



PROPOSED RESPONSE TO ELDER ABUSE IN THE ACT

A Discussion Paper

Justice and Community
Safety Directorate

December 2019



Call for submissions

The Government invites stakeholders and members of the public to make a submission in response to this consultation paper by 29 January 2020. Submissions are welcome in respect of any matter raised in this paper.

How to comment

You can tell us your views about the proposals in this paper by sending —

- a) an email to jacslppcriminal@act.gov.au
- b) a letter to: Elder Abuse Offence & Redress Reform
Legislation, Policy and Programs
Justice and Community Safety Directorate
GPO Box 158 CANBERRA CITY ACT 2601
- c) submissions via www.yoursay.act.gov.au/elder-abuse

The closing date for comments is **29 January 2020**.

Generally, submissions will be made public. In the absence of a clear indication that a submission is intended to be confidential, the submission will be treated as non-confidential.

CONTENTS

OVERVIEW	4
Purpose of this discussion paper	4
What is elder abuse?	5
What have we done so far?	5
OPTIONS FOR ELDER ABUSE CRIMINAL LAW REFORMS	6
Standalone elder abuse offence/s	6
Aggravated elder abuse offences.....	7
Including elder abuse as an aggravating sentencing factor for specific offences	7
Specific neglect offence.....	8
Offence for misuse of power of attorney powers to obtain financial advantage	8
Potential challenges.....	9
Proposal.....	9
OPTIONS FOR IMPROVING PROTECTION FOR OLDER PEOPLE EXPERIENCING ELDER ABUSE	10
Proposal.....	10
STRENGTHENING ACAT POWER TO ADDRESS MISUSE OF POWERS OF ATTORNEY AND WRONGDOING OF GUARDIANS OR MANAGERS.....	10
What is a power of attorney?.....	11
Who is a guardian? What does a manager do?	11
Why expand ACAT's power?	11
What have other States and Territories done?	13
Proposal.....	13
NEXT STEPS.....	13
ATTACHMENT A: JURISDICTIONAL OVERVIEW OF OFFENCE PROVISIONS	15

OVERVIEW

Older people have contributed greatly, and continue to enrich, our Canberra community. Like all members of society, they deserve to be protected from abuse, harm, and exploitation, and to be treated with dignity and respect. The ACT Government recognises that it is important that we have robust protections in place to prevent and address elder abuse to ensure the wellbeing of all Canberrans at all stages of life.

All Australian governments have agreed to focus on building an understanding of elder abuse and raising community awareness as the first two priority areas in *the National Plan to Respond to the Abuse of Older Australians 2019-2023* (the National Plan) which was launched on 19 March 2019. In addition to focusing on raising awareness, the National Plan reflects other key priorities to address and prevent elder abuse, which were drawn from consultation with stakeholders. These are:

- > Strengthening front-line responses for older people experiencing abuse,
- > working to harmonise enduring power of attorney legislation across Australia and setting up a national register of enduring powers of attorney, and
- > identifying gaps in legislation for safeguarding vulnerable older people.

The National Plan is supported by an Implementation Plan, endorsed by all Attorneys-General in June 2019, which sets out actions to be taken under each priority. The current Implementation Plan captures actions up to 2022. It is a living document that will be updated to reflect emerging initiatives and will be monitored by a national Implementation Executive Group which includes two ACT senior officials.

Purpose of this discussion paper

In developing Canberra into an Age-Friendly City, the Government recognises there is more work to be done to protect our older Canberrans from abuse as they enter the more vulnerable stages of life. The protection of older people from any form of abuse is an absolute priority and these protections are fundamental to the human rights of older Canberrans who should be able to live free from abuse, violence and exploitation.

In August 2019 the Attorney-General Gordon Ramsay MLA announced that the ACT Government would consider how offences targeting elder abuse could work to address issues such as physical and financial abuse and neglect. The Government is also considering ways to strengthen the ACT Civil and Administrative Tribunal's (ACAT) powers to order remedies where an attorney has misused a power of attorney, or where a guardian or manager appointed by ACAT has failed to perform their functions according to the law. Consideration of whether to strengthen ACAT powers aligns with recommendations in the ALRC's report *Elder Abuse—A National Legal Response* (the ALRC Report).

