Q1. The role of the group

The group, known as Preventing Elder Abuse in Tasmania (PEAT) was convened in early 2016 to apply (successfully) for a University of Tasmania 'Cross-Disciplinary Incentive (CDI)' grant. The group comprises UTAS academics drawn together by common concern about the under-reporting and misunderstanding of elder-abuse in Tasmania. There is increasing recognition that elder abuse is both under-reported and a growing risk to the ageing population of Tasmania. Tasmania is Australia's 'ageing' state, but without coordinated action across sectors, Tasmania could also become known as the elder abuse state.

The current PEAT group members are:

- Associate Professor Terese Henning, Faculty of Law
- Associate Professor Christine Stirling, School of Health Sciences
- Dr Suanne Lawrence, School of Health Sciences
- Dr Susan Banks, School of Social Sciences
- Dr Valerie Williams, Faculty of Law

The role of PEAT is to further the understanding of elder-abuse and how it can be prevented. While specifically focussed on the Tasmanian context, PEAT is very aware of the significant effect the national environment has on Tasmanian law, health and social processes. For example, in Q 4 and Q6 it is noted that the Australian Law Reform Commission has recently released its report on elder abuse (ALRC 131, May 2017). The impact of this report on Tasmanian law is uncertain, but should be considered in any future recommendations.

A key focus of PEAT is to continue to undertake research into elder-abuse prevention, and apply for funding to support this aim. The group has used funds from the initial CDI grant to employ two research assistants to undertake a scoping paper of elder abuse from a legal and sociological viewpoint. This work has informed the responses here as well as the group's application for another UTAS grant (College of Arts and Law 'Hot-house' grant, awarded in 2016) to undertake a qualitative study of Tasmanian policy responses to elder abuse across government and non-government (including health) agencies. From the group's work, it became clear that elder sexual abuse is one of the most understudied and least understood aspects of elder mistreatment. This has been the basis for a grant application to Australia's National Research Organisation for Women's Safety (ANROWS). Further funding from the Criminology, Law and Policing Fund (CLP) (2016) supported a feasibility study for a 'clearing-house' for researchers, policy and law-makers, and potentially community organisations to access a centralised 'library' of resources on the prevention of elder-abuse. This project will be further developed in partnership with the Australian Association of Gerontology.

PEAT is delighted to have been asked by Coroner McTaggart to assist in her preparation for the inquest into the death of Mrs Janet Mackozdi. The group's combined knowledge and experience

of sectors key to the prevention of elder abuse is driving the group's research direction toward practical outcomes, such as this inquest. Everyone in Tasmania knows about the 'shipping container death', and it is certain that the outcomes of this inquest will be as keenly reported as the original case. These community level conversations are critical in raising awareness to change the status quo of older persons in Tasmania and elsewhere.

Q2. Tasmania's definition of elder abuse

The generally accepted definition of elder abuse in Tasmania is:

> *Abuse of older people is a single or repeated act occurring within a relationship where there is an implication of trust, which causes harm to an older person.*[1]

The Tasmanian government considers this definition to be in line with international and national agreements on what constitutes elder abuse.[2]

The definition is a human rights conceptualisation of elder abuse that emphasises self-determination, autonomy and respect. It was developed by the United Kingdom group Action on Elder Abuse.[3] It was subsequently adopted by the International Network for the Prevention of Elder Abuse[4] which includes the Australian Network for the Prevention of Elder Abuse (ANPEA).[5] It is used to inform the policies of the Council on the Aging (COTA), the peak body representing the rights, needs and interests of older Australians, and is consistently used in the government elder abuse strategies of all Australian states.[6]

However, globally, the common view held amongst researchers is that there is, in fact, 'no consensus on the definition of elder abuse or standard term for elder abuse consistently used by the scientific and practice communities, advocates, or state and local governments.'[7] Terms such as 'elder abuse'[8], 'elder mistreatment'[9] and 'elder maltreatment'[10] are often used

---

[1] Protecting Older Tasmanians from Abuse (Department of Health and Human Services (Tas), 2010) 9.

[2] Protecting Older Tasmanians from Abuse, above n.1.

[3] Action on Elder Abuse, http://elderabuse.org.uk/.

[4] International Network for the Prevention of Elder Abuse, http://www.inpea.net/

[5] Australian Network for the Prevention of Elder Abuse http://www.eapu.com.au/uploads/ANPEA/ANPEA%20Brochure%20Fill%20In.pdf

[6] With respect to age – 2009. Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse (Victorian Government, 2010) 4.

[7] Karen A. Roberto, The Complexities of Elder Abuse (2016) 71 *American Psychologist* 302, 303.

[8] World Health Organization, *Active ageing: A policy framework* (WHO, 2002).

[9] Richard J. Bonnie and Robert b. Wallace, *Elder mistreatment: Abuse, neglect and exploitation in an aging America*. (Washington, DC: National Research Council, 2003).

[10] World Health Organization, *Elder maltreatment* (WHO, 2011).

interchangeably. The parameters of both the abuse, and the persons covered, vary widely,[11] resulting in confusion surrounding what elder abuse is,[12] limiting generalizing findings across studies, and prohibiting the identification of common courses for effective intervention.[13]

This 'absence of a precise agreed definition is considered problematic for a range of reasons, not the least of which is, the difficulty in measuring elder abuse'.[14] For example, what age does one become a target group 'elder'? The World Health Organisation defines the commencement age as 60, as does the U.S. Centre for Disease Control. In Australia, however, for statistical, and a range of other purposes, including access to the pension, 65[15] is the starting point for status as an 'elder' although 70 is the age for access to aged care services.[16] The literature on ageing distinguishes between 'old' people (65-84 years) and 'old old' people, aged 85 and above.[17] Yet for Aboriginal and Torres Strait Islander peoples, who have a substantially lower life expectancy than non-Indigenous peoples, a lower age for those who are 'older' is considered to be appropriate (e.g., 45-50 years).[18] So, should age be the defining aspect of elder abuse at all or, should it instead be conceptualised on the basis of 'an assessment of capacity for self-care and self-protection'?[19]

Q3. The extent of elder-abuse is uncertain

Given the numerous risk factors and a growing number of vulnerable elderly in Tasmania, it is of concern that the extent of elder abuse is uncertain. The World Health Organisation estimates that

[11] Linda K. George and Kenneth F. Ferraro (Eds.) *Handbook of aging and the social sciences* (2016) (New York, NY: Elsevier/Academic, 8th Ed.) Karen A. Roberto, Abusive relationships in late life, 337.

