php/latest/27-migrants-with-disability-and-social-security>. See also: National Ethnic Disability Alliance (NEDA) and the National Disability and Carer's Alliance (NDCA), 2013, *Parliamentary Roundtable Discussion: Recommendations and Outcomes*, available: [http://www.neda.org.au/images/NEDA\\_Parliamentary\\_Recommendation\\_Outcomes.pdf](http://www.neda.org.au/images/NEDA_Parliamentary_Recommendation_Outcomes.pdf)

75 Ibid, see also: Federation of Ethnic Communities' Councils of Australia (FECCA) and National Ethnic Disability Alliance (NEDA) 2015, *Submission to the Australian Human Rights Commission's 'Willing to Work' Inquiry: Employment Discrimination Against Older Australians and Australians with Disability*, p13, available: [http://www.neda.org.au/images/reports/FECCA\\_NEDA\\_Submission\\_Willing\\_to\\_Work.pdf](http://www.neda.org.au/images/reports/FECCA_NEDA_Submission_Willing_to_Work.pdf)

76 DPO Australia (as Australian Cross Disability Alliance), 2016. 'Election Policy Platform: Building a Disability Inclusive Australia', p7 available: <http://dpoa.org.au/wp-content/uploads/2016/06/ACDA-Election-Policy-Platform.pdf>

77 Ibid, p7.

78 For more information, see the NDIS Continuity of Support information on the NDIS website: <https://www.ndis.gov.au/people-disability/continuity-support>

79 DPO Australia, 2016, op. cit., p7.

It is critical that a national Disability and Ageing Action Plan is developed, to align and integrate the provision of specialist disability support across service systems, including ageing, NDIS and health.<sup>80</sup> Such a plan could be incorporated into the proposed National Plan, or could be a standalone service system operational plan. It must ensure equity in the provision of specialist disability supports to older people with disability, regardless of NDIS eligibility. Older Aboriginal and Torres Strait Islander people with disability must also be assured of equitable access to the NDIS and aged care options, including community-led solutions that are responsive to the unique experiences of this cohort.

### *Aged Care Reforms*

DPO Australia recognises that the proposals in section 11 reflect the broad desire to provide protections to increase the safety of individuals receiving aged care. However, these protections and safeguarding responses must be appropriate and proportionate, and must not interfere with the dignity and autonomy of older people and people with disability.

DPO Australia is concerned that the proposals for aged care propose a similar system to that which is currently failing people with disability in the disability service system.<sup>81</sup> As such, any changes to the *Aged Care Act 1997* must not “maintain a number of failures of the current disability support system and existing protection mechanisms that are gender neutral and unable to address gendered disability violence”.<sup>82</sup> This is particularly important given the additional ageism and discrimination older women with disability may face, and the higher rates of violence experienced by women with disability.<sup>83</sup>

Both the aged care system and disability service system must therefore be focused on upholding and respecting the human rights of all recipients of services and care.<sup>84</sup> Any new safeguarding efforts, including an aged care reportable incidents scheme, must also be based upon this strong commitment to the human rights of older people and people with disability.<sup>85</sup>

### *Reportable Incidents*

With respect to proposals 11-1 and 11-2, it is worth noting that the NDIS Quality and Safeguarding Framework<sup>86</sup> also proposes a reportable incident scheme for people using NDIS registered

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80 Ibid. See also: DPO Australia, 2017. *Submission to the Department of the Treasury Priorities for the 2017/2018 Federal Budget*, DPO Australia.

81 WWDA and PWDA, 2015, op cit. p13.

82 Ibid, p4.

83 Frohmader, C. and Sands, T. 2015, op cit.

84 WWDA and PWDA, 2015, op cit.

85 Ibid, pp2-3.

86 Available:

[https://www.dss.gov.au/sites/default/files/documents/02\\_2017/ndis\\_quality\\_and\\_safeguarding\\_framework\\_final.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf)

services. An aged care reportable incidents scheme should be connected or integrated with this scheme to ensure consistency and equity of protection between the different service systems. Any form of reportable incidents arrangements must ensure that people with disability of all ages, including older people and children, and their experiences of violence, are fully included and reflect commensurate expectations of conduct. This involves including disability-specific settings and ensuring that the definition of reportable conduct includes all forms of violence against people with disability. There must be crossover and collaboration between the disability and aged care system, particularly in respect to potential areas of overlapping responsibilities.

