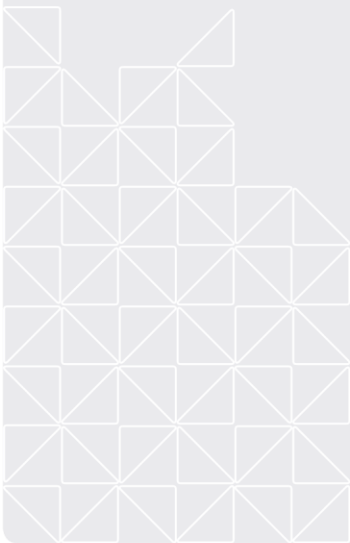


# Royal Commission into Family Violence

Submission

May 2015



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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. This will be the focal point of our submission.

### What has been done so far?

Seniors Law welcomes the shifting attitudes and heightened awareness of gender-based family violence (FV). However, we are yet to see similar progress with respect to understanding elder abuse and addressing ageism as its underlying cause.

With elder abuse remaining “societally hidden” further education is required. The Victorian Government has developed policy guidelines detailing a state-wide approach to addressing elder abuse, with a focus on education. Building on these policy documents, we would recommend an education program promoting the financial literacy of older people and their understanding of powers of attorney (POAs).

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

### Reduction and prevention

Prevailing ageist attitudes in the community facilitate and enable the commission of elder abuse. Beyond these community attitudes, there are key characteristics – identified in our submission – that can increase a person’s vulnerability to elder abuse as well as those that relate to perpetrators.

While people experiencing elder abuse and FV may display similar risk factors, there are other risk factors of elder abuse that would not necessarily be identified by the established common risk assessment framework (CRAF) for FV. We would, therefore, recommend the development of a CRAF for elder abuse reflecting these different risk factors.

### Ensuring safety

#### The legal response

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

Gaps and deficiencies currently exist in the legal response to elder abuse, especially with respect to older people:

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

Lawyers require further clarification of their professional obligations when assessing a client’s capacity to provide instructions. If a lawyer is unable to navigate these obligations, older people with diminished capacity – a risk factor for elder abuse – may not be able to obtain assistance with a legal matter arising in the context of elder abuse.

Further barriers can arise if an older person has a matter requiring litigation. To address these barriers, we recommend changes to court rules with respect to the appointment of litigation guardians, their risk of costs liability as well as the oversight of their appointment.

Financial elder abuse can often occur as a result of a failed “assets for care” arrangement or through the misuse of a POA.

“Assets for care” arrangements are becoming increasingly common. The informal nature of these arrangements, compounded by substantial evidentiary burdens imposed by archaic legal presumptions, can make it difficult for an older person to enforce their rights under these arrangements. We recommend legislative amendments limiting the operation of these presumptions when courts and tribunals adjudicate property disputes.

Finally, while we welcome the introduction of the new *Powers of Attorney Act 2014* (Vic), deficiencies in the oversight of attorneys still remain.

## The integration of 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 discrete issues that can be addressed in isolation. Insufficient integration and coordination of health, community and legal services can hinder respective professions in the identification of, and response to, elder abuse.

With significant barriers compounding an older person's reluctance to seek assistance, lawyers are reliant on trusted health and community professionals to identify relevant legal issues and, if necessary, make appropriate referrals.

While health professionals are best placed to identify elder abuse, they may be constrained in their ability to facilitate a legal response. There is a clear need for professional training on elder abuse.

Recognising this, Seniors Law delivered a training program on elder abuse and other legal issues associated with ageing for community and health organisations. Our experience suggests ad hoc training of health and community professionals does not necessarily translate into the systemic change of practice needed to effectively identify and respond to elder abuse. A more integrated approach to multi-disciplinary practice is required.

Consequently, we are currently integrating our legal service into a multi-disciplinary team at cohealth, a community health service in Footscray. This integrated model of service delivery is known as a "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.

In light of these positive results, we recommend funding the expansion of the HJP model of service delivery for older people experiencing elder abuse.

In the evolution of the HJP model, barriers to integrating legal, health and community services have been identified – mainly due to a mistrust and misunderstanding between different professions. There are, however, strategies available to overcome these barriers.

## Recommendations

**Recommendation 1:** extending the definition of “family violence” in the FVPA to include neglect as well as more subtle forms of financial abuse, such as living with the older person and refusing to contribute to living expenses.

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

- financial literacy
- understanding of formal substitute decision-making

to coincide with the commencement of the POA Act.

**Recommendation 3:** amending the *Guardianship and Administration Act 1986 (Vic)* (G&A Act) to provide for greater accountability of guardians and administrators:

- creating a new offence where a guardian or administrator dishonestly uses their appointment to gain financial advantage or cause loss to the represented person
- empowering VCAT or the Supreme Court to order a guardian or administrator to pay compensation for loss caused by breach of their obligations under the G&A Act
- allowing for the lodgement with VCAT a statement detailing wishes for future appointments
- affording represented persons the right to apply for a review of individual decisions made by guardians and administrators.

**Recommendation 4:** developing a specific CRAF to assist professionals in identifying elder abuse, reflecting the different risk factors heightening an older person’s vulnerability to abuse.

This framework could be based on the existing Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse, titled *With respect to age – 2009*.

**Recommendation 5:** amending the Australian professional rules of conduct, enabling a lawyer to seek the appointment of a guardian or administrator in certain limited circumstances, through the creation of an exception or qualification to a lawyer’s duty of confidentiality.

However, the exemption should only operate when all other less restrictive alternatives have been considered, with the lawyer being required to make reasonable attempts to support the client to make decisions before relying on the exemption.

**Recommendation 6:** amending the relevant court rules regulating litigation guardians to:

- encourage referral to a specialist court or tribunal for questions of capacity, if necessary;
- allow an appointed person to conduct litigation on behalf of a person with diminished capacity without the risk of liability for an adverse cost order against them personally, provided they do so with proper diligence
- provide for appeals of the decision to appoint a litigation representative and regular review of their appointment
- require a court to ensure that a litigant is provided with the support necessary to promote their capacity.

**Recommendation 7:** restricting the operation of the presumption of advancement, through amending Part IV of the *Property Law Act 1958 (Vic)* (PLA) requiring VCAT to consider the mutual intention of parties in characterising property contributions, irrespective of the nature of the relationship between them.

**Recommendation 8:** providing for greater oversight of attorneys appointed under the new *Powers of Attorney Act 2014 (Vic)*:

- the introduction of a mandatory online registration scheme
- the representative or supported 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.

**Recommendation 9: funding the expansion of the HJP model** of service delivery for older people experiencing elder abuse.

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.

# 1. Introduction

Justice Connect Seniors Law (**Seniors Law**) welcomes the opportunity to make a submission to the Royal Commission into Family Violence in undertaking a review of Victoria's response to family violence (**FV**).

We have extensive experience working with the health and community sector to assist older people who are experiencing elder abuse, especially financial abuse. This will be the focal point of our submission.

While there are similarities between FV and elder abuse, there are some key distinctions. Namely, the dominant contributing factor to elder abuse is ageism, rather than gender, giving rise to different risk factors. As such, risk assessment frameworks for elder abuse must reflect these distinctions.

## 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

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

We 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.

## Collaboration with the health and community sector

In delivering its service, Seniors Law has developed a close connection with the health and community sector.

Our pro bono lawyers provide free legal appointments at hospitals and health centres across Melbourne. Complementing this, Seniors Law delivers training on elder abuse and other legal issues associating 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 also has a project lawyer based at cohealth, a community health organisation, in Footscray. 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 identify laws that adversely impact the interests of older people and their access to justice. We undertake law reform and advocacy initiatives to



advocate for the reform of those laws to make them fairer.

