

Better aged care for all

Economic security, choice and control for older Australians at risk of abuse, isolation and discrimination

August 2019

Executive Summary

Everyone deserves to age safely, with choice and control in their care. Our case studies show this is not what ageing looks like for many older Australians at risk of or experiencing elder abuse, isolation and discrimination.

We can't have a high-quality and safe aged care system without addressing the barriers to access, affordability, control and choice for the most at risk in our community. In its review of the aged care system, the Australian Government must consider these older Australians, and address:

- Drivers and impacts of elder abuse (our submission focuses on elder financial abuse)
- The lack of future planning by older Australians and their families
- Laws that limit the control and choice of at-risk older Australians ageing alone, experiencing abuse or at risk of discrimination.

Justice Connect's submission to this Royal Commission into Aged Care Quality and Safety is based on over a decade of legal experience working with older Australians, many at risk of and experiencing elder abuse, isolation and facing significant disadvantage. Our work, ideas and recommendations are always informed by our clients' experiences.

Our experience has helped us identify the **challenges**, their drivers and **solutions** relating to the delivery of aged care and, in particular, person-centred services—terms of reference (c) and (e), as covered in sections 2 and 3, respectively.

Challenges and opportunities for accessible, affordable and high-quality aged care services (pages 10-19)

Elder abuse and inadequate future planning challenge the delivery of accessible, affordable and high-quality aged care services. These problems cause financial and housing insecurity, damage relationships and impact health and wellbeing. With shortages in appropriate public supports and failures in other sectors, often the only option for our clients is early admission to publicly-funded hospital or

residential aged care—with limited choice.

Older peoples' wealth is increasingly used to support the growth in aged care. Over time, this care is also more likely to be provided in their home. Elder abuse and economic insecurity of older Australians thus undermines the aims of the retirement income system, erodes the capacity of the aged care sector to meet future need, and further compounds inequality.

These issues aren't new or surprising, with elder abuse the subject of—or considered as part of—many national and State-level inquiries, government-commissioned reports and Royal Commissions.¹ Despite multiple conferences, working groups, networks, reports and inquiries into elder abuse, the problem continues to grow. There are national, State and Territory opportunities, including this Royal Commission, through which real and overdue change can be made.

Government should:

- invest in expert legal help for older people at risk of abuse, integrated into settings where clients can access early and preventative help (**recommendation 2**, pages 11-12)
- develop and deliver user-centred strategies to increase the use of family care agreements (for those with trusted family members), which will help to manage the intergenerational transfer of wealth (**recommendation 8**, pages 18-19)
- holistically address drivers of elder abuse, including failures in the mental health and housing sectors, by elevating these reforms to the National Plan to Respond to Elder Abuse (**National Plan**) (**recommendation 1**, page 10).

The banking industry must also review its role in offering products and guarantees that are routinely used as a vehicle for elder abuse, and:

- be restricted in offering and enforcing these products (**recommendations 5-7**, pages 14-16)
- take reasonable steps to identify and prevent elder abuse, and train staff accordingly (**recommendation 3-4**, pages 14-16).

¹ E.g. House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law* (2006), Victorian Royal Commission into Family Violence (2015), Australian Institute of Family Studies, *Elder Abuse*:

Understanding issues, frameworks and responses (2016), Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (ALRC Report 131, 2017) ([ALRC Elder Abuse Inquiry Report](#)), Banking Royal Commission (2018).



Ensuring aged care services are person-centred with choice and control for older people (pages 20-26)

Aged care is becoming more diverse and person-centred, with new laws (such as power of attorney laws) further supporting older people to have more control. However, these laws assume the older person has a trusted friend or family member to help them as they age. Our case studies show how these laws and systems leave out older people at risk of isolation, abuse and discrimination.

- We have observed service providers and professional decision-makers preferencing aged care that keeps the older person safe—at times, early admission to residential aged care—against the person’s wishes.
- For some older people, the engagement of families and carers can increase their chances of experiencing abuse and discrimination; and can work against the provision of person-centred services.
- For LGBTI elders, not only is there a risk of abuse by someone close to them, but also discrimination by service providers.

In our work, we see these legal gaps—and a distrust of the guardianship system—deterring people ageing alone from future planning and entering sometimes risky informal arrangements.

All Australians, including those most at risk, should have the ability to record their preferences and wishes to maintain control and choice as they age (critically, in relation to future aged care). This is especially important for people ageing alone, who rely on public guardians and trustees, having no other person they can appoint.

Pre-emptive nomination of the public trustee and guardian would provide a mechanism to document values and preferences and serve as a strategy to prevent abuse and discrimination ([recommendation 11](#), pages 24-25). Values and preferences should be recorded by expanding the planned National Powers of Attorney Register, to ensure all future planning arrangements are centralised, effected and cohesive ([recommendation 14](#), pages 25-26).

With no place or mechanism to record values and preferences, even the most experienced professional guardians may find it difficult to understand an older person’s wishes. By their nature, guardians and administrators are generally appointed when a person has diminished capacity. Decisions made by public guardians and trustees—some of which involve critical choices in aged care—need some oversight and should be reviewable ([recommendation 10](#), page 22).

For a truly inclusive and person-centred aged care system, Government needs to work with State and Territory governments to:

- ensure supported and substituted decision-making laws and systems are adapted to the needs of older people ageing alone or at risk of abuse or discrimination
- expand the range of future planning documents that can be stored and accessed on the planned National Powers of Attorney Register
- invest in more community-based aged care services for all older Australians to access
- develop and deliver user-centred strategies to increase everyone’s understanding of older people’s rights and the use of future planning documents.

Recommendations: pages 4-5



Recommendations

Recommendation 1: Government should holistically address drivers of elder abuse, including failures in the mental health and housing sectors, by elevating these reforms to the National Plan.

Recommendation 2: All levels of government should invest in the systematic rollout of elder abuse legal advice and support services that:

- (a) are low cost, independent and targeted at older people at risk of elder abuse
- (b) adopt a partnership model of service-delivery, e.g. through community health services
- (c) show evidence of early intervention.

Recommendation 3: The Australian Banking Association should require all banks to develop and roll out a comprehensive elder abuse training program:

- (a) to all bank staff and contractors
- (b) in consultation with sector experts
- (c) delivered on a regular basis.

Recommendation 4: The Australian Banking Association should amend the Banking Code of Practice and/or Vulnerability Guideline to require banks to take reasonable steps to identify and prevent elder abuse.

Recommendation 5: Government should amend the National Credit Act to extend responsible lending obligations to:

- (a) business loans that are secured by an older person's residential home
- (b) guarantee arrangements with an older person, involving their residential home.

Recommendation 6: Government should amend the National Credit Act to prohibit banks from enforcing guarantees in these circumstances until after the death of an older person or transfer of the residential home.

Recommendation 7: Industry regulators or bodies should regularly investigate banks' compliance with laws and guidelines that protect vulnerable customers, such as at-risk older Australians.

Recommendation 8: Government and the community and health sectors should adopt the following strategies to encourage older people and their families to consider future planning:

- (a) harmonising resources to frame family care agreements as part of a routine future planning
- (b) systematically engaging with older people online and at key points in the service sector
- (c) investing in accessible, affordable professional advice—particularly for those at-risk
- (d) developing interactive, user-designed online platforms and resources.

Recommendation 9: All levels of Government should invest in more affordable community-based aged care and accommodation, including a range of retirement housing options, such as:

- (a) older persons' public and social housing
- (b) independent living units.

Recommendation 10: Victorian and other State and Territory Governments should allow for merits review of decisions by guardians and administrators by:

- (a) adopting the VLRC recommendations 315–322 made in the 2012 Guardianship Inquiry
- (b) amending relevant laws (e.g. the *Guardianship and Administration Act 2019* (Vic)).

Assessments and advice for older people as part of the review should also be affordable and accessible.

Recommendation 11: State and Territory Governments should amend State laws allowing a person to:

- (a) pre-emptively appoint the public guardian and trustee in supportive and substitute decision-making
- (b) document their values and preferences.

Recommendation 12: The National Enduring Powers of Attorney Group, in considering the harmonisation of enduring powers arrangements, should ensure all arrangements are adapted to the needs of people ageing without a trusted person.

Recommendation 13: State and Territory Governments, in reviewing and enacting laws to safeguard and support 'at-risk adults', should ensure all laws are adapted to the needs of people ageing without a trusted person.



Recommendation 14: Government should expand the development of the planned National Register to include future planning documents—relating to all aspects of a person’s affairs—including those appointing a public trustee and guardian.

Recommendation 15: The Australian Guardianship and Administration Council should develop best practice guidance on supportive and substitute decision-making for service providers.

Recommendation 16: Federal, State and Territory Governments, building on existing initiatives, should invest in professional education on the rights of older people.



