A CRITICAL COMMENTARY ON THE 2017 ALRC ELDER ABUSE REPORT:
LOOKING FOR AN ETHICAL BASELINE FOR LAWYERS

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In Australia, the ethical rules for lawyers faced with clients exhibiting signs of mental incapacity or otherwise vulnerable and at risk of abuse are neither consistent nor clear. Lawyers cannot freely act to protect vulnerable clients without risking an unethical breach of client confidence, a position that sits in stark contrast to commonly understood moral norms in the community. The 2017 Australian Law Reform Commission Elder Abuse Report seeks a community response to elder abuse. In so doing it opens discussion for a reconceptualisation of some of the underlying assumptions upon which legal ethical rules in Australia are based. Further, it provides the opportunity to form a more solid philosophical basis for lawyers to develop an understanding of the competing interests between human rights and the protection of the vulnerable at the heart of this complex area.

In May 2017, the Australian Law Reform Commission (‘ALRC’) published its report Elder Abuse—A National Legal Response.¹ The report addresses the legal and social issues raised by the increasing number of older people in Australia,² and the potential for older people to be the subject of abuse for multiple reasons and from different sources.³ The complexities of the subject matter and the diverse circumstances in which elder abuse can occur, are illustrated by the range of contexts discussed in the report. Elder abuse can arise in the provision of financial, medical, care related, physical, housing, legal, family, administrative, social and community services. It can be ‘casual’ abuse that arises from misconceptions about the needs and potential of older people. It can arise within families or within service provision. It can be entrenched by legal, systemic, administrative, social and community standards. Elder abuse requires a whole community response, and the report considers the issues relating to elder abuse from a range of social perspectives and institutions.⁴

Lawyers come into regular contact with clients who fall into the ambit of the ALRC report. Lawyers are rightly concerned about mental capacity in the case of elderly clients, which can be coupled with concerns about undue pressure and influence from family and others. These concerns may or may not arise alongside concerns about physical, mental, or financial safety and wellbeing. In their professional capacity, lawyers are not acting as part of the broader community and must work within the specific boundaries of legal ethical guidelines.⁵ This constrains the actions that they are at liberty to take in relation to their clients. To date, the various legal ethical rules that guide lawyers in this complex area have been inconsistent and often opaque. Lawyers also operate in a legally structured framework; their role vis-à-vis clients is to manage legal problems or legal outcomes. It is not their role to be concerned with broader social, community, financial or other matters.⁶

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² Ibid.
³ Ibid 18.
⁴ Ibid 21.
⁶ This is an accurate reflection of lawyers in their traditional advisory role. It does not reflect ideas like ‘ethics of care’ lawyering in which a lawyer would indeed consider the broader social and community implications of a client’s situation. Lawyers do undoubtedly think beyond basic legal advice and indeed
After grappling with the practical challenges of elder abuse, the ALRC recommended reforms that have philosophical, ethical and practical implications for legal practitioners. The purpose of this article is to critically analyse these proposals and evaluate their impact on lawyers aiming to achieve access to justice for clients with capacity issues. I will do this in three stages and much of this discussion will refer to an earlier article that compared approaches on client capacity between jurisdictions within Australia and internationally. In Part One, I will briefly revisit and summarise the current ethical position of lawyers in relation to managing clients with capacity issues. I will review more recent ethical guidelines that have been developed in Australia, and give particular consideration to the extent to which current guidelines and ethical regimes conceptualise ideas of autonomy, dignity and protection. In Part Two, I will consider the nature and impact of the reforms proposed by the ALRC on the current position for lawyers. In Part Three, I will pose a question: If the reforms are implemented, what will be the implications for lawyers in philosophical and practical terms?

I The Current Ethical Position

Older people do not occupy a special or distinct legal position. The rule of law, and principles of legal ethics apply across the community. Older people may exhibit a cluster of characteristics that expose them to abuse and vulnerability, and the same can be said for people with mental incapacity. However this does not mean that they should be treated ‘differently’, individually or as a class, which would itself constitute a breach of human rights. This is explicitly identified in the ALRC report, which frames elder abuse as a human rights issue grounded in the idea that dignity and autonomy are the inalienable rights of every human. However, the report also points out that whilst older people can be exposed to a cluster of risks, their rights are not well defined.

The general human rights approach of equal treatment can be eclipsed by community perceptions of the elderly as a specific vulnerable class, perhaps not unlike children. This in turn can result in benign paternalism or best-interests decision making, which consequently informs law, policy and practice around older people. Ideas of independence, self-fulfilment and dignity can be overlooked when focusing on immediate needs such as physical care, access to resources, health care, and accommodation. As older or otherwise vulnerable people may experience multiple challenges, it is easy to assume that merely being older somehow defines personhood. This gives rise to the concern that underlies the ALRC report: the general belief that the human right to autonomy and self-determination must be necessarily balanced against the physical, care related, and social ‘best interests’ of the person. This idea of protection often slides into paternalistic intervention which fails to recognise that the subject...
of the decision should be involved in decision making, and that their needs go beyond day to
day physical requirements. Benign or ignorant paternalism, motived by the perceived best
interests of the elder person, is pervasive and can result in cultural blindness to the
foundational rights of older people. This perception permeates society, and lawyers are no
exception.\textsuperscript{18}

Legal ethical principles address two key questions that arise for lawyers encountering client
capacity and client abuse:

1. What should a lawyer do if their client’s capacity to give instructions to the lawyer is in
doubt? and;
2. When can and should a lawyer breach their duty of confidence to a client in order to divulge
lack of capacity or report abuse in order to protect the client’s best interests?

