



# **Submission to the Elder Abuse Inquiry: Response to the Issues Paper**

August 2016

## About National Seniors Australia

National Seniors Australia is a not-for-profit organisation that gives voice to issues that affect Australians aged 50 years and over. It is the largest membership organisation of its type in Australia with more than 200,000 members and is the fourth largest in the world.

**We give our members a voice** – we listen and represent our members' views to governments, business and the community on the issues of concern to the over 50s.

**We keep our members informed** – by providing news and information to our members through our Australia-wide branch network, comprehensive website, forums and meetings, bi-monthly lifestyle magazine and weekly e-newsletter.

**We provide a world of opportunity** – we offer members the chance to use their expertise, skills and life experience to make a difference by volunteering and making a difference to the lives of others.

**We help our members save** – we offer member rewards with discounts from thousands of businesses across Australia. We also offer exclusive travel discounts and more tours designed for the over 50s and provide our members with affordable, quality insurance to suit their needs.

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## Introduction

National Seniors welcomes the opportunity to respond to the questions put forward within the Australian Law Reform Commission's Issues Paper 47 as part of the ongoing inquiry into elder abuse.

As a member-based organisation representing the interests of Australians over the age of 50, National Seniors is well placed to provide advice to the Commission on elder abuse.

National Seniors believes that all government's, led by the Commonwealth, have a critical role to play in developing a comprehensive agenda to prevent and address elder abuse.

A comprehensive response to elder abuse should include the following key elements:

- Dedicated and coordinated research into the prevalence of elder abuse in Australia and the best practice remedies.
- An ongoing national public awareness campaign to educate all Australians about elder abuse, which highlights the ways that individuals can minimise their risk of abuse in the future.
- Strong and cost-effective legal instruments to enable older people to protect themselves from elder abuse.
- Effective legal remedies to prosecute and punish perpetrators and compensate individuals who are victims of elder abuse.
- National laws or nationally consistent laws to better prevent and address elder abuse.

Aside from these key elements, National Seniors offers several specific recommendations in this submission for consideration. Recommendations have been formulated which are specific to each of the Issue Paper questions.

National Seniors looks forward to working with the Commission throughout the inquiry process.

## What is elder abuse?

**Question 1** To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse: •

- harm or distress;
- intention;
- payment for services?

### Recommendation 1

***National Seniors recommends that a nationally consistent definition of elder abuse be adopted through consultation with key stakeholders.***

A nationally consistent definition of elder abuse should include the following key elements:

- where the relationship between the victim and perpetrator involves an expectation of trust
- whether there was action or inaction
- where the act or inaction was singular or repeated
- whether the act or inaction is intentional or unintentional
- where the act or inaction results in harm or distress to an older person
- the type of abuse, e.g. physical, sexual, financial, psychological, social and / or neglect.

The definition should not preclude situations in which the relationship involves payment for services.

A nationally consistent definition of elder abuse adopted by government departments, the police, health professionals and service providers would ensure a consistent approach to data collection. This would assist research efforts and detection and intervention<sup>1</sup>.

**Question 2** What are the key elements of best practice legal responses to elder abuse?

National Seniors believes that a best practice legal response to elder abuse aims to prevent abuse from occurring in the first instance but provides legal remedies when unacceptable behaviour occurs.

### Recommendation 2

***National Seniors supports the development of a dedicated and coordinated research program to better understand the prevalence of elder abuse in Australia and best practice remedies.***

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<sup>1</sup> James, M. undated. 'Abuse and Neglect of Older People' Australian Institute of Family Studies, Family Matters No. 37 <https://aifs.gov.au/publications/family-matters/issue-37/abuse-and-neglect-older-people>

A best practice legal response should be based on strong evidence. Currently we do not have a clear picture of the extent of abuse in Australia, particularly as it relates to specific populations. Ongoing research is required to assess the effectiveness of different practices used to prevent elder abuse and to address the harms from elder abuse.

**Recommendation 3**

***National Seniors supports the development of an ongoing national public awareness campaign, which outlines the risks of abuse and highlights the mechanisms that can be used to minimise this risk.***

National Seniors believes that the financial abuse of older people is largely preventable. Unfortunately, there is lack of awareness or acceptance that older people are at risk of abuse. As one report has shown, it is difficult to engage people to adopt strategies to prevent financial abuse because they are not mindful of the risk<sup>2</sup>. A best practice legal response to elder abuse must therefore include non-legal elements that raise awareness of the risk of abuse and highlight the means to mitigate it.

**Recommendation 4**

***National Seniors recommends that legal instruments to protect older people from the risk of elder abuse should be strengthened.***

A best practice legal response to elder abuse is one that includes low-cost and legally enforceable mechanisms to protect an older person's interests as they age, especially if capacity becomes an issue.

**Recommendation 5**

***National Seniors supports the development of effective legal remedies to prosecute, punish and compensate if elder abuse occurs***

A best practice legal response to elder abuse provides appropriate legal mechanisms to prosecute, punish and compensate if abuse occurs. This involves an array of legal remedies including both civil and criminal. To be effective, these remedies must include mechanisms to support abuse victims through these processes.

**Recommendation 6**

***National Seniors supports the development of national or nationally consistent laws governing elder abuse.***

It makes little sense that the legal frameworks to protect older Australians from abuse differs across the various states and territories. National laws or at the least nationally consistent laws are required to reduce confusion and improve protections for older people.

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<sup>2</sup> Bagshaw, D., Wendt, S., Zannettino, L. and Adams, V. (2013). 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members' in *Australian Social Work*, 66, 1, pp. 86-103.

**Question 3** The ALRC is interested in hearing examples of elder abuse to provide illustrative case studies, including those concerning:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse communities;
- lesbian, gay, bisexual, transgender or intersex people;
- people with disability; or
- people from rural, regional and remote communities.

National Seniors does not have specific examples of elder abuse regarding the specific populations in this question. Each of these populations will have unique experiences of elder abuse and urge that responses to this take account of these differences.

**Question 4** The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence?

### ***Recommendation 7***

***National Seniors recommends that the Commonwealth fund a comprehensive research agenda to illicit a clearer understanding of the incidence and nature of elder abuse in Australia and to investigate strategies and methods to prevent abuse.***

Currently, there is a paucity of primary research into the incidence and nature of elder abuse in Australia. The primary sources of information include case data collected from the various state and territory elder abuse units / helplines and data collected by the Department of Health from mandatory reporting in residential aged care facilities. Other potential data sources include police, court and tribunal records, although these are not routinely reported.

While each of these data sources is important they will only provide information about reported cases. Dedicated research is required to more accurately gauge the extent and nature of elder abuse in Australia. Research is also required to investigate and analyse effective prevention strategies, including best case service and legislative responses.

## Social security

**Question 5** How does Centrelink identify and respond to people experiencing or at risk of experiencing elder abuse? What changes should be made to improve processes for identifying and responding to elder abuse?