Acknowledgements

We would like to acknowledge the expertise of the following people, who helped inform our submission:

First and foremost, our clients, who entrust us with their stories. We have tried to capture key aspects of their experiences in de-identified, illustrative case studies throughout the submission.

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Justice Connect

Justice Connect is a large social justice organisation that addresses public interest, access to justice and unmet legal need issues through a range of programs and projects; and uses our learnings to influence law and policy reform. We lead innovative solutions to help to close the 'justice gap', including:

- brokering strategic, efficient use of pro bono lawyers and barristers—30,000 hours last year, equating to \$15.6 million of pro bono legal help
- being an effective partner in delivering holistic and intensive legal services to support clients experiencing significant disadvantage. For example, health justice partnerships to target hard to reach clients
- leading access to justice innovation through our Legal Gateway and other digital programs.

We welcome the opportunity to provide more information and discuss the below examples and recommendations further.

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For over 10 years, Justice Connect's Seniors Law program has provided specialist legal help to older Australians. In the past five years, we have intensified and targeted our services, through health justice partnerships with health organisations across Melbourne and Sydney; and the majority of our casework now relates to elder financial abuse.

Our longstanding partnerships with health organisations have provided the supported environment in which health professionals feel confident to identify the subtle signs of elder abuse, and work with our lawyers to provide a coordinated and sensitive multi-disciplinary response. We're preventing the escalation of legal problems and family conflict; and, ultimately, promoting the economic security and independence of older people, as well as their control in decision-making and choice in care.

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1. Context

Wealth of older people to support growth in aged care

Australians are living longer, healthier lives.² As a result, the aged care sector is growing and becoming more diverse—especially when it comes to receiving care in the community.³

There are concerns that younger generations may ultimately have to pay for increased government spending in the aged care sector.⁴ However, with the creation of the retirement income system, many older people will be in a better position to support the growth of the sector, being ‘significantly wealthier’ than previous generations.⁵

Some older people have accumulated significant wealth due to decades of strong economic conditions⁶ including gains in the housing market and favourable tax treatment for investments in shares, superannuation and property.⁷

Many older people have benefitted from these economic conditions and reforms. At the same time, others found different ways to contribute—such as, caring for children and ageing parents—without the remuneration and flow on benefits of the reforms. In their own ways, all older people have shaped the society we live in today; and deserve to age safely, with choice and control and their care.

Shortage of community-based public care, accommodation

More and more people are expecting to age at home and help pay for their care.⁸ Ageing at home is the strong preference of most of our clients.

An emerging community-based aged care option is family care arrangements.⁹ These often involve an older person divesting themselves of their assets to support a family carer. Not only do these arrangements help a person age at home, they also

value family care. However, too often, they are undocumented, and failing, making payment for future professional aged care difficult.

Further, some older people cannot access professional aged care at home, due to:

- economic and personal insecurity arising from elder abuse and inadequate future planning
- shortages in publicly-funded community-based aged care options
- the absence of trusted ‘co-resident informal carer’—often, a necessary supplement.¹⁰

All aged care services, whether private or public, are subject to the same standards of quality and care.¹¹ However, in our work, we see people using the public system being far more limited in the nature and standard of care they can access, than those who can afford to pay for their care.

Increasing inequality, poverty

Over time, inequality has also increased—amongst older people, as well as inter-generationally. The Office of this Royal Commission projects ‘there will continue to be a significant group of older people with low incomes and little wealth.’¹² There are also concerns about the wealth of younger generations, which may be ‘going backwards’.¹³

This rising inequality is pronounced in the particular communities we work with, where it is estimated up to 30% of people over 65 are living in poverty. Poverty rates amongst homeowners in many of Melbourne’s outer northern and western suburbs are estimated to have ballooned to 60-99%.¹⁴

In the future, inequality is also likely to be perpetuated through the provision of inheritances, which typically benefit those who are ‘already well-off’. It is projected that \$70bn will be bequeathed in 2030, well above \$8.8bn in 2000.¹⁵

² Commonwealth of Australia, *2015 Intergenerational Report* (Report, March 2015) 96 ([‘Intergenerational Report’](#)).

³ *The Royal Commission into Aged Care Quality and Safety* (Background Paper No. 2, May 2019) 14 ([‘Background Paper No. 2’](#)).

⁴ *Intergenerational Report*, 57. Danielle Wood and Kate Griffiths, Grattan Institute, *Generation gap: ensuring a fair go for younger Australians* (Report No. 2019-07, August 2019) ([‘Generation Gap’](#)).

⁵ *Background Paper No. 2*, 8. ⁶ Australian Institute of Family Studies, [‘Socio-economic context and intergenerational wealth transfer’](#) *Elder abuse: Understanding issues, frameworks and responses*, (Research Report No. 35, February 2016).

⁶ Australian Institute of Family Studies, [‘Socio-economic context and intergenerational wealth transfer’](#) *Elder abuse: Understanding issues, frameworks and responses*, (Research Report No. 35, February 2016).

⁷ *Generation Gap*, 13, 36-38.

⁸ Commonwealth of Australia, Department of Health, [‘Legislated Review of Aged Care 2017’](#) (Report, July 2017) 9. Incremental changes to aged care means-testing aim to ensure ‘equitable and sufficient contributions’ are made by consumers; however, further changes may be necessary.

⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (Report, September 2007), page 136 [4.4].

¹⁰ *Background Paper No. 2*, 31.

¹¹ For example, those required by the *Aged Care Act 1997* (Cth).

¹² *Background Paper No. 2*, 8.

¹³ *Generation Gap*, 3, 16-17.

¹⁴ Victorian Council of Social Service, [‘Every Suburb, Every Town – Poverty in Victoria’](#) (Web Page).

¹⁵ Simon Kelly and Ann Harding, *AMP.NATSEM Income and Wealth Report Issue 5: Wealth and Inheritance* (Report, 2003). *Generation Gap*, 41-45.



Poverty and disadvantage among younger generations has a major impact on older people, with many supporting adult children and their families by providing financial assistance, housing and care.¹⁶

Our case studies illustrate how:

- intergenerational inequality may contribute to elder abuse
- the resulting health impacts and economic insecurity of older people can limit their choice and increase reliance on aged care services.

Failures in key sectors

Growing inequality may be further compounded by failings in key sectors, such as housing, mental health and banking.

On any given night in Australia, there are more than 116,000 people experiencing homelessness;¹⁷ and there are also more than 82,000 people on the Victorian social housing waiting list.¹⁸ Reviews of Victoria's mental health services found a sector under 'substantial stress', with emergency department presentations increasing 9% from 2015-2016.¹⁹ Creating further pressure, many Victorian community-based mental health services ceased operation on 30 June 2019.

Finally, the Royal Commission into the banking sector discovered widespread misconduct that fell short of community standards and expectations and, at times, broke the law.²⁰ Banks have a role to play in identifying and responding to elder abuse, especially given their staff are at the frontline witnessing elder abuse and its warning signs.

Ageism, elder abuse and inheritance impatience

At a time where older Australians are growing in number and in wealth, there also appears to be a dominant, negative narrative of ageing. 'Ageism' results in prejudicial attitudes, discrimination and unhelpful stereotypes with respect to ageing, and older people.

Ageism is a significant driver of elder abuse—a recognised form of family violence.²¹ Prevalence studies estimate up to 14 percent of older Australians experience elder abuse, which disproportionately affects women. Financial elder abuse appears to be the most common type.²² The significance of the problem is highlighted by the Victorian Government's campaign to tackle ageism and elder abuse, launched in June 2019.

Elder abuse can have devastating consequences for the older person, including a decline in health and wellbeing, economic insecurity, and loss of independence, connection, self-worth and identity.

Elder abuse is complex. It is difficult to disclose, identify and intervene in, as the older person may:

- want to keep family close as they age
- feel responsible for the perpetrator
- want to avoid entry to residential aged care
- be in a relationship of dependence or co-dependence with the perpetrator
- be unaware of the full extent of the abuse
- have limited access to professional help and appropriate interventions
- be experiencing health, financial and emotional complications as a result of the abuse.

As inter-generational inequality grows, and as older people with accumulated wealth live longer, ageist attitudes can manifest as 'inheritance impatience',²³ even financial elder abuse. This sense of entitlement to the older person's assets can also conflict with the older person's desire to pay for aged care services.²⁴

In our work, we see this situation taking a profound toll on the older person, often preventing them from ageing at home, with the right care. More broadly, it undermines the retirement income system and the capacity of the aged care sector to meet future need.

¹⁶ Australian Institute of Family Studies, '[Socio-economic context and intergenerational wealth transfer](#)' *Elder abuse: Understanding issues, frameworks and responses*, (Research Report No. 35, February 2016).

¹⁷ ABS '2049.0 - Census of Population and Housing: Estimating homelessness, 2016'.