The purpose of this discussion paper is to inform public consultation on a number of proposals for changes to ACT laws to address elder abuse. In particular, the ACT Government is seeking community views on:

- > the introduction of offences targeting elder abuse,
- > introducing elder abuse as an aggravating factor in sentencing,
- > giving the ACAT the power to remedy the misuse of powers of attorney, and wrongdoings of guardians or managers, and
- > expanding family and personal violence provisions to cover abuse by non-family members.

What is elder abuse?

Elder abuse is defined as ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’.¹ Elder abuse can take various forms including physical violence, emotional abuse, neglect, and financial abuse.

Evidence of the prevalence of elder abuse in Australia is limited; however, international research suggests between 2 and 14 percent of older Australians experience elder abuse in any given year.² Australian research suggests that financial abuse is the most common form of elder abuse, followed closely by psychological or emotional abuse.³ Women are more likely to be victims of elder abuse, and the majority of perpetrators are male, though female perpetrators are not uncommon and male victims are reported. Perpetrators are more likely to be family members, particularly children.⁴

Abuse can be deliberate or unintentional. It can occur once or many times. Abuse does not have to be physical – misusing an older person’s money or threatening to restrict access to friends and family can cause immeasurable and lasting damage to an individual and their family. It can also lead to older people needing more help from the health and aged care systems, government benefits, and other services.⁵

What have we done so far?

The ACT Government has already commenced several initiatives to safeguard the rights of older Canberrans, with more than 20 initiatives included in the Implementation Plan.

The local framework document in the ACT is Age-Friendly Canberra: A Vision for Our City. An Age-Friendly City Plan is being developed which will include targeted actions to ensure that older people are safe, secure and free from abuse and discrimination. The Government is consulting on this Plan, including engaging with older people and those who support them across the community on how elder abuse and age discrimination can best be tackled.

Momentum in the community to focus on the rights of older persons is clear. In the ACT, we have the opportunity to make world-leading laws in this area.

A key initiative in the ACT is the establishment of the Older Persons ACT Legal Service (OPALS) within Legal Aid ACT. OPALS, which commenced in July 2018, provides a broad range of free and flexible legal assistance to older people in Canberra, including help with elder abuse, enduring powers of attorney, guardianship, and financial arrangements with family members. It also makes referrals to other services if needed. The OPALS solicitor travels to meet clients if needed, bringing services to the people who need them rather than expecting vulnerable older people to come to them. OPALS also runs the Older Persons Abuse Prevention Referral Information Line, and received a total of 553 telephone calls last financial year.

The Australian Law Reform Commission (ALRC) has recommended consistent national reforms of enduring powers of attorney legislation to provide greater protections for people granting a power of attorney and a national register for all powers of attorney documents. The Justice and Community

¹ World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

² Kaspiew, R; Carson, R & Rhoades, H (2018) *Elder Abuse – understanding issues, frameworks and responses*, Australian Institute of Family Studies, 5.

³ Ibid, 7.

⁴ Ibid.

⁵ Council of Attorneys-General, ‘National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023’ (Intergovernmental Plan, Council of Attorneys-General, 19 March 2019) 3.

Safety Directorate is working very closely with jurisdictional counterparts in the Council of Attorneys-General Enduring Power of Attorney Working Group consider harmonisation of enduring powers of attorney laws and develop a proof of concept register for enduring powers of attorney documents.

The ACT Government recognises that building community awareness is essential in driving cultural change to address elder abuse and has funded a number of initiatives to build awareness across government services and in the community. For example, ACT Domestic and Family Violence Frontline Worker Training is being rolled out to equip ACT Government workers with the ability to recognise and respond to domestic and family violence and to refer on to relevant supports. Foundation training, which includes content on elder abuse, will be rolled out for all ACT Public Servants. It will also help workers to understand the barriers that might inhibit older people from disclosing elder abuse.