### **Recommendation 8**

***National Seniors recommends that the Centrelink website provide information about elder abuse and what a person can do if they suspect they or someone else is a victim of elder abuse.***

The Centrelink website does not currently provide information about elder abuse. There is no specific web page referring to elder abuse nor is there any reference to elder abuse on Centrelink's Family and Domestic Violence web page<sup>3</sup>. As such, there are no links to the various states and territory elder abuse information and support units.

### **Recommendation 9**

***National Seniors recommends that Centrelink deliver information about elder abuse to all older clients.***

Centrelink should play a direct role in educating older clients about elder abuse. All older clients should be provided with information about elder abuse along with information about the types of mechanisms available to protect themselves from abuse in the future. Ideally this should include information about who they can report abuse to and contact details for elder abuse advice services.

### **Recommendation 10**

***National Seniors recommends that Centrelink staff be provided with training and resources to help them detect and report suspected cases of elder abuse.***

Centrelink should also be more proactive in identifying people experiencing or at risk of experiencing abuse. Centrelink's role in providing welfare payments makes it a primary site for the detection of abuse. In a recent elder abuse case in Queensland, Centrelink referred a suspected abuse case to the Adult Guardian and Public Trustee, which led a conviction of fraud against a victim's daughter<sup>4</sup>. Mechanisms, such as electronic monitoring tools, and training should be put in place to assist staff to detect abuse.

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<sup>3</sup> Department of Human Services 2016. 'Family and domestic violence' Accessed 10 August 2016  
<https://www.humanservices.gov.au/customer/subjects/family-and-domestic-violence>

<sup>4</sup> Brisbane times 2015. 'Daughter gets bail in 'elder abuse' case' in *Brisbane Times*. 9 October 2015.  
<http://www.brisbanetimes.com.au/queensland/daughter-gets-bail-in-elder-abuse-case-20151009-gk5g72.html>



**Question 6** What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?

National Seniors believes that the current laws and legal frameworks relating to payment nominees are deficient. Legislation could be strengthened to ensure that benefit recipients relying on a payment nominee are not open to exploitation.

**Recommendation 11**

**National Seniors recommends that Centrelink initiate an effective monitoring and auditing regime for payment nominees.**

Currently, there is no regular oversight over the actions of a payment nominee. Under section 123L (1) of the *Social Security (Administration) Act 1999* Centrelink has the right to request a nominee provide a statement of payments made on behalf of the benefit recipient<sup>5</sup>:

*The Secretary may give the payment nominee of a benefit recipient a notice that requires the nominee to give the Department a statement giving particulars of the disposal by the nominee of money paid under the social security law to the nominee on behalf of the benefit recipient.*

While the legislation does not specify when Centrelink should enact a review, it has been noted elsewhere that a review is undertaken immediately if “Centrelink is advised that a nominee may not be acting in the customer's best interests”<sup>6</sup>. Unfortunately, this relies on a third party to inform Centrelink of an issue. In certain instances this might not take place. If a principal had impaired capacity and was socially isolated, such abuse may never come to light. It also assumes also that a third party is aware that a nominee agreement exists.

There is also no reference in the legislation to any regular schedule for reviewing payment nominee arrangements beyond reviews initiated in response to an allegation of misuse. Periodic or random reviews could be useful because they would increase oversight and deter or reduce the risk of malfeasance on the part of the nominee.

This approach has already been recommended in the past *Older People and the Law* inquiry conducted in 2007. The inquiry report recommended that Centrelink establish a process whereby a representative sample of nominee arrangements are examined<sup>7</sup>. The recommendation was accepted in principle by Government in its response to the inquiry

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<sup>5</sup> *Social Security (Administration) Act 1999* (Cth). <https://www.legislation.gov.au/Details/C2016C00472>

<sup>6</sup> Commonwealth of Australia 2007a. *Older people and the law: Government Response*. House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, September 2007. [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=laca/governmentresponse/olderpeople.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/governmentresponse/olderpeople.pdf)

<sup>7</sup> Commonwealth of Australia 2007b. *Older people and the law*. House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, September 2007. [http://www.aph.gov.au/parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=laca/olderpeople/report.htm](http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm)

report in 2009, but it is unclear if this has occurred in practice as this was not the case in 2012<sup>8</sup>.

Aside from random auditing there are several other options that could be adopted.

Centrelink could mandate that nominees supply Centrelink with statements of payments on a regular basis. Under such a proposal, nominees would be required to use approved templates to record transactions made on behalf of the benefit recipient and submit these to Centrelink. This would not be an additional burden on the nominee because nominees are already required to keep records. The only difference would be the requirement to submit these statements periodically, which could occur on a six monthly basis. A standard template would make the process more streamlined and enable the development of guidance materials for nominees to explain what is required.

Nominees could have access to applications, such as those on mobile phones, to enable electronic recording and reporting of payments made on behalf of a benefit recipient. Accounting applications, such as the free ASIC *Money Smart* mobile phone application, could be adapted to suit the needs of a payment nominee. Such applications could include an option to record copies of receipts and upload statements to a central server held by Centrelink.

Centrelink could offer benefit recipients the option of opting into a review process. This would be particularly useful in instances where a recipient's affairs were being managed by a voluntary payment nominee. The existence of ongoing review or auditing would act as a deterrent to payment nominees seeking to misuse their nominee role. It would give the benefit recipient greater assurance that their affairs and best interests were being independently monitored. A risk assessment tool could be developed in conjunction with this option. The risk assessment tool would assess the situation of the recipient to ascertain the frequency of any review or auditing processes.

### ***Recommendation 12***

***National Seniors recommends that improvements are made to the information provided to benefit recipients and nominees.***

Under the Australian Government's guide to social security law it is stated that a Centrelink staff must be satisfied that a proposed nominee understands their responsibilities as a nominee in order to authorise this agreement<sup>9</sup>. Given that this places an onus on Centrelink staff to explain and validate a potential nominee's understanding of their responsibilities, it is

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<sup>8</sup> Australian Law Reform Commission 2012. 'Social Security - Crisis Payment, Methods of Payment and Overpayment' in *Family Violence and Commonwealth Laws - Improving Legal Frameworks*. ALRC Report 117. [http://www.alrc.gov.au/publications/9-social-security%E2%80%94crisis-payment-methods-payment-and-overpayment/nominee-arrangements#\\_ftn50](http://www.alrc.gov.au/publications/9-social-security%E2%80%94crisis-payment-methods-payment-and-overpayment/nominee-arrangements#_ftn50)

<sup>9</sup> Australian Government 2016. '8.5.3 Responsibilities of Nominee' in *Guide to Social Security Law*. Version 1.224 - Released 15 August 2016 <http://guides.dss.gov.au/guide-social-security-law/8/5/3>

imperative that they have the skills and resources available to fulfil this requirement to an adequate standard.