## Family violence and elder abuse

### Ageing population

Australians are expected to live longer, healthier lives. This is a triumph of modern medicine. In 2055, life expectancy at birth is projected to be 95.1 years for men and 96.6 years for women, compared with 91.5 and 93.6 years today.<sup>1</sup> It is also anticipated that 'health expectancies' will likewise increase; meaning people are not only living for longer, but they are enjoying good health for a longer period of time.<sup>2</sup>

A likely consequence of the increase of the number of older Australians is, sadly, an increase in the incidence of elder abuse.

### Elder abuse

Like family violence, elder abuse is framed according to:

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

### Definition and form

The World Health Organisation (WHO) has defined elder abuse:<sup>3</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.

The different way elder abuse can manifest are:<sup>4</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.

Typically, these different forms of abuse co-occur, with financial and psychological abuse being the most common.<sup>5</sup>

<sup>1</sup> Australian Government, *2015 Intergenerational Report* (2015) 5, 7 and 8.

<sup>2</sup> Above n1, 8.

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

<sup>4</sup> Victorian Government, Department of Health, *Elder Abuse Prevention and Response Guidelines 2012-2014* (2012) 3

<sup>5</sup> Peteris Darzins, Georgia Lowndes and Jo Wainer, 'Financial abuse of elders: a review of the evidence' (2009) 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; Mals *et al*, 2003.

## Seniors Law assistance with elder abuse matters

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

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

As Seniors Law can draw on the capacity and resources of pro bono lawyers, we can assist older people with these extremely complex matters that can involve extensive negotiations and protracted higher court litigation.

As such, our submission will focus on financial elder abuse.

### Financial abuse

The WHO has defined financial abuse:<sup>6</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 – such as banks. Our submission will only address financial abuse committed within a relationship of trust.

As illustrated in the adjacent table, financial abuse operates in a spectrum from deliberate theft to inadvertent mismanagement. Intended 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>7</sup> Whereas, unintended 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>8</sup>

#### common examples of financial abuse<sup>9</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>10</sup>

<sup>6</sup> World Health Organisation, *Abuse of the Elderly* (2002) 127.

<sup>7</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>8</sup> Above n 5, 5.

<sup>9</sup> Above n 5, 9; OP&L page 21-22.

<sup>10</sup> Above n 5, 8 and 10 citing Boldly *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 Commission, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 15.

## Different types of violence and abuse: family, elder and financial



There are similarities between elder abuse and FV in terms of 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. However, with ageist attitudes – rather than gender inequality – regarded as the dominant underlying cause, elder abuse can be distinguished from FV. Further, some risk factors heightening an older person’s vulnerability to elder abuse – such as the accumulation of significant assets – would not necessarily be recognised as risk factors for FV.

Financial abuse can include abuse arising within a relationship of trust – such as between family members – as well as abuse committed by third parties – such as banks. The former is elder abuse, while the latter, in the absence of a relationship of trust, is not. Financial elder abuse can include prohibited actions causing financial harm, which would overlap with FV. However, it can also contemplate unintended omissions causing financial harm – such as financial mismanagement or neglect – that would seem to fall outside the current legislative definition of FV.

<sup>11</sup> Victorian Government, Department of Human Services, *With respect to age* (2009) 3 citing Duncan Boldy, Barbara Horner, Kathy Crouchley, Margaret Davey and Stephen Boylen, ‘Addressing elder abuse: West Australian case study’ (2005) 24(1) *Australasian Journal on ageing*: 3-8.

<sup>12</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.

<sup>13</sup> Above n 4, 2.

<sup>14</sup> Elder Abuse Prevention Project, *Strengthening Victoria’s Response to Elder Abuse* (2005) 12.

While Seniors Law can assist older people experiencing any of the three types of abuse, this submission will focus on elder financial abuse, as shaded on the adjacent diagram.

## Prevalence

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 42,000 Victorians.<sup>11</sup>

Up to 80% of perpetrators of elder abuse are family members, such as a spouse, adult children, grandchildren, siblings or other family members, friends or carers.<sup>12</sup> The abuse may be perpetrated as a result of ignorance, negligence or deliberate intent.<sup>13</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>14</sup>

There are many reasons why an older person may not disclose elder abuse, including:<sup>15</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

<sup>15</sup> Above n 5, 10; 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*, 702-714, 711.

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

Given the subtlety of elder abuse and a reluctance of those experiencing the abuse to disclose it, trusted health and community professionals who work with older people must be able to identify the risk factors of elder abuse and respond accordingly. Our work in this area is outlined on page 33.

## Impact

The WHO describes elder abuse as “a violation of human rights and a significant cause of injury, illness, lost productivity, isolation and despair”.<sup>16</sup>

The impact of elder abuse on older Victorians can be life changing, leading to:<sup>17</sup>

adverse impact of elder abuse
depression and anxiety
psychological harm
declining physical health compounded by a decrease in resources available for healthcare
increased mortality
relocation to an aged care facility
fear and lack of trust
poverty and homelessness
behavioural problems

<sup>16</sup> World Health Organisation, *Active Ageing: A Policy Framework* (2002) 29.

<sup>17</sup> Above n5, 8, 12 and 18; Claudia Cooper, Amber Selwood, Gill Livingston, ‘Knowledge, detection and reporting of abuse by health and social care professionals: a systematic review’ (2009) 17(10) *The American Journal of Geriatric Psychiatry* 826-838, 827 citing Lachs MS, Williams CS, O’Brien S et al ‘The mortality of elder mistreatment’ (1998) *Journal American Medical Association* 428-432 and Ogioni L, Liperoti R, Landi F et al, ‘Cross-sectional association

According to Professor P Darzins et al, financial elder abuse can have a particularly profound effect on older people:<sup>18</sup>

*“The impact of financial losses may be greater for older people than for younger people as they have neither the time nor the capacity to recover from economic loss. Financial loss may have far-reaching effects for an older person, including forcing major life decisions such as the sale of their homes, may cause marked emotional distress and may even be linked to adverse health states.”*

Of course, there are also broader costs to society if financial abuse of an older person results in increased financial dependency on government assistance.

## Distinctions between elder abuse and family violence

### Ageism as the dominant contributing factor

Unlike FV, the gender of the perpetrator does not appear to be a significant contributing factor in the commission of financial elder abuse. As noted by Mr Julian Gardner, Public Advocate, Victoria:<sup>19</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.”*

Rather, prejudicial attitudes, discrimination and unhelpful stereotypes with respect to ageing and older people, known as “ageism”, is commonly

between behavioral symptoms and potential elder abuse among subjects in home care in Italy: results from the Silvernet Study’ (2007) *American Journal of Geriatric Psychiatry*, 70-78.

<sup>18</sup> Above n 5, 5.

<sup>19</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.

regarded as the dominant contributing factor of elder abuse.<sup>20</sup>

This ageism can manifest as a perpetrator's strong sense of entitlement to an older persons' assets because of:<sup>21</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>22</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 depleted through the purchase of needed healthcare."*

as a "lack of appropriate action" – such as neglect – thereby imposing positive obligations on a trusted person, which would fall outside the currently accepted definition of FV. In particular, the *Family Violence Protection Act 2008* (Vic) (**FVPA**) does not appear to protect older people experiencing neglect and subtle forms of financial abuse.

Given the different underlying causes, motivating factors and perspectives of elder abuse, the FVPA's regulation of certain forms of elder abuse, should be adapted to accommodate these distinctions.

**Recommendation 1:** The definition of "family violence" in the FVPA should expressly include neglect as well as more subtle forms of financial abuse, such as living with the older person and refusing to contribute to living expenses.

By extending the definition of FV in the FVPA to include these instances of elder abuse, intervention orders may provide a useful mechanism to address neglect – by allowing the provision of services to an isolated older person – and financial abuse – by, for example, excluding an adult child from the older person's residence.