Additionally, a total of \$80,000 in grant funding is provided annually through the ACT Seniors Grants Program, which funds community organisations to complete projects in priority areas which include addressing elder abuse and promoting supported decision making for older people. The recipients of the first round of the 2019-20 ACT Seniors Grants Program will be announced soon. Past grant rounds provided funding for a number of projects related to elder abuse prevention, including \$6,000 for Legal Aid ACT to consult Aboriginal and Torres Strait Islander community members about elder abuse and to develop resources and proposals for dealing with the issue; and \$10,000 for ADACAS to counter elder abuse through individual advocacy and community education at aged care facilities and organisations that provide services to seniors.

OPTIONS FOR ELDER ABUSE CRIMINAL LAW REFORMS

The ACT Government is seeking the community's views on how elder abuse could be addressed through the criminal law. Specific focus on elder abuse in criminal legislation may provide clearer justice pathways for victims of elder abuse, may act as a deterrent, and may raise awareness about elder abuse in the justice sector and the community more broadly. The creation of a specific elder abuse offence could hold abusers to account and would aim to keep older Canberrans safe in later life.

There are a number of ways in which elder abuse could be targeted through the criminal law.

Standalone elder abuse offence/s

One option to target elder abuse would be to create a specific offence, or offences, dealing with criminal conduct when directed towards older people. Although such offences would target conduct already prohibited under existing ACT laws, introducing new specific offences may result in greater focus on older people the criminal justice system and the need for targeted laws to recognise their vulnerability.

There are several ways such an offence could be framed - for example:

- > a 'catch-all' offence covering conduct directed at an older person which causes harm. This approach may not specify the type of conduct engaged in, but would identify the harm caused, as the basis of the offence, or
- > new offences dealing with different types of conduct against a victim whose age makes them vulnerable, for example fraud, theft, assault or sexual assault.

These offences could have higher or similar penalties than for existing offences which apply to all members of the community.

Currently no Australian jurisdiction has a specific criminal offence for the abuse of older persons. Overseas, some states in the USA have introduced specific offences for elder abuse that apply to older people and certain vulnerable adults, including those with some physical and intellectual disabilities. Broadly speaking these cover a range of behaviours including physical abuse, neglect, financial abuse, emotional abuse, and endangering health or life.⁶ ‘Elder’ is defined as either a person aged 60⁷, or 65⁸, and in one jurisdiction higher penalties also apply for offences against people over 70.⁹

Different views have been expressed about standalone ‘elder abuse’ offences. Whilst the ALRC Report did not recommend criminal offences to address elder abuse, on the basis existing criminal law covered most conduct associated with elder abuse, and duplication of offences was undesirable,¹⁰ other groups, including Legal Aid ACT¹¹ and a number of seniors’ rights groups,¹² have indicated support for introducing a separate offence for elder abuse, similar to the way children are recognised as especially vulnerable and are afforded special treatment.

Aggravated elder abuse offences

An alternative to introducing stand-alone offences for elder abuse would be to introduce aggravated offences for elder abuse. This approach would set out additional circumstances which, if present in offending, would attract a higher penalty than the basic offence. This would be similar to the approach taken in the Crimes Act 1900 (ACT) in relation to aggravated offences against pregnant women.¹³ Offences to which the aggravating factor applies could include violent and sexual offences, as well as property and financial offences.

Queensland, Western Australia, and South Australia have aggravating circumstances for some or all offences where committed against someone aged 60 or over.¹⁴

Another option for an aggravated elder abuse offence could be to apply the aggravation to a new offence of elder abuse, rather than aggravate existing offences. This type of offence could include aggravating factors such as whether the abuse was repeated or systemic, whether the person was in a position of trust and whether the victim suffered serious or permanent harm.

Including elder abuse as an aggravating sentencing factor for specific offences

Elder abuse could also be addressed by making it a mandatory factor for the Court to consider when sentencing an offender. This could be introduced in addition to, or instead of, elder abuse offences as outlined above.

Under section 33(1)(d) of the Crimes (Sentencing) Act 2005 (Sentencing Act), when deciding how an offender should be sentenced for an offence, the Court must consider any personal circumstances of

⁶ See eg, Cal [Pen] Code ss 368-368.5; Mo Rev Stat s 565.182 (2013); Fla Stat s 825 (2012).