This could be enhanced by strengthening the nominee related materials produced by Centrelink. The current nominee registration form, for example, could be improved to set out more detailed information than is currently available. This should include:

*I. Details about any potential penalties for a nominee.*

- The current form does not explicitly state the penalty if a nominee fail to produce financial records when requested<sup>10</sup>.
  - Under the current legislation the fine for failing to do so is 60 penalty points, which equates to a fine of \$10,800. Stating that there is a potential penalty without stipulating the potential amount of the penalty reduces the effectiveness of the penalty as a deterrent. Such information should be clearly communicated to the benefit recipient and the nominee.
- The current form does not discuss that there are potential penalties associate with the misuse of a benefit recipients funds<sup>11</sup>.
  - While the *Social Security (Administration) Act 1999* includes no specific penalty for misuse of funds, the misuse of any funds is likely to be covered under relevant state and territory criminal laws. This fact should be clearly pointed out to the nominee as a further deterrent to abuse.

*II. Details about the review process.*

- The current form does not provide any information about how a review of records is initiated<sup>12</sup>.
  - It would be beneficial to include information about the mechanisms by which a review can be initiated to alert the benefit recipient what they can do to protect themselves if they have concerns. Providing information about the review process would be particularly useful if Centrelink had in place a mandatory or random review process as this would increase the deterrent effect.

**Recommendation 13**

***National Seniors recommends that a detailed risk assessment tool be developed for voluntary payment nominee arrangements.***

National Seniors is concerned about the potential for abuse arising from the ability of benefit recipients to enter into voluntary arrangements with a nominee. While it is important that voluntary arrangements exist, it is possible that there is a higher risk that a benefit recipient might have been encouraged to enter into such an agreement. Care should be taken to ensure that the benefit recipient is willingly giving this authority to a nominee.

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<sup>10</sup> Australian Government Department of Human Services 2016. 'Authorising a person or organisation to enquire or act on your behalf' Accessed 5 August 2016.

<sup>11</sup> Australian Government Department of Human Services 2016 *Ibid*.

<sup>12</sup> Australian Government Department of Human Services 2016 *Ibid*.

Voluntary arrangements do not require any supporting documentation, which means that there is a low level of scrutiny compared to other arrangements such as for a power of attorney or court, tribunal, guardianship, or administration orders.

Under the Australian Government's guide to social security law it is stated that scrutiny of the appointment of a nominee should occur if<sup>13</sup>:

- *a nominee runs a boarding or rooming establishment,*
- *the nominee has multiple nominee appointments,*
- *the nominee does not live in the same residence or in close proximity.*

There should be greater scrutiny of a nominee than what is outlined in the Australian Government's guide to social security law.

A risk assessment tool designed to ask questions about the benefit recipient, the nominee and their relationship would have the potential to indicate if a nominee posed a high risk to a benefit recipient. This could be used to determine an appropriate auditing regime or to reject an application.

#### ***Recommendation 14***

***National Seniors recommends that Centrelink publicly report the number of nominee arrangements in place and the outcomes of any reviews undertaken.***

Currently, there is no public information available about the number of payment nominee arrangements in place nor is there any information provided as to how many reviews of payment nominee arrangements occur or how many payment nominee arrangements are revoked.

**Question 7**    What changes should be made to the laws and legal frameworks relating to social security payments for carers to improve safeguards against elder abuse?

#### ***Recommendation 15***

***National Seniors recommends that the Commonwealth investigate options for protecting older care recipients from abusive carers.***

Carers play a significant role in addressing the needs of older people. Their contribution is vital, without which there would be a significant burden on government and society. The vast majority of carers take their responsibility to care for older people seriously and provide high levels of care that would otherwise be impossible. Importantly, carers enable older people to stay at home and out of institutional care.

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<sup>13</sup> Australian Government 2016. *Op cit.*

Unfortunately, there are a small number of carers who do not live up to the high standards set by the majority of the caring community. As it has been suggested<sup>14</sup>:

*...there is strong empirical evidence to suggest that the abuse and neglect of older people may result from the fact that the caregiver is not economically, physically or psychologically prepared to take on the responsibilities that such a commitment implies.*

Caring is an emotionally, financially and physically demanding task that will not suit all people. While a lack of support for carers is a clear and present concern and should be addressed, older people should not be placed at risk from carers who do not hold an older person's best interests at heart.

**Question 8**    What role is there for income management in providing protections or safeguards against elder abuse?

**Recommendation 16**

***National Seniors recommends that the Commonwealth investigate the feasibility of a "money management" tool to enable older Australians to securely and safely pay for essential goods and services from their Centrelink payments.***

Income management, when undertaken voluntarily by a benefit recipient may provide a mechanism to protect a vulnerable older person from abuse by allowing a recipient to quarantine a portion of their income to essential goods and services. A benefit recipient who voluntarily chooses to be the subject of an income management regime could ensure their income is directed to meet priority needs, such as housing, food, utilities and health care. This could reduce the risk of elder abuse by taking away the inducement for a potential perpetrator.

There are a number of issues with income management that would need to be addressed in order for this to be effective.

Currently, under a voluntary income management regime, 50 per cent of a benefit recipient's payment must be income managed. This money can be spent through either direct payment to service providers or by using a Basics Card at an approved retailer. This does not provide enough flexibility to be tailored to the specific circumstances of someone who is choosing have their income voluntary managed. As it is noted in Australian Government's Guide to Social Security Law<sup>15</sup>:

*As income managed funds will amount to between 50 and 100% of the person's relevant income support and family assistance payments, the costs of meeting a person's priority needs may be more than the income managed amount. In these situations, the person*

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<sup>14</sup> James, M. undated *Op cit*.

<sup>15</sup> Australian Government 2016. '11.1.7.10 Guidance on the Allocation of Income Managed Funds' in *Guide to Social Security Law*. Version 1.224 - Released 15 August 2016 <http://guides.dss.gov.au/guide-social-security-law/11/1/7/10>

*would need to use their non-income managed funds (discretionary funds), and any unrestricted funds, to meet the difference.*

It may well be that the 50 per cent limit is too low to enable protection of a recipient's payment from potential abuse. Older people wishing to voluntarily protect their payments should be able to set higher or lower limits if they wish, provided there are adequate protections to stop a perpetrator from summarily changing these limits.

By far though the biggest hurdle to using income management as a tool to protect individuals from elder abuse is the stigma attached to income management as a concept. While income management offers a "voluntary" option, it implies a negative connotation of dependency and imprudence that would likely put off older people from using this as a tool to protect against elder abuse.

While there are clear benefits in being able to direct payments to service providers for specific goods and services, such as utilities, rent, rates etc., it is also unlikely that older people would voluntarily choose to use a Basics Card. The existing Basics Card is likely to publicly stigmatise older people as being unable to manage their own affairs.

It is unlikely that older people would be willing to adopt the existing income management system unless it was a separately branded program. A completely alternative "money management" tool for older people based on some of the architecture of the income management regime might be more readily adopted.

**Question 10** What other risks arise in social security laws and legal frameworks with regard to elder abuse? What other opportunities exist for providing protections and safeguards against abuse?