## The violence and care perspective of elder abuse

Finally, elder abuse can be conceptualised from two perspectives – of violence and of care. The violence perspective involves criminalising or prohibiting behaviour – assault, theft, fraud, etc. While the care perspective frames elder abuse as a "problem of inadequate or inappropriate care", drawing parallels with child abuse, and emphasises the dependent relationship between the victim and carer.<sup>23</sup>

This means the concepts of FV and elder abuse overlap in that they each define prohibited behaviour that causes physical, sexual, psychological, economic harm or is otherwise threatening or coercive. However, from the care perspective elder abuse can also be characterised

<sup>20</sup> Above n 12, 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 and Harriet Macmillan, 'Elder abuse and oppression:

voices of marginalized elders', 23(1) *Journal of Elder Abuse & Neglect*.

<sup>21</sup> Above n 5, 15-17; Above n 12, 99;

<sup>22</sup> Above n 5, 15.

<sup>23</sup> Rodney Lewis, 'Taking action against abuse of older people: pathways out of the maze' (2013) 4.



## 2. What has been done so far?

### Question Two

The Royal Commission wants to hear about the extent to which recent reforms and developments have improved responses to family violence, and where they need to be expanded or altered.

Seniors Law welcomes the shifting attitudes to, and heightened awareness of, gender-based family violence. However, we are yet to see similar progress with respect to attitudes towards ageing and awareness of elder abuse.

With elder abuse remaining “societally hidden” further education is required. The Victorian Government has developed policy guidelines detailing a state-wide approach to addressing elder abuse, with a focus on education. Building on these policy documents, we would recommend an education program promoting the financial literacy of older people and their understanding of POAs.

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

Significant progress has also been made with the regulation of POAs, providing important remedies for older people experiencing elder abuse. However, greater accountability of guardians and administrators is required.

## Awareness and education

### The hidden problem 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>24</sup>

<sup>24</sup> Above n 12, 106-107 citing World Health Organisation, *Missing Voices: Views of older persons on elder abuse* (2002) 2 and John B Breau and Orrin G Hatch, ‘Confronting Elder Abuse, Neglect and Exploitation: The Need for Elder Justice Legislation’ (2003) 11 *Elder Law Journal* 207, 208.

<sup>25</sup> Above n 12, 100-101.

Wendy Lacey attributes this to the following:<sup>25</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>26</sup>

### Elder abuse guidelines

In 2012 the Victorian Government established *Elder abuse prevention and response guidelines for action 2012-2014* outlining priorities and actions to address elder abuse. The initiative is primarily educative, focussing on:

- professional and community education
- provision of legal, referral and advocacy services
- coordination of service responses<sup>27</sup>

Supporting this initiative, the Victorian Government has developed practice guidelines for health services and community agencies for the prevention of elder abuse. Titled *With respect to age – 2009*, it

<sup>26</sup> Above n 12, 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>27</sup> Above n 4, 5.

provides practical and comprehensive guidance on developing the frameworks necessary to identify and respond to elder abuse.

## Targeted elder abuse education

In accordance with these policy documents, we recommend an ongoing education program targeting specific issues and professionals.

### Professional training

Evidence suggests 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.”*

For further information on this issue, and our recommendation, please refer to page 32.

### Community education

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>29</sup>

For example, in his Churchill Fellowship report, John Chesterman highlighted the shortcomings of a public awareness campaign called ‘act against harm’ encouraging the public to identify at-risk adults:<sup>30</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”*

The benefit of public campaigns may be further limited with respect to older people who are socially isolated or cognitively impaired.<sup>31</sup>

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 would 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 promoting financial literacy and understanding of POAs.

### Financial literacy

Evidence suggests older people generally require assistance with managing their assets.<sup>32</sup> The University of Queensland surveyed older people on the financial management of their assets. Of the older people surveyed, they cited receiving help with:<sup>33</sup>

- paperwork – 72.4%
- paying bills – 54.6%
- accessing money and banking – 41%

<sup>28</sup> Above n 5, 28.

<sup>29</sup> Above n 5, 28.

<sup>30</sup> John Chesterman, *Responding to violence, abuse, exploitation and neglect: improving our protection of at-risk adults* (2013) 49 and 52.

<sup>31</sup> Above n 5, 4 and 6.

<sup>32</sup> Above n 5, 28 citing Tilse *et al* (2005a).

<sup>33</sup> Above n 19, 19 citing Queensland Attorney-General, Submission No 107, 2.

- pensions and management – 36.9%
- property management – 30.8%

One of the major reasons older people require assistance was a lack of confidence in doing it themselves. Literature, therefore, suggests improving the financial literacy of older people, and promoting their confidence in managing their finances could be a successful strategy in preventing financial abuse.<sup>34</sup>

Professor P Darzins *et al*, distinguished between the benefits of a general financial abuse awareness campaign and building financial literacy:<sup>35</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 abuse.”*

## Understanding POAs

In seeking assistance with financial affairs, older people generally prefer informal arrangements between family members, with whom they vest complete trust. This may be attributed to a limited understanding of formal substitute decision-making.<sup>36</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>37</sup> Execution of an enduring POA:

- provides continuity of managing 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>38</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 29, be more accountable in fulfilling their role as an attorney.

The limited understanding of the utility of POAs and attorney’ responsibilities is likely to be compounded by the commencement of the new *Powers of Attorney Act 2014* (Vic) (**POA Act**). A targeted education campaign could coincide with the expected commencement of the POA Act in September 2015.

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

- financial literacy
  - understanding of formal substitute decision-making
- to coincide with the commencement of the POA Act.

<sup>34</sup> Above n 5, 30 citing Setterlund *et al*, 2002 and Tilse *et al*, 2005a; Above n 19, 49.

<sup>35</sup> Above n 5, 32.

<sup>36</sup> Above n 5, 30 citing Setterlund *et al*, 2002; Above n 19, 72 citing Department of Justice Victoria, Submission No 121, 45.

<sup>37</sup> Above n 19, 70-71.

<sup>38</sup> Above n 5, 30 citing Setterlund *et al*, 2002.



## Accountability of substitute decision-makers

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

### New POA regime

The POA Act, which is expected to commence on 1 September 2015, consolidates legislative provisions for POAs and enduring powers of guardianship, which currently fall within the *Instruments Act 1958* (Vic) and the *Guardianship 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

As discussed on page 29, Seniors Law also recommends 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.

## Guardianship and administration regime

A substantial number of Seniors Law matters involve guardianship and administration. For example, guardianship and administration matters constituted one third of our caseload in the 2013-2014 financial year.

While significant progress has been made in the regulation of POAs, further legislative amendments are required to provide for greater accountability of guardians and administrators who perpetrate financial elder abuse, such as the ability to order compensation and impose penalties. This would promote the consistent application of accountability measures for all formally appointed substitute decision-makers.

**Recommendation 3:** making the following amendments to the G&A Act to provide for greater accountability of guardians and administrators:

- creating a new offence where a guardian or administrator dishonestly uses their appointment to gain financial advantage or cause loss to the represented person, and requires them to compensate the represented person for any loss caused
- empowering VCAT or the Supreme Court to order a guardian or administrator to pay compensation for loss caused by breach of their obligations
- allowing for the lodgement with VCAT a statement detailing wishes for future appointments
- the right for represented persons to apply for a review of individual decisions made by both guardians and administrators

### 3. Reduction and prevention

#### Question Six

What circumstances, conditions, situations or events, within relationships, families, institutions and whole communities, are associated with the occurrence or persistence of family violence?

Prevailing ageist attitudes in the community facilitate and enable the commission of elder abuse.

#### Characteristics of victims and perpetrators

Beyond these community attitudes, research has identified key characteristics that can increase a person's vulnerability to elder abuse as well as those that relate to perpetrators.<sup>39</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
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, *of itself*, can increase an older person's

vulnerability to financial abuse, irrespective of the presence of other aggravating characteristics or conditions.<sup>40</sup>

People experiencing elder abuse and FV may display a number of similar risk factors – including dependency, social isolation, poor health and disability. There are, however, other risk factors of elder abuse – such as the accumulation of assets, reduced capacity and death of a partner – that would not necessarily be identified by the established common risk assessment framework (CRAF) for FV. 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.