⁷ See Mo Rev Stat s 565.182 (2013); Fla Stat s 825 (2012).

⁸ See Cal [Pen] Code ss 368-368.5.

⁹ Ibid.

¹⁰ Australian Law Reform Commission (2017), *Elder Abuse – A National Legal Response: Final Report*, ALRC Report 131, (ALRC Inquiry Report) 364.

¹¹ See <https://www.canberratimes.com.au/story/6357887/act-looks-to-make-elder-abuse-a-crime/>

¹² See, Seniors Right Service submission to ALRC Inquiry (submission 169); National Seniors Australia submission to ALRC Inquiry (submission 154).

¹³ See s 48A.

¹⁴ See eg *Criminal Code 1899* (Qld) s 340(1)(g); *Criminal Code* (WA) s 221(1)(d); *Criminal Law Consolidation Act 1935* (SA) ss 5A(1)(f) and (j).

the victim that were known to the offender. This includes age and vulnerability. If an aggravating factor approach is taken, an offence against a vulnerable older victim, would likely lead to a higher sentence within the maximum range available for the offence.

The Sentencing Act could be amended to include a provision explicitly requiring the court to consider the age and vulnerability of the victim in sentencing. This would be similar to how offences against a pregnant woman are currently treated under section 33(1)(g) of the Sentencing Act.

In NSW and South Australia, age is specifically stated as a potential circumstance of vulnerability which the Court must consider when determining the appropriate sentence for an offence.¹⁵ A similar approach is taken in Canada.¹⁶

Specific neglect offence

Neglect involves failing to provide someone with basic needs such as food, shelter or medical care. One study has shown that neglect could be as high as 20 percent among older women, with international studies estimating up to 6 percent of older people in high-middle income countries experience neglect.¹⁷ The ACT is the only jurisdiction in Australia without a neglect offence which could apply to older people.

In most jurisdictions, 'neglect' offences are framed as 'failure to provide necessities of life'.¹⁸ In Victoria, the broader offence of 'negligently causing serious injury' applies.¹⁹ Broadly, the neglect provisions include a duty of care and a threshold to prove serious harm or a likelihood of serious harm. A legal duty arises where a person has assumed the care of another and the person in care is unable to remove themselves from that care or provide for themselves due to vulnerability. Reasons for vulnerability specified in these offences include age, sickness, mental impairment, detention, or any other reason which prevents a person removing themselves from the care of another. A summary table setting out these offences is set out at **Attachment A**.

The ALRC Report found that offences for neglect are under-utilised, and prosecutions can be challenging.²⁰ Despite this, they found that "...in absence of specific offences for elder abuse, it is important to ensure that general 'neglect' offences exist in all States and Territories."²¹

In considering whether an offence for neglect is needed in the ACT, options to address neglect in institutional settings, such as aged care homes, also warrant consideration. For example, consideration could be given to introducing an offence and looking at corporate accountability.

Offence for misuse of power of attorney powers to obtain financial advantage

In the ACT it is an offence to dishonestly induce someone else to make or revoke a power of attorney.²² This is similar to the offences in other jurisdictions.²³

¹⁵ See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l); *Sentencing Act 2017* (SA) s 11.

¹⁶ See *Criminal Code*, RSC 1985, c C-46 ss 718.2(a)(iii) and (iii.1).

¹⁷ Kaspiew, R; Carson, R & Rhoades, H (2018) *Elder Abuse – understanding issues, frameworks and responses*, Australian Institute of Family Studies, 5

¹⁸ See eg, *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1983* (NT) s 149; *Criminal Code Act 1924* (Tas) s 144; *Criminal Law Consolidation Act 1935* (SA) s 14; *Criminal Code Act 1899* (Qld) s 285; *Criminal Code* (WA), s 262.

¹⁹ See *Crimes Act 1958* (Vic) s 24.

²⁰ See eg *ALRC Report*, 367-368.

²¹ *Ibid*.

²² *Powers of Attorney Act 2006* (ACT), s 90.