#### **Recommendation 17**

***National Seniors recommends that the Commonwealth investigate developing a seniors Centrepay facility to protect older Australians from elder abuse.***

Centrepay currently offers benefit recipients a way of paying bills and other outgoings directly from their Centrelink payment. In principle, this enables a benefit recipient to effectively quarantine a portion of their income to pay for essential goods and services. If properly adapted, Centrepay could offer older Australians a mechanism to protect them against fraud and abuse.

Unfortunately, Centrepay is not currently able to be used as an effective tool to assist vulnerable older people to manage their day-to-day living because of a number of deficiencies. Centrepay deductions are voluntary and can commence or be suspended, changed or cancelled by a payment recipient online or by completing a form without any

need to provide a reason for their decision<sup>16</sup>. As Centrepay can be changed at any time, older people would still be at risk of potential abuse from persons who might force, cajole or manipulate them to change these arrangements. Centrepay conditions would need to be changed to institute more stringent processes governing changes to payments in order to protect a payment recipient from abuse.

Other problems with the Centrepay system include<sup>17</sup>:

- A limited number of goods and services able to be paid. E.g. State Government transport bodies managing car registration and compulsory third party insurance.
- Centrepay is also open to misuse because a number of businesses listed with Centrepay sell over-priced or unsafe products and can exploit consumers.
- An individual can allocate up to 100 per cent of their Centrelink benefits to Centrepay, which makes it possible that a recipient can overspend and be left with no income to pay for goods and services not listed on Centrepay.

While wholesale reform of the Centrepay system is required to address systemic issues, it may be possible to develop a dedicated Centrepay option for seniors with specific guidelines and restrictions that gave greater protection against elder abuse. At a bare minimum this would require stricter controls to make it more difficult for payments to be summarily changed. There may be scope for combining Centrepay and income management to create a novel money management tool for seniors receiving a pension.

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<sup>16</sup> Financial Counselling Australia 2013. *Centrepay: A good idea that has lost its way*. February 2013  
<http://www.financialcounsellingaustralia.org.au/getattachment/Corporate/Publications/Reports/Centrepay-A-Good-Idea-that-Has-Lost-Its-Way-February-2013.pdf>

<sup>17</sup> Financial Counselling Australia 2013. *Ibid*.



## Aged care

### Question 11 What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

While National Seniors does receive calls, from time-to-time, from members and the general public with elder abuse concerns, we do not actively record case studies. In these situations, we pass on the details to callers of elder abuse hotlines as these organisations are best placed to deal with these enquiries.

### Question 12 What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?

The role of assessment programs in identifying and responding to elder abuse is complicated. Unlike in other parts of the aged care sector, Aged Care Assessment Team (ACAT or ACAS in Victoria) and Regional Assessment Service (RAS) assessors do not have compulsory reporting responsibilities, but instead are advised to follow relevant state and territory laws. According to the *Aged Care Assessment Programme Guidelines*<sup>18</sup>:

*ACATs must comply with relevant laws in their state or territory if neglect or abuse is suspected. ACATs should also be familiar with any protocols or procedures in their state or territory which address the neglect or abuse of older people.*

Notwithstanding the obvious issues relating to jurisdictional authority, it would be beneficial to have a more consistent and streamlined approach to assist assessors in their duties.

### **Recommendation 18**

***National Seniors recommends that training and skill development opportunities are made available for assessors to increase their capacity to identify and respond to suspected cases of elder abuse.***

A further complicating factor in this regard is the fact that it is often difficult for an assessor to identify the presence of elder abuse. This is because they generally only see people at the beginning of their journey through care and because they are not in continued or regular contact with the client. It is difficult to identify signs of abuse when someone has limited time to understand a person's life and when an assessor is not able to observe changes to a client's conditions or behaviour over time.

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<sup>18</sup> Australian Government Department of Social Services 2015. *Aged Care Assessment Programme Guidelines* May 2015 [https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/05\\_2015/acap\\_guidelines\\_-\\_accessible\\_version\\_-\\_may\\_2015\\_0.pdf](https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/05_2015/acap_guidelines_-_accessible_version_-_may_2015_0.pdf)



### **Recommendation 19**

***National Seniors recommends that the User Guide for the National Screening and Assessment Form strongly encourage assessors to ask abuse relevant questions in private and do so even in a situation where a carer has decision making power.***

Assessment guidelines attempt to overcome this deficiency by including a number of abuse related questions within the assessment process. The *User Guide for the National Screening and Assessment Form*, which guides the assessment process, prompts an assessor to ask a variety of questions about safety and abuse. For example, an assessor must ask “Are you afraid of someone who hurts, insults, controls or threatens you, or who prevents you”<sup>19</sup>.

While it is important for direct questions like this to be asked, it might be the case that a client consents to a carer or family member to be present in the assessment. If this person is the source of abuse it would be difficult for the client to raise their concerns and could make asking questions of this nature uncomfortable for the client. It is important to note that the *User Guide for the National Screening and Assessment Form* does not specify that an assessor ask such questions of the client alone.

### **Recommendation 20**

***National Seniors recommends that assessors be included as part of a consistent approach to reporting in the residential care setting.***

On occasion, assessors see clients in residential care settings. Under these circumstances there is a question as to whether the assessor should be required to report any alleged or suspected abuse directly to the approved provider. Doing so would be consistent with the existing requirements for approved providers, which specify that a provider has a mandatory responsibility to report abuse.

While this may provide a consistent approach within the residential care setting it complicates the process somewhat. Given that mandatory reporting places the obligation to report on the provider not on staff specifically, it may be problematic to expect that individual assessors who are not attached to a facility learn the reporting procedures in place in different residential care facilities. Regardless, there should be some mechanism to enable a provider to be better informed, given their duty of care to the resident.

**Question 13** What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?

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<sup>19</sup> Australian Government Department of Social Services 2015. *National Screening and Assessment Form User Guide* June 2015.  
[https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/06\\_2015/national\\_screening\\_and\\_assessment\\_form\\_user\\_guide\\_-\\_june\\_2015.pdf](https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/06_2015/national_screening_and_assessment_form_user_guide_-_june_2015.pdf)

**Recommendation 21**

***National Seniors recommends that an ongoing public campaign be developed to educate older Australians about the need to consider how they want their affairs to be handled if they lose their decision making capacity.***

While the *Aged Care Act 1997* enables another person representing the care recipient to enter into an agreement on behalf of the care recipient, how can we be certain that this person is representing a care recipient's wishes and that the care recipient is not the victim of abuse? National Seniors believes that elder abuse will likely occur when an older person's wishes are not being adequately communicated by those who assume some level of decision making power on their behalf.

Protection against abuse can only reasonably occur if an older person has actively put in place suitable arrangements with other people to help carry out their wishes faithfully if their capacity diminishes. For this to occur people will need to have robust conversations with family and friends long before the risk of needing care occurs. It is often too late to begin these discussions when the need for care becomes pertinent.