¹⁸ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, '[Inquiry into the Public Housing Renewal Program](#)' (June 2018).

¹⁹ Victorian Auditor-General's Office, '[Access to Mental Health Services](#)' (Independent Assurance Report to Parliament, March 2019).

²⁰ KPMG, DHHS, '[Design, Service and Infrastructure Planning Framework for Victoria's Clinical Mental Health System](#): Developing excellence in clinical mental health care for Victoria (Discussion Paper, August 2016) 7.

²¹ [Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#) (Final Report, February 2019) vol 1, 1.

²² The WHO defines elder abuse as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'. See also: World Health Organisation, '[Ageing and Life-Course](#)' (Webpage, 2019). Council of Attorneys-General, '[National Plan to Respond to the Abuse of Older Australians \(Elder Abuse\) 2019–2023](#)' (Report, 19 March 2019) 5 ('[Elder Abuse National Plan](#)'). [Royal Commission Family Violence](#) (Summary and Recommendations, March 2016) 67.

²³ Australian Institute of Family Studies, 'What is known about the prevalence and dynamics of elder abuse?' *Elder Abuse: Understanding Issues, Frameworks and Responses*, (Research Report No. 35, February 2016) ('[Elder abuse prevalence](#)').

²⁴ Alzheimer's Australia, '[Preventing financial abuse of people with dementia](#)' (Discussion Paper, 2014), 18.

²⁵ Peteris Darzins, Georgia Lowndes and Jo Wainer, '[Financial abuse of elders: a review of the evidence](#)' (2009) 15.



Isolation and loneliness

Social isolation and loneliness increase a person's risk of experiencing elder abuse and poor health.²⁵ These factors may also prevent older people from ageing and receiving aged care services at home, or exercising control in relation to their care.²⁶

An estimated 10% of Victorians over 60 experience chronic loneliness. The number of people ageing without a trusted carer is, therefore, significant and likely growing in number.²⁷ Those already experiencing discrimination and disadvantage—women; people at risk of abuse; people from Culturally and Linguistically Diverse (CALD) groups; LGBTI elders—may be over-represented in this cohort.²⁸

Changes and barriers to future planning

With aged care becoming more diverse and person-centred, new decision-making laws further support older people to have more choice and control in their care.²⁹

The new laws elevate a person's 'values and preferences'—a shift towards a social model and away from the medical model of making decisions that are in a person's 'best interests'. Further, with the introduction of supportive decision-making, older people are also encouraged to make decisions as often as—and for as long as—possible.

One way to ensure services are person-centred, is to engage in future planning, outlining preferences and values in aged care. However, some older people find it difficult to engage in future planning and obtain professional advice³⁰, or don't feel the need to engage in planning until something goes wrong. Our cases demonstrate future planning—with the assistance of a professional—is vital for people at increased risk of isolation, abuse and discrimination; but reform is needed to make these laws more inclusive.

²⁵ National Ageing Research Institute Ltd, [Elder Abuse Community Action Plan for Victoria](#) (Report, February 2018) 80. Lincoln Gerontology Centre, [Aged Care Assessment Program National Minimum Data Set Report July 2000–June 2001](#) (Research Report, July 2011). Also as noted by the Office of this Royal Commission [Background Paper No. 2](#), 31.

²⁶ Ibid.

²⁷ State Government of Victoria, DHHS, [Ageing](#) (Web Page).

²⁸ [Elder abuse prevalence](#). Lois Bedson, John Chesterman and Michael Woods 'The Prevalence of Elder Abuse Among Adult Guardianship Clients' 18 *Macquarie Law Journal* 15. Commonwealth of Australia, Department of Health, [Review of the Culturally and Linguistically Diverse Ageing and Aged Care Strategy](#) (Report, June

2017) 7–8. National LGBTI Health Alliance, [Decades of Discrimination](#) (Web Page, July 2015). Bolton Clarke, [Older Women Living Alone](#) (Web Page, 2019).

²⁹ [Powers of Attorney Act 2014 \(Vic\)](#); [Medical Treatment Planning and Decisions Act 2016 \(Vic\)](#); [Guardianship and Administration Act 2019 \(Vic\)](#).

³⁰ One of our health partners, cohealth, delivered age and culturally appropriate information about advance care planning to groups of older or CALD individuals. The evaluation identified some of the key barriers to engage in advance care planning: lack of awareness; cultural factors; worrying their family; loss of control and independence; discomfort or embarrassment; and family members' unwillingness to engage. For LGBTI elders, the fear of discrimination in aged care may be an additional barrier.



2. Accessible, affordable and high-quality aged care services for *all* older Australians

Elder abuse and inadequate future planning challenge aged care

Term of Reference (c)

The future challenges and opportunities for delivering accessible, affordable and high quality aged care services in Australia, including:

- in the context of changing demographics and preferences, in particular people's desire to remain living at home as they age; and
- in remote, rural and regional Australia

Elder abuse and inadequate future planning challenge the delivery of accessible, affordable and high-quality aged care services. These problems cause financial and housing insecurity, damage relationships and impact health and wellbeing. As a result, many older Australians find themselves unable afford or access the care of their choice.

With shortages in appropriate public supports, sometimes the only option for our clients in these circumstances is early admission to a public hospital or residential aged care. These early admissions can have a significant personal impact on older Australians, and also come at a significant public cost, requiring more expensive interventions.³¹ Our client stories illustrate how:

- 2.1 Elder abuse leads to early admission into residential aged care—Rosa's and Audrey's cases
- 2.2 Elder abuse leaves people unable to access and afford the care of their choice—Rosa's and Thanh's cases
- 2.3 Certain financial products enable abuse, compromising economic security and future care options—Thanh's case
- 2.4 Inadequate future planning leaves people unable to afford the care of their choice—Chan's and Jim's cases

2.1 Elder abuse leads to early admission into residential aged care

Of our clients who have experienced elder abuse, approximately three-quarters were female and 30% were adversely affected by a relative's or friend's gambling, drug or alcohol use. Further, 30% of clients were tolerating living in a high-risk situation because action was likely to result in the perpetrator becoming homeless.

Audrey's case shows how a person experiencing elder abuse—unable to age safely at home—can become reliant on public residential aged care.

Audrey's case—likely early admission to residential aged care due to abusive son

Audrey's adult son was experiencing problems with drug addiction and family breakdown. He was excluded from his family home through a family violence intervention order and turned up at Audrey's public housing property. After a few days, Audrey asked her son to leave; but he became threatening and violent.

³¹ *Background Paper No. 2*, 22-23. The Office of the Royal Commission estimates the costs of aged care per person, with community and residential care estimated to be \$26,539 and \$98,386, respectively.



Audrey's case—continued

She asked the public housing office for support with her son, but they refused to assist. Instead, they raised her rent because her son was now living there. Audrey's son's abuse persisted over weeks and, terrified for her safety, eventually Audrey fled to her daughter's house.

Audrey was referred to our integrated lawyer at a health service and sought our advice—as she was now couch-surfing and worried about damage to her public housing property. We attempted to have the police intervene, but they declined because she was now 'safe'. They indicated they might be able to assist if Audrey returned home and her son's behaviour escalated. Unfortunately, we lost contact with Audrey at this point and couldn't pursue a complaint.

Audrey's social worker later informed us that the public housing office had contacted Audrey; and had convinced her to relinquish her public housing property, as this would allow them to remove the son from the property. Despite being young for her age and entirely independent, Audrey is now on a waitlist for either public housing or a government-supported place in residential aged care—possibly a shared room with other people who cannot afford a private room.

Limited public housing stock means Audrey will almost certainly enter the aged care system early. Audrey is still sleeping on her daughter's couch while she waits for more secure and appropriate accommodation.

More public community-based, holistic supports and care

For older people in Audrey's situation, a common legal solution involves taking a family member to court and making them homeless. This is a highly undesirable option, especially when it involves family members who are also disadvantaged. Part of the solution should involve community-based holistic supports—including housing, mental health, alcohol and other drug counselling—for the person causing the abuse.

If these supports had been provided to Audrey's son before, or even after he moved in, elder abuse may

have been prevented. An investment in community-based supports would promote the independence, health and wellbeing of older people experiencing elder abuse, allowing them to age safely at home.

Recommendation 1:

Government should holistically address drivers of elder abuse, including failures in the mental health and housing sectors, by elevating these reforms to the National Plan.

Given the breadth and scale of work needed, Government will need to work with State and Territory governments.

2.2 Elder abuse leaves people unable to access and afford care of their choice

Sixty percent of our clients who were experiencing or at risk of elder abuse, provided, or were pressured to provide, financial assistance to family or friends to:

- purchase their own property;
- start a business; or
- avoid financial distress.