²³ See *Powers of Attorney Act 1998* (Qld) ss 26 and 61; *Powers of Attorney Act 2014* (Vic) ss 135-136.

Victoria has an additional offence, prohibiting attorneys under an enduring power of attorney from using the power dishonestly to obtain financial advantage or to cause loss to the principal or another person.²⁴

A similar provision could be developed for the ACT to respond to concerns about financial abuse and misuse of powers of attorney. However, a general offence for obtaining financial advantage by deception already exists under section 332 of the Criminal Code 2002 (ACT).

There have been differing views about the effectiveness of such offences to address the misuse of power of attorneys, and financial abuse of older people. The ALRC Report noted that “[f]inancial offences, in particular, are often difficult and complex to prosecute, and will continue to be so irrespective of the existence of new specific provisions relating to powers of attorney”.²⁵ The ALRC also raised concerns that such new offences duplicate existing offences, which may cause complexity.²⁶ The NSW Legislative Council and the Law Reform Committee of the Parliament of Victoria however were supportive of new offences to address this issue.²⁷

Potential challenges

The ACT Government acknowledges that there may be challenges related to the introduction of specific or aggravated offences to address elder abuse. These include:

Defining who is protected

The description of the target victim group to ensure that the specific vulnerabilities of older people are appropriately captured. In other jurisdictions this has been done by setting an age at which such offences, or aggravation factors, apply.²⁸ Such an approach offers clarity and certainty, but also raises challenges in capturing the diverse experiences of older people, including in terms of the impact that socio-economic and cultural differences have on life expectancy.

Barriers to justice

Older people may be reluctant to report abuse for a range of reasons, including shame, fear of retaliation and fear of jeopardising relationships with family, particularly where family members are their carers, or otherwise relied upon for support.²⁹ It is important that any proposed approaches are accompanied by community education initiatives and support for victims in relation to elder abuse.

Proposal

As outlined above, there are several ways in which the ACT criminal law could be reformed to specifically address elder abuse and hold institutions responsible for appropriate standards of care, either as an offence, and/or or as a consideration in sentencing. If the ACT were to introduce a

²⁴ *Powers of Attorney Act 2014* (Vic), s 135(3).

²⁵ Australian Law Reform Commission (2017), *Elder Abuse – A National Legal Response: Final Report*, ALRC Report 131, (ALRC Report), 366.

²⁶ *Ibid.*

²⁷ See NSW Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (2016) rec 7, [6.101]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) rec 61.

²⁸ See eg *Criminal Code 1899* (Qld) s 340(1)(g); *Criminal Code* (WA) s 221(1)(d); *Criminal Law Consolidation Act 1935* (SA) ss 5A(1)(f) and (j).

²⁹ ALRC Report, p.369.

standalone offence for elder abuse, this would be the first of its kind in Australia. The Government is seeking the community's views on the options outlined above.

OPTIONS FOR IMPROVING PROTECTION FOR OLDER PEOPLE EXPERIENCING ELDER ABUSE

The ACT protection order scheme (set out in the *Family Violence Act 2016* (FV Act) and the *Personal Violence Act 2016* (PV Act)) provides powers to the courts to make orders to protect victims of family violence and personal violence.

In recognition of the nature and harm caused by family violence, the FV Act offers protection from a broad range of behaviours (including economic, physical, sexual, psychological and emotional abuse, as well as coercion and control)³⁰ when perpetrated by a family member, or person in a familial like relationship with the victim (including a carer).³¹ It also provides that the Court can make orders for up to two years, or longer in special or exceptional circumstances.³²

The PV Act provides that a personal protection order can be made where 'personal violence' occurs. The definition of personal violence is less broad than family violence, and economic abuse, emotional and psychological abuse and coercion and control are not explicitly included in the definition.³³ Under the PV Act the court can usually make an order for 12 months (or longer in special or exceptional circumstances).³⁴

Proposal

Whilst elder abuse often occurs within the confines of the family, not all victims of elder abuse would be covered by the FV Act, for example, where an older person was abused by a carer with whom they did not have a close dependent relationship. Given the nature of elder abuse, consideration could be given to expanding the definition of violence, as it applies to vulnerable adults, to address this gap. Consideration could also be given to providing the court with the power to make longer orders (up to two years for consistency with the FV Act) in these circumstances, without the need for the applicant to prove that special or exceptional circumstances exist.