**Recommendation 22**

***National Seniors recommends that assisted decision making tools be promoted as part of a wider public information campaign.***

Unfortunately, older people are not always able to have robust conversations with family and friends to clearly articulate their wishes. Older Australians should instead consider putting in place formal mechanisms which clearly document their wishes. Instruments, such as power of attorney, guardianship or Advance Care Directives, can help an individual to communicate their wishes and avoid any confusion about their intentions. Doing so can overcome some of the limitations that exist in only making verbal arrangements with family and friends. It is critical that these are written before the person loses capacity and free of any interference or undue influence.

**Recommendation 23**

***National Seniors recommends that consistent national laws covering assisted decision making instruments be developed across the different states and territories.***

It is highly problematic that an older person must have separate legal instruments in place in each state and territory to be covered by these instruments. A power of attorney, guardianship or Advance Care Directive written in one jurisdiction should apply in all other jurisdictions. This is not currently the case.

**Recommendation 24**

***National Seniors recommends that a national registration system be developed for power of attorney, guardianship and Advance Care Directives, which enable relevant people, including health professionals, to have access to these documents.***

For such instruments to be useful they must also be easily accessible. The details set out in an Advance Care Directive should be known and respected by relevant family and friends

and by aged care and other health care staff. This may require a system to register such instruments so that it is available when required. It is pointless to have an advance care directive in place if no one knows where it is or what it says. Older people should not, for example, have to tattoo 'DO NOT RESUSCITATE' on their chests if they wish to die with dignity.

People need to know that their wishes will be respected if they become a care recipient. This can only occur if they can communicate these wishes free of interference. Instruments, such as power of attorney, guardianship or Advance Care Directives, can help to communicate an individual's wishes and avoid any confusion. This will require a national conversation about the importance of these instruments and consistent legislation with appropriate checks and balances. Provided that these instruments are entered into freely, this will provide older Australians with greater protection and reduce their risk of abuse while in care.

**Question 14** What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

While Consumer Directed Care (CDC) is an important step forward in empowering older people to take greater ownership over their care, the potential for increased risks for vulnerable older people does exist. It must be acknowledged, for example, that decision making occurs within existing power relationships. Because existing power relations are not always symmetrical, the overlaying of CDC can act to exacerbate abusive and neglectful relationships to the detriment of vulnerable older people.

A carer with decision making power may choose to withhold the provision of care against the interests of the older person. This can be especially problematic in situations where there are financial costs associated with the provision of care. A carer might withhold access to care in an attempt to protect their own economic interests. Price competition could lead some carers into making decisions which could be construed as abuse. A family member may choose to sign up an older person in their care to cheaper service of poor quality in an attempt to maximise their own economic interests.

National Seniors is concerned that some informal carers, family members, friends or neighbours may wish to provide an older person with contracted services and that this may result in suboptimal outcomes or abuse. In these situations there are important questions, which need to be asked, about how best to protect older people. Should, for example, an informal carer, family member, friend or neighbour providing contracted subsidised home care services be:

- registered
- insured
- subject to police checks
- compliant with workplace health and safety laws

- compliant with quality standards
- bound by duty of care obligations.

National Seniors believes older people will need increased information about their rights and responsibilities under CDC in both residential and community care. While Charters of Rights and Responsibilities exist for care recipients, it does not include choice and decision making and internal and external dispute and complaint processes nor is simple information accessible about rights and responsibilities in a variety of formats.

National Seniors argues that the CDC model is open to exploitation because it places an enormous responsibility on the consumer of aged care services. According to the logic of the CDC model, a consumer will choose a service provider that suits their needs and go elsewhere if their provider does not meet their expectations. This logic assumes that consumers are discerning and forthright in their dealings with providers and have full access to the information they need to make decisions in their best interests. This is unlikely to be the case in reality.

National Seniors is also concerned that a deregulated market system for aged care services creates risks for older people from abuse. As CDC frees up the market for care, this has the potential to result in the entry of new private providers. While private providers are not inherently bad, vulnerable older people could be open to exploitation from unscrupulous profit-driven providers if the services they offer are suboptimal and there is no realistic means to assess quality or compare between offerings. As is often the case, consumers make choices about goods and services based on price, which may have no relationship with the quality of the service provided.

Consumers are open to exploitation as a result of the increased competition in an open market. Competition between consumers could drive some service providers to reduce price to secure customers such that it severely undermines the quality of services provided. This might place a client at risk of achieving poor outcomes because the level of care is inadequate.

Under a CDC model there are also fundamental questions about responsibility and duty of care. If a consumer chooses a particular type and level of care and something goes wrong because the type or level of care was inadequate, this raises questions about who is responsible in these situations. Unless these fundamental questions about fault are answered, an approved provider may fear litigation or formal complaint if injury or death ensues. This may impact on a provider's decision making or actions.

**Question 15** What changes to the requirements concerning quality of care in aged care should be made to improve safeguards against elder abuse?

Both mandatory and voluntary monitoring and compliance systems exist to ensure quality of care within the Australian aged care system.

All aged care homes and community care providers have a mandatory requirement to meet basic quality standards in order to operate. The accreditation quality assurance programme is administered and managed by the Australian Aged Care Quality Agency (AACQA). All services will receive a quality review at least once every three years.

More recently, a voluntary quality system has been added to this as part of the implementation of reforms to the aged care sector. The National Aged Care Quality Indicator Programme (QI Programme) is designed to deliver more “patient centric” measures of quality in residential care<sup>20</sup>. Implementation of quality indicators for home care is also underway<sup>21</sup>. The QI programme is intended to give consumers comparable information to assist their decision making and to give providers data to measure and monitor their performance for quality improvement<sup>22</sup>.

National Seniors is sceptical about the capability of quality indicators to address elder abuse in the aged care sector. Unless specific quality indicators have the capacity to shape the service environment in ways that reduce the risk of abuse, there is a real threat that these may in fact heighten rather than lessen risk. There have already been concerns expressed, for example, that specific quality indicators create perverse incentives which divert resources at the expense of other areas<sup>23</sup>. This is particularly troubling in an environment where there are already limited resources and concerns that these limitations are compromising quality of care.

### **Recommendation 25**

***National Seniors recommends that AACQA investigate the use of qualitative indicators that seek to demonstrate if a resident (or representative) feels safe and supported when in care.***

For this to be effective there must be ongoing conversations about what feeling safe and supported means to residents and their representatives. In this regard, we would argue that indicators should reflect the practical and common sense things that make them feel safe and supported. This might include practical, understandable and measurable indicators, such as:

- Staff to resident ratios
- Mix of qualifications held by staff
- Quality and quantity of interactions between staff and residents

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<sup>20</sup> Australian Government Department of Health 2016a. ‘About the National Aged Care Quality Indicator Program’ in *Ageing and Aged Care*. Accessed 21 July 2016. <https://agedcare.health.gov.au/ensuring-quality/quality-indicators/about-the-national-aged-care-quality-indicator-programme>

<sup>21</sup> Australian Government Department of Health 2016b. ‘Home care quality indicators’ in *Ageing and Aged Care*. Accessed 21 July 2016. <https://agedcare.health.gov.au/ensuring-quality/quality-indicators/home-care-quality-indicators>

<sup>22</sup> Australian Government Department of Health 2016a *Ibid.* <https://agedcare.health.gov.au/ensuring-quality/quality-indicators/about-the-national-aged-care-quality-indicator-programme>

<sup>23</sup> O’Keeffe, D. and Belardi, L. 2016. Special report: Quality indicators program rolls out, but debate continues in *Australian Ageing Agenda*. 20 January 2016. <http://www.australianageingagenda.com.au/2016/01/20/37547/>

- Presence or absence of staff monitoring practises e.g. staff supervision, video monitoring

As a labour intensive practice, it is clear that staffing has a clear impact on resident's feelings of safety and support. National Seniors members indicate a strong view that both staff quality and quantity is important to them. Unless quality indicators are able to focus resources towards the things that residents and their representatives themselves believe make them safe and supported, quality monitoring systems such as the QI Programme will not actively reduce the risks of abuse in residential care. The same will be true in the home care setting.

