The future of adult safeguarding in Australia

Summary

Adult safeguarding laws and practices are changing in the context of increasingly consumer-choice oriented social care provision, and in line with human rights developments. This article charts recent activity in this area and identifies ten principles that should guide future reform.

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The future of adult safeguarding in Australia

Abstract

Significant reforms to Australia's adult safeguarding laws and practices are in the process of occurring in the context of increasingly market-oriented social care provision and rising human rights consciousness. Recent safeguarding developments have included federal regulatory reforms concerning disability and aged-care service provision, together with significant reform activity stemming from a national inquiry into elder abuse. Despite this national activity, adult safeguarding continues largely to be an arena of state and territory responsibility. This article examines recent reform developments and asks how safeguarding laws and practices can be reformed to take account of increased federal involvement in social care regulation and the more market-oriented ways in which social care is being provided. The article argues that while state and territory safeguarding laws and practices are unlikely to become uniform, ten principles ought to guide continued adult safeguarding reform. These principles seek to balance respect for the autonomy of individuals with society's obligation to support those in need.

Key words

Aged abuse, policy, reform, social change, guardianship

Article

For a number of years two legal and social policy developments have been influencing changes to Australia's adult safeguarding laws and practices. Those developments are the increasing recognition that protective practices can unduly limit (as well as enliven) a person's human rights, and the adoption of consumer choice as a key underwriting principle for the delivery of social care, most notably in the aged care and disability fields ([reference removed to preserve peer review process]).

Those trends are continuing to influence the development of new state and territory models of adult safeguarding, against a backdrop of ever stronger national presence in social care domains, particularly in the field of elder abuse and in the funding and regulation of disability services. This increasing national presence comes primarily in the form of a national elder abuse reform agenda, and in the establishment of the National Disability Insurance Scheme (NDIS) and the NDIS Quality and Safeguards Commission. These reforms, together with the safeguarding gaps created by changed service delivery practices in the aged-care and disability sectors (such as more individuated service provision), are directly and indirectly prompting reform of state and territory safeguarding practices. Decisions are being made now that will likely affect future safeguarding practices for decades. This article surveys the current situation and looks at drivers of reform, before outlining key principles that should shape future adult safeguarding reform.

In this article I look at adult safeguarding in the general community. Additional regulations exist in relation to people in institutional settings (such as, for instance, residential aged care facilities and mental health facilities). In using the term 'adult safeguarding' I am referring to laws and policies that enable protective state responses to situations where particular adults are, for any of a number of reasons, at greater risk of harm than general members of the population. That may be because of the existence of a significant cognitive disability, significant frailty, social isolation, or other vulnerability. In identifying this focus, one must, of course, be wary of ascribing some kind of innate vulnerability to groups of people with certain shared characteristics. In this article I look at aged-care and elder abuse reforms, as well as reform in the provision and regulation of disability services. But it is important to note that many older people, and people with disability, are at no greater risk of abuse than others in the general community. Likewise not all people who are at-risk of harm are older or have disabilities.

A considerable body of adult safeguarding research and practice exists in the United Kingdom and North America, where a range of different adult safeguarding systems exist for people in the general community (see Graham et al 2017). In the UK, for instance, local authorities tend to exercise lead roles in coordinating multi-agency responses to concerns about adults who may be at risk of abuse. But even there, different models are evident, with some agencies utilising centralised expert units, and others adopting more localised responses (Graham et al 2017, pp. 260-266). In the United States, state-based adult protective services are common, with

considerable variety in resourcing, reporting requirements, and in investigatory and referral powers and practices (see Ramsey-Klawnsnik 2018).

The question for this article is how Australian safeguarding practices can keep pace with reforms in the way social care is delivered and regulated.

Rising federal presence

In Australia, important federal adult safeguarding developments have recently occurred or are currently in train in the overlapping fields of elder abuse, disability and aged care service provision.

The Australian Law Reform Commission (ALRC) 2017 report on elder abuse, and the subsequent development of a National Plan to Respond to the Abuse of Older Australians [Elder Abuse] 2019-2023 (Council of Attorneys-General 2019), signals a new foray by the national government into a field traditionally the preserve of states and territories, and carries significant implications for state and territory reform, some of which is already underway (see further [reference removed to preserve peer review process]).