The proposed reportable incident scheme must not exclude people with disability on the basis of behaviour management, or due to perceived characteristics of the individuals.<sup>87</sup> The NSW Reportable Conduct Scheme, for instance, outlines that conduct may be deemed reasonable, and thus excluded from the scheme due to 'other characteristics' of individuals. Unfortunately, disability is often seen to be included within this category.<sup>88</sup> As such, institutional settings in which older people reside or receive support must have a thorough understanding of elder abuse, violence against people with disability and a robust understanding of disability more generally, to ensure that they do not deem violence or restrictive practices against this group as reasonable.

Within the disability services area, there is a widespread tendency to downplay and reframe violence as 'abuse' or 'service incidents'.<sup>89</sup> Such language "dilutes the reality of violence and harmful practices and often leads to different, and often highly inappropriate, responses for people with disability"<sup>90</sup> and older people. For instance, framing violence as a 'service incident' often results in people with disability being denied the legal protections and justice responses that are extended to other people. The aged care system must not detoxify violence against older people, must not use a reportable incident/assault scheme as an alternate pathway for older people and must ensure that any criminal conduct is reported to the police.

In order to oversee the provider's investigation of and response to the reportable incidents, the Aged Care Complaints Commissioner must be provided adequate resources and training on best practice responses to people with disability, including best practice responses to assaults (used here to refer to a range of physical and sexual offences, assaults and misconduct, ill-treatment, neglect, or unexplained injuries).

Reported incidents that are criminal matters or suspected criminal matters must be immediately handed over to police so that the administrative response does not undermine the criminal justice response by, for example, sully evidence. The autonomy and dignity of the person who is the victim of any crime should be upheld throughout any criminal justice response. As such, criminal conduct in aged care settings must be reported, but in line with proposal 3-2, older people and people with disability have the right to refuse supports or protections offered to them.

Violence against people with disability, including older people with disability, is so prevalent and pervasive that the development of various reportable incident schemes, covering a range of

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87 DPO Australia (as Australian Cross Disability Alliance), 2016. *Response to ACT Reportable Conduct Consultation Paper*.

88 Ibid.

89 Frohmader, C. and Sands, T. 2015, op cit.; PWDA, 2014, op cit. p48.

90 WWDA and PWDA, 2015, op cit. p7.

settings and adhering to different legislation, frameworks and approaches, has proven insufficient.<sup>91</sup> It is extremely important that, at the very least, any aged care reportable incident scheme and the role of the Aged Care Complaints Commissioner is integrated or interconnected to the NDIS Quality and Safeguards Framework and the work of the proposed NDIS complaints commissioner.

However, our strong recommendation, as outlined in this submission under *Proposal 3: Powers of Investigation*, is for the establishment of an independent, statutory, national protection mechanism:

“Developing an overarching national protection framework offers a significant opportunity to ‘fix’ current failings and ensure comprehensive and rigorous protection for people with disability, including gender and age specific measures.”<sup>92</sup>

This mechanism would have broad functions and powers to protect, investigate and enforce findings in relation to all forms of violence against people with disability, regardless of the settings in which the violence occurs, and regardless of who perpetrates it.<sup>93</sup>

#### *Restrictive Practices*<sup>94</sup>

The environments and treatment approaches that have been shown to exacerbate behaviours that lead to the application of inappropriate behaviour modification and restraint must be eliminated, as outlined in section 4. There is a concern that efforts to regulate or provide instances in which restrictive practices may be used instead provide tacit approval of these practices, resulting in services continuing to use them.<sup>95</sup>