**Question 16** In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

**Recommendation 26**

***National Seniors believes that more education and training is required to assist staff to manage challenging behaviours in residential aged care in the least restrictive manner to minimise the risk of elder abuse.***

The use of restricted practices is a controversial topic. Restrictive practices should be a method of last resort. Restrictive practices should only be used following assessment by a qualified medical practitioner, preferably a psychogeriatrician, geriatrician or geropsychologist or after advice from a Dementia Behavioural Management Advisory Service or Older Persons Mental Health Service. Restrictive practices should also only be used after the consent of a guardian or representative has been obtained.

Restrictive practices should only be used when all behavioural prevention strategies have been systematically attempted or considered. While it would be preferable to not have to employ environmental, physical, mechanical or chemical restraints, there may be times when it is necessary to use these methods to protect other care recipients and staff.

**Question 17** What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?

The *Report on the Operation of the Aged Care Act 1997* publishes the number of reports made to it of alleged or suspected assault (unreasonable use of force and unlawful sexual conduct) occurring within residential aged care facilities. Under the *Aged Care Act 1997*, 'services must make a report if someone suspects that an assault may have occurred or if someone has witnessed or been informed of a reportable assault'<sup>24</sup>. There is also a

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<sup>24</sup> Australian Government Department of Health 2015. *2014–15 Report on the Operation of the Aged Care Act 1997*. [http://apo.org.au/files/Resource/final\\_final\\_typeset\\_version\\_-\\_sent\\_to\\_printer\\_20\\_nov\\_2015.pdf](http://apo.org.au/files/Resource/final_final_typeset_version_-_sent_to_printer_20_nov_2015.pdf)

requirement that the alleged or suspected assault be reported to police who are responsible for substantiating the allegation. The obligation to report is on the provider not the staff and as such the provider must put in place appropriate policies, protocols and procedures to manage mandatory reporting obligations.

In 2014-15, it was reported that there were 2,625 notifications of reportable assault made to the department. This was made up of 2,199 reports of alleged or suspected unreasonable use of force, 379 reports of alleged or suspected unlawful sexual conduct and 47 reports involving both unreasonable force and unlawful sexual conduct. This represented 1.1 per cent of the 231,555 resident population in 2014-15. Beyond this, there is little more that is reported in the *Report on the Operation of the Aged Care Act 1997*. This is because the department does not investigate the alleged criminal activity but only assesses that an approved provider has met its reporting responsibilities under the Act<sup>25</sup>.

**Recommendation 27**

***National Seniors recommends that the Report on the Operation of the Aged Care Act 1997 publish a wider variety of information about alleged or suspected incidents of abuse.***

Information should be published showing if the alleged or suspected assaults were perpetrated by care staff, resident representative, resident or otherwise. Information should also be published as to whether the alleged or suspected assault is being reported by the provider or by a staff member directly or if it is the result of a resident representative, resident or other person informing a staff member or provider who then makes the report. Publishing this information will provide a clearer understanding of the nature of abuse in aged care facilities.

**Recommendation 28**

***National Seniors recommends that police be required to collect and report data on assaults in residential care to the Department of Health for inclusion in the Report on the Operation of the Aged Care Act 1997.***

While providers are required to report assaults to the police for investigation, there is currently no information provided in the *Report on the Operation of the Aged Care Act 1997* to show many of these cases were substantiated by police. There is no obligation on police to provide the Department of Health with data showing the number of reports, substantiations or any other information. In contrast, state and territory departments responsible for child protection have obligations to publish a range of data relating to child protection.

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<sup>25</sup> Australian Government Department of Health 2016c. 'Guide for reporting reportable assaults' in *Ageing and Aged Care*. Accessed 21 July 2016. <https://agedcare.health.gov.au/ensuring-quality/aged-care-quality-and-compliance/guide-for-reporting-reportable-assaults>



Publishing data on substantiations would show how many of these instances involved verifiable cases of assault and would give a more accurate picture of the extent of abuse in aged care facilities. This should also include relevant information about the abuse incident, such as the relationship between the victim and the perpetrator.

**Recommendation 29**

***National Seniors recommends that ongoing education, training and support be provided to police officers to ensure that they are better equipped to respond to cases of abuse.***

Information provided to National Seniors suggests that police are not adequately prepared to deal with allegations of assault occurring within aged care facilities. National Seniors has been advised that police officers are not always equipped with the skills and knowledge to deal with allegations of assault and in some instances do not take the allegations as seriously as they should.

**Recommendation 30**

***National Seniors recommends that mandatory reporting be extended to alleged or suspected cases of financial elder abuse.***

Providers of commonwealth funded aged care services should be required to report alleged or suspected cases of financial abuse where these allegations or suspicions exist. While it can be difficult for a provider to recognise if financial abuse is occurring, especially where there are assisted decision making provisions in place, aged care providers and staff should be cognisant of this issue and be prepared to report abuse if there are reasonable grounds for the allegation or suspicion.

**Recommendation 31**

***National Seniors believes that staff need to be adequately trained to be able to identify abuse and fulfil mandatory reporting requirements.***

Staff need to be highly skilled to ensure that the necessary information and evidence is available to assist any investigation by police. Non-compliance with mandatory reporting requirements can occur when staff do not receive adequate or regular education and training. Non-compliance also occurs when the aged care service guidelines are not easily accessible, simple and clear. The education levels and cultural backgrounds of direct care workers must be kept in mind in this regard.

**Recommendation 32**

***National Seniors recommends that dedicated elder abuse units be established within state and territory police and justice services to help investigate and prosecute elder abuse cases.***

The aged care context presents unique challenges for police and prosecutors, which cannot be addressed without dedicated staff. The high proportion of cases involving care recipients with limited capacity makes this type of investigation challenging. The high proportion of staff



from Culturally and Linguistically Diverse (CALD) backgrounds can exacerbate this situation and may require competency in dealing with people from a CALD background.