The NDIS Quality and Safeguards Commission now has jurisdiction in all states and territories except Western Australia, and will have nationwide coverage from July 2020. The Commission provides the main oversight of the provision of ever-evolving disability services, and is another new national development that supersedes the operation of comparable agencies in those states and territories where such agencies existed. In addition, a federal Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is now underway, which one would expect ultimately to lead to significant reforms that would likely be led by the national government.

Meanwhile the creation and operation, since January 2019, of the Aged Care Quality and Safety Commission is a new development in the oversight of aged care service provision. Further important federal aged care regulatory developments will no doubt follow from the current work of the national Royal Commission into Aged Care Quality and Safety, whose establishment in part stems from systemic failures at the Oakden residential aged care facility in South Australia, which was the subject of a damning report in 2018 by the South Australian Independent Commissioner Against Corruption.

But despite the considerable national activity that is occurring in Australia, state and territory adult safeguarding laws and practices will continue to be paramount. While there are new national regulatory commissions in the social care field, both the NDIS Quality and Safeguards Commission and the Aged Care Quality and Safety Commission are constrained in their operations to focus on nationally-funded service provision in the disability and aged care fields. They are not broadly-defined adult safeguarding commissions. In contrast sit agencies such as England's Care Quality

Commission, which has regulatory roles spanning multiple service sectors, enabling it to promote itself (2019) as having a broad general community ‘safeguarding’ role.

Even people living in federally-regulated accommodation settings – such as residential aged care facilities or NDIS Specialist Disability Accommodation – whose service provision and general welfare receive more stringent oversight than is the case for people receiving services in private homes, are still reliant on, and subject to, state and territory safeguarding laws. For example, an older person in a residential aged care facility who is being financially abused by an adult child will need to rely on state and territory elder abuse responses, possibly involving police, a guardianship tribunal and a financial manager. All of these services are regulated under state and territory laws.

It is worth noting that the Australian Law Reform Commission did not recommend the creation of national safeguarding legislation or a national safeguarding agency. Nor are the current Royal Commissions in the disability and aged care fields likely to do so. This leaves state and territory laws and agencies with ongoing adult safeguarding expectations.

Consumer choice

The trend of social care provision being provided on a ‘consumer choice’ basis continues to be implemented in Australia, most notably in the disability and aged care services fields. I have elsewhere argued that the application of ‘consumer choice’ models of service delivery for people with significant cognitive disabilities is problematic, and indeed that consumer directed care often in practice means that services are directed *at* rather than *by* the consumer (see [reference removed to preserve peer review process]).

I put that concern to one side and instead simply note that this trend sees ever more services being provided away from institutional settings in favour of greater in-home service delivery. This is both a stated aim of current disability and aged care service provision, and a direct outcome of the effective privatisation, and disaggregation, of disability services under the NDIS as states and territories withdraw from disability service provision (and, largely, from disability services regulation).

Accompanying the shift away from institution-based and strongly sector-regulated care provision are more limited regulatory requirements. The focus here tends to be on thresholds for service registration (and de-registration), something of a contested area when market development is being encouraged; and the facilitation of consumer-instigated complaints. The NDIS Quality and Safeguards Commission (2018) and the Aged Care Quality and Safety Commission (2018) both highlight each of these elements as central to their ability to ensure the quality of disability and aged care services.

While each of these regulatory mechanisms is important, each is focussed on the quality of particular services, or service providers which provide them, rather than the general wellbeing of the individual who receives them. And while empowering people to complain about the services they are receiving is an important regulatory safeguard, obvious questions exist about the general effectiveness of this mechanism for people with significant cognitive impairments (even while acknowledging that complaints systems are far more accessible now than they have been in the past). Meanwhile, the greater variety of settings in which social care is now provided raises questions about the future role of historic safeguarding mechanisms – such as onsite community visiting schemes that monitor disability services in some jurisdictions (Department of Social Services 2016, p. 54).

Human rights

At the same time, international human rights norms are gradually becoming more manifest in their impact on adult safeguarding laws; most notably in the fields of guardianship, powers of attorney, medical and mental health treatment. Here the *Convention on the Rights of Persons with Disabilities*, which Australia ratified in 2008, is paramount, although other human rights instruments in the fields of civil, political, economic and social rights are also relevant.

Two consistent developments can be noted here. The first is the promotion of supported decision-making alternatives to substitute decision-making arrangements (where one person is empowered to make decisions for another). The second is the requirement for substituted judgement approaches to guide decisions where there is no option but to have substitute decision-making arrangements in place. That approach requires a representative to act in a way that privileges what the person would have wanted, rather than simply making a decision that they believe to be in the person's best interests.