[12] A distinction is sometimes drawn between mistreatment (such as verbal abuse, passive and active neglect, financial exploitation and overmedication) and abuse (including physical, psychological and sexual violence, and theft).

[13] Karen A. Roberto, The Complexities of Elder Abuse (2016) 71 *American Psychologist* 302, 303.

[14] Rae Kaspiew, 'Elder Abuse' (Australian Institute of Family Studies, 2016) 5.

[15] As of July 1, 2017, Australians must be aged 65.5 to receive and aged pension. This will increase in increments until the qualifying age will be 70.

[16] Eva Cotterell , et al, Elder Abuse in the Act: A literature review, COTA (Council On The Ageing) ACT June 2015, http://docplayer.net/16904292-Elder-abuse-in-the-act-a-literature-review.html.

[17] Jo Wainer, J., et al, *Diversity and financial elder abuse in Victoria: Protecting Elders' Assets Study*. Melbourne: Faculty of Medicine, Nursing and Health Sciences, Monash University, 2011.

[18] Eva Cotterell , et al, Elder Abuse in the Act: A literature review, COTA (Council On The Ageing) ACT June 2015, http://docplayer.net/16904292-Elder-abuse-in-the-act-a-literature-review.html

[19] Mike Clare, Barbara Blundell and Joseph Clare. 'Examination of the extent of elder abuse in Western Australia: A qualitative and quantitative investigation of existing agency policy, service responses and recorded data.' *Service Responses and Recorded Data. (Crime Research Centre, The University of Western Australia, April 2011)* 40.

the prevalence of elder-abuse ranges from 1-10% (WHO 2015)[20]. This estimate was, however, based on a limited number of studies.

The few Australian studies estimate rates of 3% (McCallum 1993), 4.6% (Sadler 1994), and 5% (Kurrle et al. 1992, 1997; Livermore et al. 2001, Cooper, Selwood & Livingston 2008). Overall, Australia lacks reliable national reporting of elder abuse (Boldy et al. 2007). In the most comprehensive analysis of elder-abuse reporting in Australia to date, The Elder Abuse Prevention Unit (Queensland)[21] analysed five years of their help-line call data. A total of 5,785 victims were identified in the calls, the most common age group of victims was 80-84 years (23%) and the majority (70%) were women. In their conclusion, the authors of this study argue that this data represents 'the tip of the iceberg' of cases due to the very nature of elder-abuse where the victim is intimidated and isolated from services such as access to a phone (Spike 2015).

Similar to other states, Tasmania has an elder-abuse hotline. It is operated by Advocacy Tasmania.[22] A case study report is available[23] but there appears to be no quantitative analysis of the use of this service, or any other approach to examining the extent of elder-abuse in Tasmania to date. Community based health and welfare practitioners in Tasmania report elder-abuse cases as being 'difficult, complex and at times dangerous' (Cairns & Vreugdenhil 2014,p.59). The key areas of concern are intimidation and threat by family members, the difficulties relevant agencies and professionals face in balancing duty of care with client rights, and a lack of organisational support (Cairns & Vreugdenhil 2014).

In answer to the question – are you able to assist with statistics and research regarding the prevalence of elder abuse? The answer is 'yes' but the group does not have access to any data to analyse. To access the Tasmania call-centre data would require ethics approval which would be difficult to obtain because of the sensitive nature of the data and privacy concerns.

Recommendation

That Tasmanian call-centre data collection be reviewed and any potential barriers to analysis be identified and resolved. Further sources of data should be considered. For example police records, hospital and community health service notes.

References

Cairns, J. and Vreugdenhil, A. (2014) 'Working at the frontline in cases of elder abuse: 'it keeps me awake at night'', Australas J Ageing, 33(1), pp. 59-62.

[20] http://www.who.int/ageing/projects/elder_abuse/en/

[21] http://www.eapu.com.au/elder-abuse

[22] http://www.advocacytasmania.org.au/elderabusehelpline.htm

[23] http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0010/76672/Protecting_Older_Tasmanians_from_Abuse.pdf

Cooper, C., Selwood, A. and Livingston, G. (2008) 'The prevalence of elder abuse and neglect: a systematic review', Age Ageing, 37(2), pp. 151-60.

Kurrle, S. (1995) 'Australian society for geriatric medicine position statement on elder abuse', Australian Journal on Ageing, 14(4), pp. 172-175.

Kurrle, S. and Naughtin, G. (2008) 'An overview of elder abuse and neglect in Australia', J Elder Abuse Negl, 20(2), pp. 108-25.

Livermore, P., Bunt, R. and Biscan, K. (2001) 'Elder Abuse among Clients and Carers Referred to the Central Coast ACAT: a Descriptive Analysis', Australasian Journal on Ageing, 20(1), pp. 41-47

McCallum, J. (1993) 'Elder abuse: the 'new' social problem', Modern Medicine of Australia, (September), pp. 74-83.

Sadler, P., Kurrle, S. and Cameron, I. (1995) 'Dementia and Elder Abuse', Australian Journal on Ageing, 14(1), pp. 36-40.

Spike, C. (2015) 'The EAPU Helpline: Results of an investigation of five years of call data', International Association of Gerontology and Geriatrics Asia & Oceania Regional Congress 2015.