**Recommendation 33**

***National Seniors recommends that an independent body be established to support staff participating in court proceedings as a result of witnessing or reporting a suspected or alleged case of abuse.***

Staff involved with the legal proceedings that can follow a reportable assault require expert assistance when participating in these proceedings. National Seniors has received feedback from members with direct experience of such proceedings who claim that they were not adequately supported by their employers or by the public prosecution. Participation in court proceedings is a stressful process. Individuals should be offered professional support including counselling if this is required.

**Recommendation 34**

***National Seniors recommends that all unregistered direct care staff become registered practitioners governed by a relevant national board in order to work in approved aged care facilities in Australia.***

The difficulty in gaining prosecutions poses further challenges for the aged care sector. Given that personal care workers do not have to be registered with a professional body, there exists no mechanism to record instances of suspected or alleged abuse among this group, which could act as a deterrent to future behaviour. Unregistered personal care workers accused of assault, but not convicted, continue to be employed in the sector. There are no remedial activities available to rehabilitate an unregistered worker who has been suspected of assault. Registration with a relevant professional body would ensure that this disciplinary and remedial action could occur.

**Question 18** What changes to aged care complaints mechanisms should be made to improve responses to elder abuse?

National Seniors believes that the problems with aged care complaints mechanisms revolve primarily around the issues of confidentiality and fear of retribution. Individuals may be discouraged from or refuse to make complaints for fear that doing so will lead to reprisals. This fear is likely to be heightened in situations involving abuse.

While the My Aged Care website encourages people to first discuss a complaint with a service provider, this can be an awkward and intimidating way to resolve a complaint, especially if a complaint is directed at a staff member. The cultural background of a complainant may also discourage people from approaching someone in authority.

**Recommendation 35**

***National Seniors recommends that a framework be developed with target timeframes for responding to complaints, completing investigations and initiating necessary actions.***

While information and locked boxes are generally made available within residential homes for anonymous complaints there is likely to be reticence on the part of an individual to submit an anonymous complaint for fear that they will inevitably be identified. Delays in the processing of complaints could result in delays in resolution. It is likely that a complainant may have to continue interacting with a person who is the subject of a complaint without knowing if the complaint has been acted upon.

***Recommendation 36***

***National Senior believes that residents and their representatives should be provided with information about the complaints process directly by an independent body.***

Often people are too overwhelmed by their own personal situation to take in any information provided to them about the complaints process when they or their relative enter the care system. This will mean that individuals will often have to seek out information about the complaints process. Given that there may be concerns about confidentiality and retribution, residents and their representatives are right to be wary about approaching facility staff to ask about the complaints process.

***Recommendation 37***

***National Seniors believes that the Aged Care Complaints Commissioner should act as the clearing house for complaints and be responsible for assessing the merit of each complaint in the first instance.***

Major matters should be dealt with by the Commissioner directly. Minor matters should be referred to a provider for action. The Commissioner would have responsibility for referring complainants to organisations providing advocacy or support services. These organisations could then assist a complainant to negotiate satisfactory outcomes with providers. This will have a threefold effect. It will give confidence to the residents and their representatives, enable the Commissioner to keep records of complaints and will place pressure on providers to improve their practices to avoid complaints.

***Recommendation 38***

***National Seniors recommends that complaints about overcharging be included in the remit of the Aged Care Complaints Commissioner.***

***National Seniors recommends that the Aged Care Act 1997 include penalties for providers who overcharge care recipients.***

While the *Aged Care Act 1997* sets out rules for the payment of fees and charges, there is little support offered to care recipients who are concerned about overpayment. National Seniors has received a number of complaints concerning overpayment. It has been reported that when a provider is notified that an overpayment is occurring, it often takes a long time to get the provider to repay the monies. When money is repaid, there is no compensation for any loss as a result of the overpayment. Furthermore, there appears to be no penalty for providers who overcharge in the legislation.

***Recommendation 39***

***National Seniors recommends that care recipients and their representatives have access to advocates who can help to challenge instances over overcharging by providers.***

What is a glaring omission is the fact that no mechanism exists to assist care recipients when they have concerns about being overcharged by provider. None of the existing complaints services offered, such as the free aged care advocate services, state-based Health Care Complaints Commissions, Australian Health Practitioner Regulation Agency or the Aged Care Complaints Commissioner, have a mandate to support a care recipient in such disputes. The overcharging of vulnerable residents constitutes an act of financial abuse. It is not acceptable that care recipients or their representatives have to deal with such issues.

**Question 19** What changes to the aged care sanctions regime should be made to improve responses to elder abuse?

National Seniors supports the ongoing need for a comprehensive sanctions regime to ensure that approved providers meet their responsibilities to care recipients. While sanctions are serious and impose financial costs on a provider they are not applied without evidence and due consideration as their imposition can have deleterious impacts on staff, care recipients and representatives of care recipients. Sanctions are required where care recipients are at immediate risk without remedy.

***Recommendation 40***

***National Seniors recommends that all direct care staff be registered practitioners governed by a relevant national board in order to work in approved aged care facilities in Australia.***

Personal care workers should be required to meet basic registration requirements, participate in ongoing professional development and be subject to review and sanctions if their actions are called into dispute. This is particularly important where there is an increasing proportion of higher care residents and a decreasing proportion of registered nursing staff in aged care facilities. Registration of personal care workers will ensure that workers meet adequate qualifications and have ongoing oversight and sanctions which can protect care recipients from abuse.

**Question 20** What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?

The National Aged Care Advocacy Programme (NACAP) and the Community Visitors Scheme (CVS) play an important role in independently supporting residents and in home care recipients. While this role is vital, it is important to recognise that there are limitations to

what advocates and community visitors can do. Advocates and community visitors are not necessarily equipped to deal with complex and sensitive issues such as elder abuse.

While a recent review of NACAP has highlighted concerns among advocates about the growing incidence of elder abuse it is important to acknowledge that responding to elder abuse is outside the scope of the NACAP and the CVS. Elder abuse creates difficulties for advocates who have limited resources to deal with such complex and time-intensive issues<sup>26</sup>.

**Recommendation 41**

***National Seniors believes that there is a need to develop specific guidelines to assist both advocates and community visitors to respond appropriately to instances of suspected or alleged elder abuse.***

**Recommendation 42**

**National Seniors recommends that advocates and visitors receive education and training to help them identify verbal, physical and emotional ‘triggers’ which could suggest abuse and assist them in determining if they should report an allegation.**

This might entail developing national guidelines which require advocates or visitors to report suspected abuse to residential aged care providers so that they can act on these suspicions accordingly or to the Aged Care Complaints Commissioner in situations involving home care clients. Advocates and visitors should have access to education and training to help them to identify elder abuse and to know how best to respond.

**Question 21** What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

**Recommendation 43**

***National Seniors recommend that aged care workers are adequately supported when allegations are made.***

It is important to acknowledge that aged care workers are at times subject to vexatious claims of abuse from care recipients and their representatives. Care recipients and their representatives can be capable of overreacting in emotionally stressful or unforeseen situations. Aged care staff often work under demanding and distressing situations and can often be blamed for failings beyond their control.

