

## **INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES**

**Organisation:** Justice Connect Seniors Law

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Parliament of New  
South Wales  
Legislative Council  
Inquiry into Elder Abuse  
in New South Wales

Submission

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*Elder abuse is a violation of human rights and a significant cause of injury, illness, lost productivity, isolation and despair.*

World Health Organisation, *Active Ageing: A Policy Framework* (2002) 29.

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## Executive summary

Justice Connect Seniors Law has extensive experience working with the health and community sector to assist older people who are experiencing elder abuse, especially financial abuse, in Victoria. We make this submission to the NSW Legislative Council inquiry into Elder Abuse based on our experience of elder abuse and various service responses in the Victorian context. Given our particular experience, the submission will focus on financial elder abuse.

### The nature of elder abuse

Elder abuse is framed according to the nature of the relationship between the victim and the perpetrator and the type of abuse. Prevailing ageist attitudes in the community facilitate and enable the commission of elder abuse. The intersection of gender inequality compounds the risk of elder abuse for older women. Beyond these community attitudes, there are key characteristics of the older person and the perpetrator - identified in our submission - that can increase a person's vulnerability to elder abuse.

### Barriers to disclosure of elder abuse

Our experience and research suggests that there is a general reluctance on the part of older people to report cases of elder abuse. Social isolation is both a key risk factor for abuse, and makes it difficult for an older person to seek support from outside the family. This can be compounded by the desire to maintain family relationships. In cases where the older person also has complex health problems, the older person may also feel that they are unable to cope with taking action given the likely impact on their health and well-being as well as on family relationships. Evidence also suggests that an older person may not recognise that they are experiencing elder abuse, and rather see their problem as a 'life problem.'

An older person experiencing difficulties is more likely to disclose their problem to a trusted health or community professional than to a lawyer. It is

important that people who work with older people are able to identify elder abuse and respond appropriately when it is disclosed to them. A worker's ability to recognise a problem as one of elder abuse however, is dependent on experience and training. Where a worker does recognise elder abuse, the assistance he or she is able to provide will depend on their knowledge of what assistance is appropriate and available, and who to approach for help.

### Strategies to prevent elder abuse

With elder abuse remaining "societally hidden", further targeted education is required. In particular, an education program promoting the financial literacy of older people and a campaign to improve understanding of powers of attorney (**POAs**) would improve the capacity of older people to avoid experiencing elder abuse and to respond to it if it occurs. In addition, we recommend the provision of services dedicated to assisting older residents considering entering into a family arrangement that involves the transfer of property in return for care (**assets for care arrangements**).

While education is an important preventative measure, it is also crucial to have robust enforcement mechanisms available to make perpetrators of elder abuse accountable. In particular, greater accountability of attorneys, guardians and administrators is required.

The availability of a less formal forum for the resolution of property disputes (similar to Victoria's Building and Property List at the Victorian Civil and Administrative Tribunal (**VCAT**)) would provide a quicker and less stressful dispute resolution mechanism for older people involved in family disputes involving property.

Finally, the legal response to elder abuse must advance the human rights of older people, balancing their right to be safe with their right to be autonomous.

## New strategies to safeguard older people vulnerable to elder abuse - the integration of health and legal services

Often, an older person's health, social and legal issues arising in the context of elder abuse are interconnected. Elder abuse may, therefore, present as a 'life problem' rather than a discrete issues that can be addressed in isolation. Insufficient integration and coordination of health, community and legal services can hinder respective professionals in the identification of, and response to, elder abuse.

While health professionals are best placed to identify elder abuse, they may be constrained in their ability to facilitate a response. A more

integrated approach is required. For example, Seniors Law has partnered with cohealth, a community health service in the west of Melbourne, to provide an integrated model of service delivery or "health justice partnership" (HJP).

There is an emerging body of knowledge illustrating the benefits of the HJP model of service delivery to both the clients and the partners. We will contribute findings from the evaluation of the HJP to this growing evidence base.

Given the preliminary experiences of multidisciplinary practises operating in Australia and comprehensive data coming out of the United States, we recommend that the NSW state government consider opportunities for the expansion of the HJP model of service provision in relation to elder abuse in NSW.

# Recommendations

## Recommendation 1:

**Fund professional development** of health, community and other professional who come into contact with older people to ensure that they are able to identify and respond to elder abuse.

## Recommendation 2:

**Fund a targeted community education campaign** promoting:

- financial literacy
- understanding of formal substitute decision-making
- provide a free mediation service similar to the Dispute Settlement Centre of Victoria Family Meeting Service, and other services to assist older people considering assets for care arrangements

## Recommendation 3:

**Provide for greater oversight of attorneys** appointed under power of attorney legislation including the introduction of:

- criminal sanctions and compensation orders against attorneys who misuse a power of attorney, as provided for in the new Victorian *Power of Attorney Act (Vic) 2014*
- a mandatory online registration scheme for powers of attorney

- a requirement that the representative or supported decision-maker sign a statement agreeing to comply with their responsibilities before they undertake their role, as is already the case in relation to some personal appointments in Victoria
- a requirement that the representative keep accurate separate records of all decisions made
- a requirement that the representative submit an annual declaration of compliance with their obligations during the previous year
- random audits of the records of a percentage of all representative decision makers

## Recommendation 4:

**Expand the jurisdiction of the New South Wales Civil and Administrative Tribunal** to include the determination of disputes concerning co-owners, as per the jurisdiction of the Victorian Civil and Administrative Tribunal (Building and Property List) under Part IV of the *Property Law Act 1958 (Vic)*.

## Recommendation 5:

**Fund Health Justice Partnerships (HJPs)** to respond to and prevent elder abuse.

In expanding the model, a common set of metrics measuring HJP service quality and impact should be established to promote the sustainability and awareness of the model.

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# 1. Introduction

Justice Connect Seniors Law (**Seniors Law**) welcomes the opportunity to make a submission to the New South Wales Legislative Council's Inquiry into Elder Abuse in New South Wales (NSW).

Justice Connect is a community legal service working across NSW and Victoria. Justice Connect Seniors Law has experience assisting older people who are at risk of or experiencing elder abuse, especially financial abuse, in Victoria. The submission will focus on our learnings about elder abuse and program responses from our Victorian experience.

## 1.1 About Justice Connect Seniors Law

**Justice Connect** exists to help build a world that is just and fair – where systems are more accessible and accountable, rights are respected and advanced and laws are fairer.

In pursuing this vision, Justice Connect:

- provides access to justice through pro bono legal services to people experiencing disadvantage and the community organisations that support them
- builds, supports and engages a strong commitment to lawyers' pro bono responsibility
- challenges and changes unjust and unfair laws and policies, using evidence from our case work and the stories of our clients to bring about reform
- undertakes legal education and law and policy reform aimed at improving access to justice

**Seniors Law**, a program of Justice Connect, assists vulnerable older Victorians with legal issues associated with ageing, with a focus on the prevention of, and response to elder abuse.

Seniors Law works in Partnership with Seniors Rights Victoria, a specialist community legal centre, to provide free legal services to older people who are unable to afford legal help. Legal services are provided by Seniors Law lawyers and pro bono lawyers from Justice Connect member law firms. The objective of Seniors Law is to improve the ability of older Victorians to age with dignity and respect.

We assist clients with legal issues including guardianship and administration, housing, credit and debt, grand parenting, powers of attorney (**POAs**) and making arrangements to live with family. While these legal issues are experienced by many older Victorians, they also tend to arise in the context of elder abuse.

For example, POAs are commonly misused by perpetrators of elder abuse and elder abuse is often experienced by older Victorians who live with their family, particularly when they exchange assets for the promise of care. Providing legal advice to older Victorians in these matters empowers them to make informed decisions, ensuring that their rights are protected.

## 1.2 Justice Connect Seniors Law partnerships

In delivering our service, Seniors Law has developed close connections with the health and community sectors.