STRENGTHENING ACAT POWER TO ADDRESS MISUSE OF POWERS OF ATTORNEY AND WRONGDOING OF GUARDIANS OR MANAGERS

In the ACT, the ACAT is the relevant body that supervises the use of powers of attorney, and the exercise of functions by a guardian or manager. The Government is considering strengthening the ACAT's powers to order remedies where an attorney has misused a power of attorney, or where a guardian or manager appointed by ACAT has failed to perform their functions according to the law.

³⁰ *Family Violence Act 2016* (ACT) s 8.

³¹ *Ibid*, s 11.

³² *Ibid*, s 35.

³³ *Personal Violence Act 2016* (ACT) s 8.

³⁴ *Ibid*, s 27.

What is a power of attorney?³⁵

A power of attorney is a document that allows a person (the principal) to authorise another person (the attorney) to make decisions and do particular things on their behalf. This authorisation creates a legal relationship between the principal and the attorney, and the attorney has a duty to the principal. In the ACT, there are two types of powers of attorney: a general power of attorney, and an enduring power of attorney.

A general power of attorney is valid and effective only when the principal has decision-making capacity. If the principal wants a power of attorney to be effective when the principal has impaired decision-making capacity, the principal would have to make an enduring power of attorney.

An attorney cannot do anything that would create a conflict between the attorney's duty to the principal, and the interests of the attorney (including the attorney's relatives, business partners or close friends). For instance, an attorney cannot sell the principal's property and keep the proceeds, unless the principal has clearly asked the attorney to do so.

Who is a guardian? What does a manager do?³⁶

A *guardian* is an individual or organisation (such as the Public Trustee and Guardian) who has been appointed by the ACAT to make decisions on behalf of a person (the protected person). A guardian can only be appointed for a person if the person has impaired decision-making ability with respect to the person's health or welfare matters.

In general, ACAT may find that an individual is not suitable to be a guardian if the individual's interests and duties may conflict with the protected person's interests, and the conflict may harm the protected person's interests.

The ACAT appoints a *manager* for a person who has impaired decision-making ability about the person's property or financial matters. The manager has the power to manage all or a specified part of the protected person's property.

In general, a manager cannot deal with a protected person's property in a way that conflicts with the manager's interests. For example, a manager is not allowed to transfer the person's property to themselves.

Why expand ACAT's power?

Changes to expand the ACAT's powers would respond to recommendation 5-2 of the ALRC Report which is:

All state and territory tribunals in Australia should have —

- a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and
- b) the power to order any remedy available to the Supreme Court.

³⁵ See generally, *Power of Attorney Act 2006* (ACT).

³⁶ See generally, *Guardianship and Management of Property Act 1991* (ACT).

The ALRC notes that this jurisdiction should be available in relation to the misuse or abuse of a power of attorney, and the failure to exercise a functions or power of a guardian/manager.³⁷

In making the recommendation, the ALRC stated that:³⁸

5.1 Enduring powers of attorney and enduring guardianship (together referred to as ‘enduring documents’) are important tools that allow older people to choose the person (or persons) who will make decisions on their behalf should they lose decision-making ability in the future. Enduring documents may also protect an older person who has lost (or who has impaired) decision-making ability from being exploited and abused by others.

5.2 However, enduring documents may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney.

Most civil and administrative tribunals in Australian jurisdictions have the power to vary or revoke an enduring power of attorney, or remove a guardianship/manager, but do not have the power to grant other any reliefs when things go wrong.

In the ACT, only the Supreme Court can order an attorney to compensate the principal for a loss caused by the attorney’s failure to comply with the *Powers of Attorney Act 2006* (ACT) in the exercise of a power.³⁹ There is currently no statutory relief provided in the *Guardianship and Management of Property Act 1991* (ACT) for the failure of a guardian or manager.