The first challenge rests partly on the concept of agency – the principle that the lawyer as agent
can only give effect to the client’s informed instructions. It also rests on the concept of dignity
– that lawyers must act on the client’s expressed will, not supplant it with some other idea of
what is best for the client.\textsuperscript{19} The second challenge arises out of the strict provisions
surrounding lawyer-client confidentiality. Absolute primacy is given to confidentiality
between lawyer and client. This rests on the presumption of exclusivity between lawyer and
client, and on the client’s entitlement to privacy and confidence. It can only be prised open in
specific and very narrowly defined circumstances.\textsuperscript{20}

The peak professional body in Australia, the Law Council, has issued Australian Solicitors’
Conduct Rules (‘ASCR’), which most states and territories in Australia have adopted with only
minor variation. These rules specify that lawyers must act in the client’s best interests;\textsuperscript{21} that
lawyers must provide clear and timely advice to assist a client to understand relevant legal
issues and to make informed choices;\textsuperscript{22} and that a lawyer must follow a client’s lawful, proper,
and competent instructions.\textsuperscript{23} The rules go on to state that a lawyer must not disclose any
information confidential to the client that is acquired during the engagement with the client
unless the client consents,\textsuperscript{24} and the solicitor does so for the sole purpose of avoiding the
probable commission of a serious criminal offence\textsuperscript{25} or for the purpose of avoiding imminent
serious physical harm to the client or another person.\textsuperscript{26} Explicit application of these principles
means that a lawyer cannot take any action on behalf of a client who does not give instructions
that are prima facie competent, and that if the lawyer believes the client is incompetent, they
are barred by prohibition from breaching the confidence of the client by telling anyone else
about it. This might mean that the lawyer believes the client is incompetent and at risk but is
not able to divulge that information to anyone in order to protect the client. It also means that
if the client is competent, the lawyer is bound to follow their instructions, however much the
lawyer believes they are not in the client’s best personal, social, financial, or other interests.\textsuperscript{27}

Mindful of these internal tensions of principle, law societies in all states in Australia have
looked for a way to guide lawyers through this very complex situation. Progress has been slow.

\textsuperscript{18} The Law Council of Australia’s commentary on the Solicitors’ Conduct Rules specifically identify ‘old age’
as a possible indicator of lack of competency, along with mental illness, undue influence and fraud. See
Law Council of Australia, Australian Solicitors’ Conduct Rules 2011 and Commentary (at August 2013) r
8.1.
\textsuperscript{19} For example, by allowing their own view of what is best conflict with the client’s stated view.
\textsuperscript{20} Law Council of Australia, above n 18, r 9.
\textsuperscript{21} Ibid r 4.1.1.
\textsuperscript{22} Ibid r 7.1.
\textsuperscript{23} Ibid r 8.1.
\textsuperscript{24} Ibid r 9.2.1.
\textsuperscript{25} Ibid r 9.2.4.
\textsuperscript{26} Ibid r 9.2.5.
\textsuperscript{27} Whilst lawyers may only act on client instructions, they can of course counsel clients about the
implications of, or on, other people or interests.
Writing on this topic three years ago, only two states in Australia, South Australia (‘SA’) and New South Wales (‘NSW’), had specific ethical guidelines for working with clients with incapacity issues.\(^{28}\) Guidelines introduced in SA in 2012 proposed a strong human dignity approach,\(^{29}\) limiting the role of lawyers to support and advise, but recommending against any paternalistic intervention in the case of questionable capacity.\(^{30}\) They proposed that a lawyer could never breach client confidence without express instructions, even to achieve protective measures for a client losing capacity, and that a lack of instructions would inevitably result in the lawyer being disabled from acting further for the client. This also meant that the lawyer was not permitted to reveal the need for protection. Guidelines introduced in NSW in 2003 took a more paternalistic approach.\(^{31}\) Prompted by the practical reality that there would be cases where a lawyer cannot obtain instructions and has legitimate concerns about the client’s welfare, the 2003 NSW guidelines envisaged lawyers breaching confidence in order to seek some form of intervention for a client exhibiting incapacity, and also allowed lawyers to personally initiate this process.\(^{32}\) The guidelines updated in 2016 place greater emphasis on the balance of confidentiality and protection but continue to reflect the common law position that intervention is an option if there is no reasonable alternative.\(^{33}\) Both sets of guidelines are grounded in ethical principles, but result in diametrically opposed outcomes. The SA guidelines took a clear view on the absolute nature of client autonomy and the prohibition on lawyers breaching confidence, even in perceived best interest, while the NSW guidelines looked to the need to protect vulnerable clients against disadvantage, even if there was some risk to lawyer-client confidentiality. This position is illustrated in the case \(R \ v \ P,\(^{34}\) where the client lacked any community support, the lawyer was familiar with the client’s circumstances and there was no reasonable alternative available to the lawyer to seek protection for the client. The intersection of rules and reality reflects the dilemma for lawyers trying to do the best for the clients they are dealing with.\(^{35}\) Neither set of guidelines approach the matter lightly. Both acknowledge that capacity can be decision specific and they contain detailed and informative guidance on determining capacity, maximising the client’s capacity to be involved in decision making.

More recently, Victoria and Western Australia (‘WA’) introduced detailed guidelines,\(^{36}\) and the Law Society of Queensland has endorsed guidelines prepared independently.\(^{37}\) These guidelines also reflect divergent approaches. The Victorian guidelines appear to adopt a position similar to the SA guidelines, particularly by acknowledging that if a client cannot give instructions due to incapacity, the lawyer may have to cease acting for them.\(^{38}\) However, the guidelines then veer towards the NSW approach suggesting that only as a very last resort should lawyers make an application for guardianship or protection of the client.\(^{39}\) The WA guidelines are limited to detailed practical advice without explicit discussion of human rights principles.\(^{40}\) The Queensland guidelines are significantly more conservative, suggesting

\(^{28}\) Castles, above n 5, 29–30.
\(^{30}\) Castles, above n 5, 30.
\(^{32}\) Castles, above n 5, 29.
\(^{33}\) Law Society of New South Wales, above n 31, 12; \(R \ v \ P[2001]\) NSWCA 473, cited in Law Society of New South Wales, above n 31.
\(^{34}\) Ibid.
\(^{35}\) Purser, above n 8, 3.
\(^{38}\) This advice relates specifically to situations where the lawyer believes a medical assessment is needed to determine capacity but the client refuses. See Law Institute of Victoria, above n 41, 5.
\(^{39}\) Ibid 6.
\(^{40}\) Law Society of Western Australia, above n 36.
extreme caution before involving third parties without client consent.\textsuperscript{41} The different state guidelines, to varying degrees, all advocate for respectful, patient, careful and, if necessary, repeated engagement with the client in order to maximise their capacity to make choices. With the exception of SA and Queensland, this often involves suggesting medical assessment, inviting the client to include relatives in future dealings with the lawyer, or involving other supportive agencies or resources.