Our staff and pro bono lawyers have provided free legal assistance in collaboration with hospitals and health centres across Melbourne. Complementing this, Seniors Law delivers training on elder abuse and other legal issues associated with ageing to health and community professionals as well as its pro bono lawyers. This facilitates referrals from trusted service providers and increases the capacity of pro bono lawyers, thereby promoting better access to justice for older people.

Seniors Law has recently moved to an integrated model. Since February this year, a project lawyer has been based at cohealth, a community health



organisation in Melbourne's west. The lawyer works with staff to identify legal issues for older people and provide more convenient legal assistance and referrals.

Through this casework, Seniors Law is well placed to comment on our experience of elder abuse, with

a particular emphasis on financial abuse, and of our experience in relation to various service responses to abuse. As a result, the submission will focus on terms of reference 2, 5, 6, 8 and 9.

## 2. The nature of elder abuse

### Terms of reference - 2

The most common forms of abuse experienced by older persons, and the most common relationships or settings in which abuse occurs

## 2.1 Forms of abuse

### 2.1.1 Overview of forms of elder abuse

Elder abuse is framed according to:

- the nature of the relationship between the perpetrator and victim; and
- the type of abuse carried out.

The World Health Organisation (WHO) has defined elder abuse:<sup>1</sup>

**Elder abuse:** *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.*

There are a number of different ways elder abuse can manifest:<sup>2</sup>

physical	Non-accidental acts that result in physical pain, injury or physical coercion.
financial	Illegal use, improper use or mismanagement of a person's money, property or financial resources by a person with whom they have a relationship implying trust.

psychological	Inflicting mental stress via actions and threats that cause fear or violence, isolation, deprivation or feelings of shame and powerlessness. These behaviours – both verbal and nonverbal – are designed to intimidate, are characterised by repeated patterns of behaviour over time, and are intended to maintain a hold of fear over a person.
social	The forced isolation of older people, with the sometimes additional effect of hiding abuse from outside scrutiny and restricting or stopping social contact with others, including attendance at social activities.
sexual	Unwanted sexual acts, including sexual contact, rape, language or exploitative behaviours, where the older person's consent is not obtained, or where consent was obtained through coercion.
neglect	Failure of a carer or responsible person to provide life necessities, such as adequate food, shelter, clothing, medical or dental care, as well as the refusal to permit others to provide appropriate care (also known as abandonment). This definition excludes self-neglect by an older person of their own needs.

<sup>1</sup> World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (17 November 2002) 3.

<sup>2</sup> Victorian Government, Department of Health, *Elder Abuse Prevention and Response Guidelines 2012-2014* (2012) 3

Typically, these different forms of abuse co-occur, with financial and psychological abuse being the most common.<sup>3</sup>

In the 2013-2014 financial year Seniors Law assisted 91 vulnerable older people in relation to 108 matters of which 40% involved elder abuse. Of the 40% of cases involving elder abuse, 42% involved more than one type of abuse.

The most common form of elder abuse we continue to see is financial, comprising 68% of all elder abuse matters. A substantial 25% of financial abuse matters that Seniors Law assisted with involved property, equity and trust issues.

## 2.1.2 Financial abuse

The WHO defines financial abuse as follows:<sup>4</sup>

**Financial abuse:** *the illegal or improper exploitation or use of funds or resources of the older person.*

This definition contemplates financial abuse arising within a relationship or trust, such as between family members, as well as abuse committed by third parties, for example, banks. Our submission will only address financial abuse occurring within a relationship of trust.

As illustrated in the adjacent table, financial abuse operates in a spectrum from deliberate theft to inadvertent mismanagement of the older person's assets. Intentional financial abuse is associated with "greed leading to opportunistic or well-planned exploitation, family expectations around inheritance and cultural differences surrounding the use and management of older people's finances".<sup>5</sup> Unintentional elder abuse can be "the inadvertent and/or uninformed financial mismanagement or

neglect of financial assets which causes the deprivation of benefits to be derived from those assets".<sup>6</sup>

### common examples of financial abuse <sup>7</sup>

theft
misappropriation, misuse or mismanagement of money, property, assets
exerting undue influence to give away assets or gifts
putting undue pressure on the older person to accept lower quality services to preserve an anticipated inheritance
misuse of a power of attorney or administration order
denial of access to funds, even if believed to be in their "best interests"
failure to repay loans
living with the older person and refusing to contribute to living expenses
forging or forcing an older persons signature
abusing joint signatory authority
promising long-term care in exchange for money or property – an "assets for care" arrangement – and then not providing the promised care
persuading an older person to sign a will, contract or power of attorney through deception, coercion or undue influence
persuading an older person to guarantee a loan without sufficient information or knowledge to make an informed decision

While financial abuse may be the fastest growing form of elder abuse in Australia, it can also be one of the most detectable, often leaving a clear trail of financial transactions through banking records.<sup>8</sup>

<sup>3</sup> Peteris Darzins, Georgia Lowndes and Jo Wainer, 'Financial Abuse of elders: a review of the evidence' (2009) 8

<sup>4</sup> World Health Organisation, *Abuse of the Elderly* (2002) 127.

<sup>5</sup> Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse' (Queensland Law Society Incorporated, Brisbane, 2000).

<sup>6</sup> Above n 3, 5.

<sup>7</sup> Above n 3, 9; OP&L page 21-22.

<sup>8</sup> Above n 3, 8, 10 and 19 citing Boldy *et al*, 2005; Elder Abuse Prevention Unit (EPAU), 2005; Rabiner *et al*, 2004; Bomba, 2006; Rodney Lewis, 'Taking action against abuse of older people: pathways out of the maze' (2013), 10 quoting Clare, Prof M, Blundell, Dr B, Clare, Dr J, Examination of the extent of elder abuse in Western Australia, Crime Research Centre, University of Western Australia with Advocare Inc, pp82-83, April 2011; Human Rights and Equal Opportunity

**CASE STUDY:** Terry trusted his daughter to make legal decisions on his behalf, but was devastated to discover that she had abused his trust. Terry's daughter told him that she had purchased a house for him, but instead registered the property in her own name. At 60 years old, after a lifetime of hard work, Terry was left with nothing except terrible grief at the deterioration of his relationship with his daughter. Terry's daughter refused to return the money or transfer the house into his name. "The whole thing, for three years, was a nightmare," he said. Over 12 months, Terry's lawyers negotiated a settlement including a declaration by his daughter in favour of Terry in relation to the property, enabling him to sell the house and receive money from the sale.

### 2.1.3 Financial abuse - property transfers and "assets for care" arrangements

One common family arrangement that can leave an older person vulnerable to financial elder abuse is an "assets for care" arrangement. An older person or couple may decide they can no longer live alone and, as an alternative to residential care, move in with family. This may involve the transfer of title or sale proceeds to their family member in exchange for the promise on long-term care. This transfer may be used to repay a mortgage, with the older person living the same house as their family, or construct a separate "granny flat".

With an ageing population, a general preference for older people to remain living in the community with their family and government policy encouraging this, we are likely to see an increasing number of "assets for care" arrangements.

The Human Rights and Equal Opportunity Commission has also observed that financial pressures on working families and a desire to

preserve the family inheritance are other contributing factors to the increase in the number of these types of family arrangements.

#### factors contributing to the rise of "assets for care" arrangements

aversion, and limited access, to 'institutional' residential aged care
older persons' preference to remain in the community
limited access to community care
ageing population
desire by older person to preserve their assets to provide inheritance and maximise entitlement to government support
high levels of workforce participation and debt among adult children

The form of these arrangements can range from informal conversations to agreements recorded in more formal legal documents. In our experience, however, the majority of these arrangements are informal. This is despite the significant assets involved and the serious consequences if they fail. For example, we have assisted older people where the failure of these arrangements has left them homeless, having lost the sale proceeds of their home, and without an income having compromised their eligibility for Centrelink benefits.

The informal nature of these arrangements can make it difficult for the older person's interest in the transfer to be recognised at law if a dispute between family members ensues.

## 2.2 Relationships and abuse

By definition, the perpetrators in cases of elder abuse are those in a relationship of trust with the older person.

According to the literature, between 80% and 92% of perpetrators of elder abuse are family members, such as a spouse, adult children, grandchildren, siblings or other family members, friends or carers.<sup>9</sup>

Commission, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 15.