The Supreme Court also has the power to order to a person to account for profits made. The Magistrates Court also shares the same power but can exercise it only under limited circumstances.⁴⁰ This power is known as an “equitable” relief or remedy. Equitable relief is usually ordered by a court when other forms of relief may not be adequate.

The costs are usually burdensome to institute proceedings in the Supreme Court to recover losses from an attorney, guardian or manager. Apart from having to pay the applicable court fees, the costs of seeking preliminary advice, and retaining a lawyer have made this avenue highly inaccessible to many. Additionally, in many cases, a substantial amount of the victim’s financial resources is effectively controlled by the attorney or manager.

The legislation governing the operation of the ACAT directs it to ‘ensure the procedures...are as simple, quick, inexpensive and informal as is consistent with achieving justice’⁴¹.

The parties to a matter in ACAT bear their own costs in most situations.⁴² The ACAT is designed to be a more accessible forum than the courts to seek remedies for misuse of powers of attorney, and for the guardian/manager’s failure to perform their functions and obligations.

³⁷ In the ACT, a guardian or manager is appointed by the ACT Civil and Administrative Tribunal under the *Guardianship and Management of Property Act 1991* (ACT).

³⁸ Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 159–60.

³⁹ *Powers of Attorney Act 2006* (ACT) s 50.

⁴⁰ See, eg, *McCauley v McInnes* [2012] ACTMC 2 (6 July 2012).

⁴¹ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 7.

⁴² *Ibid* s 48(1).

What have other States and Territories done?

The Victorian Civil and Administrative Tribunal (VCAT) can order an attorney to compensate the principal for the loss,⁴³ if the loss is caused by the attorney's breach of the relevant legislation. Victoria has also passed legislation that, when commenced, will allow the VCAT to order compensation for a guardian or administrator's wrongdoing.⁴⁴

The Queensland Civil and Administrative Tribunal (QCAT) has the power to award compensation against a guardian or administrator for the loss caused by their noncompliance with legislation,⁴⁵ but does not currently have similar powers in relation to the actions of a power of attorney.⁴⁶ Queensland has passed legislation (yet to commence) that will empower the QCAT to order compensation for a loss caused by an attorney's noncompliance with the *Powers of Attorney Act 1998* (Qld) and to order an attorney to account for any profits accrued as a result of the noncompliance.⁴⁷

Proposal

To create a more accessible forum for victims of elder abuse in these circumstances to seek remedies and reparation, the Government is considering expanding the ACAT's power by allowing ACAT to order—

- a) the attorney to compensate the principal for the loss caused by the attorney's misuse of the power of attorney
- b) the attorney to pay the principal any profit the attorney has made as a result of the misuse of the power of attorney
- c) the guardian or manager to compensate a person for the loss caused by the guardian or manager's breach of the law
- d) the guardian or manager to pay a person any profit the attorney has made as a result of the guardian or manager's breach of the law
- e) (in a longer term) other types of remedies for the wrongdoings, for example:
 - i. ordering that a property be used to the benefit of the principal or the protected person,
 - ii. ordering that a property be returned to the principal or the protected person.

The Government is currently seeking the community's views on this proposal.

NEXT STEPS

This public consultation paper is an important step in the development of the Government's approach to tackling elder abuse. The input received from interested parties will assist the Government in assessing options and in raising issues for consideration.

The Government may undertake targeted consultation with a range of government agencies, non-government organisations, and other relevant parties.

Call for submissions

⁴³ *Powers of Attorney Act 2014* (Vic) s 77.

⁴⁴ *Guardianship and Administration Act 2019* (Vic).

⁴⁵ *Guardianship and Administration Act 2000* (Qld) s 59.

⁴⁶ *Public Trustee of Queensland v BN* [2011] QCAT 666 (19 December 2011) [46]; *Powers of Attorney Act 1998* (Qld).

⁴⁷ *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) s 74.

The Government invites stakeholders and members of the public to make a submission in response to this consultation paper by 29 January 2020. Submissions are welcome in respect of any matter raised in this paper.