Q4. The state of law reform in this area, both in Tasmania and nationally

A number of relevant law reform enquiries in this area are underway and/or have been completed. At the national level, in June 2017, the **Australian Law Reform Commission** tabled its report, *Elder Abuse—A National Legal Response* (ALRC Report 131). Of particular relevance in relation to the enquiry into the death of Mrs Mackozdi, her care and the management of her finances prior to her death are the recommendations made in relation to enduring powers; family agreements; the *Code of Banking Practice*; guardianship and administration processes; the enactment of adult safeguarding mechanisms; and measures in relation to social security benefits.

In summary, the principal recommendations made in the report are:

- The development of a national plan to combat elder abuse;
- The reform of aged-care legislation to provide for a new serious incident response scheme for aged care including replacement of the current responsibilities in relation to reportable assaults in s 63-1AA of the *Aged Care Act 1997* (Cth);
- Improving safeguards against the misuse of an enduring document in state and territory legislation;
- Institution of reforms in relation to family agreements, including granting state and territory tribunals jurisdiction to resolve family disputes involving residential property

under an 'assets for care' arrangement and amending the *Social Security Act 1991* (Cth) to require that a 'granny flat interest' is expressed in writing for the purposes of calculating entitlement to the Age Pension;

- Review of the structure and drafting of the provisions relating to death benefit nominations in ss 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth);
- That the Law Council of Australia, together with state and territory law societies, develop national best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they provide thorough coverage of matters;
- That the *Code of Banking Practice* provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*. The guideline should set out examples of such reasonable steps, including:
    - training staff to detect and appropriately respond to abuse;
    - using software and other means to identify suspicious transactions;
    - reporting abuse to the relevant authorities, when appropriate;
    - guaranteeing mortgages and other loans; and
    - measures to check that 'Authority to Operate' forms are not obtained fraudulently and that customers understand the risks of these arrangements;
- Institution of reforms to Guardianship and Administration processes, namely:
    - requiring newly-appointed private guardians and private financial administrators to sign an undertaking with respect to their responsibilities and obligations;
    - The development by the Australian Guardianship and Administration Council of best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible;
- Institution of measures in relation to Social Security including:
    - That the Department of Human Services (Cth) develop an elder abuse strategy;
    - That payments to nominees be held separately from the nominee's own funds in a dedicated account nominated and maintained by the nominee;
    - That Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments;
- The development of safeguards in relation to adults at risk including:
    - Enactment of adult safeguarding laws in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting 'at-risk adults';
    - Giving adult safeguarding agencies a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an 'at-risk adult'. The first step of an inquiry should be to contact the at-risk adult;

- Defining ‘at-risk adults’ in safeguarding laws to mean people aged 18 years and over who:
    (a) have care and support needs;
    (b) are being abused or neglected, or are at risk of abuse or neglect; and
    (c) are unable to protect themselves from abuse or neglect because of their care and support needs;
- The stipulation in adult safeguarding laws that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:
    (a) in serious cases of physical abuse, sexual abuse, or neglect; or
    (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or
    (c) if the adult lacks the legal capacity to give consent, in the circumstances;
- The provision in adult safeguarding laws that, where a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult, the agency may take the following actions, with the adult’s consent:
    (a) coordinate legal, medical and other services for the adult;
    (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;
    (c) report the abuse to the police;
    (d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or
    (e) decide to take no further action;
- The provision in adult safeguarding laws for adult safeguarding agencies to have necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents. Agencies should only be able to exercise such powers where they have reasonable grounds to suspect that there is ‘serious abuse’ of an at-risk adult, and only to the extent that it is necessary to safeguard and support the at-risk adult;
- The provision in adult safeguarding laws that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of their report, be:
    (a) liable civilly, criminally or under an administrative process;
    (b) found to have departed from standards of professional conduct;
    (c) dismissed or threatened in the course of their employment; or
    (d) discriminated against with respect to employment or membership in a profession or trade union;

- Specification that adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals, such as medical practitioners, should refer the abuse of at-risk adults to adult safeguarding agencies.

In February 2016, **The Australian Institute of Family Studies** released its report on Elder Abuse.[24] As stated on its website, (https://aifs.gov.au/publications/elder-abuse) this Report "provides an overview of elder abuse in Australia - including its characteristics, context, and prevention. First, it considers definitional issues and what is known about prevalence and incidence, risk and protective factors, and the dynamics surrounding disclosure and reporting. The report details the evidence on the demographic and socio-economic features of the Australian community that are relevant to understanding social dynamics that may influence elder abuse, including intergenerational wealth transfer and the systemic structures that intersect with elder abuse. Lastly, the report considers legislative and service responses and Australian and overseas approaches to prevention." Key messages include:

- "Although evidence about the prevalence of elder abuse in Australia is lacking it is likely that between **2% and 10% of older Australians experience elder abuse in any given year, and the prevalence of neglect is possibly higher.**
- The available evidence suggests **that most elder abuse is intra-familial and intergenerational**, **with mothers most often being the subject of abuse** by sons, although abuse by daughters is also common, and fathers are victims too.
- **Financial abuse appears to be the most common form of abuse experienced by elderly people**, and this is the area where most empirical research is available. Psychological abuse appears slightly less common than financial abuse, and seems to frequently co-occur with financial abuse.
- The problem of elder abuse is of increasing concern as in the coming decades unprecedented proportions of Australia's populations will be older: in 2050, just over a fifth of the population is projected to be over 65 and those aged 85 and over are projected to represent about 5% of the population.
- Our federal system of government means that responses to elder abuse are complicated as they are contained within multiple layers of legislative and policy frameworks across health, ageing and law at Commonwealth and state level."[25]

On 24 June 2016, the **General Purpose Standing Committee No. 2 (the Committee) of the NSW Legislative Council** tabled the Report of the Parliamentary Inquiry into Elder Abuse in NSW (Report no 44). In summary, its recommendations are:

---

[24] Rae Kaspiew, 'Elder Abuse' (Australian Institute of Family Studies, 2016) 21

[25] Quoted from the AIFS website: https://aifs.gov.au/publications/elder-abuse last viewed 11th July 2017.