<sup>9</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder abuse and the rights of older persons in Australia' (2014) 36(99) *Sydney Law Review*, 99-130, 99-100.; Seniors Rights Victoria (SRV) and the National Ageing Research Institute Ltd (NARI), *Profile of Elder Abuse in Victoria – Analysis of data about people*

The abuse may be perpetrated as a result of ignorance, negligence or deliberate intent.<sup>10</sup>

This was confirmed in recent research by Seniors Rights Victoria (SRV) and the National Ageing Research Institute (NARI) based on advice sought from SRV. The findings confirmed that adult children were most commonly the perpetrators of abuse, with intergenerational relationships established as those most likely to lead to abuse:<sup>11</sup>  
<sup>12</sup>

*Overall, 40% of alleged perpetrators are sons, and 26.8% are daughters: therefore 66.8% of abuse is perpetrated by a child of the older person.*

*92.3% of alleged perpetrators are related to the older person or in a defacto relationship*

Neighbours, carers, and boarders or lodgers made up a small percentage of those perpetrating abuse.

The nature of the relationship between the victim and perpetrator, the types of conduct that are characterised as abusive and risk factors that can heighten an older persons vulnerability to abuse, are similar to those in other types of family violence. However, ageist attitudes together with unique risk factors heightening an older person's vulnerability to elder abuse, such as the accumulation of significant assets, distinguish elder abuse from other forms of family violence.

## 2.2.1 Ageism as the dominant contributing factor

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*seeking help from Seniors Rights Victoria – Summary Report, June 2015, 36*

<sup>10</sup> Above Lacey, n 9, 2.

<sup>11</sup> Above, SRV & NARI Report, n 5, 36

<sup>12</sup> Ibid., 36

<sup>13</sup> Above n 9, 99 and 101; Ibid, 17; NACLC, Submission to the Office of the High Commissioner for Human Rights, *Public Consultation on the Human Rights of Older Persons*, 2013, 4 citing Christine Walsh, Jennifer Olson, Jennifer Ploeg, Lynne Lohfield

Perhaps most significantly, it is prejudicial attitudes, discrimination and unhelpful stereotypes with respect to ageing and older people, known as “ageism”, that are commonly regarded as the dominant contributing factor of elder abuse.<sup>13</sup>

This ageism can manifest as a perpetrator's strong sense of entitlement to an older persons' assets because of:<sup>14</sup>

- their care-giver status
- an expectation of inheritance
- an attitude that the older person cannot manage their own affairs
- the need to qualify the older person for government funded long term care. This sense of entitlement can conflict with an older person's desire to pay for care:<sup>15</sup>

*“...there is a conflict between older people who want to preserve their assets to pay for high quality care and accommodation as they age and become increasingly more disabled and vulnerable, and the expectations of their children who historically have grown up to expect that they will one day inherit their parents assets that have not been”*

## 2.2.2 The significance of gender

The recent research by Seniors Rights Victoria (SRV) and the National Ageing Research Institute (NARI) based on advice sought from SRV, found that

and Harriet Macmillan, ‘Elder abuse and oppression: voices of marginalized elders’, 23(1) *Journal of Elder Abuse & Neglect*.

<sup>14</sup> N3, 16, and 8 citing Dong *et al*, 2008; Chokkanathan and Lee, 2006; Anne *et al*, 2005; Boldly *et al*, 2005; McCawley *et al*, 2006; Kemp and Liao, 2006; Rabiner *et al*, 2004; Choi and Mayer, 2000; Malks *et al*, 2003. 15-17;

<sup>15</sup> Above n 3, 15.

women are more likely than men to be the victims of abuse:<sup>16</sup>

*In all categories of abuse (apart from neglect), the older person who suffers abuse is more likely to be female than male, and the total number of older women reporting abuse was approximately 2.5 that of older men.*

For example, 70% of the victims of financial abuse were women<sup>17</sup>. In addition to this, the evidence shows that the combination of age and gender is relevant, with reports of abuse more frequent for women once over the age of 65 years.<sup>18</sup>

On the other hand, it is more commonly men (in 60% of cases of financial abuse analysed), who perpetrated the abuse.<sup>19</sup> In relation to financial abuse, however, this does mean that in 40% of cases the perpetrator was a women. As noted by Mr Julian Gardner, Public Advocate, Victoria, when it comes to financial abuse:<sup>20</sup>

*“Gender seems to make little difference so that if it is the children who are abusive they may either be the son or daughter.”*

<sup>16</sup> Ibid., 12

<sup>17</sup> Ibid., 27

<sup>18</sup> Ibid., 32

<sup>19</sup> Seniors Rights Victoria (SRV) and the National Ageing Research Institute Ltd (NARI), *Profile of Elder Abuse in Victoria – Analysis of data about people seeking help from Seniors Rights Victoria – Summary Report*, June 2015, 9

<sup>20</sup> Human Rights and Equal Opportunity Commission, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 20-21.

<sup>21</sup> Ibid., 37

## 2.2.3 Living arrangements

An older persons' living arrangements play a further part in determining their risk of elder abuse.

Around 43% of older people reporting abuse as part of the SRV study were living with the alleged perpetrator, while around 35% lived alone.<sup>21</sup>

These figures indicate that older people living as part of a couple are most protected from abuse.

## 2.2.4 Characteristics of victims and perpetrators

Beyond community attitudes, research has identified key characteristics of older people and potential perpetrators that can increase a person's vulnerability to elder abuse.<sup>22</sup>

risk factors of elder abuse	
older person	perpetrator
dependency	family member or friend
social isolation and loneliness	sense of financial entitlement
accumulation of substantial assets	carer stress
reduced capacity	substance abuse
poor health	mental illness
disability	disability
family violence	access to finances
death of a partner	financial reliance
poverty	lack of social integration

<sup>22</sup> Above n 3, 6, 8 and 14-16 citing Peri et al, 2008; Hafermeister, 2003; Malks et al, 2003; Choi and Mayer, 2000; Quinn, 2000; Tueth, 2000; Bond et al, 1999; Comijs et al, 1998; Wilber and Reynold, 1996; Above n22, 99; Above n 19, 17-18; Lynette Joubert et al; Rodney Lewis, 'Taking action against abuse of older people: pathways out of the maze' (2013) 2-3; A Almogue, A Weiss, E-L Marcus, Y Beloosesky, 'Attitudes and knowledge of medical and nursing staff towards elder abuse' 51 (2010) *Archives of Gerontology and Geriatrics* 86; Seniors Rights Victoria, Submission No 71 to the Victorian Law Reform Commission, *Guardianship*, 3 June 2011; Lynette Joubert and Sonia Posenelli, 'Window of opportunity: the detection of management of aged abuse in an acute and subacute health care setting' 48 *Social Work in Health Care*, 706

divorce	living in close proximity to the older person
language or financial literacy barriers	overbearing

Older people are the most vulnerable to abuse between the ages of 75 and 85. Further, evidence suggests the accumulation of significant savings and assets, *itself*, can increase an older person's vulnerability to financial abuse, irrespective of the presence of other aggravating characteristics or conditions.<sup>23</sup> The identification of accumulated

assets as a risk factor of elder abuse is particularly important as it can increase vulnerability to elder financial abuse even in the absence of other risk factors.

People experiencing elder abuse may experience a number of risk factors, including dependency, social isolation, poor health, disability, reduced capacity and the death of a partner.

Key risk factors associated with the perpetrator of elder abuse include a sense of financial entitlement to the assets of the older person, and stress arising from their role as carer.

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<sup>23</sup> Above n 9, 112 and 120; Above n 8, 17-18.