The SA and Queensland guidelines take a consistently robust approach to breach of confidence. Both demand informed client consent before any breach of confidence, and in the absence of consent, state that the lawyer should cease to act for the client.\textsuperscript{42} This is particularly problematic given the interlinking ethical responsibilities of legal advisors, who are tasked with the triple goals of zealously pursuing client interests (as stated by the client not presumed by the lawyer),\textsuperscript{43} ensuring that the clients are fully advised in order to provide meaningful instructions,\textsuperscript{44} and respecting confidence.\textsuperscript{45} Guidelines that recommend advising an elderly client to seek medical assurance of their capacity to avoid things ‘going wrong’ in the future uniformly fail to require the client to be advised that one possible outcome of this assessment is a finding that they are not legally capable, with consequential removal of their autonomy. Lawyers in any other context would be ethically obliged to alert clients to possible negative outcomes of proposed action.\textsuperscript{46} Elder clients should be afforded the same care. The disparity between approaches well illustrates the dilemma addressed by the ALRC in its report. Conversely, the conclusion that the lawyer must cease acting if consent is not forthcoming, rather than seeking to protect the client, can expose vulnerable clients without community or other support (as in the case of \textit{R v P}) to significant risk. Respecting the ethical concept of absolute confidentiality might be at the expense of wellbeing, safety, protection, and quality of life. The ALRC report acknowledges this dichotomy, noting that different views of human rights and the practical impact of low level abuse on key human rights will influence where the balance falls in this situation.\textsuperscript{47}

It is notable that all of these guidelines fail to reiterate the position stated by the Law Council of Australia’s ASCR, which explicitly limit when a lawyer can breach client confidence to circumstances where the client is at risk of imminent serious physical harm,\textsuperscript{48} or to prevent the probable commission of a serious criminal offence.\textsuperscript{49} At present, psychological or financial harm are expressly excluded. There is no provision for breaching confidence if the solicitor has reason to doubt the client’s capacity and believes they need protection other than from serious physical harm.\textsuperscript{50} The much lower benchmarks set by Australian law societies (other than in SA and Queensland) demonstrate the weighing of best interests over autonomy that is not consistent with the national statement of ethics on client confidence.

Whilst all of the guidelines propose measures for maximising client participation in decision making, none go to the lengths that have been introduced in the UK which take a different philosophical approach. Underlying the UK position is the maximisation of client capacity to make choices within the lawyer-client relationship by insisting on an evidence-based assessment of likely client preferences in the event that paternalistic decision making is
inevitable. This is the UK approach across professions and services. By contrast, in Australia, capacity is still primarily seen as an all or nothing proposition. This approach can be seen in the recent call for submissions on the revision of the Australian Model Rules of Professional Conduct by the Law Council of Australia. Discussing the current position on the ethical management of clients with questionable capacity, the document suggests that ‘a client incapable of managing his or her own affairs is likely, generally, to be incapable of giving instructions ...’. This simplistic assumption reinforces the binary approach of incapacity as all or nothing. It gives little attention to empowering and supporting decision making for clients who have nuanced needs and capacities.

The various positions in Australia at this time all rest on the same broad ethical values of confidentiality, client autonomy and residual protection from harm but emphasise different balances between these interests. We still lack a clear statement of principle around balancing autonomy and protective best interests. Very real personal, social and legal dilemmas arise when a person is not legally competent, but not legally protected. Lawyers, acting as lawyers, may not be able to ignore the plight of a client suffering abuse, nor leave a vulnerable and incapable client unprotected. Lawyers have a duty of confidentiality and loyalty, but when that duty conflicts with concerns that a client is at risk, the issues are complex and not helpfully solved by a rigid statement of principle.

II ALRC REFORMS

The 2017 ALRC report and recommendations bring new depth to this discussion. The ALRC report spotlights the dilemma lawyers can face when the threatened wellbeing or safety of a client conflicts with the lawyer’s duty to respect the client’s autonomy. As a member of the community, the lawyer may feel a moral imperative to take steps to protect a client at risk of abuse. However, legal ethical rules do not reflect the community’s moral position. They restrain the lawyer from acting as their instincts might suggest. ASCR rule 9 specifies the only circumstances when a lawyer can breach the confidence of a client: to prevent the probably commission of a serious criminal offence, or to prevent imminent serious physical harm to the client. These exceptions will apply in extreme circumstances, and to that extent align with the ALRC benchmark that only serious abuse triggers intervention. But they set a high benchmark that will not catch instances of minor financial, psychological, and freedom of choice abuse that older adults are also commonly exposed to. This underlines blurred lines around the meaning of human dignity. The very capacity to exercise autonomy and agency may itself be facilitated by the provision of more basic needs such as care, housing, finances, health and safety. A high threshold may overlook the value of supporting quality of life at a less extreme level in order to facilitate a dignified and autonomous life.

The ALRC report is framed in terms of elder abuse. This can take many forms: physical, emotional, psychological, legal, financial and social. Issues of mental capacity that inhibit the ability to make decisions can coincide with, and may be catalysts for, abuse. Mental capacity is not axiomatically related to concerns of abuse, although it may raise concerns about the client’s capacity to care for themselves and determine their best interests. Moreover, mental frailty, lack of confidence, dependency and vulnerability may affect a person’s willingness and capacity to make decisions freely. Abuse is not necessarily linked to mental capacity, but elder people are vulnerable to both.