Recommendation 1

That the NSW Government embrace a comprehensive, coordinated and ambitious approach to elder abuse with the following elements:

- a rights based framework that empowers older people and upholds their autonomy, dignity and right to self-determination;
- a major focus on prevention and community engagement;
- legislative reform to safeguard enduring powers of attorney and to establish a Public Advocate with powers of investigation;
- an ambitious training plan to enable service providers to identify and respond appropriately to abuse.
- an active commitment to building the evidence base for policy
- an enhanced role for the NSW Elder Abuse Helpline and Resource Unit.

Recommendation 2

That the NSW Government make a significant new investment of resources in the prevention of elder abuse. This must involve the development and funding of a new prevention framework that provides for:

- substantially enhanced primary prevention, community education, awareness and engagement, carer support and later life planning initiatives;
- specific resources for strategies targeting culturally and linguistically diverse and Indigenous communities and engagement with Multicultural NSW and Aboriginal Affairs NSW.

Recommendation 3

That the NSW Steering Committee on the Prevention of Abuse of Older People meet at least quarterly in order to enhance accountability and drive the implementation of government policy.

Recommendation 4

That in undertaking the three-year review of the NSW Interagency policy for preventing and responding to abuse of older people, the NSW Government:

- explicitly consider the improvements to content recommended by stakeholders documented in our report, including with regard to duty of care, reporting requirements in respect of a crime, and privacy and confidentiality;
- conduct further consultation on potential improvements with relevant government and non-government stakeholders;
- develop a comprehensive strategy to ensure widespread promulgation of a revised policy;
- ensure that service providers exercise their responsibilities under the policy.

Recommendation 5

That the Department of Family and Community Services and the NSW Ministry of Health develop and fund a comprehensive plan addressing the training needs of service providers, to enable better identification of and responses to abuse. The plan should address:

- the role of the NSW Elder Abuse Helpline and Resource Unit and other potential training providers;
- the needs of the full range of service providers including general practitioners and other health professionals;
- the potential for mandatory training for some service providers.

Recommendation 6

That the NSW Government expand the role of the NSW Elder Abuse Helpline and Resource Unit to include:

- provision of case management and coordination;
- consideration of Helpline operating hours, based on an assessment of demand;
- adequate provision for culturally and linguistically diverse and Aboriginal clients.

Recommendation 7

That the NSW Government, as a priority, introduce legislation to amend the Powers of Attorney Act 2003 consistent with Victoria's Powers of Attorney Act 2014, thereby significantly enhancing safeguards in respect of enduring powers of attorney.

Recommendation 8

That the NSW Government liaise with Law Society of New South Wales to request that the Society include a unit on the assessment of mental capacity in respect of substitute decision making, wills and property transactions in its Continuing Professional Development Program for legal practitioners.

Recommendation 9

That the NSW Government fund the NSW Elder Abuse Helpline and Resource Unit to conduct information sessions with financial institutions to raise awareness of financial abuse and promote online training tools for staff such as Capacity Australia's training program to identify financial abuse.

Recommendation 10

That the NSW Police Force establish a Vulnerable Community Support Officer in each Regional Command in New South Wales, with the position entailing training and support to front line officers, police response, liaison with local service providers and other government agencies, community education, awareness and engagement.

Recommendation 11

That the NSW Government introduce legislation to establish a Public Advocate's Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults at risk of abuse. Further, that the operation of the Office be reviewed after three years.

Tasmania

In Tasmania, the Tasmania Law Reform Institute (TLRI) has received a reference form the Tasmanian Attorney General to review the operation of the *Guardianship and Administration Act 1995* (Tas). Work on this reference will commence at the end of July 2017. The terms of reference are:

To ensure that guardianship and administration law in Tasmania is responsive to the needs of persons in the community with impaired decision-making capacities and advances, promotes and protects the rights of people with impaired decision-making capacity.

To review and report on the need for or desirability of changes to the Tasmanian *Guardianship and Administration Act 1995,* having regard to the following:

A. the general principles in the United Nations *Convention on the Rights of Persons with Disabilities* and other international human rights instruments;
B. developments in policy, law and practice in Tasmania and other jurisdictions that may impact on persons with impaired decision-making capacity since the Act commenced;
C. whether the current guardianship and administration framework will be sustainable and responsive to the needs of Tasmanians, in particular demographic changes.

In particular the Institute is to have regard to:

a) the role of guardians, administrators and 'persons responsible' in advancing the interests of persons with impaired capacity when making substitute decisions in line with national and international trends;
b) the need to ensure that the powers and duties of guardians, administrators and 'persons responsible' are effective, appropriate and, advance the best interests of persons with impaired capacity;
c) the functions, powers and duties of the Guardianship and Administration Board and Office of the Public Guardian;
d) the appropriateness of current mechanisms to address poor conduct of guardians, administrators and 'persons responsible' not acting in the best interests of a person with impaired capacity;

e) the provisions in relation to consenting to medical and dental treatment and how to address long term or indefinite medical treatment in institutional and non-institutional settings;
f) how both informal and formal assisted or supported decision-making frameworks are working with for persons with impaired capacity in Tasmania, including consideration of national and international trends;
g) the interrelationship between the *Guardianship and Administration Act 1995* (Tas) and other relevant Tasmanian legislation, in particular the *Mental Health Act 2013, Disability Services Act 2011* and associated regulations, *Powers of Attorney Act 2000, Alcohol and Drug Dependency Act 1968, Public Trustee Act 1930,* and the *Trustee Act 1898,* and how these Acts should interact if legislative amendments are proposed; and
h) other matters the Tasmanian Law Reform Institute considers relevant to the Terms of Reference.

This reference is in line with the national trend in other Australian jurisdictions to review Guardianship and Administration legislation. It also accords with the recommendations made in the ALRC Report *Elder Abuse—A National Legal Response* (ALRC Report 131) ad with the recommendations made by the General Purpose Standing Committee No. 2 (the Committee) of the NSW Legislative Council in its report on Elder Abuse in NSW (Report no 44).