### 3. Barriers to disclosure of elder abuse

#### Terms of reference - 5

Identifying any constraints to elder abuse being reported and best practise strategies to address such constraints

#### 3.1 Prevalence of elder abuse and barriers to reporting

There is limited data on the prevalence of elder abuse, with most studies offering a range. For example, Boldy *et al*, suggests up to 5% of older people have experienced elder abuse, correlating to approximately 52,000 people aged over 65 in New South Wales.<sup>24</sup>

As noted above, up to 90% and more of perpetrators of elder abuse are family members, such as a spouse, adult children, grandchildren, siblings or other family members, friends or carers.<sup>25</sup>

As with family violence, elder abuse is under-recognised and under-reported. While some forms of elder abuse are obvious and involve criminal acts, in many cases the problem is subtle and hidden, occurring between older people, their families, neighbours, friends and carers. For this reason, elder abuse has been referred to as "a hidden problem, under-recognised and under-reported due to a stigmatisation and a lack of community awareness".<sup>26</sup>

There are many reasons why an older person may not disclose elder abuse, including:<sup>27</sup>

##### barriers to disclosing elder abuse

isolation and reliance on the perpetrator for care and companionship

fear of institutionalisation

fear of family members being penalised or prosecuted

desire to preserve family relationships

shame

blaming themselves or feeling responsible for perpetrators actions

fear loss of independence

poor health impacts on energy and motivation to manage emotional conflict and physical change

More than one of these barriers may operate to prevent an older person disclosing elder abuse. Our experience has highlighted the importance of addressing all barriers to disclosure to enable older people to report abuse within their family. For example, our Lawyer in a Bus program addressed the barriers of social isolation and dependence on the perpetrator for transport, by bringing lawyers to residents at Aged Care facilities. It was anticipated that having lawyers available within the homes of older people would mean that those residents too frail to leave home to seek legal help, or otherwise reliant on a possible perpetrator of elder abuse to transport them to get legal advice, would be able to access legal assistance. What we found, however, was that while the barrier of isolation was overcome, other barriers to seeking help remained.

<sup>24</sup> According to the Australian Bureau of Statistics, 1.04 million people living in New South Wales were aged over 65 as at 30 June 2011. See <http://www.abs.gov.au/ausstats/abs@.nsf/Products/3235.0~2011~Main+Features~New+South+Wales?OpenDocument#PARALINKO>

<sup>25</sup> n 9 , Wendy Lacey, NARI Report

<sup>26</sup> Elder Abuse Prevention Project, *Strengthening Victoria's Response to Elder Abuse* (2005) 12.

<sup>27</sup> Above n 3, 10



The desire to preserve family relationships or just not to “rock the boat”, or feeling too frail and unwell to deal with the particular legal issue, meant that many residents declined to take action or even obtain advice in relation to the abuse. These findings underscore the importance of a comprehensive strategy to prevent and respond to elder abuse which addresses each of the known barriers to reporting.

## 3.2 Best practice strategies to address constraints to reporting elder abuse

### 3.2.1 Professional education to enable health and other professionals to identify elder abuse

Elder abuse can be subtle and, without disclosure, may be difficult to detect. Given the barriers to older people reporting the abuse, it is vital that people who work with older people, particularly those that are trusted by older people such as

*“It is generally agreed that the healthcare team plays an important role in identifying, reporting and preventing elder abuse, particularly physicians and nurses as they are best placed to recognise these cases since most elderly people trust them.”*

health professionals, are able to identify elder abuse when it occurs.

<sup>28</sup> Above n 3, 28.

<sup>29</sup> Above n 3, 6 and 29; Almogues, A *et al* above n 22, 86; Lynette Joubert *et al* above n 22, 710; Claudia Cooper, Amber Selwood, Gill Livingston, ‘Knowledge,

Research confirms that training health and community professionals is an important intervention to address elder abuse. Professor P Darzins *et al* highlights the findings of research conducted by Boldy *et al* (2002):<sup>28</sup>

*“...the intervention cited as being the most important was more education of health professionals, followed by education of older people to assert and protect their rights, while establishing abuse help lines was rated least important.”*

However, health professionals may be constrained in their ability to identify and, even if elder abuse is apparent, to respond. Health and community professionals have cited the following reasons for this:<sup>29</sup>

#### factors constraining health professional's identification of, and response to, elder abuse

limited consensus and understanding of what constitutes elder abuse
lack of knowledge of reporting or referral frameworks
concerns about confidentiality
concerns referral may compromise therapeutic relationships
consequences for the older person
impact of the legal process on the older person
reluctance to become involved in legal process
outside scope of professional responsibility
dissatisfied with authorities response to elder abuse
lack of conviction that referral would improve outcomes
older person has denied mistreatment
abuse only involved subtle signs
difficulties in obtaining necessary evidence

detection and reporting of abuse by health and social care professionals; a systematic review’ (2009) 17 (10) *The American Journal of Geriatric Psychiatry*, 833 and 837; R V P [2001] NSWCA 473

Lynette Joubert and Sonia Posenelli provide an insight into how health care professionals may try to assist an older person experiencing elder abuse:<sup>30</sup>

*“The complexity of family relationships and dependency issues surrounding suspected elder abuse of the aged are subtle and can make detection and referral difficult. Substantiating and gathering information may need to be done over time and involve multiple community contacts and resources. There is always a need to proceed with investigations of [elder abuse] very carefully and where possible involve other health care professionals, drawing on their perceptions, judgement and experience...Health care providers may not have the confidence, compounded by a lack of professional expertise, to take the matter further.”*

The WHO also recognises the important role of health care professionals in recognising elder abuse as well as the constraints on their ability to do so:<sup>31</sup>

One of the key factors constraining health professional's ability to identify elder abuse is the limited consensus between older people, carers and health professionals on what behaviour constitutes elder abuse. For example, Hempton found:<sup>32</sup>

*“health professionals were more likely to correctly identify abusive and potentially abusive strategies than carers or healthy older people, but nonetheless between one quarter and two-thirds of health professionals did not identify the two ‘definitely abusive’ strategies.”*

<sup>30</sup> Lynette Joubert et al above n 22, 711.

<sup>31</sup> World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (17 November 2009), 2.

<sup>32</sup> C Hempton et al, ‘Contrasting perceptions of health professionals and older people in Australia: what

These two strategies were:

- locking someone in a house (23%)
- using an over chair restraint (40%)

Both strategies are considered abusive according to the Victorian Government's ‘With Respect to Age’ guidelines.<sup>33</sup>

*“Primary health care workers have a particularly important role to play as they deal with cases of elder abuse regularly – although they often fail to recognise them as such.”*

Given this limited consensus on what constitutes elder abuse, Hempton concluded:<sup>34</sup>

*“There is a clear need for both community and professional education about abuse...”*

This sentiment is echoed by Lynette Joubert and Sonia Posenelli:<sup>35</sup>

*“Staff knowledge and skills emerge as a clear deficit in detection, with the education of medical staff identified as the most effective way of improving the recognition of cases of [elder abuse] in the acute hospital setting”*

Training of health professionals to identify and respond to elder abuse has been shown to be effective. According to Cooper “health professionals who had received some professional

constitutes elder abuse?’ (2011) 26 *International Journal of Geriatric Psychiatry* 466-472, 466.

<sup>33</sup> Ibid, 472.

<sup>34</sup> Ibid, 472

<sup>35</sup> Lynette Joubert et al above n 22, 707.

training relating to elder abuse were twice as likely to suspect physical abuse.”<sup>36</sup>

Not only are professionals more likely to suspect abuse, but they are “more likely to record, report and discuss elder abuse if they have received professional training in managing elder abuse”<sup>37</sup>

In particular, health professionals are more likely to detect elder abuse if they: <sup>38</sup>

- routinely asked older people about abuse
- had an elder abuse protocol
- knew about the relevant law on abuse

Cooper, however, emphasised the importance of delivering professional training, face-to-face:

*“Current evidence would support the development and tests of face-to-face training interventions to increase professionals’ detection and reporting of abuse that encouraged them to ask older people about abuse...”*

Training of health and community professionals must also be supported by effective tools to screen for abuse.<sup>39</sup> In using these risk assessment tools, however, “professional judgement is always needed”. Lynette Joubert and Sonia Posenelli conclude “[i]n this respect, an interdisciplinary approach to detection, evaluation and management is crucial”.<sup>40</sup>

Our experience supports this conclusion. In FY2013-2014 Seniors Law delivered training to over 500 professionals at health and community agencies. The training session, which incorporated the use of a unique screening tool were combined to train workers to recognise and respond to elder abuse and to make appropriate referrals. Feedback from these sessions was very positive:

*“I feel more capable of identifying and responding to elder abuse after your presentation - it has opened my eyes.”-*  
Occupational Therapist from a public hospital  
High Admission Risk Program

However, while many professionals reported an increase in knowledge and ability to respond effectively to elder abuse, it did not result in a marked increase in referrals or collaboration between professions.