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51 Castles, above n 5, 43.
52 Law Council of Australia, above n 50.
54 Law Council of Australia, above n 43, r 9.2.4.
55 Ibid r 9.2.5.
56 Australian Law Reform Commission, above n 1, 51–2 [2.91]–[2.93].
57 The ALRC Report provides a comprehensive list of risk factors. See Australian Law Reform Commission, above n 1, 18, 20–1.
The ALRC report focuses on older people. However, founded as it is on human rights principles, the report is explicit that its premises apply to any adult experiencing abuse. It necessarily draws on extensive discussion of mental capacity in relation to older people.  

However, the ALRC report specifically recognises that its recommendations are equally applicable to any adult person. The ALRC report adopts the World Health Organisation definition of elder abuse 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.’ It notes that a confluence of factors including dependency, poor health, mental disorders including depression, low income or social economic status, cognitive impairment and social isolation are typical risk factors for abuse of any person, but are prevalent in the case of the older population.

Recognising the lack of consistency or coverage of the protections for older people, the ALRC proposes the development of comprehensive and cogent adult safeguarding arrangements to provide accessible, consistent and nuanced protection. In the context of elder abuse, these protective measures apply equally to any adult. However, the report also makes a clear statement of principle that whilst protection of adults against abuse is imperative, autonomy is a priority and outweighs protection. This is an important statement of principle. It challenges the implicit tendency of ethical guidelines and community attitudes to put protection first. It proposes that the consent of at-risk adults prior to considering any safeguarding arrangements is absolutely imperative, except in serious cases of physical abuse, sexual abuse or neglect. Only in these extreme circumstances is intervention without consent appropriate. Even then, autonomy is still a critical factor, with protection given extra weight only in cases of serious abuse.

The report makes a second innovative recommendation. It suggests moving away from the concept of ‘presumed capacity’ to a model of supported decision making. Every set of guidelines in Australia starts with the traditional common law proposition that clients should be presumed to have capacity unless there is some legitimate reason to think otherwise. This places an onus on lawyers (and others) to make at least a preliminary assessment of client capacity. The necessity for lawyers to draw upon the expertise of medical professionals to determine capacity opens the door for loss of the client’s legal capacity. Evaluations of legal capacity are not nuanced, yet it is by now well accepted that people may have different levels of capacity that have different impacts. For example, an elderly client with some capacity issues may be well able to make a decision that they want to divide their estate equally to all offspring (or even that they do not), but may not understand the consequences of a complex financial investment arrangement. Many elderly people with diminishing capacity will have no doubt that they ‘don’t want to go into a home’, although they may lack the capacity to organise and implement other arrangements to maximise their independence for as long as possible. Under existing law and ethical guidelines, once legal capacity is found to be lacking, discussions about maximising engagement with the decision making process are no longer mandated. It is true that the older person’s support network can explore the options, but legally the older person’s rights to be heard and to make these decisions are taken over by another representative, even though there may be a range of decisions that they can make autonomously.

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58 This is because of the purely demographic incidence of diminished mental capacity that goes with ageing.
59 Australian Law Reform Commission, above n 1, 19.
60 Ibid 20.
61 Ibid 376 [14.6].
62 The definition of a person needing safeguarding such that consent might not be needed is that the person needs care and support, is being abused, or is at risk of abuse or neglect, and cannot protect themselves.
63 Australian Law Reform Commission, above n 1, 52.
64 Ibid 56.
65 Castles, above n 5, 32.
Whilst legal guardians are expected to act reasonably in the best interests of the person, they are not required in Australia to specifically seek out the older person’s views. This contrasts with the situation in the UK where there are explicit guidelines for determining the preferred wishes of the older person. In supporting an approach that looks at practical means to maximise the expression of will and exercise of autonomy, rather than defaulting to a black and white ‘competent or not’ approach, the ALRC moves closer to the UK philosophy. For example, in the context of enduring documents, the ALRC adopts the ‘Commonwealth Decision Making Principles’ which recommend incorporating the supports necessary to enable any person to make an informed decision, rather than seeing capacity as an ‘all or nothing’ condition. The principles were developed in the 2014 ALRC report *Equality, Capacity and Disability in Commonwealth Laws*. They require that a person be given access to as much support as they need to make decisions, that their will and preferences must direct decisions that affect their lives, and that there must be appropriate safeguards in relation to any interventions for persons who require decision making support. The ‘Commonwealth Decision Making Principles’ explicitly reject the ‘best interests’ approach, preferring a process of determining or discovering a person’s preference, or likely preference. This ideally enables the person to continue to be involved in shared decision making, rather than substituted decision makers being appointed. Any representative of a person is not only required to understand the shifting nature of capacity, but to also represent the person’s will, preferences and rights.

The ALRC’s approach is not new. It is already reflected, albeit to different degrees, in capacity guidelines in Australia where lawyers are encouraged to take the time to seek out the resources needed to determine the client’s will and intent. However, making this a key recommendation is important in reframing the approach to elder decision making and providing lawyers (and others) with more options when supporting clients with capacity issues. It is a particularly useful initiative in the context of the narrow legal ethical principles which bind lawyers and place them in a morally untenable position. Lawyers are bound to follow only the instructions of ‘their client’ and if ‘their client’ is represented by a litigation guardian, they must follow the instructions of that guardian. Lawyers need only be satisfied that the guardian is acting in the best interests of the client, as determined by the guardian. They do not have a supervening role to interrogate the basis of instructions given by the guardian. By specifically including the ‘will, preferences and rights’ of the person in that decision making process, the ALRC report provides lawyers with the scope to expand their role to ensure that the client’s views are given a voice. This is particularly important in cases where an elder person is represented by a guardian in decisions affecting their legal autonomy.