Similarly, the CRAF for FV may assist in identifying elder abuse by highlighting a perpetrator's close relationship with the victim, substance abuse, mental illness and financial distress. It may not, however, identify other key risk factors of elder abuse – such as a sense of financial entitlement and stress arising from their role as carer.

**Recommendation 4:** development of a specific CRAF to assist professionals in identifying elder abuse, reflecting the different risk factors heightening an older person's vulnerability to abuse.

This framework could be based on the existing Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse, titled *With respect to age* – 2009.

<sup>39</sup> Above n 5, 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 n 30, 22; Above n 12, 99; Above n 19, 17-18; Lynette Joubert *et al* above n 15, 706.

<sup>40</sup> Above n 12, 112 and 120; Above n 19, 17-18.

## Situations and events

As detailed on page 25, financial elder abuse can often occur as a result of a failed “assets for care” arrangement or the misuse of a substitute decision-maker’s appointment.

### Question Seven

What circumstances and conditions are associated with the reduced occurrence of family violence?

While there has been limited research on protective factors of elder abuse, having children and relatives who care, social networks, an assertive personality, an understanding of rights and good coping skills have been recognised as protective factors.<sup>41</sup>

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<sup>41</sup> Above n 5, 6 and 15.

## 4. Ensuring safety

### Question Eight

Tell us about any gaps or deficiencies in current responses to family violence, including legal responses. Tell us about what improvements you would make to overcome these gaps and deficiencies, or otherwise improve current responses.

The legal response to elder abuse must advance the human rights of older people, balancing their right to be safe and their right to exercise self-determination.

Gaps and deficiencies currently exist in the legal response to elder abuse, especially with respect to older people:

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

Lawyers require further clarification of their professional obligations when assessing a client's capacity to provide instructions. If a lawyer is unable to navigate these obligations, older people with diminished capacity may not be able to obtain assistance with a legal matter arising in the context of elder abuse.

Further barriers can arise if an older person has a matter requiring litigation. Amendments to court rules are required with respect to the appointment of a litigation guardian, their risk of costs liability as well as the oversight of their appointment.

Financial elder abuse can arise due to the failure of "assets for care" arrangements, which are becoming increasingly common. The informal nature of these arrangements, compounded by substantial evidentiary burdens imposed by archaic legal presumptions, can make it difficult for an older person to enforce their rights under these arrangements. Legislative amendments are required limiting the operation of these presumptions when courts and tribunals adjudicate property disputes.

Further, while we welcome the introduction of the new POA Act, deficiencies in the oversight of attorneys still remain.

## Advancing the human rights of older people

### 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 on page 11, there are many reasons why an older person may choose not to disclose abuse. Two common reasons are: (a) the need to preserve family relationships; and (b) the wish to avoid exposing family members to legal sanctions.<sup>42</sup>

### 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>43</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

<sup>42</sup> Above n 5, 7 and 32

<sup>43</sup> Disability Practice Institute, "Dignity of Risk" (21 May 2015)

<<http://www.disabilitypracticeinstitute.com/services/%E2%80%9Cdignity-of-risk%E2%80%9D/>>

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 highlighted 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>44</sup> Victoria Police 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>45</sup>

## Rights-based response to elder abuse

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>46</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.”*

<sup>44</sup> Above n 30, 48.

<sup>45</sup> Above n 5, 4.

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

## Assisting clients with diminished capacity

A person must have legal capacity to instruct a lawyer to obtain legal assistance. Gaps and deficiencies in the legal system can arise when:

- a person’s capacity is in doubt and a capacity assessment is required to obtain instructions; or
- litigation is required to resolve the legal matter.

## Assessing capacity and the duty of confidentiality

Lawyers face a dilemma when they are uncertain about their client’s capacity to provide instructions in relation to their legal problem. This is particularly problematic when a client has no other family members or friends to assist or support in making an application for the appointment of a substitute decision maker.

## Victorian rules

In Victoria lawyers are currently bound by the Professional Practice and Conduct Rules 2005 (the **Victorian rules**). Rule 3 provides for an express duty of confidentiality, while rule 12 states that a lawyer is under a duty to advance and protect the client’s interests. Both duties are repeated at rule 1-1 of the Rules which states that a “practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients’ best interests and maintain clients’ confidences”.

Law Institute of Victoria (**LIV**) Ethics Committee rulings indicate that where a lawyer has doubts about their client’s capacity, they should seek a medical assessment. If the client refuses to consent to an assessment, the lawyer may cease to act, giving reasons. Similarly, if the lawyer forms the view that the client does not have capacity, they may apply to have a guardian appointed but if the

<sup>46</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s7(2)(e).

client objects to the application, they should cease to act, giving reasons.<sup>47</sup>

This means, if a lawyer concludes that a client lacks capacity to instruct them in relation to the application, they must face the difficult choice of ceasing to act or potentially breaching their duty of confidentiality by making an application to VCAT seeking the appointment of an administrator. This raises significant concerns about the ability of clients with diminished capacity to access the justice system and to realise their right to equality before the law.<sup>48</sup> This barrier may have a significant impact on an older person requiring assistance with a legal matter arising in the context of elder abuse.

### NSW rules

There is, however, New South Wales authority for a qualification to the obligation of confidentiality. In the 2001 decision of *R v P*<sup>49</sup>, the Court held that there was no absolute rule against a solicitor bringing an application for the appointment of a guardian or administrator against their client's wishes, finding that there was no misuse of confidential information in the circumstances.

However, the court noted that the bringing of such applications by a solicitor is extremely undesirable. Lawyers should only bring such an application as a last resort, where all other avenues have been explored, including the possibility of another person bringing the action.<sup>50</sup>

### Australian rules

Rule 9.2 of the Australian Solicitors' Conduct Rules (the **Australian rules**), provides a number of exemptions to the duty of confidentiality. However, there is currently no exemption that addresses the situation of a lawyer advancing the interests of a client with diminished capacity.

### American rules

The American Bar Association Model Rules of Professional Conduct (the **American rules**) includes an exemption to the confidentiality rule if a lawyer reasonably believes a client has diminished capacity and is at risk of substantial physical, financial or other harm unless action is taken.<sup>51</sup> In these circumstances, the lawyer may take

“reasonably necessary protective action”.<sup>52</sup> This action may include consulting with third parties who have the capacity to protect the client and, only in appropriate cases, seeking the appointment of a substitute decision maker.<sup>53</sup>

### Roundtable discussions

On 25 September 2013, the Public Interest Law Clearing House – as it was known then, now known as Justice Connect – jointly hosted a roundtable with the Office of the Public Advocate Victoria (**OPA**) and the LIV (the **roundtable**). The roundtable was attended by representatives from Justice Connect, OPA, the LIV, government departments, statutory bodies, the judiciary and trustee services, amongst others.

The question of whether an amendment to the Victorian Rules to provide for an exemption or qualification to the duty of confidentiality was desirable was considered at that meeting. The risk that lawyers might too readily rely on the exemption rather than work to support their client to provide instructions was considered. On balance, however, the attendees supported a proposal to amend the Victorian Rules to provide for a limited exemption or qualification to the duty of confidentiality.

**Recommendation 5:** amend the Australian rules to include an exception or qualification to a lawyer's duty of confidentiality enabling the lawyer to seek the appointment of a guardian or administrator in certain limited circumstances. For example, a limited exemption similar to the exemption provided for in the American rules.

However, the exemption should only operate when all other less restrictive alternatives have been considered, with the solicitor being required to make reasonable attempts to support the client to make decisions before relying on the exemption.

<sup>47</sup> Public Interest Law Clearing House (now Justice Connect), *Incapacity and the Justice System in Victoria: Discussion paper* (2013) 2.

<sup>48</sup> *Ibid.*

<sup>49</sup> *R v P* [2001] NSWCA 473.

<sup>50</sup> Above n47, 2.

<sup>51</sup> American Bar Association, Model Rules of Professional Conduct, r.1.14.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*



## Litigation guardians

As illustrated by Mary's matter, a person with diminished capacity who has a matter to litigate can experience significant barriers to justice.