We experienced similar results from the training provided to staff at Aged Care Facilities as part of our Lawyer in a Bus project. Training was delivered to around 120 staff across seven aged care facilities plus Transitional Care (a group who have beds/staff across about five different aged care facilities). Training was by way of both formal presentation and smaller group meetings with key staff, who would then pass information on to their teams.

Staff training was well received and it would seem that, at least in some cases, staff played an active role in encouraging residents to take advantage of the Lawyer in a Bus service and seek legal assistance. Whilst the training did go some way to facilitating access to justice for older people, the number of referrals to the service was relatively low. Our experience suggests that the once off training did not translate into the systemic change of practice needed to effectively identify and respond to elder abuse.

Of course, whilst professional education is critical to identify elder abuse, it is insufficient unless combined with an interdisciplinary service response.

Acknowledging the realities of a working at a health service, Lynette Joubert and Sonia Posenelli suggested an integrated multidisciplinary response to elder abuse:<sup>41</sup>

<sup>36</sup> Cooper above n 22, 834.

<sup>37</sup> Cooper above n 22, 835 citing Tilden VP, Schmidt TA, Limandri BJ, et al ‘Factors that influence clinician assessment and management of family violence’ (1994) 84 *American Journal of Public Health* 628-633, 835.

<sup>38</sup> Ibid, 834.

<sup>39</sup> Lynette Joubert et al above n 22, 707.

<sup>40</sup> Ibid, 707.

<sup>41</sup> Lynette Joubert et al above n 22, 712.

Early suspicion and identification of risk and an integrated multidisciplinary response across the health service could be effective in responding to the multiple and complex behavioural and social issues that contribute to aged abuse in emergency, acute and sub-acute care. Effective use of this “window of opportunity in health care” could extend the level of community response to this vulnerable group of people.

Further supporting this approach, the WHO states in its ageing policy framework:

*“Confronting and reducing elder abuse requires a multisectoral and multidisciplinary approach”*

We discuss the importance of a multi-disciplinary approach further in part 5 of the submission.

### 3.2.3 Raising community awareness of elder abuse

Elder abuse remains “societally hidden”. When compared with child abuse and domestic violence, it has taken longer to develop a body of research on the nature and prevalence of elder abuse, with the issue remaining “under-researched, under-reported and under-funded”.<sup>42</sup>

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<sup>42</sup> Above n 9, 106-107 citing World Health Organisation, *Missing Voices: Views of older persons on elder abuse* (2002) 2 and John B Breux and Orrin G Hatch, ‘Confronting Elder Abuse, Neglect and Exploitation: The Need for Elder Justice Legislation’ (2003) 11 *Elder Law Journal* 207, 208.

<sup>43</sup> Above n 9, 100-101.

Wendy Lacey attributes this to the following:<sup>43</sup>

*“The abuse, exploitation and neglect of vulnerable older persons involves the serious denial of a person’s basic human rights, however, a lack of community awareness, ageism and the frequent invisibility of our elderly mean that elder abuse remains a hidden problem within society.”*

Prevailing ageist attitudes and the subtle exclusion of older people from society further compounds the problem preventing older people from engaging in their communities and leaves open “the potential for their basic rights and freedoms to be easily ignored, overlooked or downplayed”.<sup>44</sup>

A community education program is required. For example, the Victorian Government policy guidelines detailed a state-wide approach to addressing elder abuse, with a focus on education.

However, while broader community education campaigns are vital to address prevailing ageist attitudes, the underlying cause of elder abuse, there is limited evidence supporting their effectiveness in reducing abuse.<sup>45</sup> For example, in his Churchill Fellowship report, John Chesterman highlighted the shortcomings of a public awareness

<sup>44</sup> Above n 9, 114 citing John Williams, ‘An International Convention on the Rights of Older People’ in Marco Odello and Sofia Cavandoli (eds) (2011) *Emerging Areas on Human Rights in the 21<sup>st</sup> Century* 128, 140.

<sup>45</sup> Above n 3, 28.

campaign called ‘act against harm’ encouraging the public to identify at-risk adults:<sup>46</sup>

*“...while the ‘act against harm’ campaign was successful in raising awareness, that awareness diminished once the campaign intensity was reduced. Suggestions are now being made that the campaign may have been too broad...and that a new campaign should focus on particular aspects of adult protection, such as protection from financial abuse”*

Further, Wendy Lacey notes that campaigns “have not tended to include a broader safeguarding approach based on empowerment and strategies for self-protection.”

Community education should, therefore, target specific strategies to empower older people and prevent elder abuse. These campaigns should reflect the complex family dynamics associated with elder abuse and align with an older person’s desire to preserve family relationships.

Two recommended strategies are strategies to promote financial literacy and to improve understanding of powers of attorney. These strategies are discussed in further detail in section 4.

The benefit of public campaigns may be further limited with respect to older people who are socially isolated or cognitively impaired.<sup>47</sup>

Raising community awareness and improving knowledge through education and training to community and health professionals, will address some of the constraints faced by both the victims and those supporting people experiencing elder abuse, to report abuse. As discussed below (see for example p 23), however, it is recognised that education is not of itself sufficient to prevent and respond to elder abuse. A broader approach is required to enable those at risk of elder abuse to disclose the abuse and receive an appropriate service response.

**Recommendation 1:** fund a targeted campaign of professional and community education and awareness raising around elder abuse.

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<sup>46</sup> John Chesterman, *Responding to violence, abuse, exploitation and neglect: improving our protection of at-risk adults* (2013) 49 and 52.

<sup>47</sup> Above n 3, 4 and 6.

## 4. Strategies to prevent elder abuse

### Terms of reference - 6

Identifying any strength based initiatives which empower older persons to better protect themselves from risks of abuse as they age

### 4.1 Financial literacy programs

Literature, suggests that improving the financial literacy of older people, and promoting their confidence in managing their finances could be a successful strategy to preventing financial abuse.<sup>48</sup>

Professor P Darzins *et al*, distinguished between the benefits of a general financial abuse awareness campaign and building financial literacy:<sup>49</sup>

*"...while large sum of money can be spent on educating people to become more aware that they may become victims of financial abuse, this may not lead them to report the abuse. In contrast educating persons on how to best manage or protect their finances may allow them to avert being abused in the first place, or may enable them to remove themselves from situations wherein they are at risk of being abused."*

Furthermore, there is evidence that older people often require assistance managing their assets.<sup>50</sup> For example, the University of Queensland surveyed older people on the financial management of their assets. The older people surveyed cited that they received help with:<sup>51</sup>

- paperwork – 72.4%
- paying bills – 54.6%
- accessing money and banking – 41%
- pensions and management – 36.9%
- property management – 30.8%

One of the major reasons older people required assistance was a lack of confidence in doing it themselves.

By investing in financial literacy programs, older people will be more confident to manage their own affairs and to respond to abuse in the event that it occurs.

### 4.2 Community education to improve understanding of powers of attorney

In seeking assistance with financial affairs, older people generally prefer informal arrangements between family members in whom they vest complete trust. This may be attributed to a limited

<sup>48</sup> Above n 5, 30 citing Setterlund *et al*, 2002 and Tilse *et al*, 2005a; Human Rights and Equal Opportunity Commission Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 49.

<sup>49</sup> Above n 5, 32.

<sup>50</sup> Above n 5, 28 citing Tilse *et al* (2005a).