Older people we work with are entering transactions with family or friends without professional guidance. Rosa's case illustrates how financial support—provided without legal advice—can result in elder abuse, economic insecurity and limit future choices in aged care services.

Rosa's case—providing financial support without professional advice results in economic insecurity

Rosa separated from her abusive husband of many years, and received a property settlement. She decided to use that money to purchase a property with her only adult son. Rosa put the house in her son's name because she hoped to leave it to him one day anyway; but the arrangement was that they would live there together, and Rosa would pay the mortgage. She didn't get legal help because she couldn't afford it.

Rosa's case—continued

Rosa's son developed an addiction to drugs.

Rosa was making mortgage repayments, and also paying off her son's drug debts. Eventually Rosa's son decided to sell the property to pay his drug dealers. As the house was in her son's name alone, Rosa couldn't stop the sale of the property.

Justice Connect and our pro bono lawyers helped Rosa negotiate with her son to receive part of the sale proceeds to reflect her financial contribution to the property.

We also referred her to a housing provider to secure a private rental property. Her housing situation is currently secure; however, she has to use her part of the sale proceeds—her only savings—to pay her rent. This is not a long-term solution for Rosa and she may eventually end up moving into public housing or residential aged care far sooner than she would like.

Rosa tells us that had she received advice about the risks of purchasing the home in her son's name, she would have purchased in her name alone.

Rosa's son expected that the house and the money were his. Like Audrey's son, Rosa's son also would have benefitted from more holistic supports for his addiction.

Early and integrated advice is needed

Had Rosa received early legal help, she may have avoided elder abuse and the economic insecurity that followed. She now faces limited choice and ability to afford future aged care services because of the financial consequences of elder abuse that she experienced.

In the National Plan, Government has pointed to the importance of older Australians receiving advice early to prevent elder abuse, identifying future planning as a national priority.³² From our casework it appears older people—especially those from CALD backgrounds—are not getting legal help before they sign future planning documents or enter into significant property and financial transactions.

³² *Elder Abuse National Plan*, 24.

With an ageing population—and few free specialist legal services—there is enormous and growing unmet need for legal services that can work with older people in a supported setting; and provide the suite of early and tertiary supports. We commend the Government on its investment in 'trials' for legal and support services to address elder abuse. However, further strategies are needed to provide early legal intervention, not just a tertiary response.

By integrating lawyers into partner health services over many years, Justice Connect is supporting older people to overcome barriers to accessing legal help. We reach older people:

- by cultivating lasting, trusted relationships with health workers, who are deeply connected with their local communities, and have been trained to help clients engage with our lawyers before they sign important legal documents
- who need it most: approximately 60% of our matters are for people at risk of, or experiencing, elder abuse; and about 50% are for people from more than 30 CALD communities
- earlier in the cycle of their legal and financial issues, when we can help clients adopt strategies to prevent elder abuse and promote economic security through routine future-planning
- in an environment where they generally have the support and time to make considered decisions.

We are starting to redefine the role of lawyers in preventing elder abuse, and helping clients—like Agnes—avoid litigation and economic insecurity.

Agnes' case—early legal advice prevents elder abuse and economic insecurity

Agnes was being emotionally and financially abused by her son. When Agnes refused to provide him financial support, he accused her of 'blocking him from buying his home'. Agnes' son then took her to Centrelink and told the representative that she wanted to build a granny flat.

The Centrelink officer provided limited information that Agnes didn't understand and handed her a lengthy document.



Agnes' case—continued

Agnes walked out of the meeting feeling confused, holding a 17-page document outlining her options—the part on granny flat arrangements had been highlighted.

Luckily, she told her nurse about her situation, and her nurse encouraged her to speak to us. She trusted her nurse so, in turn, she was able to trust us.

The 17-page document was complicated and confusing. We also knew this arrangement had significant risks because it was unclear in the arrangement who was going to fund the granny flat. We referred Agnes to one of our pro bono lawyers, who outlined all the risks to her.

She decided this arrangement was not going to work for her, and could explain the risks to her son.

When contrasted with Rosa's case, Agnes' case shows the harm that was avoided through early legal advice. Government has also elevated the importance of future planning, yet it has largely left responsibility to the individual 'to protect themselves by planning ahead'.³³

Free, specialist legal advice is extremely limited—Justice Connect's five part-time lawyers work across six health partner sites in Melbourne, and three sites in Sydney. There are just one or two other legal services in each State providing dedicated, integrated legal help to older people at risk of or experiencing elder abuse.

With the spotlight on the welfare of older Australians, this Royal Commission and the National Plan provide critical opportunities for Government to increase investment in proven strategies to promote the economic security and independence of older people. Our cases illustrate how timely and integrated legal help can promote the economic security, choice and control of at-risk older Australians—and ease the burden on the public aged care system.

Recommendation 2:

All levels of government should invest in the systematic rollout of elder abuse legal advice and support services that:

- (a) are low cost, independent and targeted at older people at risk of elder abuse
- (b) adopt a partnership model of service-delivery, e.g. through community health services
- (c) show evidence of early intervention.

2.3 Financial products enable abuse, compromising economic security and future care options

Even with legal advice and knowing the risks, some clients tell us they would still financially assist family members. This feedback is consistent with evidence in the Banking Royal Commission; and highlights the complexity of elder abuse and intergenerational inequality. It also highlights the need for a thoughtful response.

Certain financial products—like guarantees and credit cards—play a significant role in elder abuse. We see the use and abuse of these products in particular, compromising the economic security of older people, leaving them unable to access or afford future aged care of their choice.

Our clients regularly sign guarantees, using their own home as security for a family member's loan. The family member is often borrowing money to purchase their own home or start a business.

Even though the older person is using their residential home as security, guarantee transactions avoid responsible lending rules (for the guarantor), undergoing less scrutiny than standard loans. Further, banks' lending obligations are more relaxed for business loans, meaning the risk is effectively passed onto the older person, who incurs significant liability with limited options when things go wrong.

³³ *Elder Abuse National Plan*, 24.



Thanh's case—risky guarantee causes economic insecurity, limits future care

Thanh doesn't speak English and has limited literacy and education. She owns her home, which she purchased with her late husband.

The bank wanted to sell Thanh's house; and she couldn't understand why. A guarantee had been signed using her home to secure her son's business loans that were now in significant arrears.

Thanh's son had a crippling gambling addiction; and was indebted to various creditors for the two business loans and nine credit cards, totalling about \$500,000. When Thanh first met with us, she was still in shock at the prospect of losing her home. Her daughter was stressed because she was not sure she could financially assist Thanh to age at home.

The bank was insisting on enforcing Thanh's guarantee, despite Thanh not remembering or understanding signing any such agreement—let alone having access to independent legal advice or an interpreter at the time.

Even though Thanh had risked her own home, responsible lending rules did not apply to the same degree to the guarantee or Thanh's son's loans because they were for 'business purposes'.

Justice Connect was able to negotiate with the bank to waive \$100,000 from the amount it sought to recover. However, in order to keep her home, Thanh had to enter into a reverse mortgage with the bank. As Thanh now ages, she will largely be unable to pay for her care, as the equity is substantially depleted in her home.

Thanh faced homelessness, declining health and the onus of proving the bank failed to do the right thing. She ultimately avoided the bank selling her home. Yet, as a result of the bank enforcing the guarantee, Thanh will struggle to access or afford future aged care of her choice.

Tighter controls around guarantees & other financial products

The vulnerable position of older people in financial transactions has been comprehensively considered, and strong recommendations for change have been made.³⁴ Across the multiple inquiries and reports concerning elder financial abuse, a spectrum of measures has been proposed to improve guarantee laws and other financial products that present risks to older people. For example:

- requiring older people to obtain independent professional advice, before entering into guarantees³⁵
- a positive duty on banks to take 'reasonable steps' to 'identify and prevent the financial abuse of vulnerable customers'; and prescribing that duty in the Banking Code of Practice,³⁶ which is binding on signatories—95% of the retail market³⁷
- prohibiting the use of an older person's home as security for another's debt³⁸
- limiting an older person's liability under guarantees to a fixed amount, or percentage of their assets.³⁹

It is important to remember the nature and context of these transactions, often involving the older person entering into a financial product:

- exposing them to significant liabilities, with minimal financial benefit
- at a time when they have to weigh the financial, legal, health, emotional and relational impacts of their decisions
- to help a person, where there is a high level of dependence or, possibly, duress
- at a time when they may be contemplating or experiencing a cognitive decline or loss of independence.

³⁴ ALRC Elder Abuse Inquiry Report, Chapter 9. Banking 9.2 ('ALRC Inquiry Report')

³⁵ Fiona Burns, 'Legally regulating intergenerationally transmitted debt' (2005) 24 *Australasian Journal on Ageing* 46, 49.

³⁶ ALRC Inquiry Report, Superannuation – Summary.