### Case study

Mary suffered from a stroke when she entered into a contract without the necessary capacity. Supreme Court proceedings were commenced against her seeking to enforce the contract.

The plaintiffs' lawyers argued Mary could not defend the proceedings without the appointment of a litigation guardian. Mary did not have any friends or family who could take on the role and there is no funded litigation guardian service for civil matters in Victoria. Fortunately, the matter settled as Mary didn't know how she would have been able to defend the proceeding without a litigation guardian.

## Decision to appoint

Litigation guardians are currently appointed by the court in which the proceedings are taking place pursuant to the relevant court rules. Meanwhile, states and territories have courts and tribunals established to consider applications for the appointment of substitute decision makers.<sup>54</sup> The legislation governing these bodies provides a framework in which the relevant powers must be exercised.<sup>55</sup>

Members sitting on the state bodies have considerable expertise in making capacity assessments. Assessments are made within an overall framework, unlike judges making determinations pursuant to the provisions in an order of the relevant court rules.

In Victoria, the Magistrates Court, County Court and Supreme Court may refer the issue of whether a

party before the court requires a guardian or administrator, or both, appointed under the G&A Act to VCAT for a determination pursuant to section 66. Appointments made by VCAT have the benefit of being subject to appeal<sup>56</sup> and regular review<sup>57</sup> and can be tailored to the requirements of the litigation.

**Recommendation 6a:** amending the relevant court rules to encourage referral to a specialist court or tribunal for questions of capacity, if necessary.

## Risk of costs liability

If the court decides a person does not have capacity to litigate, a litigation guardian must be appointed to conduct litigation on their behalf. Appointment as a litigation guardian attracts the risk of liability for an adverse cost order.<sup>58</sup> Personal liability is a significant disincentive to being appointed litigation guardian and constitutes a barrier for people with diminished capacity to access the justice system.

An appointed person should be able to conduct litigation on behalf of a person with diminished capacity without the risk of a liability for an adverse cost order against them personally, provided they do with proper diligence. There are two ways this can be achieved:

- if there is an existing validly appointed substitute decision-maker, they should be automatically recognised by the relevant court as being authorised to provide instructions on behalf of the represented person for the purposes of litigation.
- if there is no such appointment, an independent person should be appointed to conduct litigation on behalf of a person with diminished capacity.

In both situations the appointed person should conduct litigation in the name of the represented person. The appointed person should be able to conduct the litigation without the risk of a liability

<sup>54</sup> For example, Victorian Civil and Administrative Tribunal; NSW Civil and Administrative Tribunal; Northern Territory local courts and a Guardianship Panel; ACT Civil and Administrative Tribunal; Tasmanian Guardianship and Administration Board; Queensland Civil and Administrative Tribunal; Western Australia State Administrative Tribunal; South Australian Guardianship Board.

<sup>55</sup> For example, Division 3 in Part 4 and Division 3 of Part 5 of the *Guardianship and Administration Act 1986* (Vic) and section 4 of the *Guardianship and Management of Property Act 1991* (ACT).

<sup>56</sup> *Guardianship and Administration Act 1986* (Vic), div 1 pt 6.

<sup>57</sup> *Ibid*, s 35D and div 2 pt 6.

<sup>58</sup> *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86.

for an adverse cost order against them personally, provided they do with proper diligence.

**Recommendation 6b:** amending the relevant court rules allowing an appointed person to conduct litigation on behalf of a person with diminished capacity without the risk of a liability for an adverse cost order against them personally, provided they do with proper diligence

## Appeal and review of the appointment of a litigation guardian

Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) provides that, amongst other things, measures that limit the exercise of legal capacity apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards must be proportional to the degree to which such measures affect the person's rights and interests.

A litigation guardian is generally appointed for the entirety of the proceeding, while the represented person's capacity may evolve or fluctuate over the course of the proceeding. A person may also be able to contribute to proceedings – with or without a litigation guardian – if they have the necessary support available.

This means, in some cases the appointment of a litigation guardian may be inconsistent with the CRPD. Failure to provide the necessary support to litigants may result in older people being denied the right to legal capacity and equality before the law, in breach of the CRPD.

Whilst we acknowledge arguments about efficiency and certainty are valid, they are outweighed by the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings. As such, court rules should be amended to improve compliance with the CRPD.

At the very minimum, the decision to appoint a litigation representative should be reviewable and subject to regular review.

We would also support a provision in the court rules requiring the court to ensure that a litigant is provided with the support necessary to promote their capacity along the lines of:

*In determining whether a person needs a litigation representative, the court must ensure that the litigant has been provided with all support necessary to promote the ability of the person to initiate, communicate and participate in relation to the litigation.*

**Recommendation 6c:** amend the relevant court rules to:

- provide for an appeal of a decision to appoint a litigation representative and regular review of their appointment
- requiring the court to ensure that a litigant is provided with the support necessary to promote their capacity

This approach enables an older person to engage with the legal system in a meaningful way, without having to resort to unnecessary protections that could be construed as paternalistic. This tension is articulated by Wendy Lacey:<sup>59</sup>

*"A person cannot lose the entitlement to enjoy universal human rights and freedoms simply because they fall into the category of 'older' person. Yet it must be acknowledged that as a person ages, the capacity to realise one's basic rights fully and effectively can be reduced."*

<sup>59</sup> Above n 12, 113.



## Property transfers

As detailed on page 10, Seniors Law assists older people with disputes over significant legal and equitable interests in property.

### “Assets for care” arrangements

A common family arrangement that can leave an older person vulnerable to 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”.

### Rising popularity

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 more “assets for care” arrangements.

The Human Rights and Equal Opportunity Commission also notes 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

## Informal arrangements

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 in these arrangements and the serious consequences if they fail. For example, we have assisted older people where the failure of these arrangements have 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.

## Resolving property disputes

Generally, these disputes have to be heard in the Supreme Court and County Court.

The Joint Property List at VCAT does, however, provide a less formal, generally less expensive and more expedient jurisdiction to resolve property disputes. This appears to be a unique, and welcome, feature of the Victorian system.

## Property Law Act

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>60</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>61</sup>

Further, VCAT can order compensation, reimbursement or adjustments to interests between the co-owners reflecting 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

<sup>60</sup> *Property Law Act 1958* (Vic), s225.

<sup>61</sup> *Property Law Act 1958* (Vic), s228.

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

## Common law presumptions

In determining what is a *just and fair* sale or division of land under the PLA, VCAT can be guided by common law principles.<sup>62</sup> In the context of inter-family transfers arising out of “assets for care arrangements”, explained on page 25, three presumptions are relevant:

- presumption to create legal relations
- presumption of resulting trust
- presumption of advancement

### (a) presumption to create legal relations

For a contract to be valid, parties must have intended to create legal relations. Without such an intention, a contract cannot be enforced. While parties to commercial agreements are presumed to have intended to create legal relations, the same cannot be said for agreements between family members. Instead, the law presumes parties to family agreements – including “assets for care” arrangements – do not intend to be bound by the law of contract. Failure to prove otherwise, will mean there was no valid contract.

Evidencing an intention to create legal relations is particularly difficult with “assets for care” arrangements as they are commonly created through informal conversations and are rarely reduced to writing. If an older person cannot evidence a mutual intention to create legal

relations, and therefore the existence of a valid contract, they will not be able to enforce their contractual rights.

For example, if their family does not provide the promised care, an older person may want to assert a breach of contract and reclaim all or part of their payment, generally a property contribution or transfer. Conversely, family members may attempt to rely on the presumption to resist such a claim.

However, decisions in the High Court and the Full Federal Court appear to have rejected the operation of this presumption when determining the existence and nature of intention between contracting parties in special relationships.<sup>63</sup>

Rather, these decisions have emphasised an objective assessment – with consideration given to the words and actions of each party and the context and circumstances therein – to determine whether the requisite intention was formed. The *type of relationship* between contracting parties is just one relevant circumstance.