In 2014 the ALRC recommended the adoption of these two features in its report on *Equality, Capacity and Disability in Commonwealth Laws* when it proposed a suite of National Decision-Making Principles (p. 3). Both of those elements – the promotion of supported decision-making, and the preference for substituted judgement approaches to be used where substitute decision-making is required – are being recommended in reviews of state and territory laws, with recent examples including guardianship reviews that have been conducted by the ACT Law Reform Advisory Council (2016), the NSW Law Reform Commission (2018) and the Tasmania Law Reform Institute (2018).

Meanwhile legislative developments are also following this pattern. In Victoria, for instance, the *Powers of Attorney Act 2014* (s. 85) and the *Medical Treatment Planning and Decisions Act 2016* (s. 31) introduced new supported decision-making options to substitute decision making, as does the recently-enacted *Guardianship and Administration Act 2019* (s. 87). Victoria's medical

treatment legislation (s. 61) and new guardianship legislation (s. 9) also require a substituted judgement approach to any substitute decisions.

The impact of these recent and likely future changes is that older protective safeguarding models, such as those that have existed in guardianship and mental health laws and that have enabled others to make 'best interests' decisions for vulnerable adults, are giving way to more nuanced approaches that privilege the person's choices.

Safeguarding gaps

The sum result of all these developments is that more at-risk adults are receiving social care services in home-like settings with consumer-instigated complaints prominent among the quality assurance mechanisms. Meanwhile adult safeguarding responses are increasingly being required to privilege the preferences and wishes of the person in question, rather than simply enabling protective actions to be taken on their behalf.

These are important changes that are resulting in significant improvements to the way people with support needs are being assisted. But they lead us to ask whether adult safeguarding laws and practices are keeping pace with reforms to the way that social care is delivered.

It is now widely agreed that there are gaps in the adult safeguarding arena in Australia (ALRC 2017, pp. 382-4). I mentioned earlier the limited reach of new national commissions in the aged care and disability fields. In addition, most states and territories do not have an easily identified agency that is empowered to investigate non-emergency situations of concern. Put simply, outside of situations that warrant immediate medical intervention or that involve obvious criminality, it is not immediately apparent in most states and territories which agencies, if any, are empowered to seek protective interventions for adults should harm or neglect occur (see further [reference removed to preserve peer review process]; ALRC 2017, chapter 14).

In the context of elder abuse, which is one area where this gap is currently manifest, the ALRC (2016, p. 61) noted that:

'While older people may contact elder abuse helplines or seek support and assistance from advocacy services, these services do not have the power to investigate. To the extent that public advocates and guardians have a power to investigate, they are generally limited, and vary between states and territories.'

In its final report the ALRC (2017, recommendations 14-1, 14-2 and 14-6) recommended a suite of reforms, including the following:

- ‘Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting “at-risk adults”’.
- ‘Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an “at-risk adult”.’
- ‘Adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information-gathering powers ...’

Analogous calls for reform to enable investigations into situations of concern have been made prior to, and following the ALRC report, including by the Victorian Law Reform Commission (2012, p. 447; and see [reference removed to preserve peer review process]), a New South Wales parliamentary committee (General Purpose Standing Committee No. 2, 2016, rec. 11), the NSW Ombudsman (2018, pp. 1, 3-4), the NSW Law Reform Commission (2018, Rec. 13.1) and the Tasmanian Law Reform Institute (2018, Rec 16.3). The Australian Bankers’ Association (2018) is one industry body that has strongly supported reform in this area.

Reform here would be consistent with developments, for instance, in England (Graham et al 2017, p. 258), where advocacy and research following the release of the ground-breaking *No Secrets* report (Department of Health 2000) has led to a surer legislative basis for safeguarding investigatory agencies and multi-agency ‘Safeguarding Adults Boards’.

While a degree of agreement exists that there are gaps in Australian approaches to adult safeguarding, a divergence of views exists about which agencies should fill it. The ALRC argued (2017, par. 1.48) that:

‘Existing public advocates and public guardians have expertise in responding to abuse, and may be appropriate for this broader safeguarding function, if given additional funding and training. However, some states or territories may prefer to give this role to another existing body or to create a new statutory body.’