The TLRI is also currently finalising its **Final Report on an *Intermediary/Communication Assistant Scheme* for people with communication needs** when involved in the criminal justice system. Recommendations made in this report may assist in addressing the barriers facing elderly people who complain of elder abuse to the police or legal counsel in gaining access to justice. Specifically, the recommendations, if implemented, may help elderly people communicate accounts of their experiences to the police, prosecutors and courts with the aid of communication assistants and intermediaries.

Possible areas for law reform in Tasmania

- Reform of the Tasmanian *Registration to Work with Vulnerable People Act 2013,* Registration to Work with Vulnerable People Regulations 2014, and relevant Department of Justice processes and forms;
- Enactment of comprehensive adult protection legislation;[26]
- Reform of guardianship and related laws (the TLRI has a reference from the AG on this matter);
- Provision of educational programs for the legal profession, the judiciary, magistrates and coroners about elder abuse and its prevalence;[27]

[26] Wendy Lacey, 'Neglectful to the Point of cruelty? Elder abuse and the rights of older persons in Australia', (2014) 34 *Sydney Law Review* 99.
[27] Ibid.

- Development of multidisciplinary teams – social workers and/or lawyers[28] to investigate matters of elder abuse as an adjunct to police investigation;[29]
- Reform of privacy laws;[30]
- Review the criminal law (it is not currently well tailored to deal with elder abuse and it is not being implemented effectively by police and prosecutors.[31] Criminal legislation should be nuanced and recognise the complexity of elder abuse.[32] In any event a specific offence of elder abuse should be created; [33]
- Implementation of mandatory reporting requirements;
- Enactment of legal protection for people reporting elder abuse cases;[34]
- Enactment of Tasmanian Human Rights legislation;[35]
- Encourage support for an International Convention to protect the rights of older people.[36]

Q5. How, systematically, and at what points, could intervention have reasonably occurred to protect and assist Mrs Mackozdi (MM)?

Developing an algorithm

Date	*MM's movements*	*Diagnoses, etc.*	*Money*	*Flags?*
Mid- to late-2007	MM sells Sydney house. Gives daughter $50,000	Long-term financial planner concerned that Mrs Mackozdi (MM) is confused		Planner could alert … whom? Do they have a code of ethics? Amber flag
October 2007	MM arrives in Tasmania			
November 2007	MM buys unit in New Norfolk outright		$202, 381.54 in one	Real estate agent – unlikely

[28] Victoria Rizzo, David Burnes, and Amy Chalfy, 'A systematic evaluation of a multidisciplinary social work–lawyer elder mistreatment intervention model', (2015) 27 *Journal of elder abuse & neglect* 1.

[29] Lacey, op. cit.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Susan Ryan, Age Discrimination Commissioner, Elder Abuse Forum: A Human Rights Perspective, Auburn Town Hall, NSW, 13 October, 2015, https://www.humanrights.gov.au/news/speeches/elder-abuse-forum-human-rights-perspective

[34] Deborah Cairns, Miranda Davies and Pricilla Harries et al, 'Framing the detection of elder financial abuse as bystander intervention: Decision cues, pathways to detection and barriers to action' (2013) 15 *Journal of Adult Protection* 1.

[35] Susan Ryan, Age Discrimination Commissioner, Elder Abuse Forum: A Human Rights Perspective, Auburn Town Hall, NSW, 13 October, 2015, https://www.humanrights.gov.au/news/speeches/elder-abuse-forum-human-rights-perspective

[36] Ibid.

			account (A) *after* purchase	
4 January 2008	MM visits GP at Brighton	Daughter says MM has Alzheimer's Disease (AD), cannot be left, is not cooking, wants to go to England and is giving away money		
11 January 2008	MM visits GP at Brighton	MMSE completed (15/30) Referral to Dunbabin (despite MM's reluctance) No further visits to this GP		GP – Process to check with Specialist? – amber flag Invasion of privacy and dignity of risk/personal choice
February 2008	Daughter writes to GP requesting copy of referral	Daughter tells GP that MM has taken offense to GP		GP – red flag
20 June 2008	MM visits GP at New Norfolk	GP notes serious problems, including MM claiming that daughter is taking her 'treasures'		new GP – was there any contact between former and new GP? – should there be? Amber flag – note: claims of taking treasures are very common amongst people with dementia and this is unlikely to raise a lot of concern
18 March 2009	MM transfers title of New Norfolk unit to daughter			Legal secretary says MM is of sound mind – red flag
25 June 2009	MM falls, alerts neighbour, and is admitted to RHH	Medical assessment: Fracture C2; underweight and mod to severe muscle and fat mass depletion;[37] dementia and delirium		Neighbour RHH specialists/staff
3 July 2009		ACAT assessment: MM lacks capacity to sign; score on MMSE = 15/30; MM needs residential high-care		ACAT – red flag: why was there no power of attorney (or equivalent) given signing problem?
		Speech pathologist assessment: Difficulty		SP with ACAT – was there contact? Should there be?

[37] Burns, J. M., Johnson, D. K., Watts, A., Swerdlow, R. H., & Brooks, W. M. (2010). Lean Mass is Reduced in Early Alzheimer's Disease and Associated with Brain Atrophy. *Archives of Neurology*, *67*(4), 428–433.