<sup>51</sup> Above n 8, *HREOC Inquiry Into Older People and the Law*, 19 citing Queensland Attorney-General, Submission No 107, 2.



understanding of formal substitute decision-making.<sup>52</sup>

While these informal arrangements may work for some families, there are many benefits to formalising decision-making arrangements in the event of legal incapacity:<sup>53</sup> Execution of an enduring power of attorney (POA):

- provides continuity of management of the older person's affairs, subject to limitations
- safeguards the best interests of the donor
- enables confidentiality to be maintained
- avoids a subsequent application to VCAT for a guardianship or administration order.

However, the appointment of a substitute decision-maker does not necessarily guard against financial abuse. In our clients' experience a formal appointment can, in fact, be used to deliberately or inadvertently perpetrate financial abuse.

Evidence suggests people executing POAs have a limited appreciation of how they can be misused.<sup>54</sup> Further, attorneys may not understand their obligations, which can lead to inadvertent financial abuse through mismanagement of finances.

To guard against misuse, attorneys must have a full understanding of their role and, as detailed on page 23-24, be more accountable in fulfilling their role as an attorney.

## 4.3 Support services for older people considering transferring property to family

25% of the financial abuse cases that Seniors Law assisted with during the 2013-2014 financial year concerned disputes over significant legal and equitable interests in property which often resulted from the failure of an assets for care arrangement.

These disputes could, in some cases, have been prevented if the older person had obtained information, support and advice prior to the property being transferred.

Seniors Rights Victoria (SRV) has developed a booklet titled *Care for Your Assets*<sup>55</sup> to raise awareness about the legal and other issues that can arise, and the importance of documenting arrangements where an assets is exchanged in return for a promise of care. An initiative to encourage older people to consider obtaining advice and recording family agreements in writing may go some way to preventing disputes should an assets for care arrangement not go according to plan.

Additionally, the Dispute Settlement Centre of Victoria (DSCV) in conjunction with SRV, offers a free, confidential Family Meeting Service to older Victorians looking at entering into assets for care agreements.

DSCV employs professionally trained mediators to facilitate discussions between family members, considering options and addressing any concerns at an early stage. DSCV has developed a checklist of general concerns to assist with discussions, and can help with the drafting of written agreements relating to assets for care arrangements.

A similar service in NSW, coupled with other services including legal advice services to assist older people looking at entering into assets for care arrangements may reduce the incidence of elder financial abuse.

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<sup>52</sup> Above n 5, 30 citing Setterlund *et al*, 2002; Above n 3, 72 citing Department of Justice Victoria, Submission No 121, 45.

<sup>53</sup> Above n 8, *HREOC Inquiry Into Older People and the Law*, 70-71.

<sup>54</sup> Above n 5, 30 citing Setterlund *et al*, 2002.

<sup>55</sup> Seniors Rights Victoria & Council on the Ageing, 'Care for Your Assets: Money, Ageing and Family' 2012 at [http://seniorsrights.org.au/wp-content/uploads/2014/03/Care-For-Your-Assets\\_guide-for-older-people-on-money-ageing-and-family.pdf](http://seniorsrights.org.au/wp-content/uploads/2014/03/Care-For-Your-Assets_guide-for-older-people-on-money-ageing-and-family.pdf)

**Recommendation 2: Fund a targeted community education campaign promoting:**

- financial literacy
- understanding of formal substitute decision-making
- provide a free mediation service similar to the DSV Family Meeting Service, and other services including legal advice to assist older people considering assets for care arrangements

## Terms of reference - 8

The possible development of long term systems and proactive measures to respond to the increasing numbers of older persons, including consideration of cultural diversity among older persons so as to prevent abuse

## 4.4 Improve legal systems and protections

The legal system must advance the human rights of older people and provide a range of interventions that are adapted to their needs and priorities. As financial abuse is commonly perpetrated through the use of assets for care arrangements or substitute decision-making appointments, our recommendations focus on addressing gaps and deficiencies in the legal frameworks that regulate these situations. We also support the recommendations in the submission by Seniors Rights Service.

In Victoria, significant progress has been made in the regulation of POAs, with the new Power of Attorney Act 2014 (Vic) (**POA Act**) including provisions to increase the accountability of attorneys, with the introduction of criminal sanctions and the ability for VCAT to order compensation where an attorney has misused his or her power.

Still lacking, however, is a more systemic oversight of POAs – involving a register of POAs, annual declarations of compliance and random audits – which we believe will reduce the incidence of abuse without being overly onerous.

### 4.4.1 Improve accountability measures

While education is an important preventative measure, it is vital that there are robust enforcement mechanisms available to enable an older person to hold an appointed substitute decision-maker to account for any financial abuse committed during their appointment.

While there are benefits to formalising substitute decision-making authority in a POA, the use of POAs cannot completely prevent financial abuse. In fact, research suggests financial abuse occurs in 10 to 15% of executed POAs.<sup>56</sup> Seniors Law has assisted numerous clients where a substitute decision-maker used their appointment to perpetrate financial abuse.

Increased accountability of substitute decision-makers, and the availability of robust enforcement mechanisms, are essential to reduce the incidence of financial abuse associated with these appointments.

In Victoria, the POA Act, which commenced on 1 September 2015, consolidates legislative provisions for POAs and enduring powers of guardianship which previously fell within the *Instruments Act 1958* (Vic) and the *Guardianship*

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<sup>56</sup> Above n 5, 30 citing Lush, 1998.



and Administration Act 1986 (Vic) (G&A Act), respectively.

The POA Act creates robust enforcement mechanisms by:

- creating new offences where an attorney dishonestly obtains, revokes or uses a POA to gain a financial advantage for themselves or cause a loss to the principal
- expanding VCAT's powers, especially the new power to order compensation

While the introduction of the new POA Act is welcome, literature highlights the following ongoing deficiencies with the POA regime:<sup>57</sup>

- no system to verify an appointed person's understanding of their role and responsibilities
- no current requirement for the appointed person to produce annual reports or have them audited
- no register of POAs

The accountability regime should also apply to Tribunal appointed substitute decision makers as well as to personal appointments.

The *Inquiry Into Older People and the Law* report recommended a national register for enduring POAs, as has been implemented in both the UK and Scotland, the latter operating on a full 'cost recovery' basis.<sup>58</sup>

Seniors Law recommends the establishment of a mandatory online registration system for all enduring POA appointments coupled with random audits. We believe this could lead to a reduction in the incidence of elder abuse, as registration would prevent people from purporting to rely on POAs that have subsequently been revoked, and the prospect of being audited would assist to ensure that attorneys comply with their obligations.

We acknowledge that striking the balance between appropriate safeguard mechanisms and excessive regulation of substitute decision-makers and supporters is a delicate one. Any new obligations must not be so onerous or complicated as to dissuade older people from making, and ordinary people from accepting, an appointment.<sup>59</sup> This may

lead to "perverse outcomes, such as driving people to use informal, unregulated approaches, which could increase rather than decrease the occurrence of financial elder abuse".<sup>60</sup>

In our view, the requirement to lodge annual declarations is not too onerous for representative decision makers. Whilst the lodgment of annual declarations alone is unlikely to prevent abuse, the annual declarations form part of an overall regime which we believe will reduce the incidence of abuse without being overly burdensome.

These measures would complement education and support for supporters and representatives, thereby ensuring they understand their role and can effectively fulfil their responsibilities.

**Recommendation 3: the introduction of measures to improve the accountability of substitute decision makers including:**

- the introduction of criminal sanctions and compensation orders against Attorneys misusing a power of attorney, as per the new Victorian *Power of Attorney Act 2014*
- the introduction of a mandatory online registration scheme for POAs
- the representative decision-maker to sign a statement agreeing to comply with their responsibilities before they undertake their role, as is already the case in relation to some personal appointments
- the representative to keep accurate separate records of all decisions made
- the representative to submit an annual declaration of compliance with their obligations during the previous year
- random audits of the records of a percentage of all representative decision makers.

<sup>57</sup> Above n 5, 30 citing Langan and Means, 1996; Lush, 1998.