³⁷ ALRC Inquiry Report, Banks responding to elder abuse.

³⁸ Fiona Burns, 2005, 46, 49.

³⁹ A Duggan and E Lanyon, *Consumer Credit Law* (Butterworths, Sydney, 1999). There are limited circumstances in which a guarantor may be released from liability under a guarantee (such as where there has been force, fraud, illegality, duress or undue influence exercised by a credit provider or where a credit provider allowed the guarantor to be mistaken regarding their rights and liabilities under the guarantee) and limited regulation in Division 2 – Guarantees, Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth).



Banks need to take more action

Banks receive substantial benefit from these transactions and should bear more responsibility.

The Banking Code of Practice⁴⁰ already requires banks to take extra care with respect to customers in vulnerable situations, specifically including people experiencing age-related impairment, cognitive impairment and elder abuse. Our casework consistently shows how banks are falling short of what the community would expect 'extra care' to mean for an older person at risk of or experiencing elder abuse. The current investigation by the Banking Code Compliance Committee might identify the true extent of banks' compliance with the obligations for older customers in vulnerable situations.

Our experience also suggests the need for more prescriptive requirements on banks—preferably through the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**) or Banking Code of Practice (otherwise, in the updated Vulnerability Guideline which, at the time of writing this submission, has not been published).

(a) Identifying warning signs and preventing elder abuse

Bank staff and contractors should be trained to identify and respond to elder abuse and its warning signs. Training needs to be:

- prepared in consultation with the community sector to address the nuances of elder abuse
- rolled out across the entire company, including overseas contact-centre staff
- delivered regularly.

If elder abuse or warning signs are identified by bank staff or contractors, 'prevention' could include:

- escalating complaints, queries or enquiries to specialist teams within the bank
- declining or delaying a transaction or arrangement, and requiring further information
- offering referral information to the older person on local community support services
- in some cases, notifying the police, the Public Advocate or Aged Care Commissioner.

Many of the major banks are delivering training and taking action in response to intimate-partner family

violence, such as economic abuse. Elder abuse training is a logical extension of this work.

Anecdotally, some banks that have set up systems and training to identify elder abuse have seen an influx in elder abuse cases being reported. After training, banks will need to adequately resource their teams to deal with the inevitable growth in elder abuse cases being identified.

(b) Higher standard for business loans secured by older parent's home

Business loans that are secured by an older person's residential home should be subject to the same responsible lending requirements as personal loans (those in Regulatory Guide 209). This will help to ensure a vulnerable customer/guarantor does not bear all the risk of a business loan in circumstances where enforcement might result in homelessness or early admission to residential aged care.

(c) No risk of substantial harm

Responsible lending obligations should apply not only with respect to the customer taking out the loan, but also for guarantors. Banks should ensure there is no risk of substantial harm in entering a guarantee agreement with any older person who is using their residential home to secure the risk of the transaction.

This will go some way to addressing the 'gap' in responsible lending obligations for guarantee transactions involving older Australians' homes. It also makes sense that the same level of scrutiny should apply to the family home of a 'vulnerable customer' guarantor as, in many cases, to the primary person taking out the loan.

(d) Restricting enforcement

Enforcement of guarantees should also be restricted to after death or transfer of the property, where enforcement by the bank might lead to substantial harm of the older person (such as homelessness or economic insecurity).

Some banks may use their discretion to withhold enforcement of guarantees for vulnerable customers. However, Thanh's case shows this practice is not always followed. A stronger requirement against enforcement should be legislated or included in the Banking Code of Practice.

The original loan and guarantee transactions that lie behind these enforcement scenarios should also be scrutinised by a regulator or industry body.

⁴⁰ Chapter 14, section 38.



Legal safeguarding vs. freedom of choice

There is a balance to strike in preventing elder abuse through the use of guarantees and other financial products, while also offering older Australians freedom and flexibility to manage their own assets and navigate personal relationships.⁴¹

Based on over a decade of our work with older people experiencing elder abuse, we believe the following recommendations strike the right balance. These reforms will also help avoid early and distressing admission to publicly-funded residential aged care or hospital.

Recommendation 3:

The Australian Banking Association should require all banks to develop and roll out a comprehensive elder abuse training program:

- (a) to all bank staff and contractors
- (b) in consultation with sector experts
- (c) delivered on a regular basis.

The Australian Banking Association should consult with elder abuse sector experts to develop guidance materials to support banks in implementing effective systems and training.

Recommendation 4:

The Australian Banking Association should amend the Banking Code of Practice and/or Vulnerability Guideline to require banks to take reasonable steps to identify and prevent elder abuse.

Recommendation 5:

Government should amend the National Credit Act to extend responsible lending obligations to:

- (a) business loans that are secured by an older person's residential home
- (b) guarantee arrangements with an older person, involving their residential home.

Recommendation 6:

Government should amend the National Credit Act to prohibit banks from enforcing guarantees in these circumstances until after the death of an older person or transfer of the residential home.

Recommendation 7:

Industry regulators or bodies (e.g. ASIC, Banking Code Compliance Committee) should regularly investigate banks' compliance with laws and guidelines that protect vulnerable customers, such as at-risk older Australians.

2.4 Inadequate future planning leaves people unable to afford care

Increasingly, older people are receiving aged care services at home, supported by family members and professional carers.⁴² 'Family care arrangements' often involve an older person transferring assets, such as the family home, to family members, in exchange for care. These arrangements help a person age at home, and can value historically-unremunerated familial care.

Too often, these agreements are undocumented, and don't work out. Following the failure of a family care arrangement, we have seen older people like Chan forced into public residential aged care earlier than they wanted to.

Chan's case—abuse results in early admission to, and limited choice in, public residential care

Chan did not speak English, and was illiterate. He also received an Australian and Chinese pension. He and his wife migrated to Australia to join their only daughter, who would care for them.

⁴¹ Melanie Joosten, Freda Vrantzidis and Briony Dow 'Understanding Elder Abuse: A Scoping Study' (University of Melbourne and the National Ageing Research Institute, 2017) 24.

⁴² House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (Report, September 2007), page 136 [4.4].



Chan's case—continued

As part of this 'family care arrangement', they sold their property in China and their life savings went straight into the daughter's bank account. She then used this money to purchase of a property in her name. There was no written agreement, no caveat or any bank statements evidencing the cash transfer. The money was given on the understanding that they would all live together. They also appointed their daughter under a power of attorney.

For a few years, they lived together. Over this time, the daughter became increasingly abusive and controlling. She was 'the banker', eventually having full control of their pensions.

Escalating conflict was also negatively impacting Chan and his wife's health. Seeing the health impacts, a service provider suggested Chan and his wife go into a Chinese-speaking residential aged care facility. Their daughter did not support this, as it would have incurred an additional cost. Instead, she arranged for them to go to an English-speaking facility, which presented language barriers.

His daughter then sold the home they were living in—Chan and his wife did not receive any money from the sale. Staff at the facility also informed Chan some of his bills were unpaid and overdue. With growing concerns about the management of his finances, Chan arranged for his nephew to be his enduring power of attorney, removing his daughter. Chan soon discovered a series of unexplained withdrawals from his bank account. His daughter also threatened proceedings at VCAT, challenging his nephew's appointment.

Chan's story highlights the elevated risks faced by older migrants, who may be reliant on family for assistance, due to language and cultural barriers.⁴³ The true extent of their assets may never be reflected in Australian bank accounts or systems, making it difficult to prove elder abuse. Even if they can prove abuse, finding the right professional

advice—at the right time—can be difficult for older people from CALD backgrounds.

Some older people want to financially assist family members, for example, to acknowledge those who make sacrifices or give up employment opportunities to be carers. In helping their carer, and countering an expectation of inheritance by other family members, an older person like Jim can find themselves in a precarious financial position, igniting family conflict.

Jim's case—entering into informal family agreement before seeking advice

Jim, 70, owns his home—his main asset. He has two adult children, a daughter and son. A few years ago, Jim's daughter agreed to move in to help him care for his terminal wife, who has since died. Jim's daughter agreed to stay living with him, and provide care as he ages. His financially-independent son lives overseas.

Jim wants to provide financial security for his daughter because she supported him and his wife, and Jim hopes she will continue to do so as he ages. However, Jim's son has an expectation of inheritance; and Jim is concerned his son will insist on 'his share' of the property when Jim passes, making his daughter homeless.

Jim decided to make his daughter joint-owner of the property. He didn't get legal advice at the time as he didn't think he needed to, and couldn't afford it. The transfer had significant tax and social security consequences. Unwinding the transfer is complicated, difficult and costly.

Jim's decision to help his daughter compromised his economic security, making it difficult to afford future care. Further, if the arrangement doesn't work, he may be unable to age at home, or recover funds to pay for professional care. Had he received practical advice about the implications of the transfer, he may not have entered into this arrangement.