		chewing and swallowing; recommends pureed and thin liquids		What do RHH discharge records show?
9 July 2009	MM to Mary's Grange (MG) for respite	MM's weight = 53.25Kg GP (Taroona) notes MM is 'very confused'		
		GP (Taroona) sees MM once a week MM very paranoid and teary; prescribed anti-depressant and anti-psychotic; MM a 'very high-care' patient (all ADLs)		Did GP (Taroona) consider home circumstances in New Norfolk – amber flag Was there contact between this GP and others who had seen MM?
c. 9 August 2009	Daughter requests that MM be discharged from MG	GP (Taroona) concerned that 24-hour care needed Daughter advised room being prepared, and that she would provide care needed		No option for checking on daughter's capacity to provide care. Red flag Requirement for home visit by professional to determine suitability of accomodation
13 August 2009	MM discharged to care of daughter			What do discharge records show? Discharge planner? ACAT re home circumstances? Amber flag
14 August 2009 (next day!)	Daughter gets 'Authority to Operate' from CBA New Norfolk	Daughter can operate MM's accounts		Circumstances unclear – no PoA or Guardianship in place CBA? Red flag No carer's benefit – thus, no Centrelink contact
August 2009	Daughter gets repeat prescriptions from GP (Taroona)			
30 October 2009	New Norfolk unit sold		Proceeds into MM's son-in-law's account	
16 November 2009 (3 months after last consultation)	MM sees GP (Taroona)	MM confused; poor insight and judgement; hard work says daughter; GP provides info re palliative care and re placement option		Daughter flagging need for help to GP Amber flag

20 January 2010 (2 months after last consultaton)	MM sees GP (Taroona) – to obtain prescriptions	Consult is conducted (?) with MM in the car		GP aware that MM unable to mobilise (?) - amber flag
18 June 2010	MM sees GP: in wheelchair; inflamed toes (lack of care); son in law promises to arrange with podiatrist through his work – no notice given to GP of name, despite agreement	GP (Taroona) thought daughter doing a very good job (how would GP know?)		GP suggests podiatrist home visit (not taken up) – red flag
22 July 2010	MM and family move to Mount Lloyd	Accommodation is a hut (4 rooms)		NN Council?
23 July 2010	MM put to bed in shipping container			
24 July 2010	MM found dead	MM's weight = 37.9Kg		
31 August 2010			$30,490.31 in account A	CBA – red flag

(See appendix 1: Time-line graphic)

Comments

Taken one at a time, none of these events automatically signals a problem—other than that MM had some form of dementia and was declining. Do any two signal a problem? For example:

- Financial planner + GP
- Repeated change of GP
- ACAT + Speech Pathologist
- RHH Specialists + ACAT
- GP and non-follow-up of referral to podiatrist

A clearly problematic link in the chain is that the in-hospital assessment could discover nothing about MM's home circumstance nor about how her daughter was managing. Similarly, there were opportunities for the GP at Taroona to press the point (re podiatry, for example), but this did not happen. In August, 2009, when the GP provided information about palliative care and placement, was information about home care packages also offered? Presumably the workload for most GPs is such that unless an alert were to be put on MM's file, no follow up would happen regarding whether the son-in-law had indeed called in the podiatrist he knew.

When we look at the timeline, there are clusters of events and contacts with health and other professionals. These are:

- When MM transferred NN title to daughter; stopped visiting NN GP
- From the fall event to the discharge from Mary's Grange
- When GP saw MM in car
- When (same) GP recommended podiatry
- Authority to Operate being given to daughter
- Continuing withdrawals from MM's accounts and property sales money not being deposited.

So, the GPs, the ACAT and Speech Pathologist, the Bank, the Financial Planner and the discharge planners at RHH and Mary's Grange could all have raised the alarm.

ACAT, discharge planners or GP making a home visit – or at the very least conducting an interview with the patient and the proposed carers – would possibly have alerted them to any problems.

The Bank may well have noticed what was happening, but appears to have failed to give due care and attention to the matter of MM's transfer of title to her daughter. Legal Secretary is the only person who did not think MM was probably incapable. Is it in the interests of the bank to be attentive to the capacity of the client? The other person who may have acted is the Financial Planner. In this regard we note that the Australian Law Reform Commission's report (see response Q4, above) made recommendations in relation to the *Code of Banking Practice*, guardianship and administration processes, and measures in relation to social security benefits.

We also know nothing about what MM's other child was saying or doing about her.

Q.6 Would/could the Guardianship and Administration Board have any role to play in intervening in Mrs Mackodzi's situation?

Examination of the relevant facts in Mrs. Mackozdi's situation demonstrates that both her daughter and son-in-law would have met the criteria for satisfying the role of 'person responsible' as defined in the Act, and had they applied to the Board for an Order for legal guardianship or administration, this would have, in every probability, been ordered.

While the Act does allow for urgent intervention (Ss.29 and 30), there are no facts here to suggest that an application by a third party to the Board for Mrs Mackozdi's removal was warranted, or that a guardianship application would be successful. In fact, the contrary appears to be the case, in that the GP thought 'the daughter was doing a very good job to care for someone so highly dependent.'

With regard to the use of Mrs Mackozdi's monies, a third party application for administration of her finances could have been made at any time that a party reasonably suspected that her daughter was dealing with Mrs Mackozdi's monies without her consent. The Board, however, has no present power to recoup lost monies.

The role of the family in supported decision-making

While healthcare decision-making has traditionally focused on individual autonomy, there is now a change occurring in which the involvement of families is gaining prominence. This appears to stem from an increasing emphasis on relational aspects of autonomy which recognises the individual's connectedness to their family, and also the state's reliance upon families to share the burdens and costs of caring for elderly and disabled dependents. It places emphasis on patient autonomy as understood in relational terms, offering more adequate conceptions of independence, confidentiality and decision-making authority.