The report also deals specifically with the role of legal practitioners both in relation to elder abuse and in relation to mental capacity. Firstly, there are some fairly obvious observations about the need for training and education. Some lawyers are much more likely to encounter issues of capacity and warnings of elder abuse than others. Some will already have sophisticated strategies for dealing with these challenges, but many will not. Mandatory education and training is important to ensure solicitors who are engaged in activities such as drafting enduring powers of attorney and wills, have the skills and expertise to enhance autonomy and recognise abuse. However, it is questionable whether one or two hours of CPD

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66 ‘Best interests’ is the typical description of a guardian’s role. A lawyer may in fact refuse to act on the instructions of a guardian if they are not satisfied that they have the best interests of the person in mind.
67 Castles, above n 5, 24, 43.
69 Ibid 63.
70 Australian Law Reform Commission, above n 1, 55.
71 Ibid 200 [5.186].
72 Ibid 202 [5.192].
73 Ibid 164 [5.14], 166 [5.23].
74 Ibid 288.
75 Ibid 282, 287.
training will equip a lawyer with anything more than a rudimentary grasp of the complexities and demands that arise in this area. The depth and breadth of skills required by lawyers to meaningfully engage with older clients, both in terms of understanding the impact of diverse conditions and developing effective communication strategies, are complex.76 Lawyers who work on ‘family agreements’, in which older people might sign over property in return for promises of support, should also be alert to family, health and cognitive influences. However, there is simply no guidance at all as to how far lawyers should inquire into the proposals, insist on enforceable agreements,77 or intervene, or refuse to act, where potentially adverse outcomes seem likely.

Secondly, the report explores models for introducing protective ‘adult safeguarding’ measures. Under present ethical rules, and case law, lawyers are in a difficult position. They are bound to adhere to principles of client confidentiality. They are not permitted to divulge information obtained as part of the client relationship (including suspicion of incapacity or abuse) without competent client instructions. However, if they do nothing for want of instructions, clients may suffer adverse consequences. The Victorian case Goddard Elliott v Fritsch raised this issue in the context of a solicitor accepting a settlement that the client lacked the mental capacity to instruct on.78 It was not clear in that case whether the solicitor knew that the client’s mental state had deteriorated during the retainer, although it was explicitly stated that the solicitor’s duty to the client extended to being aware of that possibility.79 The court drew an important distinction between strongly advising a competent client to accept a settlement in their best interests, and accepting a settlement for a client who is not competent in the belief that it is in their best interests.80

Most state ethical guidelines envisage lawyers breaching confidence by alerting relatives or carers, or themselves initiating protective action.81 When such actions are challenged, the courts appear to recognise the inevitability of such steps in some cases and look to the reasonableness and sensitivity of the lawyer’s actions.82 There have been several cases across jurisdictions that deal with this dilemma. For example, the NSW case of R v P considered a situation where a lawyer sought the appointment of a guardian for his client against the client’s specific wishes.83 The court concluded that in the circumstances of this case the lawyers’ actions, whilst in conflict with the client’s expressed instructions, did not warrant criticism because he had taken into account the client’s antipathy to some family members in deciding what action to take. The court indicated that it would consider what steps the lawyer had taken to provide support for the client, and would require the lawyer to consider reasonable alternatives to the ultimate decision to seek a guardian to take over the client’s affairs. Justice Bell in Goddard Elliott v Fritsch also noted that a solicitor might then be expected to assist the court in any inquiry into the client’s capacity, which might itself prompt a conflict between the duty of confidence to the client and the duty to assist the court.84

In terms of clear guidance for the legal profession, there is not a great deal of joy to be had from the ALRC report. The report canvasses existing legislative and ethical limits on medical

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77 Australian Law Reform Commission, above n 1, 205 [6.9], 207 [6.16].
79 Ibid 149 [559].
80 The outcome of this case decision turned on whether there was immunity from punishment for a decision made by a lawyer in the process of conducting a case in court. This would prevent the client from recovering damages for the loss suffered due to the acceptance of the settlement without competent instructions, a position that Justice Bell found most concerning. See ibid [561]; Lise Barry, ‘Goddard Elliott v Fritsch [2012] VSC 87’ (2012) 10 Macquarie Law Journal 131.
81 Castles, above n 5, 30.
82 Ibid 34–5.
84 Goddard Elliot v Fritsch [2012] VSC 87, 145 [549].
practitioners breaching privacy to report abuse in some detail.\textsuperscript{85} It points out that various Commonwealth legislative initiatives in the health care sector permit breach of privacy in the case of reporting serious abuse,\textsuperscript{86} and that the Australian Privacy Principles permit disclosure where necessary for ensuring appropriate care or treatment, or for compassionate reasons.\textsuperscript{87} Health professionals may also apply to various state tribunals if they believe a person is being abused by a guardian.\textsuperscript{88} This is of no great assistance to lawyers who operate under a separate ethical code and in a different professional context. However, at the very least, this guidance to doctors and others provides a principled basis for framing discussion. The ALRC flags a range of circumstances when a breach of confidence might occur: in cases of serious abuse, when it is necessary to ensure appropriate care, and for compassionate reasons. These are all easily applicable to the decisions a lawyer might face with an older client, but are not currently discussed in any legal ethical guidelines. In a clear acknowledgment that the present ethical rules are fraught with uncertainty, the report acknowledges that lawyers’ ethical rules might need to be changed to accommodate such protection.\textsuperscript{89}

The perceived trade-off between autonomy and protection is acute when considering the range of circumstances where a breach of confidence might arise. The ALRC points out that there are many reasons why people, including older people, do not want to report abuse.\textsuperscript{90} Older people may choose to reject support or intervention and will often be fiercely protective of their right to choose. They do not want to be treated like children or sheltered from all risk.\textsuperscript{91} One submission to the ALRC describes this as the ‘dignity of risk’, the right to make decisions that may have adverse outcomes.\textsuperscript{92} Older people can be reluctant to disclose or admit to diminishing capacity.\textsuperscript{93} Breaching confidence in the ‘best interests’ of the person is a grave intrusion into their autonomy. It is for this reason that the ALRC proposes that supplanting autonomy for the perceived best interests is only permissible in cases of serious abuse.