We refer to [recommendation 2 above—the need for early, integrated legal help](#)—which extends to older people considering family care arrangements.

⁴³ See also: Ethnic Communities' Council of Victoria, 'Elder Abuse Prevention' (Web Page). Jo Wainer, Kei Owada, Georgia Lowndes and Peteris Darzins, [Diversity and Financial Elder Abuse in Victoria](#) (Research Report, February 2011).



Further, Jim's case highlights the distinction between the intergenerational transfer of wealth for family care and through inheritance. Financial security for Jim's daughter is a way to value her care. In contrast, if Jim's son inherits his home, making Jim's daughter homeless, this entrenches inequality. Getting professional advice about, and formalising, family care arrangements would help to manage the intergenerational transfer of wealth, protecting the interests of older people and family carers.

Complexity and risks of informal family care arrangements

Payment for family care at home is part of the growing diversification of aged care. However, if unforeseen circumstances arise—such as a change in relationships or care needs—the older person can be left unable to pay for professional aged care. Some cases can result in homelessness or—like Chan—in early entry to public residential aged care.

Various inquiries and committees have raised concerns about the lack of specific mechanisms regulating family care arrangements, given the 'potentially disastrous consequences' if one fails.⁴⁴

Chan's case brings these concerns to life. As Chan's financial assistance to his daughter was presumed by law to be a gift, he needed to prove it was payment for care and may be needed in future to pay for professional care.⁴⁵ Proving a legal agreement can be difficult when family care arrangements are grounded in informal conversations, unspoken expectations and power imbalances. Even if Chan did have enough evidence, legal action to recover assets can be complex, lengthy and expensive—a real deterrent.

More family care agreements

Template family care agreements and supplementary resources are freely available online, yet our casework indicates a disconnect: few people use them, or believe that things will go wrong.

Family agreements should be framed as part of future planning, in order to increase families' use and understanding of these agreements. Systematic engagement with older people is also needed, building on existing initiatives and aimed at encouraging them to consider future planning.⁴⁶

⁴⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (Report, September 2007), 146 [4.40].

⁴⁵ The law presumes parties to family agreements do not intend to be bound by the law of contract. Failure to prove otherwise will mean there was no valid contract. Further, purely because of the existence of a parent-child relationship, the presumption that a financial contribution is held on trust does not apply; and, rather, the law presumes that the transfer was intended to be a gift. These legal presumptions need re-consideration with the changing landscape of aged care.

(a) Interactive, user-designed online platforms and resources

There are opportunities to create interactive, user-designed online platforms and resources for people to think about how they want to age, and what documents can be put in place to ensure their values and preferences are respected.

Self-help resources on future planning should:

- be interactive, easy to use and relevant to older people and their families;
- include strategies to guard against elder abuse, e.g. Victoria's '[Your Voice - Trust Your Choice](#)';
- be tailored to the needs of particular communities, such as '[Safeguarding the End of the Rainbow](#)' for the LGBTI community and the '[My Farewell Wishes](#)' for the Chinese community.

These tools and resources could be made available, along with referral information, linked to existing initiatives, such as '[Life Checks](#)'⁴⁷ and the planned National Elder Abuse Hub.

(b) Targeted engagement at key points in the service and community sector

As well as online platforms, there are obvious points in the service system to engage with older people—especially those at risk of isolation, abuse and discrimination:

- screening tools at community health centres
- discharge planning for hospitals
- assessments by ACAS teams
- intake for My Aged Care
- Centrelink assessments for the aged pension, and granny flat exemption
- advice sessions with the Centrelink Financial Information Service.

With the introduction of advance care planning in Victoria, many older people are already asked questions about future medical treatment. Questions could be expanded to ask about all aspects of future planning, including care, living and financial arrangements. In doing so, we can frame family care agreements as part of the broader suite of

⁴⁶ The Elder Abuse Implementation Plan outlines some existing initiatives: investigation into strategies to improve engagement and access to information (2.2.4, 2.2.5), future planning resources (4.1.2), engagement with CALD peak bodies on future planning (4.1.3).

⁴⁷ Online 'Life Checks' for people aged 45 and 65 that incorporate questions and information about wellbeing, finances and working arrangements. Commonwealth of Australia, Department of Health '[Better Ageing – 45 and 65 year online checkup](#)' Department of Health (Web Page). Starts At 60 Writers, '[New government site for over 60s offers 'life check' advice](#)' Starts At 60 (online, 15 January 2019).



documents in future planning, including powers of attorney, advance care plans and wills.

Our work with organisations trusted by older LGBTI people and people from CALD communities suggests these communities face additional barriers to engaging in future planning. Targeted education and outreach by these organisations is, therefore, necessary to create culturally safe spaces for these communities to build their literacy and engage with professional support.

(c) Accessible and affordable professional advice

Once the need for future planning has been identified, older people could be referred to a network of accessible and affordable professional advisors. Investment in professional advisors would:

- help older people and their families understand the benefits and risks of different arrangements, and what is going to work best for them
- create a culture of people seeking professional advice for these arrangements
- build the capacity of the professional sector to provide this advice
- reduce the risk of family conflict and complex issues arising from failed family arrangements.

Recommendation 8:

Government and the community and health sectors should adopt the following strategies to encourage older people and their families to consider future planning:

- (a) harmonising resources to frame family care agreements as part of a broader suite of documents in future planning
- (b) systematically engaging with older people online and at key points in the service and community sector
- (c) investing in means-tested accessible and affordable professional advice—particularly for those facing disadvantage, discrimination or from CALD backgrounds
- (d) developing interactive, user-designed online platforms and resources, linked to existing initiatives.

3. Person-centred aged care services

For older people at risk of isolation, abuse and discrimination

Term of Reference (e)

How to ensure that aged care services are person centred, including through allowing people to exercise greater choice, control and independence in relation to their care, and improving engagement with families and carers on care related matters

Older people experiencing isolation, abuse or discrimination are more likely to have limited choice, control and independence in relation to their aged care.

Laws and practices are evolving to focus on an older person's values and preferences rather than what's in their 'best interests'. Yet our client stories illustrate how these same laws and systems can limit person-centred care for those most at risk:⁴⁸

- 3.1 older people ageing alone unable to exercise choice, control and independence in their care—Penny's and Frank's cases
- 3.2 abusive family members prevent person-centred care—Jeanie's case
- 3.3 LGBTI elders face discrimination, lack of choice and control in aged care—Alexi's case

3.1 Isolation limits choice, control and independence in aged care

For people ageing without a trusted family member or friend, when cognitive capacity is diminished, a public guardian and trustee will likely be appointed to help in the management of the older person's affairs.

Bringing in a trained, impartial person at this time can be useful—if not an essential safeguard—so long as the guardian or administrator can understand the older person's values and preferences. However, in the course of ensuring services are person-centred, even the most experienced guardian or trustee may find it difficult to understand a person's long-standing values, especially if they have diminishing capacity.

Penny's case—forcibly placed in unsuitable residential care

Penny, 80, lived alone in a one bedroom public housing property. She was well-supported by community services, including meals on wheels, nurse and OT.

However, she was struggling physically. Ignoring recommendations to consider residential aged care, she was adamant she was going to die at home. Eventually, a professional guardian was appointed. Penny felt the guardian spent a lot of time talking to her workers, but not with her.

One day, the police and ambulance attended Penny's home to have her forcibly removed. This was 'embarrassing and humiliating', especially as her neighbours watched on. Penny's guardian had arranged for her entry to a residential aged care facility; placed with residents experiencing significant cognitive decline, who would walk into her room at night.

We obtained an additional assessment, which concluded that Penny could live in the community, only if someone could live with her. We explored various community-based aged care options, which she could not afford. Her only option was to remain in the residential aged care facility.

⁴⁸ The service providers involved in these case studies were not our health partners, unless stated otherwise.



Penny's case raises three problems:

- the guardian made a decision that was at odds with Penny's choice, and failed to work with her in a way that promoted her independence and respected her autonomy and dignity
- Penny had no trusted friend or family to work with the guardian or be a co-resident informal carer
- there are insufficient community and residential aged care options in the public system for people, like Penny, ageing alone with limited means.

More public community-based aged care

The Office for this Royal Commissions projects more aged care options will need to be community-based and that Australians will expect increased availability and accessibility:

People will be able to receive the care they need in their home for a longer period of time and to a great intensity. Movement into residential aged care will be delayed and only occur at higher levels of frailty than currently.⁴⁹

...

Australians are likely to continue to expect that any publicly supported aged care system is available and accessible equally to everyone who needs assistance, especially as taxpayer contributions will continue to be necessary for those unable to afford the cost of their care.⁵⁰

Investment in more community-based aged care and accommodation is needed. Not only would this investment help those experiencing isolation, but also those who have experienced—or who want to avoid—elder abuse, such as Audrey, Chan and Rosa. It would help at-risk older Australians age safely, with choice and control in their care.