Research indicates that 44-80% of people with disability who show ‘behaviours of concern’ are administered a form of chemical restraint, and between 50% and 60% are subjected to regular physical restraint.<sup>96</sup> Individuals with multiple impairments and complex support needs are reported to be subject to even higher levels of restraint and seclusion.<sup>97</sup> Research has shown that ‘behaviours of concern’ or ‘challenging behaviours’ which are often dealt with by implementing restrictive practices, are in fact ‘adaptive behaviours to maladaptive environments, and ‘legitimate responses to difficult environments and situations’.<sup>98</sup>

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91 As mentioned on page 206 of the discussion paper, tying any proposed monitoring or complaints scheme to one form of legislation, such as the *Aged Care Act*, would result in gaps in protection as it would not apply equally to all older people.

92 WWDA and PWDA, 2015, op cit. p14.

93 For a full discussion of proposed functions for this independent national prevention mechanism and additional information, see: Frohmader, C. and Sands, T. 2015 op cit; PWDA, 2014, op cit. p50.

94 Much of the information in this section is drawn from CRPD Civil Society Parallel Report Project Group 2012, op cit.; and PWDA, 2014, op cit. pp17-20.

95 Frohmader, C. and Sands, T. 2015, op cit. pp46-47.; PWDA, 2014, op cit. pp24-25.

96 Webber, L., Donley, M. and Tzanakis, H. 2008. *Chemical Restraint: What Every Disability Support Worker Needs to Know*. Article, Office of the Senior Practitioner.

97 Ibid.

The continued use of restrictive practices means that the underlying or environmental reasons for an individual's behaviour or violent outbursts are not addressed, which potentially leads to further violence or 'challenging behaviours'. Attention must instead turn to growing research regarding positive behaviour supports,<sup>99</sup> and the establishment of an evidence-based national plan that outlines actions for the development of human rights based positive behaviour support strategies that acknowledge and respect the physical and mental integrity of the person.<sup>100</sup>

In this context, we strongly recommend that the ALRC consider additional and complementary proposals to 11-7. At the very least, additional measures should align with the NDIS Quality and Safeguarding Framework, which has a regulatory function of a Senior Practitioner. The role of the Senior Practitioner is to:

“oversee approved behaviour support practitioners and providers; provide best practice advice; receive, review and report on provider reports on use of restrictive practices; and follow-up on serious incidents that suggest unmet behaviour support needs”.<sup>101</sup>

The Senior Practitioner is one of four interconnected regulatory components of the Framework – the NDIS complaints commissioner, the NDIS registrar, the Senior Practitioner and the NDIS risk-based worker screening. This interconnected regulatory framework provides a more rigorous approach to preventing and responding to violence, abuse and neglect than legislative regulation on its own.

In addition, laws or legislative provisions directed at the elimination of restrictive practices should be absolutely rigorous given these practices often constitute torture or ill-treatment. Legislation should provide that certain restrictive practices are entirely prohibited, such as practices that are experimental; cause pain, harm or discomfort; are cruel, inhuman, degrading, or humiliating or that amount to torture; result in emotional or psychological deprivation or other harm; physical restraint; and seclusion.<sup>102</sup> The legislation should also provide that all forms of positive behaviour support must be subject to explicit approval, monitoring and review arrangements, and that they must comply with human rights related standards and be for the purpose of fulfilling a human rights related goal.<sup>103</sup> The legislation should also contain provisions that ensure that failure to comply with the legislation or an approved behaviour plan is designated as “prima facie proof that the practice is unlawful for the purpose of civil and criminal proceedings.”<sup>104</sup>

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98 Ramcharan, P., Nankervis, K., Strong, M. and Robertson, A. 2009. 'Experiences of Restrictive Practices: A view from people with disabilities and family carers: A final research report to the Office of the Senior Practitioner' Office of the Senior Practitioner, Victoria, pp1-3.