Public Advocates or Public Guardians exist in all states and territories and exercise last-resort decision-making authority for adults when empowered to do so by state and territory guardianship tribunals (Queensland has both a Public Guardian and a Public Advocate, the latter having a systemic reform function). Guardianship tribunals generally exist as lists within the jurisdictions’ large civil and administrative tribunals, and guardianship orders can be made when certain criteria are met (including, typically, that the person in question has a disability). Depending on the scope of the authority, guardianship orders enable the appointed guardian to make lifestyle decisions such as where the person lives. Each jurisdiction also has a Public Trustee (Victoria has State Trustees) who can be appointed (as can private individuals) to exercise financial management of a person’s assets.

Public Advocates and Public Guardians are appointed pursuant to state and territory legislation and some significant jurisdictional differences exist. For instance, in Victoria the Public Advocate has the power to investigate matters referred to it by the state administrative tribunal (VCAT) and to 'investigate any complaint or allegation that a person is under inappropriate guardianship, is being exploited or abused or is in need of guardianship' (*Guardianship and Administration Act 2019* (Vic), s. 16(1)(g) & (j)). As the Victorian Law Reform Commission has previously noted (2012, p. 447):

'While these provisions are expressed broadly, they are limited in their application to circumstances where a guardianship or administration order might be appropriate. Further, the Public Advocate does not have a comprehensive range of powers to carry out these functions.'

In Queensland, however, the Public Guardian, in addition to having power to investigate complaints about substitute decision makers, also has the broader power to 'investigate any complaint or allegation that an adult [with impaired capacity for a matter] ... is being or has been neglected, exploited or abused' (*Public Guardian Act 2014* (Qld), sections 12 and 19).

In seeking reform in this field, the ALRC has sought to tread the fine line between protecting vulnerable people, and respecting their right to live autonomous lives free from unwanted state intervention.

Its proposed reforms (2017, Rec. 14-3, p. 387) are focussed upon 'at-risk adults', a term it suggested be applied to adults with 'care and support needs' who 'are being abused or neglected, or are at risk of abuse or neglect' and who 'are unable to protect themselves ... because of their care and support needs.'

While the ALRC proposed that consent be required before an agency could intervene, it recognised (2017, p. 386) that:

'... in particularly serious cases, the safety of an at-risk person may need to be secured, even against their wishes. Although consent should always be sought, it should not be required in serious cases of physical abuse, sexual abuse or neglect'.

It also argued that consent oughtn't to be required 'where safeguarding agencies cannot contact the at-risk adult, despite extensive efforts to do so, or where an adult lacks the decision-making ability to give this consent.'

Recent developments

Two jurisdictions have moved in the wake of the ALRC report to address adult safeguarding gaps.

In South Australia an Adult Safeguarding Unit has been established as part of that state's Office for Ageing Well, with the legislative power to 'investigate reports relating to the suspected abuse of vulnerable adults' (*Office for the Ageing Act 1995* (SA), as amended in 2018, section 15). The office has powers in relation to adults of any age; however, for the first three years of its operation, its powers are limited to Indigenous people aged 50 and older, and other adults aged 65 and older (*Office for the Ageing (Adult Safeguarding) Amendment Act 2018* (SA), schedule 1.)

South Australian legislation defines a 'vulnerable adult' to be 'an adult person who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage, is vulnerable to abuse' (*Office for the Ageing Act 1995* (SA), as amended in 2018, section 3).

While the views of the person in question will normally determine whether an investigation proceeds, that will not apply in situations of 'immediate risk', where the allegation concerns a 'serious criminal offence', where the person has 'impaired decision-making capacity' as to the decision to consent to an investigation, or in situations where the person can't be contacted (*Office for the Ageing Act 1995* (SA), as amended in 2018, s. 24(1) and (4)).

Meanwhile in New South Wales there have been calls for the establishment of a Public Advocate with strong investigation powers. The New South Wales Law Reform Commission (2018, pars. 13.36-38) argued that:

'We see the NSW Public Advocate as having a wide scope for investigation ... Importantly, we recommend allowing the Public Advocate to act in response to a complaint or on its own motion'.

Supporting this development, the NSW Ombudsman, who released a report in 2018 drawing on his office's examination of 206 allegations of 'abuse and neglect', recommended (2018, pp. 1, 3-4) 'the establishment of an independent statutory body to investigate ... the suspected abuse and neglect of vulnerable adults in NSW'.