The ALRC proposes the creation of ‘Adult Safeguarding Agencies’ for vulnerable adults who need care and support, who are being abused or neglected, or who are at risk of abuse or neglect and cannot protect themselves from the abuse.\textsuperscript{94} The report envisages that adult safeguarding agencies will provide a first point of contact and will then investigate cases. However, the consent of the at-risk adults should always be obtained before invoking the support of the safeguarding agency.\textsuperscript{95} The only circumstance when consent is not required is in cases of serious abuse, sexual abuse, or neglect.\textsuperscript{96} Multidisciplinary in approach, it is implicit that there will be some objective measure in the approach of adult safeguarding procedures, although just how that is to be achieved is not stated. Mindful of the ethical constraints that exist around breaching client confidence, the ALRC recommends that any person who reports abuse to an adult safeguarding agency in good faith should not, as a consequence, be found to have departed from standards of professional conduct.\textsuperscript{97} Whilst this is not a reflection of professional ethical rules, it does to an extent coincide with court decisions in which the

\textsuperscript{85} Ibid 342 [11.32].
\textsuperscript{86} Where there is a threat to life, health or safety. My Health Records Act 2012 (Cth); Australian Law Reform Commission, above n 1, 341 [11.28].
\textsuperscript{87} Australian Law Reform Commission, above n 1, 341 [11.30].
\textsuperscript{88} Ibid 341–2 [11.31].
\textsuperscript{89} Ibid 414 [14.182].
\textsuperscript{90} Ibid 393–4.
\textsuperscript{91} Ibid 21.
\textsuperscript{92} Women’s Electoral Lobby, Submission No 261 to Australian Law Reform Commission, Inquiry into Protecting the Rights of Older Australians from Abuse, February 2017.
\textsuperscript{93} Castles, above n 5, 29.
\textsuperscript{94} Australian Law Reform Commission, above n 1, 376.
\textsuperscript{95} Ibid [14.6].
\textsuperscript{96} Ibid [14.7].
\textsuperscript{97} The report makes clear that in the case of trained professionals making such reports, the concept of reasonable suspicion goes hand in hand with the idea of good faith.
genuine intentions of lawyers in selecting and pursuing protection for the client are considered relevant.\textsuperscript{98}

\section*{III \hspace{1em} IMPACT ON LAWYERS}

Governed as they are by ‘one size fits all’ ethical principles, there is often little guidance for lawyers working at the edges of ‘normal’ presumptions about client capacity. Lawyers have traditionally been left to make the best decisions they can. The different approaches of principle taken in Australian states indicate uncertainty around balancing ideas of autonomy, confidentiality, and protection. This creates a grey area. Consideration of best interests, prioritising physical care needs, and the presumption that relatives will ‘do the right thing’ can swamp concepts of autonomy and the right to choose. Strict adherence to client confidence (as is the case in SA and Queensland) limits intervention to the narrow circumstances outlined in ASCR rule 9. Yet it is abundantly clear that the predominance of elder abuse occurs in the financial area. Limiting the capacity of lawyers to consider initiating protective evaluation to cases of serious imminent physical harm creates definitional challenges. The span of human rights interests below ‘serious imminent physical harm’ is extensive and is where many human rights incursions will occur. Mental wellbeing, access to family and resources, and financial exploitation are all abuse but do not appear to fall within the very high benchmark set by the legal ethical rules. The relaxation of this requirement that flows from the NSW guidelines and cases such as \textit{R v P},\textsuperscript{99} where the last resort intervention is countenanced, fails to recognise the potential negative impact of not acting earlier to avert problems. Given the pervasive and often hidden instances of elder abuse that fall along the scale of seriousness,\textsuperscript{100} there may be times when a lawyer is best placed to identify concerns but, without explicit consent from the client, is not permitted to take any action. This idea is consistent with the fiduciary role of the lawyer who has a limited and legally focused role to play with clients, but it is not consistent with a more holistic community based approach to elder abuse. The ALRC report provides valuable baseline principles for lawyers working in this grey area. It makes autonomy of the person the overriding starting point. Only serious abuse warrants the overriding of autonomy. It recommends a decision making model that strengthens and supports available decision making capacity, rather than a binary competent or not competent model. It also supports the creation of independent protective agencies that in turn provide multidisciplinary options for supporting and protecting clients who may be at risk.

The ALRC proposes that the wishes of the person must be respected and their confidentiality maintained in all but cases of serious abuse.\textsuperscript{101} There are no helpful definitions to determine what makes abuse serious. It is not clear whether it means risk to life or permanent health problems; whether it means embarrassment and upset, or ongoing psychological impact; whether it means not having access to television, phone and new clothes – or only serious life-threatening neglect. The ALRC gives examples such as cruel and degrading treatment and being locked in a room which suggest that only abuse or neglect at the upper end of the scale meets the definition. There is no real discussion of ‘scale’.\textsuperscript{102} The report also refers to the right to privacy, bodily and psychological integrity, personal development, and relationships but in the context of abuse compromising those rights.\textsuperscript{103} Where abuse is serious, the ALRC recommends the creation of safeguarding agencies that would appropriate resources to support the person. The ALRC encourages anyone to report abuse to a safeguarding agency.\textsuperscript{104} This might include members of the public, but also includes doctors, health workers or lawyers.