Recommendation 9:

All levels of Government should invest in more affordable community-based aged care and accommodation, including a range of retirement housing options:

- (a) older persons' public and social housing
- (b) independent living units.

⁴⁹ Background Paper No. 2, 2.

Limited oversight of professional decisions

Frank's case below shows how service providers and guardians start with wanting to keep an older person safe. We see this approach leading to early admission to residential aged care, almost always against the older person's wishes. This 'conservative' approach was reinforced by the previous legal requirement to act in the older person's 'best interests'. With no advocate, no alternative guardian, and no independent review, there's not much Frank can do to tackle these entrenched practices.

Frank's case—lack of professional support to return home

Frank lived alone in community housing. He had a stroke and was admitted to hospital. Later, he was transferred to transitional care where he remained for nearly 12 months.

As Frank was provided with minimal rehabilitation to support his return to the community, he found his time in transitional care immensely frustrating. He felt as though his health care team had decided he was destined for residential care.

During this time, a professional guardian was appointed to decide his future accommodation and care. He consistently requested a trial at home. His guardian refused, and pursued admission to a permanent residential aged care facility. The guardian delegated selection of a facility to transitional care staff, who refused Frank's attendance at inspections.

We outlined the relevant laws to Frank's guardian, who advised their decision 'was not reviewable.'

Frank arranged his own independent assessment, which concluded he would benefit from a trial at home. Consequently, his guardian allowed his return home.

While Frank was happy to return home, he believed the extended period without rehabilitation—and without an informal carer—will have a long-term impact on his ability to age at home, independently.

⁵⁰ Background Paper No. 2, 9.



Had Frank’s guardian understood his rights and wishes, he may have received rehabilitation earlier, to promote his independence and be in the position to choose where he was going to live. With our support, Frank arranged an alternative assessment that was ultimately persuasive. A merits review of the decision might have helped too.

Merits review of public guardian and trustee decisions

Generally, the only way to challenge a decision made by a guardian or administrator is to apply to a tribunal to have them removed. As public guardians and administrators are often the last resort for people ageing alone, there’s no way to challenge their decisions through removal (because there is no one else to appoint). Further, with limited ability to record values and preferences with respect to care—as discussed on pages 24-26—a merits review would give people ageing alone greater control in decision-making.

The Victorian Law Reform Commission (VLRC) considered the issue of whether decisions made by guardians and administrators could be independently reviewed, known as a ‘merits review’.⁵¹ The VLRC recommended these decisions, including those about a person’s care and accommodation, should be reviewable.

Not only would independent oversight promote delivery of person-centred aged care services, it would also give tribunals a broader insight into how these new decision-making laws are being applied.

Recommendation 10:

Victorian and other State and Territory Governments should allow for merits review of decisions by guardians and administrators by:

- (a) adopting the VLRC recommendations 315–322 made in the 2012 Guardianship Inquiry
- (b) amending relevant laws (e.g. the *Guardianship and Administration Act 2019* (Vic)).

Assessments and advice for older people as part of the review should also be affordable and accessible.

People ageing alone may feel future planning is pointless or be reluctant to engage in it—due to distrust in the public guardianship system, or feared loss of privacy and independence. Yet Frank’s, Jeanie’s and Alexi’s cases demonstrate it can be vital in ensuring the delivery of person-centred care, and as a safeguard against abuse.

For example, Victorians can pre-emptively appoint a public trustee as a financial enduring attorney, outlining how they like to spend their money. Without an established culture in future planning, some people ageing alone do not want to take up this option, and prefer to enter into informal arrangements with neighbours and friends.

Carlos’ case—informal arrangement with neighbour leads to dispute

Carlos, 70, was finding it difficult to get down to the shops; and kept forgetting to pay his bills. He started asking his neighbour to buy him a few things, and helping him with his bills. This turned into a weekly arrangement, until Carlos accused his friend of misusing his bank card.

With no documentation of this arrangement, there was little we could do to help Carlos, legally. However, his worker did manage to engage him with a community service to help with his shopping, where he could deposit money into a trust account.

3.2 Abuse prevents person-centred care

Family and carers can play an important role in ensuring aged care services are person-centred and meet a person’s values and preferences. However, for some older people, the engagement of families and carers can increase the chances of abuse and discrimination, and deny person-centred services.

Many laws and practices default to the engagement of certain family members in decision-making.⁵² One way to prevent the engagement of abusive family members is future planning. About 40% of our clients have taken this option, formally appointed a trusted person to help with decisions if their capacity diminishes.

⁵¹ Victorian Law Reform Commission, ‘Guardianship: Final Report’ (Report, January 2012)

⁵² *Medical Treatment Planning and Decisions Act 2016* (Vic), section 55; *Guardianship and Administration Act 2019* (Vic), section 32.



However, if an older person doesn't have a trusted person in their life, future planning for aged care is not an option. Timely intervention from a public trustee or guardian, if the older person's capacity declines, is the only hope for a person like Jeanie.

Jeanie's case—no trusted attorney to prevent future abuse

Jeanie, 75, lived alone in public housing and had one son. She had a stroke and was admitted to hospital. Jeanie's son successfully applied to VCAT to be her guardian and administrator.

After some time, Jeanie started to regain capacity, and her mobility improved with rehabilitation. She was excited about the prospect of returning home. However, her son wanted her to go into residential aged care because she would be 'safer' there. To prevent her return home, he started putting pressure on hospital staff, who weren't sure who they should listen to. At the same time, staff were becoming concerned about Jeanie's finances, as her medical bills weren't being paid.

Once Jeanie's capacity increased, she had the guardianship and administration order revoked, which meant her son couldn't prevent her return home. In reviewing her affairs, Jeanie discovered her son had used her age pension to buy takeaway food and alcohol, but failed to pay her bills.

Jeanie wanted to take steps to prevent him being involved in the future. She was concerned he would arrange for her to go into a residential aged care facility before she really needed to.

Had Jeanie been able to record her concerns about her son, and have them made known when deciding who to appoint as her administrator and guardian, she may be able to protect herself against abuse.

3.3 LGBTI elders lack choice and control in aged care

There is emerging evidence of the experience of older LGBTI people experiencing abuse and discrimination as they age.⁵³ Not only is there a risk of abuse by someone close to them, but also discriminatory practices by service providers. Ageism, homophobia, transphobia and ignorance can intersect; and—in the aged care context—can result in the denial of the older person's choice, control and access to person-centred services.

Our sector colleagues tell us that the experience of discrimination perpetuates a fear of aged care services within the LGBTI community.⁵⁴ Perversely, it deters people from future planning—a useful strategy to exercise choice and control.

Council of the Ageing Victoria and Transgender Victoria consulted with LGBTI elders to further understand their experience; and develop strategies to promote future planning. Justice Connect was a member of the steering group, alongside other community and pro bono organisations.

In doing this work, the following examples of family members or service providers denying person-centred services to LGBTI elders were raised.

LGBTI elders—denied person-centred services

Due to declining physical health, an older person entered a residential aged care facility. Before going into the facility, they had found great joy and comfort meeting with people from an LGBTI community visitors scheme. They arrange these visits at the facility, and advised staff accordingly. However, staff refused visitors access because a family member—also their power of attorney—wouldn't allow these visitors. The older person had 'come out' later in life and their family struggled with their identity.

An older trans woman went into residential aged care. She wanted to continue to express a female gender; however, family members instructed staff she was to dress as a man.

⁵³ Catherine Barrett, Alice's Garage, [The Tango Project](#) (Report, 2017). Catherine Barrett and Malloy, [The Rainbow Makers: Cultural Safety and Older LGBTI Australia](#) (Report, August 2018).

⁵⁴ Jackie Keast, ['Older trans people have an 'absolute fear' about entering aged care'](#) Australian Ageing Agenda (online, 30 October 2015).



LGBTI elders—continued

An older gay man presented at the emergency department, with his friend—his ‘family of choice’ and also his enduring power of attorney. He wanted his friend to support him in understanding his medical treatment, as he was forgetful at times. He had strained relationships with his family members, and didn’t want them to be involved. However, hospital staff only spoke to the man’s family—not his friend, who was told he could only become involved when the older person lost capacity.

Victorian power of attorney and medical treatment laws now give most older people more control in their aged care, and who will be involved.⁵⁵ As a result, we helped to produce an important resource, ‘[Safeguarding the End of the Rainbow](#)’, to help promote a culture within the LGBTI community to engage in future planning.

However, in the course of developing this resource, consistent feedback was that many LGBTI people are ageing alone. As outlined at 3.1 above, without someone to appoint as a supportive or enduring attorney for personal decisions, isolated older people cannot make important legal documents to give effect to their values and preferences in aged care.