The Full Federal Court used a hypothetical “assets for care” arrangement to illustrate how family members may evince an intention to create legal relations:<sup>64</sup>

*“Where a parent asks a child to change his or her life, such as by giving up a job or career to look after a family business or to nurse or care for the parent in old age, on the holding out of a reward, the circumstances may warrant the inference that a legally binding contract was intended ...”*

By rejecting the presumption, *both parties* will be responsible for proving the requisite legal intention, or lack thereof, manifested through their words and actions – not just the older person.

This shift in emphasis is balanced, however, with the Full Federal Court’s warning against converting informal situations that involve love, friendship and

<sup>62</sup> *Davies v Johnston* (Revised) (Real Property) [2014] VCAT 512 (5 May 2014), para 25.

<sup>63</sup> *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; *Evans (as executor for the estate of the late Evans) v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237, at [15].

*Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237.

<sup>64</sup> *Evans (as executor for the estate of the late Evans) v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237, at [15].

feelings of duty or responsibility into "the stuff of daily commercial life".<sup>65</sup>

### (b) presumption of resulting trust

A person can have a *legal interest* or an *equitable interest* in property. A person will generally have a *legal interest* in a property when they comply with necessary legal formalities, such as having their name registered on title. However, where a person's financial contribution to a property is not reflected in a recognised *legal interest*, the law may, in fairness, recognise an *equitable interest* in the property, which can be enforced.

**Example:** Dorris wants to move in with Frank. She sells her house and gives him the sale proceeds, \$200,000, and he promises to care for her. Frank uses the sale proceeds to pay off the mortgage over his home, valued at \$400,000. Frank doesn't put Dorris' name on title.

As her name is not on title, Dorris does not have a recognised *legal interest* in Frank's house.

Subsequently, Dorris' care needs increase. Frank can't look after her anymore and Dorris must go into an aged care facility. Frank refuses to return Dorris' \$200,000 contribution to the property, insisting it was a gift. Dorris needs her money back to pay for her care needs.

With no recognised *legal interest*, Dorris will need to prove she has an *equitable interest* in the property. There are two presumptions that operate in relation to the characterisation of the \$200,000 transfer:

- a financial contribution to the property, which should be recognised in an *equitable interest*; or
- a gift, which will not afford her an *equitable interest*.

Which presumption applies, depends on the *type of relationship* between the parties.

Generally, where a person's contribution to a property is not recognised as a *legal interest*, the

law will presume the owner of the property holds the value of their contribution on trust – affording them an *equitable interest*. This is the presumption of resulting trust.

In Dorris' case, the presumption of resulting trust will presume Frank is to hold the \$200,000 on trust for her and must be paid back, unless *he* can prove otherwise.

### (c) presumption of advancement

However, where the contribution was made by a person with a *special relationship* to the owner, the law will presume the contribution was intended to be a gift. This is known as the presumption of advancement. This means that, despite making a contribution towards the property, the person will not be afforded a *legal interest* or *equitable interest* in that property.

This presumption applies in respect of contributions made by parents towards property owned by their children. This means that, purely because of the existence of a parent-child relationship, the presumption that the contribution is held on trust does not apply and rather, the law presumes that the transfer was intended to be a gift.

If the older person is unable to assert an interest in the property, the only avenue for rescinding or undoing an inter-family transaction is under the legal doctrines of undue influence or unconscientious dealing, for which there is a substantial evidentiary burden.

If Dorris is Frank's mother, the presumption of advancement will presume her contribution was a gift, and that she relinquished any interest in the property, unless *she* can prove otherwise.

The presumption of advancement appears grounded in the notion that such parental contributions are out of natural love and affection, and a desire to be generous to one's children. While this may be case in some instances, increasingly

<sup>65</sup> Ibid, at [16].

these inter-family transactions are for the pragmatic purposes of asset management.

As such, it is the mutual intention of the parties, manifested in their words and actions, that ought to be the determining factor in characterising these transactions. The presumption – based on the *type of relationship* between the parties – is, at best, another hurdle an older person must overcome to assert their rights. At worst, it is a grossly unfair mechanism embedding in the law the ageist attitude that a child is automatically entitled to their parent’s assets. It is this very attitude that facilitates the commission of financial elder abuse.

The application of the presumption of advancement has the effect of imposing a significant evidentiary burden on older people in circumstances where the arrangements are often informal and undocumented. These arrangements are often borne out of an older person’s fear of institutionalisation and loss of independence. Further, the older person’s dependence on their family for care can also give rise to a significant power imbalance when negotiating these types of arrangements. With the rise of “assets for care” arrangements, and the significant consequences for older people if they fail, this deficiency in the legal response to financial elder abuse will only become more apparent.

The High Court and Full Federal Court have already recognised the value in characterising inter-family transfers by considering the objective intention of the parties, determined on a case-by-case basis. This has the effect of removing the cumbersome evidentiary burden of disproving a presumption that is no longer adapted to the realities of modern family arrangements. Such an approach is also required with respect to the presumption of advancement.

## Limiting the presumption of advancement

While the presumption of advancement is a creature of the common law, its operation can be restricted when resolving property matters under Part IV of the PLA by legislative amendments.

Currently, section 233 empowers VCAT to order compensation, reimbursement or adjustments to interests between the co-owners reflecting each co-owners individual contribution to the property. In making such an order, VCAT must take into account

a person’s contribution towards mortgage payments or purchase money.<sup>66</sup>

While this section directs VCAT to consider contributions made by co-owners, it does not automatically recognise inter-family transfers as such a contribution. A parent who makes a contribution to their child’s property, if characterised as a gift, may not be regarded as a co-owner capable of contributing towards mortgage repayments or purchase money for the purposes of section 233.

Part IV of the PLA does not appear to require VCAT to consider the intention of parties to an inter-family transfer in deciding: (a) whether a parent’s contribution falls within the ambit of section 233; and (b) if it does, whether subsequent compensation, reimbursement or adjustment of interests is required to reflect this contribution. Without such guidance, the tribunal may still consider the presumption of advancement, as occurred in the decision in *Davies v Johnston*.<sup>67</sup> Note: this case is used purely to illustrate how common law principles can inform VCAT decisions – it is not a commentary on the findings.

**Recommendation 7:** restrict the operation of the presumption of advancement, through an amendment to Part IV of the PLA requiring VCAT to consider the mutual intention of parties in characterising property contributions, irrespective of the nature of the relationship between them.

This legislative reform would be complemented by a targeted education campaign building the financial literacy of older people and training health and community professionals in encouraging clients to consider formal family agreements. These initiatives are detailed on pages 15 and 37.

<sup>66</sup> *Property Law Act 1958* (Vic), 233.

<sup>67</sup> *Davies v Johnston* (Revised) (Real Property) [2014] VCAT 512 (5 May 2014).

## Misuse of a power of attorney

While there are benefits to formalising substitute decision-making authority in a POA, the use of POAs cannot completely prevent financial abuse.<sup>68</sup> In fact, research suggests financial abuse occurs in 10 to 15 percent of executed POAs.<sup>69</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 such appointments.

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>70</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>71</sup>

### Oversight of attorneys

While the introduction of the new POA Act is welcome, literature highlights the following deficiencies with the POA regime:<sup>72</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 for POAs

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>73</sup>

**Recommendation 8:** to address current deficiencies, we propose the following measures to oversee the conduct of supportive and substitute decision-makers:

- the introduction of a mandatory online registration scheme
- the representative or supported 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.

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 onerous.

These measures would complement education and support for supporters and representatives, as discussed on page 16, thereby ensuring they understand their role and can effectively fulfil their responsibilities.

<sup>68</sup> Above n 19, 70-71.

<sup>69</sup> Above n 5, 30 citing Lush, 1998.

<sup>70</sup> Above n 19, 72 citing Office of the Public Advocate Victoria, Submission No 70, 14.