<sup>58</sup> Above n 5, 21; above n 8, *HREOC Inquiry Into Older People and the Law*;

<sup>59</sup> Above n 8, *HREOC Inquiry Into Older People and the Law*, 72 citing Office of the Public Advocate Victoria, Submission No 70, 14.

<sup>60</sup> Above n 5, 4.

#### 4.4.2 Introduce a quicker and cheaper forum for the resolution of disputes concerning real property

The availability of a less formal system of property dispute resolution through the Victorian Civil and Administrative Tribunal (VCAT) has meant that there is a less onerous and less expensive dispute resolution mechanism available to older people in Victoria.

Under the *Property Law Act 1958* (Vic) (**PLA**) a co-owner may request VCAT make an order with respect to co-owned land and goods.<sup>61</sup> The suite of orders available to VCAT to give effect to the division of property is far-ranging. VCAT may make any order it thinks fit to ensure that a *just and fair* sale or division of land or goods occurs, including:

- selling the land or goods and dividing the proceeds between the owners;
- physically dividing the land or goods; or
- a combination of both.<sup>62</sup>

Further, VCAT can order compensation, reimbursement or adjustments to interests between the co-owners to reflect each co-owners' individual contribution to the property. Contributions may be made through improvements to the property and payment of maintenance costs, rates and mortgage repayments. Conversely, interests may be adjusted to take into account damage caused to the property and the benefit that one co-owner may have had of exclusive possession.

VCAT is particularly suited to the needs of our clients for the following reasons:

- less formal and expedient procedures are less stressful for the older person and assists in preserving family relationships
- the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse
- by generally being a less expensive jurisdiction, more vulnerable older clients can access justice

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<sup>61</sup> *Property Law Act 1958* (Vic), s225.

<sup>62</sup> *Property Law Act 1958* (Vic), s228.

#### Recommendation 4:

Expand the jurisdiction of the New South Wales Civil and Administrative Tribunal to include the determination of disputes concerning co-owners, as per the jurisdiction of the Victorian Civil and Administrative Tribunal (Building and Property List) provided under Part IV of the *Property Law Act 1958* (Vic).

## 4.5 Ensure that all strategies advance the human rights of older people

### 4.5.1 Right to live free from abuse

According to principle 17 of the UN principles for older persons 1991:

*"Older persons should be able to live in dignity and security and be free of exploitation and physical and mental abuse."*

While the legal response must provide interventions that allow an older person to live free from abuse, these interventions must be adapted to the needs and priorities of the older person.

As discussed in Part 3, there are many reasons why an older person may choose not to disclose abuse. Two common reasons are: (a) the desire to preserve family relationships; and (b) the wish to avoid exposing family members to legal sanctions.<sup>63</sup> Any interventions should ensure that older people retain control over what action if any should be taken.

<sup>63</sup> Above n 5, 7 and 32

#### 4.5.2 Right to autonomy and self-determination

Any legal response must recognise the right of the older person to decide not to pursue legal remedies in order to accommodate these priorities. Any interventions that unnecessarily impose on an older person's right to autonomy and self-determination and fail to afford them the "dignity of risk" may create adverse consequences.<sup>64</sup>

For example, while the availability of criminal sanctions is necessary to publicise, quantify and address acute instances of elder abuse, the risk of exposing family members to legal sanctions can be a significant deterrent to its disclosure. We have seen this in our casework. Generally, our clients prefer informal negotiations or civil remedies to resolve their matter, rather than pursuing family members in the criminal system.

John Chesterman has identified one jurisdiction that seeks to achieve this balance. In Nova Scotia, Canada the sheriff must not make or enforce a protection order if the protected person has refused consent to the making of the order or its enforcement. However, the sheriff may ignore this refusal if the protected person has been "unduly pressured" or there are no less restrictive means to protect the person from harm.<sup>65</sup> Police forces in Australia should engage in this type of balancing act in deciding whether or not to prosecute instances of elder abuse.

Likewise, mandatory reporting of elder abuse is another legal intervention that can impose on an older person's right to self-determination and

significantly deter disclosure. As distinct from children experiencing abuse, an older person is presumed to have legal capacity and have the right to make decisions that are not necessarily in their best interests. This includes the right to decide interventions that are appropriate for them. Further, Professor P Darzins *et al*, suggest there is "no good evidence for mandatory reporting".<sup>66</sup>

In guiding the development of legal interventions for elder abuse, the Victorian Human Rights Charter states human rights can only be limited in such a way:<sup>67</sup>

*"as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including... any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."*

With this in mind, our recommendations aim to ensure the legal response to elder abuse advances the human rights of older people, especially those:

- with diminished capacity
- experiencing financial elder abuse involving a property transfer or the misuse of a POA

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<sup>64</sup> Disability Practice Institute, "Dignity of Risk" (21 May 2015)  
<<http://www.disabilitypracticeinstitute.com/services/%E2%80%9Cdignity-of-risk%E2%80%9D/>>

<sup>65</sup> Above, n 46, 48

<sup>66</sup> Above n 5, 4.

<sup>67</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s7(2)(e).

## 5. New strategies to safeguard older people vulnerable to abuse

### Terms of reference – 9

The consideration of new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse

### 5.1 Multidisciplinary Response – Health Justice Partnerships (HJPs)

Some older people, especially those with an extensive history of abuse, may not recognise elder abuse as a problem that can be resolved with a health or legal intervention.

Even if an older person does recognise their problem as a legal or health problem, there are many reasons (as noted on page 14) why an older person may be reluctant to seek assistance. Two common reasons are: (a) the need to preserve family relationships; and (b) the wish to avoid exposing family members to legal sanctions.

These legal issues can remain unresolved for extended periods of time and, generally, it is only when significant consequences transpire – such as the sale of the family home – that the older person seeks help. At this stage the legal avenues to resolve the matter, if any, can be lengthy, stressful and costly.

#### 5.1.1 Elder abuse as a health problem

Elder abuse can adversely affect an older person's mental and physical health. This is consistent with evidence that suggests law is an important "social determinant of health". Namely, people with unresolved legal problems also tend to experience multiple and complex health problems and vice versa with a causal effect in both directions. Legal

problems can lead to or exacerbate health problems. People with multiple and complex health problems tend to have more interaction with the legal system.

Given the interconnectedness of legal and health issues, especially in the context of elder abuse, these issues are likely to be presented as part of a complex life or social problem.

A significant number of these "life problems" are likely to be concentrated in a small proportion of the community. In the Legal Australia-Wide Survey conducted in 2012, around 50% of respondents reported experiencing one or more legal problems in the preceding 12 months, with 65% of legal problems being concentrated amongst a small group of 9% of survey respondents.

#### 5.1.2 The role of trusted health professionals

We have already identified the critical role that health professionals play in identifying and responding to elder abuse.

Further to this, if an older person recognises that they have a legal problem, it is unlikely that he or she will speak to a lawyer about it. In Australia, nearly 30% of people experiencing a legal problem will initially seek the advice of a doctor, or another trusted health professional or welfare adviser. This figure rises to 80% in relation to legal problems associated with health.<sup>68</sup>

In the context of elder abuse, additional barriers can further compound an older person's reluctance

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<sup>68</sup> Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney, 2012) 116.

to seek assistance with a legal issue. In these circumstances, gaining the trust of the older person is vital. Lawyers rely on trusted health and community professionals to identify relevant legal issues and, if necessary, facilitate a legal response.

Almogue *et al* agree, concluding health and community professionals are generally best placed to assist older people experiencing elder abuse.<sup>69</sup>

### 5.1.3 The health justice partnership model

Based on the United States' Medical-Legal Partnership (**MLP**), a Health Justice Partnership or HJP is a healthcare delivery model integrating legal assistance as an important element of the healthcare team.

According to the HJP Network:<sup>70</sup>

*"The model is built on an understanding that the social, economic, and political context of an individual's circumstances impacts upon their health, and that these social determinants of health often manifest in the form of legal needs or requirements."*

An integrated legal service to resolve outstanding legal issues, one of the underlying social determinant of health, may provide better health outcomes for the client. Similarly, the availability of community services – such as alternatively housing – may assist a client in pursuing a legal remedy or make it redundant. We support the recommendations made by Redfern Legal Centre to address the particular needs of older people in relation to housing, particularly the need for security of tenure to enable older people to age in place.