\begin{flushleft}
\textsuperscript{98} \textit{R v P} [2001] NSWCA 473.
\textsuperscript{99} [2001] NSWCA 473.
\textsuperscript{100} Lacey, above n 8, 113.
\textsuperscript{101} Abuse is limited to serious physical abuse, sexual abuse or neglect.
\textsuperscript{102} See, eg, Australian Law Reform Commission, above n 1, 397 [14.104]–[14. 105] where minor financial pilfering by a relative is defined as not being serious.
\textsuperscript{103} Ibid 377.
\textsuperscript{104} Ibid 376 [14.10].
\end{flushleft}
with specific obligations of confidentiality to the person. Recognising that reporting and thus breaching confidence does contravene ethical guidelines, the ALRC notes that there may need to be alterations to professional conduct rules. It also recommends that there be a good faith exemption from breach of duty under professional conduct or other rules.\textsuperscript{105} This generic proposal highlights the disparity between legal ethical rules and a broader liberty to report concerns to an agency to investigate the need for protection. Adult safeguarding agencies have been in place in the UK for some time, and are governed by the provisions of the Care Act 2014 (UK).\textsuperscript{106} A fundamental principle of the framework is the inclusion of the voice of the at risk adult and the leveraging of whatever supports might facilitate that engagement.

Since its inception, this legislation has drawn mixed reviews. Some stakeholders saw it as a necessary step forward, bringing adult protection into line with child and domestic violence protective regimes. Some thought it did not go far enough, and others that the legislation intruded unnecessarily into the private lives of adults.\textsuperscript{107} There was concern that limiting the definition of abuse to human rights violations was too broad and failed to acknowledge both the impact of specific acts and the possibility of self-neglect as a basis for the need for protection. This concern aligned with the definitional problems outlined above. The status of autonomy and self-direction as a foundational human right could create a hierarchy of importance that may have the practical effect of excluding multiple minor instances of abuse (such as financial, psychological, relational, social or health care related abuse) from both public recognition and practical protection. The idea of a threshold for triggering concern and intervention continues to inform policy and law reform in Australia,\textsuperscript{108} but in so doing invites a pinpoint rather than a more nuanced approach.

The legal profession continues to approach these questions from a slightly different perspective. In its recent call for submissions for the review of the current ASCR,\textsuperscript{109} published several months after the ALRC report, the Law Council of Australia asked whether the risk of financial exploitation should justify a breach of confidence, and whether guidelines concerning the seeking of a financial management order for a client would be useful. Financial exploitation is one of the most common forms of elder abuse.\textsuperscript{110} It may be a precursor to more serious abuse in that it takes away means of support, making the person dependent on the exploiter and thus exposed to further abuse, or it could leave them destitute and at risk of serious neglect. However, it does not seem to fall into the definition of serious abuse proposed by the ALRC. The Ethics Committee of the Law Council has expressed concern about creating a further exception to breaching confidence in the ASCR to encompass financial abuse because ’financial exploitation’ lacks specificity.\textsuperscript{111} The Law Council proposes the creation of unambiguous criteria to assist solicitors having to make such decisions.\textsuperscript{112} The idea of a serious risk benchmark as advocated by the ALRC is not discussed, although perhaps implicitly it is already reflected in the existing wording of the ASCR.\textsuperscript{113} However, as already noted, most state guidelines already move some way from this benchmark and the Law Council of Australia also seems open to moving away from such a strict approach. Even so, the opacity of the concept of serious risk, coupled with the discrete and limited role of the lawyer, raises challenges.

\textsuperscript{105} Ibid 44.

\textsuperscript{106} Care Act 2014 (UK) c 23.


\textsuperscript{108} Purser, above n 8, 80.

\textsuperscript{109} Law Council of Australia, above n 50.

\textsuperscript{110} Three chapters of the report are devoted to different instances of financial abuse. See Australian Law Reform Commission, above n 1, 19.

\textsuperscript{111} This in itself is an interesting point. The same paper suggests, at pages seven and eight, that ethical rules should not be overly prescriptive in favour of a broader reflection of underlying ethical principles. Yet, on this point, the Law Council seems concerned that definitional limits might require more detail. See Law Council of Australia, above n 50, 44.

\textsuperscript{112} Ibid 45.

\textsuperscript{113} Law Council of Australia, above n 18, rr 7.1, 8.1, 9.2.1.
lawyer may well be doubtful that the serious imminent harm test is met if they are aware that a client is being given little personal choice or freedom in a family care arrangement, or is miserable and isolated in a care facility, or is dissipating scant assets to family or other sources, or has far more bruises and cuts than are consistent with an occasional fall. Self-neglect poses another set of complex challenges.

Interestingly, the Law Council argues against further exception to confidentiality (as currently listed in the ASCR at rule 9), for cases where a lawyer forms a reasonable belief that the client cannot give instructions, on the basis that a rule to this effect is inadequate to guide solicitors through the complexities of such a decision. The ALRC report does not really assist lawyers with this difficult area of decision making. Nor, realistically, can it. Ultimately, this remains the role of the Law Council of Australia and the various state law societies. However, the ALRC report has brought into sharp focus some of the dilemmas that are not clearly covered by existing ethical rules and proposes some important baselines for further discussion. This again reflects two different approaches to the core issue. It is not always incapacity to instruct that is the problem. Client unwillingness to take any action, fuelled by pride, fear, helplessness, lack of confidence or autonomy, may be the basis of concern for a lawyer. Lack of capacity is one side of the coin, the other is much less easily defined and managed.

Firstly, there is a dilemma that is posed by the range of circumstances in which a breach of confidence, with or without active seeking out of protective measures, is warranted. The ALRC stands firm that there should be no disclosure except in the case of serious abuse, whereas at least some states in Australia, and arguably also the Law Council, accept a more permeable barrier. Guarded support for the latter position can be found in the case law which implicitly recognises the pragmatic choices faced by lawyers and the negative social and personal implications if some protective action is not taken. It is clear that the legal profession, at least on a case by case basis, moved some way from the serious physical harm benchmark. Will the ALRC report, with its emphasis on autonomy and dignity, exert pressure on the legal profession to revisit that predominant approach?