99 Such as the research being performed by UNSW, available: <https://www.arts.unsw.edu.au/research/intellectual-disability-behaviour-support-program/>

100 For more information, see: Bevan, N. 2016, op cit.; Frohmader, C. and Sands, T. 2015, op cit.

101 Department of Social Services, 'NDIS Quality and Safeguarding Framework', 9 December 2016, Commonwealth of Australia, p. 17. Available: [https://www.dss.gov.au/sites/default/files/documents/02\\_2017/ndis\\_quality\\_and\\_safeguarding\\_framework\\_final.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf)

102 French, P., Dardel, J. and Price-Kelly, S. 2009, op cit. p124.

103 Ibid.

104 Ibid.

### *Employment Screening for Aged Care*

National employment databases and employment clearance requirements must be robust, and must involve a level of coordination across the aged care, child care and disability service sectors. This is required as often, perpetrators will move between these sectors as they believe their inappropriate or abusive conduct will go unnoticed.<sup>105</sup> As such, moving between these sectors to avoid detection and prosecution would be all the more difficult for perpetrators if these employment clearances and checks were nationally consistent, connected across community service sectors and robustly enforced. This would involve informing employers if anything flags on the employees' record during their employment period, not just when they are hired or when the checks are re-performed after the designated period of time.

As outlined in the discussion paper, the Royal Commission into Institutional Responses to Child Sexual Abuse has reviewed working with children checks in detail, and as such, their work in this area should influence the responses provided to questions 11-1, 11-2 and 11-3.

### *Supported Decision-Making in Aged Care*

DPO Australia supports proposal 11-8, and agrees that providers of aged care cannot require recipients of care to have substitute decision-making arrangements in place. The provision of aged care and/or disability support services is just that - the provision of a particular support that a person requires to go about their lives. This may be support with dressing, cooking, transport, daily living and so on. In terms of making decisions, whether they be financial or personal, a CRPD compliant legal capacity framework should in the first instance ensure that an individual be provided with all the support they require in order to make these decisions themselves. Under no circumstances should the appointment of a substitute decision-maker be a pre-requisite for the provision of care.

### *Community and Official Visitors*

In regards to Community and Official Visitors, as outlined in proposals 11-9, 11-10 and 11-11, these schemes may provide a limited safeguard for some older people and people with disability in certain institutional and residential settings. However, the role and functions of existing Community and Official Visitors vary, depending on jurisdiction, which influences their overall effectiveness. For this reason, research to consider which jurisdictional arrangements result in better outcomes and to identify existing gaps should be undertaken to ensure a best practice nationally consistent Official Visitors scheme can be implemented. In addition, a proposed element of the NDIS Quality and Safeguarding Framework is the monitoring and complaints oversight by Official Community Visitors,<sup>106</sup> and any aged care Community Visitor scheme should be integrated with this Framework into the broader implementation process.

When implemented, the Official Visitors scheme for aged care services must work alongside existing mechanisms for the benefit of all people residing in residential facilities. All Official Visitors must be granted physical access to boarding houses and similar insecure residences in which older people with disability reside, and be granted access to information about boarding house

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<sup>105</sup> Ibid. pp19, 47.

<sup>106</sup> As outlined on pages 53-54 of the NDIS Quality and Safeguarding Framework.

payments to ensure social security payments such as the Disability Support Pension are not being appropriated by boarding house proprietors. However, this is no replacement for robust audits and quality assurance processes, particularly due to concerns about existing quality of care accreditation standards.<sup>107</sup>

In addition, each Official Visitor program, and other types of community oversight, must be sufficiently resourced for a substantial number of visits to aged care facilities and other residential settings to facilitate rapport building with residents in institutional settings.

DPO Australia thanks the Australian Law Reform Commission for the opportunity to contribute to this Inquiry, and we would welcome further consultation on any of the matters raised in this submission.



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<sup>107</sup> As outlined in a number of submissions to the ALRC Elder Abuse Issues Paper, including: Elder Care Watch, Submission 84; Aged Care Crisis, Submission 165; and Senior Rights Service, Submission 169, among others.