The Convention of the Rights of People with Disabilities strongly favours supported decision-making over substitute decision-making models traditionally adopted by adult guardianship laws, principally because it gives effect to the equality principle in Article 12. Supported decision-making, 'simply recognizes the way in which most adults function in their everyday lives'[38] through interdependent decision-making which assembles available advice and support from their social networks of family members, friends and others who assist them in various degrees at different times. These processes do not require legislative provision for their implementation but rather are contingent on the policies and practices of services, agencies and institutions that interact with the needs of people with impaired decision-making ability including the aged. [39]

Guardianship and Administration Board

Substituted decision making is a now dated legal concept, most directly covered in a jurisdiction's guardianship laws. In Tasmania, this is the *Guardianship and Administration Act* 1995 (GAR). Its Principles require (a) the **least restriction** of a person's freedom of decision and action, and as is possible in the circumstances and that (c) **the wishes of a person if possible, is carried into effect.**

The Objects of the GAR are (b) to enable the making of guardianship orders and administration orders; and (c) to make better provision for the authorization and approval of medical and dental treatment for persons with a disability who are **incapable of giving informed consent** to any such treatment; and (d) to ensure that persons with a disability and their families are informed of,

---

[38] Robert M Gordon, 'The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making' (2000) 23 *International Journal of Law and Psychiatry* 61, 63

[39] Terry Carney and Patrick Keyzer, 'Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Capacity' (2007) 7 Queensland University of Technology *Law and Justice Journal* 255.

and make use of, the provisions of this Act. The Act largely relies on family to assume the roles of person responsible, guardian, enduring attorney etc.

The GAA[40] designates that the 'person responsible' for an adult covered under the Act is their (i) guardian; (ii) spouse; (iii) care–giver; (iv) close friend or relative, in that priority order. In law, they are responsible for making decisions in all matters of the adult's health and lifestyle. The Board has extremely limited interventionist role in the decision-making arrangements that exist between persons with diminished capacity and their families/carers.

An application can be made to the Board for a formal Guardianship or Administration Order. This commonly occurs when there is no 'person responsible' or there is conflict between parties (between the person with the disability and their 'person responsible, or between the adult person's relatives/carers). S.20 authorises the Board to make a Guardianship Order if (1) **after a hearing**, the Board is satisfied that the person (a) is a person with a disability; and (b) is unable by reason of the disability to make reasonable judgements in respect of all or any matters relating to his or her person or circumstances; and (c) is in need of a guardian and that in (2) determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of that person's freedom of decision and action.

The Board will appoint as Guardian a suitable person[41] taking into consideration (a) **the wishes of the proposed represented person** so far as they can be ascertained; and (b) **the desirability of preserving existing family relationships**; and (c) the compatibility of the person proposed as guardian with the proposed represented person and with the administrator (if any) of his or her estate; and (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of guardianship of that person.[42]

Section 29 provides urgent powers in the case of **unlawful detention** of a person with a disability if the Board has been advised that the person is (a) being detained against their will, **or** (b) is **likely to suffer damage to his or her physical, emotional or mental health or well-being unless immediate action is taken**. The Public Guardian accompanied by a police officer can enter the premises for the purpose of preparing a report. If, after receiving the report the Board is satisfied that the information is correct, it may make an order enabling the person to be taken to, and cared for at, a place specified in the order until a guardianship application is heard.

S.30 also provides for the removal of a person to a place of safety if it appears **to a police officer** that there is reasonable cause to suspect that a person with a disability has been, or is being, ill-treated, neglected or unlawfully detained against his or her will; or who is likely to suffer serious

[40] S.4(1)(c)

[41] S.21(c)

[42] S.22

damage to his or her physical, emotional or mental health or well-being and appears to be in need of a guardian.

Law reform

At the end of 2014, Professor Wendy Lacey, co-convenor of the Australian Research Network on Law and Ageing, called for Parliamentary reform on the issue of elder abuse in the community setting.[43] Coinciding with the release of the Kaspiew Report on Elder Abuse in February 2016,[44] the Attorney General George Brandis, announced a new Inquiry for the Australian Law Reform Commission (ALRC) on 'Protecting the Rights of Older Australians from Abuse'. The ALRC released an Issues Paper in June, 2016.[45]

In its submission to the ALRC, Seniors Rights, Victoria, argued for the expansion of the 'functions of the Office of Public Advocate to receive and investigate complaints, and to conduct own-motion investigations, in relation to the abuse, neglect or exploitation of:…People who because of an attribute associated with ageing, are vulnerable to, or at greater risk of, abuse, neglect or exploitation.'[46] This was a common recommendation of submitters to the Inquiry.

In September 2015, the General Purpose Standing Committee No. 2 (the Committee) had commenced the Parliamentary Inquiry into Elder Abuse in NSW which also tabled its report, Inquiry into Elder Abuse in New South Wales,[47] in June 2016. Recommendation 11 was 'That the NSW Government introduce legislation to establish a Public Advocate's Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults at risk of abuse.

In June 2017, the ALRC tabled its report, Elder Abuse—A National Legal Response (ALRC Report 131). Contrary to the rather expected, stronger interventionist approach to elder abuse, the recommendations reinforce the elder person's autonomous right to decide. Intervention should only occur in matters of 'serious' abuse.

The following ALRC Recommendations relate to safe guarding adults at risk.

---

[43] Wendy Lacey, 'Neglectful to the Point of cruelty? Elder abuse and the rights of older persons in Australia', (2014) 34 *Sydney Law Review* 99.

[44] Rae Kaspiew, 'Elder Abuse' (Australian Institute of Family Studies, 2016) 21

[45] Australian Law Reform Commission, Elder Abuse Issues Paper 47 (Australian Government, June 2016).

[46] Seniors Rights, Victoria, Submission to ALRC on Elder Abuse, 2016, Submission 14, 8.

[47] On 1 September 2015, the General Purpose Standing Committee No. 2 (the Committee) commenced the Parliamentary Inquiry into Elder Abuse in NSW. The Committee tabled its report on 24 June 2016.

- Recommendation 14–4 Adult safeguarding laws should provide that the **consent** of an at-risk adult **must be secured before safeguarding agencies investigate, or take any other action**, in relation to the abuse or neglect of the adult. However, consent should not be required:

    (a) in **serious** cases of **physical abuse, sexual abuse, or neglect**; or

    (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or

    (c) if the adult lacks the legal capacity to give consent, in the circumstances.

- Recommendation 14-5 Adult safeguarding laws should provide that, where a safeguarding agency has **reasonable grounds** to conclude that a person is an at-risk adult, the agency may take the following actions, **with the adult's consent**:

    (a) coordinate legal, medical and other services for the adult;

    (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;

    (c) report the abuse to the police;

    (d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or

    (e) decide to take no further action.