<sup>71</sup> Above n 5, 4.

<sup>72</sup> Above n 5, 30 citing Langan and Means, 1996; Lush, 1998.

<sup>73</sup> Above n 5, 21; above n 19, page 99; Above n 30, 53 and 64-65.



### Question Nine

Does insufficient integration and co-ordination between the various bodies who come into contact with people affected by family violence hinder the assessment of risk, or the effectiveness of (early intervention, crisis and ongoing) support provided, to people affected by family violence? If so, please provide examples.

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 discrete issues that can be addressed in isolation. Insufficient integration and coordination of health, community and legal services can hinder respective professions in the identification of, and response to, elder abuse.

Given the significant barriers to disclosure, and the reluctance of many older people to seek assistance, lawyers rely on trusted health and community professions to identify legal issues arising in the context of elder abuse and, if necessary, make appropriate referrals.

Evidence suggests, while health professionals are best placed to identify elder abuse, they may be constrained in their ability to facilitate a legal response. There is a clear need for training health professionals on elder abuse.

Recognising this research, Seniors Law delivered a program of engagement and education for community and health organisations. Our experience suggests ad hoc training of health and community professionals does not necessarily translate into the systemic change of practice needed to effectively identify and respond to elder abuse. A more integrated approach to multi-disciplinary practice is required.

## The challenge of identifying elder abuse

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, outlined on page 11, 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.

### Elder abuse as a health or 'life problem'

Elder abuse can also adversely affect an older person's mental and physical health, as outlined on page 12. 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.

### The role of trusted health professionals

Further, even if an older person recognises they have a legal problem, they may not speak to a lawyer about it. In Australia, nearly 30% of people will initially seek the advice of a doctor, or another trusted health professional or welfare adviser, in

relation to a legal problem. This figure rises to 80% in relation to legal problems associated with health.<sup>74</sup>

In the context of elder abuse, additional barriers can further compound an older person's reluctance to seek assistance with a legal issue. As such, 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>75</sup>

*"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."*

## Limitations in ability to identify and respond to abuse

Elder abuse can be subtle and, without disclosure, may be difficult to detect. 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>76</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

<sup>74</sup> Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney, 2012) 116.

<sup>75</sup> Almogue, A *et al* above n 15, 86.

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

Lynette Joubert and Sonia Posenelli provide an insight into how health care professionals may try to assist an older person experiencing elder abuse:<sup>77</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>78</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."*

<sup>76</sup> Above n 5, 6 and 29; Almogue, A *et al* above n 15, 86; Lynette Joubert *et al* above n 15, 710; Claudia Cooper above n 17, 833 and 837; Above n 30, 51.

<sup>77</sup> Lynette Joubert *et al* above n 15, 711.

<sup>78</sup> Above n 3, 2.

One of the key factors constraining health professionals' 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>79</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."*

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>80</sup>

## The need for professional training

Given this limited consensus on what constitutes elder abuse, Hempton concluded:<sup>81</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>82</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"*

<sup>79</sup> C Hempton et al, 'Contrasting perceptions of health professionals and older people in Australia: what constitutes elder abuse?' (2011) 26 *International Journal of Geriatric Psychiatry* 466-472, 466.

<sup>80</sup> Ibid, 472.

<sup>81</sup> Ibid, 472.

<sup>82</sup> Lynette Joubert et al above n 15, 707.

<sup>83</sup> Cooper above n 17, 834.

## Benefits of professional training

According to Cooper "health professionals who had received some professional training relating to elder abuse were twice as likely to suspect physical abuse."<sup>83</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>84</sup>

In particular, health professionals are more likely to detect elder abuse if they:<sup>85</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>86</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>87</sup>

<sup>84</sup> Cooper above n 17, 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>85</sup> Ibid, 834.

<sup>86</sup> Lynette Joubert et al above n 15, 707.

<sup>87</sup> Ibid, 707.



## Seniors Law professional training program

Recognising this research, Seniors Law delivered a program of engagement and education for community and health organisations. The aim of the program was to promote better access to justice for older people and facilitate referrals from service providers with whom they already have a relationship of trust. The program was delivered over three phases:

### (a) 'hidden' legal issues for older people

Initially, Seniors Law visited health agencies across metropolitan Melbourne, to discuss the legal issues associated with ageing, and the ways in which Seniors Law can assist their clients. This program provided information and education around some of the common 'hidden' legal issues associated with ageing, such as "assets for care" arrangements.

### (b) legal health check

To build on these initial training sessions we developed a "legal health check" for older Victorians – a screening tool administered by health and community professionals. This tool helps professionals navigate difficult conversations with older people about elder abuse and other legal issues associated with ageing. It also streamlines referral processes from health and community professionals to Seniors Law.

### (c) training package

The tool was combined with packages to train workers in recognising and responding to elder abuse, including:

- recognising risk factors for elder abuse in their clients
- understanding the services available to respond
- how to engage with Seniors Law and make effective referrals on behalf of clients

## Our findings

In FY2013-2014 Seniors Law delivered training to over 500 professionals at health and community agencies. 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

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

Our experience suggests ad hoc training of health and community professionals does not necessarily translate into the systemic change of practice needed to effectively identify and respond to elder abuse.

Further, the reality is that "the 'window of opportunity' for responding to aged abuse in a health service is brief".<sup>88</sup> Additional screening tools and intake procedures may hinder the provision of immediate legal assistance required in these circumstances.

Acknowledging the realities of a working at a health service, Lynette Joubert and Sonia Posenelli suggested an integrated multidisciplinary response to elder abuse:<sup>89</sup>

*"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 as it presents 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"*

<sup>88</sup> Lynette Joubert et al above n 15, 712.

<sup>89</sup> Lynette Joubert et al above n 15, 712.

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

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

As discussed on page 35, a “health justice partnership”, a more integrated model of service delivery may address the limitations of ad hoc training of health and community professionals.

## Question Ten

What practical changes might improve integration and co-ordination? What barriers to integration and co-ordination exist?

Building on the findings of the evaluation of our professional training program, in 2014 Seniors Law and cohealth entered into a partnership to integrate a legal service into a multi-disciplinary team at cohealth.

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 support services, and delivers programs to promote community health and wellbeing. We partnered with cohealth because of its commitment to social justice and human rights and its capacity to work with groups and communities who are often regarded as hard to reach and difficult to service.

Our integrated model of service delivery is known as a “health justice partnership” (HJP). The HJP model focusses on creating a systemic change of practice to address the social determinants of health, providing legal assistance within a healthcare setting and allows for joint advocacy of policy change. There is an emerging body of knowledge in the US and, more recently, in Australia illustrating the benefits of the HJP model of service delivery to both the clients and the partners. We will contribute findings from an evaluation by LaTrobe University of the HJP to this growing evidence base.

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 towards the expansion of the HJP model of service delivery for older people experiencing elder abuse.

In the evolution of the HJP model, a few barriers to integrating legal, health and community services have been identified – mainly due to a mistrust and misunderstanding between different professions. There are, however, strategies available to overcome these barriers.

<sup>90</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*

## Health justice partnerships

### The model

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

According to the HJP Network:<sup>90</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, an 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.

HJP’s have three core components and activities:<sup>91</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

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

<sup>91</sup> National Center for Medical-Legal Partnership, ‘Making the case for MLP’s: a review of the evidence’ (February 2013) 3.

## 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

## The evidence

### United States

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>92</sup>

- financial benefits to clients and partnering organisations
- improved health and wellbeing of clients
- increased knowledge and confidence of health professionals to address legal issues

The NCMLP concluded 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>93</sup> In expanding the MLP model, however, the NCMLP suggested the development of a common set of metrics to measure its impact.<sup>94</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.”*

### Australia

Literature detailing the impact of HJPs in Australia is only just beginning to emerge. One example is 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 FV through a multi-disciplinary approach, it was developed to complement FV training for health professionals and provide an outreach legal service at the Women’s. The HJP commenced in 2009 and an evaluation report was released in August 2014, detailing key findings such as:<sup>95</sup>

- significant improvements in health professional’s self-reported knowledge of FV and confidence in responding to FV
- increase in referrals from health professions to the legal service
- the provision of legal advice improved the psychological and emotional health of clients

### HJP with cohealth

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>96</sup> 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 some consistent measurables to be reflected in

<sup>92</sup> Ibid, 5-6.