Secondly, there is valuable contribution from the ALRC report in its challenge to the traditional idea of assumed capacity and the binary all-or-nothing approach to capacity. In its robust shift towards supported decision making and the creation of legal processes and standards around this concept, the ALRC challenges the traditional approach at a cultural and legal level. This will potentially permeate practice across disciplines in this area, including in the area of law. Dispelling the best interests all-or-nothing culture that has informed the legal profession, and society, will force re-examination of these issues.

Thirdly, there is an important recommendation for lawyers in the creation of Adult Safeguarding Agencies. Lawyers are currently left to decide for themselves what to do. The example of \( R v P \) in which the court closely examined the choices that would have minimum impact on the client, demonstrates how difficult this can be. The provision of a consistent structure for supporting people at risk with no other effective supports will provide more certainty and confidence for lawyers wondering where to take their concerns. It does not address the issue of divulging confidence, but it provides a more certain and reliable resource for lawyers.

Fourthly, another valuable suggestion is in the creation of a ‘good faith’ exemption against disciplinary action where a person reveals confidential information. As stated by the ALRC,
the exemption is probably far too simplistic to offer any protection. However, it is in principle consistent with the case law that recognises the dilemma for lawyers and the compelling reasons that can exist to take protective measures. This offers a valuable starting point for the development of clearer protocols.

IV Conclusion

Australia appears to be at a crossroads on client capacity and intervention. The philosophy of paternalism is by now eschewed by all law societies and by the courts. This is in line with the philosophy underlining the ALRC report. It is also well accepted that capacity is decision specific and nuanced, and that all ethical guidelines in Australia contain informative guidance on how to identify and manage potential lack of capacity, and in most cases, how to maximise participation in decision making. Reform in Australia comes a little later than in the UK and the USA, where specialised legislation for elder abuse and protection that focuses on engagement in decision making rather than more legalistic approaches have been in place for some time.118

There are definitional, philosophical, and practical challenges. The idea of a hierarchy of human rights guiding the discussion about protection potentially diminishes focus on the day to day instances of abuse. These instances, while not posing a critical risk, are part of more subtle but nonetheless pervasive abuse that might cumulatively undermine the higher right to quality of life. The ALRC proposes a high 'serious abuse' benchmark for intervention, whereas some existing guidelines and case law suggest a lower standard. Financial abuse is the most common area of elder abuse and exploitation,119 but it is not clearly dealt with by either the ALRC or existing guidelines. Neglect, although not as often reported as other forms of abuse, is also not clearly defined.120 Definitions and scale remain a challenge in this discussion. This potentially limits the options of lawyers faced with the complex moral and ethical dilemmas of a client who they believe is in need of protection in order to enhance their safety, life needs, and dignity.

The ALRC recommends a wholesale departure from the simplistic binary approach to capacity by proposing an approach that maximises capacity, so that capacity can be nurtured for decision making. This reflects the focus on supporting engagement adopted in the UK. However, in so doing, it also emphasises a strict human rights approach that in turn influences community perceptions – and a recognition that being older does not warrant less autonomy but requires at times more assistance to exercise that autonomy. Innovative ideas to address the complexities of this debate abound. Effective education and training, both at the community level and within the legal community, is one. The issues around competence, client empowerment, facilitating and supporting engagement, and understanding the impact of disease and the effects of ageing, are critically important if lawyers are to be able to deal respectfully and flexibly with diverse client needs. Sensitive, informed and skilful counselling of clients throughout the engagement would go a considerable way to open doors for discussion and problem solving for clients at risk of abuse. Better integration of services is also an option. Whilst there are some examples of interdisciplinarian services for elder clients that recognise the co-dependence of health, law, wellbeing, and autonomy,121 these are for the most part limited to a few community based initiatives. There is no pattern or tradition of doctors

119 Australian Law Reform Commission, above n 1, 358 [2.51].
120 Ibid 360 [2.57].
and lawyers working together in this area, yet this fundamental step is crucial to a more
effective approach.\textsuperscript{122}

The broader community response recommended by the ALRC necessitates examination of
approaches to legal practice, the traditional nature of which isolates lawyers from engaging in
communal responses due to limiting ethical principles. Traditional adversarial and
transactional approaches to legal practice in Australia might well give way to developing
philosophies. Some challenge the idea of objective decision making in favour of mediated or
therapeutic approaches. Involving mediators in facilitating the input of elder people into
decisions about their interests,\textsuperscript{123} or the greater focus on therapeutic jurisprudence as a model
for engaging with clients at risk,\textsuperscript{124} propose different bases for decision making. Focusing on
engaged participation and holistic collaborative outcomes, these ideas explicitly involve the
lawyer in a greater circle of supporters. The legislative approach adopted in the UK is also an
option, but not without critics. It also poses risks in implementation, particularly in relation
to the tendency towards losing focus on individual context by linking abuse to legal threshold
definitions.\textsuperscript{125}

The Law Council of Australia’s call for submissions on amendment of the ASCR is an
opportunity for the legal profession to deeply consider these issues and come forward with
considered proposals that acknowledge the difficult position that lawyers can find themselves
in when torn between ethical rules and broader moral imperatives. The ALRC has greatly
assisted that discussion by its focus on human rights and the meaning of autonomy and
dignity. The recommendation of a supported decision making model that emphasises the
interests of the client, whether or not they are able to express them at the time, and framing
the discussion in terms of seriousness of abuse when balancing the option of intervention
provide solid next steps. At present there are different benchmarks that apply when questions
about the severity of abuse, the nature of abuse, and the appropriate course of action arise.
There needs to be principled reconciliation of these differences before a more confident
position on the role of lawyers in this very difficult area can be achieved.

\textsuperscript{122} Kelly Purser and Tuly Rosenfeld, ‘Evaluation of Legal Capacity by Doctors and Lawyers: The Need for


\textsuperscript{124} Purser above n 8, 55.

\textsuperscript{125} Montgomery et al, above n 118.