How to comment

You can tell us your views about the proposals in this paper by sending —

- a) an email to jacslppcriminal@act.gov.au
- b) a letter to: Elder Abuse Offence & Redress Reform
Legislation, Policy and Programs
Justice and Community Safety Directorate
GPO Box 158 CANBERRA CITY ACT 2601
- c) submissions via www.yoursay.act.gov.au/elder-abuse

The closing date for comments is **29 January 2020**.

Generally, submissions will be made public. In the absence of a clear indication that a submission is intended to be confidential, the submission will be treated as non-confidential.

ATTACHMENT A: JURISDICTIONAL OVERVIEW OF OFFENCE PROVISIONS

Jurisdiction	Offence
Western Australia	<p><i>Criminal Code</i></p> <p>Section 262 - Duty to provide necessities of life</p> <p>It is the duty of every person having charge of another who is unable by reason of age, sickness, mental impairment, detention, or any other cause, to withdraw himself from such charge, and who is unable to provide himself with the necessities of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessities of life; and he is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.</p>
Tasmania	<p><i>Criminal Code Act 1924</i></p> <p>Section 144 – Duty to provide necessities</p> <p>(1) It is the duty of every person having charge of another, who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessities of life, to provide such necessities for that other person.</p> <p>(2) It is immaterial how such charge arose.</p>
Northern Territory	<p><i>Criminal Code Act 1983</i></p> <p>Section 149 – Duty of person in charge of children or others</p> <p>It is the duty of every person having charge of a child under the age of 16 years or having charge of any person who is unable to withdraw himself from such charge by reason of age, sickness, unsoundness of mind, detention or other cause and who is unable to provide himself with the necessities of life:</p> <p>(a) to provide the necessities of life for that child or other person; and</p> <p>(b) to use reasonable care and take reasonable precautions to avoid or prevent danger to the life, safety or health of the child or other person and to take all reasonable action to rescue such child or other person from such danger.</p>
South Australia	<p><i>Criminal Law Consolidation Act 1935</i></p> <p>Section 14—Criminal neglect</p> <p>(1) A person (the defendant) is guilty of the offence of criminal neglect if—</p> <p>(a) a child or a vulnerable adult (the victim) dies or suffers harm as a result of an act; and</p> <p>(b) the defendant had, at the time of the act, a duty of care to the victim; and</p> <p>(c) the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by the act; and</p> <p>(d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.</p>

Jurisdiction	Offence
	<p>Maximum penalty: (a) where the victim dies—imprisonment for life; or (b) in any other case—imprisonment for 15 years.</p> <p>(2) If a jury considering a charge of criminal neglect against a defendant finds that— (a) there is reasonable doubt as to the identity of the person who committed the act that caused the victim's death or harm; but (b) the act can only have been the act of the defendant or some other person who, on the evidence, may have committed the act, the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the act may have been the act of the defendant.</p> <p>(3) If a defendant is charged with an offence against this section in respect of a course of conduct— (a) it is not necessary to prove that the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by each act making up the course of conduct; and (b) the information need not— (i) allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this or any other Act; or (ii) identify particular acts or the occasions on which, places at which or order in which acts occurred; or (iii) identify particular acts as causing, wholly or partly, particular harm to the victim.</p> <p>(4) A defendant may be charged with an offence against this section in respect of a course of conduct even if some of the acts making up the course of conduct occurred before the commencement of this section.</p> <p>Section 14A—Failing to provide food etc in certain circumstances</p> <p>If— (a) a person is liable to provide necessary food, clothing or accommodation to a child or vulnerable adult; and (b) the person, without lawful excuse, fails to provide that food, clothing or accommodation, that person is guilty of an offence. Maximum penalty: Imprisonment for 3 years.</p>

Queensland

Criminal Code Act 1899

Section 285 – Duty to provide necessities

It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessities of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessities of life; and the person is held to have

caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

Section 324 – failure to supply necessities

Any person who, being charged with the duty of providing for another the necessities of life, without lawful excuse fails to do so, whereby the life of that other person is or is likely to be endangered or the other person's health is or is likely to be permanently injured, is guilty of a crime.

Maximum penalty—7 years imprisonment.



Justice and Community Safety

December 2019