- Recommendation 14-6 Adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents. Agencies should only be able to exercise such powers where they have **reasonable** grounds to suspect that there is '**serious abuse**' of an at-risk adult, and **only to the extent** that it **is necessary** to safeguard and support the at-risk adult.

The ALRC called for these Recommendations to be incorporated into uniform laws across the Australian states.

Q7. The role of ACAT and other Commonwealth agencies

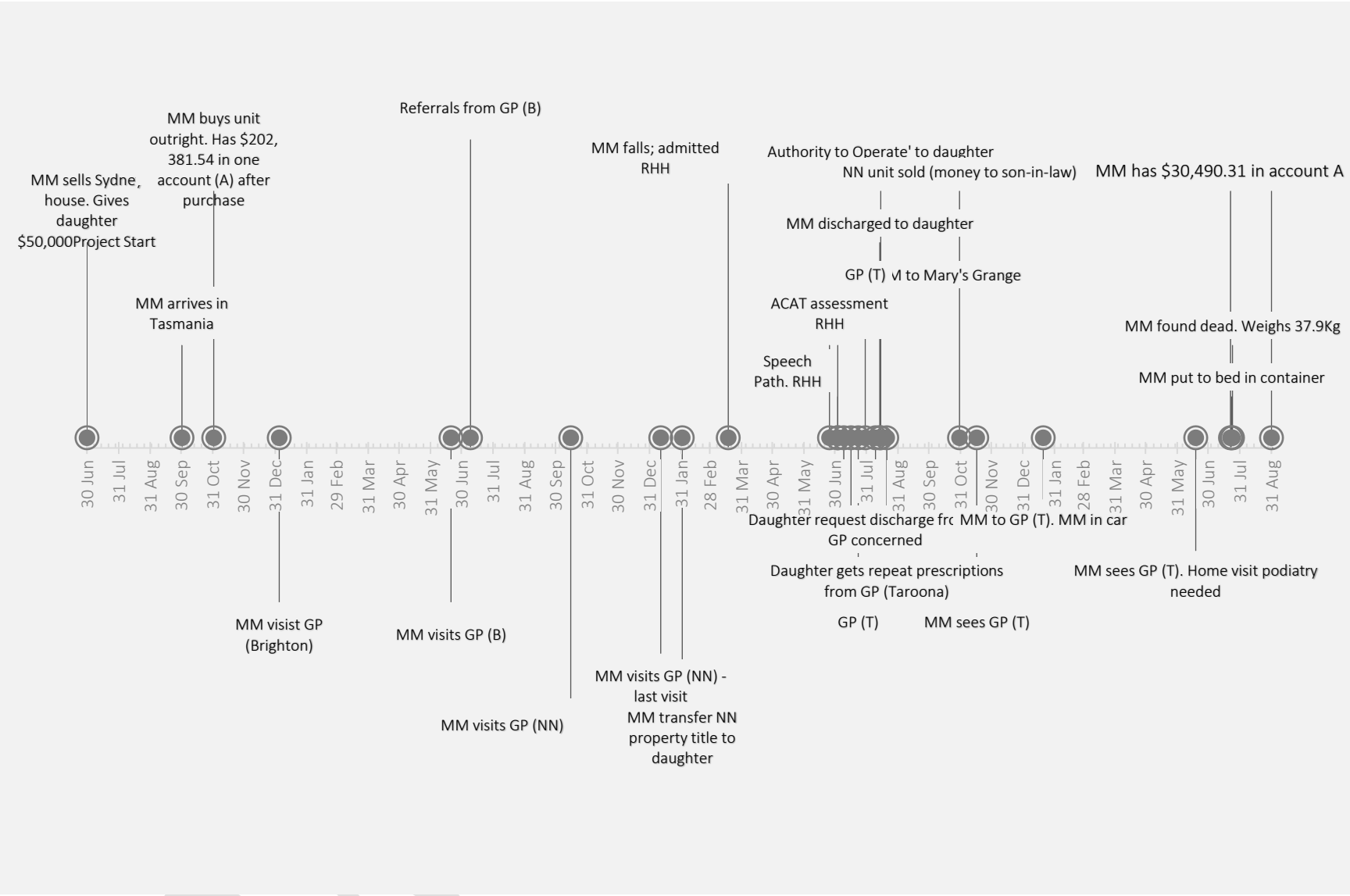
Older people with dementia and others at risk of abuse could require specific monitoring services. If assessed by ACAT as requiring high level residential care, then those who are to remain in the care of relatives/others could be referred to an advocacy/monitoring service which could be funded under the *Aged Care Act 1997*. The Home Care Packages provide a subsidy to an approved provider of home care to coordinate a package of care, services and case management to meet the individual needs of older Australians. ACAT/GP assessment could create an alert system to anyone remaining in the community but designated as needing high

level residential care, requiring a response, such as visit by advocate and nursing specialists (see our response to Q5 above). Ideally, a system will be created through consultation with expert practitioners in the area of looking after vulnerable people.

Such a system might include:

1. independent advocates who can speak on behalf of the person with dementia
2. funded 3-6 monthly monitoring and reporting that includes:
    a. assessment of weight and physical condition, including through visits by specialist Nurse Practitioners/Community Nurses
    b. where a Home Care package is in place, case managers or aged care workers could have a formal monitoring role
3. carers being required to accept some minimal levels of assistance if it is felt that the older person with high care needs is not receiving adequate care. While this draws attention to questions of dignity of risk, and of infringing individual rights, when the person has dementia the issue of dignity eventually becomes one of the right to adequate care, as the person loses the capacity to decide and to care for themselves.

While regular visits with a GP should be mandated, GPs are probably not best placed to make the home visit care assessments, as most care required by these individuals is ‘nursing care’ or support with the activities of daily living (ADLs). ACATs can refer clients for this support.



Appendix 1: Time-line (MM=Mrs Mackozdi)