<sup>93</sup> Ibid, 7.

<sup>94</sup> Ibid, 8.

<sup>95</sup> The University of Melbourne, *Acting on the Warning Signs Evaluation: final report* (August 2014) 1-5.

<sup>96</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)>.

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

**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.

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

The aims of our HJP align with the strategic outcomes in the Victorian Government's elder abuse and prevention guidelines, emphasising the importance of:<sup>97</sup>

- increased community awareness of elder abuse
- increased active engagement by professionals through an increased ability to identify and respond to elder abuse
- a coordinated multi-agency support provided by relevant services

**Recommendation 9:** 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 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.

## Overcoming barriers to integration

A number barriers to the integration of legal, health and community services have been identified in the evidence. There are, however, strategies available to overcome these barriers.

### Mistrust and misunderstanding between professions

Michael Preston-Shoot and Judy McKimm suggest mutual mistrust and misunderstanding between professions may be a barrier to multidisciplinary practice:<sup>98</sup>

<sup>97</sup> Above n 4, 9-15.

<sup>98</sup> Michael Preston-Shoot and Judy McKimm, 'Exploring UK medical and social work students' legal literacy:

comparisons, contrasts and implications' (2013) 21(3) *Health and Social Care in the Community* 271-282, 280.

*“Barriers to multidisciplinary working include mistrust and misunderstanding of colleagues’ expertise and difficulties in developing an explicit knowledge base and shared language. Working together, for example, on assessment and sharing information, may also be complicated by differences rooted in values, status and roles, notwithstanding joint statements, which emphasise respect for the roles and expertise of colleagues, sharing knowledge and teamwork.”*

There are a number of factors which may contribute to mistrust and misunderstanding between legal, health and community professionals.

Different professions will have different priorities and frameworks in which they work with clients. For example, health professionals may focus on promoting a client’s health and wellbeing. On the other hand, a lawyer is obliged to act on the instructions of their client, provided they have the necessary legal capacity, even if acting on those instructions may not produce the best health outcomes.

Respective professionals’ obligations formalise these different priorities. Health professionals have a “duty of care” to keep clients safe from harm. Whereas, lawyers have an overriding “duty of confidentiality” and to act on the instructions of the client, which must generally be preserved, even if the client chooses to expose themselves to the risk of harm.

The legal duty of confidentiality and legal professional privilege can also inhibit communications between professionals. This may cause frustration when highly collaborative health professionals seek feedback on the progress of a mutual client’s legal matter.

Fortunately, these misunderstandings can be addressed. Part of the implementation of a successful HJP model will involve extensive training on respective professional approaches and obligations.

This training will need to be supported by policies and practices facilitating seamless collaboration, while still complying with respective professional

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<sup>99</sup> Linda Gyorki, *Breaking down the silos: overcoming the practical and ethical barriers of integrating legal assistance into a healthcare setting* (2013) 76.

obligations. For example, obtaining informed client consent may permit feedback and updates between professionals. Procedures may also enable a health professional to be privy to lawyer-client communications, while retaining the privilege attaching to those communications.

Linda Gyorki highlights another important barrier to integration and how it can be overcome:<sup>99</sup>

*“A key barrier to integration is a mistrust amongst health professionals that an on-site lawyer will make the pathway to bringing a medical negligence claim more seamless for patients”.*

To preserve the partnership and promote trust between partners, a lawyer would clearly not be able to assist with these matters and a referral would be more appropriate. Linda Gyorki suggests this approach must be “made abundantly clear at the first meeting with the healthcare site to ease any tension and mistrust between the two potential partners”.

Linda Gyorki’s Churchill report *Breaking down the silos*, further details how to overcome the practical and ethical barriers to integrate a legal service into a healthcare setting.

## 5. Supporting ongoing safety and wellbeing

### Question Eleven

What are some of the most promising and successful ways of supporting the ongoing safety and wellbeing of people affected by violence? Are there gaps or deficiencies in our approach to supporting ongoing safety and wellbeing? How could measures to reduce the impact of family violence be improved?

Older people experiencing financial abuse can quickly find themselves in financial, physical and emotional distress. Their assets and savings can be depleted and their eligibility to Centrelink benefits compromised. With the breakdown of family relationships, they may even find themselves homeless.

Dependence on the perpetrator for care and fear of institutionalisation or loss of independence can prevent an older person from disclosing abuse. Consequently, the availability of health and community services to support older people to remain in their home without having to rely on the abusive family member is critical.

In particular, the availability of age-appropriate housing services is vital. Agencies such as the Housing for the Aged Action Group have been able to source appropriate housing for many of our clients, enabling them to address their legal problems.

Existing services for people experiencing family violence may not be appropriate or adapted to the needs of older men or older people, generally, who may require a higher level of care.



## 6. General

### Question Twenty-one

The Royal Commission will be considering both short term and longer term responses to family violence. Tell us about the changes which you think could produce the greatest impact

Seniors Law has made nine targeted, discrete recommendations – ranging from “quick wins” to more substantive initiatives.

#### Prevention and early intervention

Evidence suggests older people are reliant on their family to manage their financial affairs, citing a lack of confidence in managing their affairs themselves. There is also limited understanding about POAs or how they can be misused. Consequently, a targeted community education campaign promoting the financial literacy of older people and their understanding on substitute decision-making, would encourage financial independence and reduce the risk of financial elder abuse.

If elder abuse does occur, older people are generally reluctant to seek assistance. Elder abuse can be subtle and, without disclosure, can be difficult to detect. Risk assessment frameworks must be tailored to identify risk factors that can increase an older person’s vulnerability to elder abuse as well as those risk factors that relate to perpetrators. The existing CRAF for FV does not screen for significant risk factors of elder abuse – such as the accumulation of assets. As such, a CRAF designed to screen for the risk factors of elder abuse is required.

These screening tools must be supported by training of health and community professionals, who are generally best placed to identify and respond to elder abuse. However, ad hoc training does not necessarily translate into the systemic change of practice needed to effectively identify and respond to elder abuse. A more integrated, multi-disciplinary approach is required, such as a “health justice partnership”. By integrating legal, health and community services, the HJP model of service delivery can create synergies, maximising the healthcare team’s ability to identify and respond to elder abuse.

#### Services and accountability

The legal system must advance the human rights of older people, providing 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.

The FVPA does not necessarily protect older people experiencing neglect and subtle forms of financial abuse. By extending the definition of family violence to include these instances of elder abuse, intervention orders may provide a useful mechanism to address neglect – by allowing the provision of services to an isolated older person – and financial abuse – by, for example, excluding an adult child from the older person’s residence.

While significant progress has been made in the regulation of POAs, further legislative amendments are required to provide for greater accountability of guardians and administrators who perpetrate financial elder abuse, such as the ability to order compensation and impose penalties. Systemic oversight of POAs is also required – 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.

To enforce property rights under an “assets for care” arrangement, an older person may have to overcome onerous evidentiary burdens imposed by archaic legal presumptions that are not adapted to the generally informal nature of these arrangements. Legislative amendments are required to limit the operation of these presumptions in the adjudication of property matters at VCAT.

Not only do legal interventions have to be appropriate, older people – especially those with diminished capacity – must be able to access them. Currently lawyers must navigate competing



professional obligations in assessing a client's capacity to provide instructions. Clarification of these obligations encourages compliance and allows the lawyer to progress the older person's legal matter arising in the context of elder abuse.

Further barriers can arise if an older person has a matter requiring litigation. Amendments to court rules are required with respect to the appointment of litigation guardians, their risk of costs liability as well as the oversight of their conduct.

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