As well as experiencing discrimination, Alexi’s case shows how barriers to future planning can increase the risk of abuse for LGBTI elders—especially those ageing alone, and estranged from biological family.

Alexi’s case—gay man living alone tries to take steps to prevent elder abuse

Alexi was 83 years old when his long-term partner died. He was estranged from his family and living at home alone for the first time in many years. Alexi’s neighbour started coming around to visit him. At first, Alexi was grateful. His neighbour could use the internet, and helped him to pay his bills online. He also organised the shopping, and would do some housework, from time to time. After a while, Alexi started to rely on him.

Alexi’s case—continued

However, his neighbour soon became increasingly controlling. His furniture would be rearranged; and his mail would be opened. Soon, demands were made for items in Alexi’s house; and, feeling he had no choice, Alexi would give them to him.

The neighbour started making comments to Alexi about getting a power of attorney ‘over him’; and he also wanted him to make a will—he had already picked out the things to be left to him. Alexi wished his neighbour would leave him alone—he had no intention of leaving anything to him, or appointing him as attorney.

Through his worker at the hospital, Alexi was put in touch with Justice Connect. Alexi was able to find someone—his partner’s friend—to be his executor; however, they were reluctant to be his power of attorney. As a result, Alexi felt he could not take steps to prevent his neighbour from being his power of attorney, opening him up to the risk of elder abuse.

Like Jeanie, Alexi has to hope the public guardianship system will intervene in time to protect him from future abuse.

Better future planning laws and systems

Future planning laws and systems are changing to give people greater control in deciding who they want involved, what decisions they want made and where this information can be recorded.

The benefits and protections that come with these developments must be afforded to people ageing without a trusted person—who, as our cases show, are often at heightened risk of abuse, isolation and discrimination.

(a) Supported and substituted decisions

With many laws and practices defaulting to the engagement of family members, our cases highlight the need for older people to be able to take steps to prevent abuse by family members and discriminatory practices.

⁵⁵ Powers of Attorney Act 2014 (Vic); Medical Treatment Planning and Decisions Act 2016 (Vic).



In Victoria, this can be done by choosing a trusted person to be a supportive attorney—to help while they have capacity—and an enduring attorney, both having legal powers to engage with service providers. However, as public trustees and guardians cannot be supportive attorneys, a person ageing alone cannot take steps to prevent service providers automatically engaging with family members.

(b) Pre-emptive appointment of public guardian

In Victoria, a person can pre-emptively appoint the public trustee as an enduring attorney to prevent a potentially abusive family member—like Jeanie’s son—from managing their finances.

However, an older person in Jeanie’s situation cannot ensure the public guardian will be appointed to help with future personal and medical decisions. The only way to prevent appointment of a potentially abusive family member is to raise concerns before the tribunal, when determining an application. The older person’s ability to make submissions at this time may be practically difficult if they have diminished capacity, or have been isolated from other family members and supports.

As a vital safeguard, older people—especially those at risk of abuse, isolation and discrimination—need to be able to pre-emptively nominate the public trustee and the guardian to support them as they age. Pre-emptive appointment will also provide a mechanism for people to record values and preferences, to be taken into account by the public guardian or trustee, as well as service providers.⁵⁶

These gaps should be considered by:

- the Enduring Power of Attorney Working Group, charged with implementing activity 4.1.1 of the Elder Abuse Implementation Plan, relating to the harmonisation of enduring powers arrangements
- State and Territory Governments, charged with implementing activity 5.5.5 of the Elder Abuse Implementation Plan, relating to the review and enactment of laws to safeguard and support ‘at-risk’ adults.⁵⁷

⁵⁶ *Powers of Attorney Act 2014 (Vic); Medical Treatment Planning and Decisions Act 2016 (Vic).*
⁵⁷ *Elder Abuse Implementation Plan*, 23, 27.

Recommendation 11:

State and Territory Governments should amend State laws (e.g. the *Powers of Attorney Act 2014 (Vic)*, *Medical Treatment Planning and Decisions Act 2016 (Vic)* and the *Guardianship and Administration Act 2019 (Vic)*) allowing a person to:

- (a) pre-emptively appoint the public guardian and trustee in supported and substituted decision-making
- (b) prepare documents outlining their values and preferences.

Recommendation 12:

The National Enduring Powers of Attorney Group, in considering the harmonisation of enduring powers arrangements, should ensure all arrangements are adapted to the needs of people ageing without a trusted person.

Recommendation 13:

State and Territory Governments, in reviewing and enacting laws to safeguard and support ‘at-risk adults’, should ensure all laws are adapted to the needs of people ageing without a trusted person.

(c) Ensuring appointments of attorneys and guardians are enforced

Once future planning arrangements have been made, services (such as aged care providers), tribunals, guardians and administrators need to know about them, to inform person-centred services.

For people ageing without a trusted friend or family member, current systems allow for limited registration of documents and wishes with respect to decision-making.⁵⁸ However, there is no guarantee these documents will come before a relevant tribunal or service provider when they are needed. This limits the older person’s power to prevent abuse and discrimination, and to ensure their values and preferences inform person-centred care.

For example, in Victoria, the public trustee has established a manual, ad hoc process to check new administration applications, against registered enduring powers appointing them as an attorney.

⁵⁸ For example, State Trustees in Victoria has a Register for people to store certain wills and powers of attorney. My Health Record also allows for registration of advance care plans.



A new Victorian law will also allow people to lodge a 'statement of wishes' for VCAT to consider in appointing a guardian or administrator.⁵⁹ However, it appears this statement can only be made with respect to a current application, which is usually made when there are concerns about the older person's capacity. For Jeanie, if there are no concerns about her capacity, it's not clear she can pre-emptively make this statement to stop her abusive son being appointed.

(d) National register of enduring powers of attorney

Work is underway to establish a national register for financial enduring powers of attorney to 'check the authenticity of an instrument or to track one down' and 'send the signal that these are documents to be taken seriously'.⁶⁰ This rationale applies to all future planning documents relating to an older person's living arrangements, care and medical treatment.

Pre-emptive nominations of public guardians and administrators should also be stored on the national register. This will empower older Australians at risk of isolation, abuse or discrimination to record their values and preferences, and hopefully trust that these will be taken into account in future.

Work is still needed to navigate jurisdictional inconsistencies with respect to guardianship laws and instruments. While a national register is the preference, in order to elevate the status of these instruments and increase their use, the register(s) could also be state-based.

Recommendation 14:

State and Territory Governments should expand the planned National Register to include future planning documents—relating to all aspects of a person's affairs—including those appointing a public administrator and public guardian.

(e) Promote understanding of the rights of older people

Finally, laws and legal documents are not much use if people don't know how they work. There is another disconnect: laws promote greater choice, control and independence, but our cases show there are still misunderstandings amongst older people, family

members, aged care service providers and professional decision-makers.

Jeanie and Alexi had people in their lives who: attempted to take control of their affairs; felt entitled to their assets; and had no interest in promoting their control, choice and independence in their aged care.

Older LGBTI people also continue to experience discrimination by service providers, where their values and preferences are silenced by the instructions of family members, who deny the expression of their identity and relationships. This is due to a misunderstanding of the role and responsibilities of appointed decision-makers, and the rights of older people.

Again, targeted education and engagement could be useful strategies to ultimately improve aged care for at-risk older Australians. Education could promote understanding by aged care professionals and older people (especially those with diminished capacity) of the new legal frameworks and rights of older people. This education should take an intersectional approach, acknowledging the diversity of older Australians, including those who identify with LGBTI and CALD communities, Aboriginal and Torres Strait Islanders, and those with a disability. Education programs can build on existing initiatives:

- LGBTI-inclusive aged care for service providers, looking more closely at decision-making.⁶¹
- National resource on rights and responsibilities relating to enduring appointments.⁶²
- Victorian reforms aimed at developing industry and workforce capacity to prevent and respond to family violence, including elder abuse.⁶³

Recommendation 15:

The Australian Guardianship and Administration Council should develop best practice guidance on supportive and substitute decision-making for service providers.

Recommendation 16:

Federal, State and Territory Governments, building on existing initiatives, should invest in the rollout of professional education on the rights of older people.

⁵⁹ *Guardianship and Administration Act 2019* (Vic). At the time of writing this submission, the provisions have not been used.

⁶⁰ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 101. Australian Law Reform Council, *Elder Abuse Discussion Paper 83* (2016) chapter 5.

⁶¹ LGBTI Health, '[Silver Rainbow – LGBTI aged care awareness training](#)' (Web Page).

⁶² *Elder Abuse Implementation Plan*, activity 4.1.2, 23.

⁶³ Victorian Government, '[Our plans for industry and workforce development](#)' (Web Page).