<sup>69</sup> Almogue, A *et al* above n 22, 86.

<sup>70</sup> Health Justice Partnership Network, Health Justice Partnerships (21 May 2015) <<http://www.justiceconnect.org.au/what-we-do/what-we-are-working/health-justice-partnerships>> citing Elizabeth Tobin Tyler *et al* (eds) *Poverty, Health and*

HJP's have three core components and activities:<sup>71</sup>

inter-disciplinary collaboration	lawyers guide health professionals in identifying legal issues that may impact on health, and work together in providing a holistic service to address the social determinants of health
legal assistance within healthcare setting	provide more responsive legal assistance for acute legal issues, while also promoting early intervention and prevention strategies to avert legal crises
policy change	legal, health and community professionals jointly advocate for policy reform to systematically improve the health and wellbeing of clients

With more seamless integration, the HJP model of service delivery is expected to address some of the limitations of ad hoc professional training, by:

- influencing systemic change of practice in the identification and response to elder abuse – facilitating the exchange of knowledge and trust between the professions
- providing more immediate legal assistance
- encouraging a holistic service for the client – where legal assistance may resolve health issues or the availability of social services may resolve legal issues

### 5.1.4 The evidence

There is an emerging body of knowledge supporting the expansion of the MLP model in the United States. The National Centre for Medical Legal Partnership (**NCMLP**) conducted a literature review of MLPs, which demonstrated MLPs are having a positive impact in these three areas:<sup>72</sup>

- financial benefits to clients and partnering organisations

*Law, Readings and Cases for Medical-Legal Partnership* (Carolina Academic Press, 2011), 74.

<sup>71</sup> National Center for Medical-Legal Partnership, 'Making the case for MLP's: a review of the evidence' (February 2013) 3.

<sup>72</sup> *Ibid*, 5-6.

- improved health and wellbeing of clients
- increased knowledge and confidence of health professionals to address legal issues

The NCMLP concluded that MLPs are “a promising innovation for addressing social, legal and health challenges for undeserved and vulnerable patients, and should be scaled up to improve care at the patient, institution, and policy level”.<sup>73</sup> In expanding the MLP model, however, the NCMLP suggested the development of a common set of metrics to measure its impact:<sup>74</sup>

*“A common set of metrics for MLP service quality would guide both clinicians and lawyers in their interdisciplinary work in addressing patients’ health and legal needs and provide a baseline with which to evaluate improvements in quality and outcomes at the patient, system, and policy level.”*

Literature detailing the impact of HJPs in Australia is only just beginning to emerge. One example is the evaluation report on the *Acting on the warning signs* HJP between Inner Melbourne Community Legal and the Royal Women’s Hospital Victoria, which is funded by the Victorian Legal Services Board (LSB).

Aimed at addressing family violence through a multi-disciplinary approach, it was developed to complement family violence training for health professionals and provide an outreach legal service at the Women’s. The HJP commenced in 2009 and the evaluation report was released in August 2014, detailing key findings such as:<sup>75</sup>

- significant improvements in health professional’s self-reported knowledge of family violence and confidence in responding to family violence

- increase in referrals from health professions to the legal service
- the provision of legal advice improved the psychological and emotional health of clients

In NSW, a new HJP between Redfern Community Legal Centre and Royal Prince Alfred Hospital in inner Sydney commenced in May 2015. This partnership, which is aimed at assisting indigenous clients by having a lawyer based in the drug health service, has been able to reach clients who would not otherwise access legal services, and assist with a range of legal matters. Early indications suggest that the intervention has resulted in health improvements for some clients.

In September 2015 the Federal government announced *The Women’s Safety Package to Stop the Violence*. This package increases funding across the family violence sector, including the provision of \$15 million to, amongst other things, establish four new HJPs and expand the existing HJP at the Women’s Hospital in Melbourne.<sup>76</sup>

In the provision of this funding, the Federal government has recognised the potential of a multidisciplinary model in the delivery of services to the victims of intimate partner abuse. As discussed above and below, this model has proved similarly effective for victims of elder abuse, both internationally and in Australia. Seniors Law urges the NSW government to consider funding the Health Justice Partnership model to assist people at risk of or experiencing elder abuse in New South Wales.

### 5.1.5 Seniors Law and cohealth HJP

As part of its ongoing commitment to HJPs, in 2014 the LSB committed \$2.6m to nine HJPs, including our three-year HJP with cohealth.<sup>77</sup> cohealth is a community health service operating across the north and western metropolitan regions of Melbourne. cohealth provides integrated medical, dental, allied health, mental health and community

<sup>73</sup> Ibid, 7.

<sup>74</sup> Ibid, 8.

<sup>75</sup> The University of Melbourne, *Acting on the Warning Signs Evaluation: final report* (August 2014) 1-5.

<sup>76</sup> Turnbull, Malcolm The Hon: Press Release ‘Women’s Safety Package to Stop the Violence :

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<sup>77</sup> Legal Services Board, *\$2.6 million funding awarded in the 2014 Major Grants round* (22 May 2015) <[http://www.lsb.vic.gov.au/documents/Newsletter\\_11\\_Grants\\_Program\\_2014.PDF](http://www.lsb.vic.gov.au/documents/Newsletter_11_Grants_Program_2014.PDF)>.



support services, and delivers programs to promote community health and wellbeing.

The project commenced in early 2015 with a project lawyer from Seniors Law based at cohealth four days a week. The lawyer works with staff to help identify legal issues for older people and provide more convenient legal assistance and referrals.

The LSB is working with grant recipients to develop a number of consistent measurables to be reflected in each HJP's evaluation framework. The evaluation findings of these HJPs are expected to significantly contribute to the evidence base of the utility of HJPs in Australia.

The aims of the HJP with cohealth include:

- improved collaboration between legal and health professionals and greater internal capacity to identify and respond to elder abuse
- provision of legal assistance with a focus on early intervention
- development of relationships with local communities and an increase in the capacity of those communities to identify and respond to elder abuse through facilitating the development of community-specific screening tools

LaTrobe University will undertake an evaluation of the HJP, further contributing to the body of evidence in respect of the model in Australia.

**Case Study:** Yu was a victim of elder abuse, including potential financial abuse, at the hands of a controlling husband. Yu became reliant on her husband when she became ill, and because he took her everywhere, she was unable to seek legal advice. As a patient at a hospital which was partner in a HJP, Yu privately expressed her concerns to health staff, who in turn put her in touch with the lawyer. The lawyer was able to provide advice and assistance in conjunction with the delivery of health services, discretely attending Yu's medical appointment, while her husband waited outside.

Since the commencement of the project in February, early assessment of the impact of our partnership with cohealth has indicated the benefits

**Example of early intervention:** an older woman has a fall and is admitted to hospital. Upon being discharged, she mentions to a discharge worker or ACAS worker that she does not think she can live on her own anymore. She plans to sell her house and move in with her son, giving him the proceeds of sale and, in exchange, he will care for her. The worker, having received training on the risks of "assets for care" arrangements asks the patient if she would like to speak to a lawyer about her proposed living arrangements. She agrees.

The HJP lawyer speaks with the client about her options and she signs an agreement with her son and is registered on the title of his home. This means, if her care needs increase, she can use her money to pay for aged care services.

of secondary consultations. Close partnership between lawyers and health workers has allowed caseworkers to seek advice at an early stage, leading to the sharing of legal information with a client, and intervention and referral to the lawyer where appropriate. Clients with serious health issues have been able to access legal services where they would otherwise have been unavailable, and preventative work, in the form of training of health staff has begun, in moves towards an integrated change in practice.

**Recommendation 5:** in light of the positive results detailed in the emerging body of knowledge of MLPs in the US, and HJPs in Australia, we recommend government funding for **the expansion of the HJP model of service delivery for older people experiencing elder abuse** in New South Wales.

In expanding the model, a common set of metrics measuring HJP service quality and impact must be established to promote the sustainability and awareness of the model.

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