The New South Wales government then followed a slightly different tack, opting to appoint a state 'Ageing and Disability Commissioner' from mid-2019. In announcing this development, the New South Wales government (Sas and Mayers 2018) noted that the new Commissioner:

'... will have the resources and the ability to go into premises to actually ensure that if there are complaints – or if the commissioner themselves wants to start a formal investigation – they'll have those powers.'

The *NSW Ageing and Disability Commissioner Act 2019* (s. 12) empowers the Commissioner 'to deal with allegations of abuse, neglect and exploitation of adults with disability and older adults,

whether on the basis of a report made to the Commissioner or at the Commissioner's own initiative'.

It remains to be seen what other states will do. In Western Australia a parliamentary Select Committee into Elder Abuse released its final report in 2018. While it chose not to recommend the creation of new adult safeguarding legislation, which it considered arguably went beyond the scope of its brief, it did recommend that the South Australian legislation be monitored (2018 pp. 72-73).

Meanwhile the Victorian government sponsored new guardianship legislation that retains the Public Advocate's current investigation powers. But the government did note (Victorian Parliamentary Debates, Legislative Assembly, 19 December 2018, p. 52) that 'further work and consideration is required' on this topic, and noted also that there would 'likely' be 'further reforms in respect of elder abuse' in light of the ALRC report.

A central challenge for the new agencies in South Australia and New South Wales, and indeed for any other state and territory safeguarding developments in the wake of the ALRC report, will be the capacity of investigating agencies to coordinate multi-agency responses to situations of concern. International experience identifies this as crucial to the effective operation of safeguarding agencies (e.g. Graham et al 2017; Ramsey-Klawnsnik 2018).

Future reform

Clearly the adult safeguarding environment is in the process of transition. In considering the shape future reform might take, it is well to remember that there is significant variability among existing state and territory adult safeguarding laws and practices in fields that include mental health, guardianship, homelessness, compulsory drug treatment, and so on. It is also important to note that there remains considerable variability in state and territory social care service histories and cultures, even when one focusses solely on the federally-regulated (or soon-to-be federally regulated) service areas of aged care and disability. Some jurisdictions have highly developed service sectors that can cater for the needs of people with very complex support needs. Others do not, and their 'thin markets' (and routine instances of market failure) raise particular safeguarding challenges.

This variability suggests that there is probably no optimal adult safeguarding model that it would make sense to try to introduce throughout Australia.

Having said that, however, one can distil key core principles that ought to guide future adult safeguarding reforms. These principles – here I will list ten – are drawn from the variety of service sector and human rights developments that I have referenced in this article.

1. The target 'at-risk adult population' needs to be defined carefully so as to ensure an appropriate nexus exists between a person's right to make their own decisions and society's protective responsibilities.
2. A functionally independent agency must be empowered to investigate, both on its own motion and following a complaint or notification, any situation of concern involving an at-risk adult.
3. An assessment power, which enables experts to see and speak with the person in question, is fundamental.
4. The person's wishes must be a key consideration in any investigation.
5. Consistent with the principle of the 'dignity of risk', where the person in question has the capacity to do so, he or she must be able to refuse to have their situation investigated by, or be assisted by, the agency.
6. A 'supportive intervention' approach by the agency that enables it to identify and, where necessary, coordinate support services (e.g. aged care, disability, mental health, family violence support services) will be central to its effectiveness.
7. The agency will need to be able to make appropriate usage of existing safeguarding mechanisms (e.g. referrals to police, disability and mental health services; usage of intervention orders; applications for guardianship; referrals to health, aged-care, mental health and disability complaints authorities).
8. The agency's coercive investigative powers must be commensurate with the risk faced by the person in question (e.g. there must be a reasonable suspicion that an at-risk adult is suffering 'significant harm' or something comparable before forcible entry powers are exercised).
9. The use by the agency of its coercive investigative powers (e.g. where a request to see the person, or information about them, is refused) should require a warrant and be subject to monitoring and review (preferably by a tribunal).
10. Information sharing laws need to enable relevant agencies to communicate necessary information.

Reform in the adult safeguarding area will need to continue if Australia is to keep pace with demographic and social care provision changes that are occurring, and if Australia is to remain meaningfully bound by the human rights instruments that it has ratified. As always, such developments need to maximise the autonomy of the individuals concerned, while ensuring their protection.

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