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<sup>26</sup> Australian Government Department of Social Services 2015. *Review of Commonwealth Aged Care Advocacy Services* Final Report December 2015.  
[https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/03\\_2016/advocacy\\_review\\_final\\_report\\_accessible\\_published\\_version\\_changed\\_0.pdf](https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/03_2016/advocacy_review_final_report_accessible_published_version_changed_0.pdf)

It is often difficult to substantiate an allegation as it can be one person's word against another. As such, it would not be surprising if staff were the first to acknowledge the benefits of technological solutions, such as surveillance cameras, in helping to resolve abuse allegations.

## Financial institutions

**Question 26** What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

### **Recommendation 44**

**National Seniors recommends that financial service providers be supported to deliver information to clients about the potential risks of elder abuse and the mechanisms that can be put in place to protect against future abuse.**

Financial service providers are in a unique position to educate older Australians about the risks of financial elder abuse. Financial service providers are also in a unique position to detect instances of financial elder abuse. Case studies consistently show that there is a key role for financial institutions in identifying financial elder abuse.

*Given that financial abuse often takes the form of misuse of or theft from a bank account or other facility or financial services product; employees of financial institutions may be in the best, and sometimes the only, position to recognise financial exploitation as it occurs.<sup>27</sup>*

The financial services sector must take a lead role in addressing the issue of elder abuse. Financial service providers need to be supported to be able to educate clients and to be able to identify and report abuse to clients.

### **Recommendation 45**

**National Seniors recommends that the financial services sector use codes of practice to better address the risk of financial elder abuse among older clients.**

The financial services sector could use codes of practice to assist financial service providers to deal with the issue of financial elder abuse. A number of codes of practice have been developed in the financial services sector. Codes of practice are intended to raise industry standards and complement legislative requirements, and aim to encourage consumer confidence in a particular industry<sup>28</sup>.

While ASIC has the power to approve codes in the financial services sector, no financial services sector codes of practice have been submitted to ASIC for approval. However, formal codes have been developed by the financial services industry<sup>29</sup>. While some of the codes may include provisions to safeguard the rights of consumers, none of the Codes contain provisions that specifically outline how to identify and deal with elder financial abuse.

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<sup>27</sup> Financial Ombudsman Service 2007. *Banking and Finance – Bulletin 56*.  
[https://www.fos.org.au/custom/files/docs/fos\\_banking\\_finance\\_bulletin\\_56.pdf](https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf)

<sup>28</sup> Australian Securities and Investment Commission 2015. 'Codes of Practice'. <http://asic.gov.au/for-consumers/codes-of-practice/>

<sup>29</sup> Australian Securities and Investment Commission 2015. *Ibid*.

Codes of Practice relevant to the financial services sector could be amended to require appropriate training for all staff to<sup>30</sup>:

- *recognise signs of abuse, recognise the common profile of a vulnerable customer and/or potential abusers;*
- *understand protocols to deal with suspected abuse; and*
- *understand enduring powers of attorney and administration orders made by tribunals;*

To not deal proactively with the threat of elder abuse to clients would bring significant reputational risk to financial service providers and the sector more generally and raise public expectations for mandatory reporting.

**Question 28** What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

Family agreements involve a situation in which an older person enters into an agreement with another party to exchange benefit for continuing care. This often involves an older person living with and receiving care from their adult children in exchange for money or assets<sup>31</sup>.

**Recommendation 46**

***National Seniors recommends that a research project be undertaken to better gauge the extent of family agreements and the ways that these are used in Australia.***

While some 8.2 per cent of people aged 65 years and older and 12.2 per cent of people aged 85 and older live with children or other relatives<sup>32</sup> there is a clear lack of understanding about the extent to which family agreements are being used in Australia. There is also a lack of understanding about the outcomes for older people from the use of family agreements. While this is largely due to the informal nature of such arrangements it is vital that a better understanding of family agreements is sought.

Research should be undertaken to identify the ways that family agreements are used and to consider the common problems arising from such agreements. This will provide greater certainty in amending laws and legal frameworks to protect the interests of older people.

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<sup>30</sup> Edmonds, J and Noble, P. (eds). 2008. *Responding to the financial abuse of older people*. <http://seniorsrights.org.au/wp-content/uploads/2014/03/A4-financial-abuse-of-older-persons-small-for-websites.pdf>

<sup>31</sup> Commonwealth of Australia 2007b *Op cit*.

<sup>32</sup> Australian Bureau of Statistics 2013. 'Where and how do Australia's Older People live?' in *Reflecting a Nation: Stories from the 2011 Census, 2012–2013*. Cat. no. 2071.0 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features602012-2013>

**Recommendation 47**

***National Seniors recommends that the Commonwealth initiate a public education campaign to educate older Australians about family agreements and how they can mitigate their risks.***

Ideally, it would be beneficial if older people were better informed about the problems inherent in the use of a family agreement. Older people should go into such arrangements with their eyes wide open, but this is not usually the case. Older people need to know that family agreements can sometimes turn sour and that there are ways to better protect themselves should this occur.

**Recommendation 48**

***National Seniors recommends that the Commonwealth, state and territory governments legislate to regulate family agreements.***

It has been noted that the most commonly-cited disadvantage of family agreements is the potential for disputes to arise when agreements are informal or vague<sup>33</sup>. While the risks of abuse can be reduced through greater education, there is an obvious need for more formal family agreements that clearly outline the interests of all parties and include safeguards to protect these interests. Formal family agreements will only work if they are cost-effective and relatively simple to put in place.

**Recommendation 49**

***National Seniors supports moves to introduce legislation which enable courts to dissolve family agreements and restore property in the event that a family agreement has broken down.***

In situations where informal agreements have broken down, there must be some form of recourse for an older person to recover lost money or assets. This is important in instances where one party has withdrawn from providing care but continues to hold onto the money or asset that was provided in lieu of this care being provided. It has been suggested that legislation be introduced that enable courts to dissolve family agreements and restore property<sup>34</sup>.

**Question 29** What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?

One of the primary means of protecting older people is through the use of a power of attorney arrangement. Many older people have a substantial asset base and need to give careful consideration to how these assets are managed in the event of lost capacity. An

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<sup>33</sup> Commonwealth of Australia 2007b *Op cit.*

<sup>34</sup> Commonwealth of Australia 2007b *Op cit.*



Enduring Power of Attorney (EPoA) provides a relatively cost-effective and simple way of enabling another person to manage and coordinate the day-to-day financial affairs of an older person who may have experienced physical or cognitive decline.

Unfortunately an EPoA is also a primary means used to cheat older people of their income and assets<sup>35</sup>. Research indicates that elderly people with an EPoA are no more protected from financial abuse than elderly people without an EPoA<sup>36</sup>. If EPoA are to be used to protect the financial interests of older people, greater protections are required to ensure that vulnerable older people are not financially abused.

#### Case Study Example: National Seniors member's experience of financial elder abuse

I am the eldest of five children. My mother gave me Enduring Power of Attorney (EPoA) in 2009, she was then of sound mind and I explained why we should put this in place, it was signed by members of the bank and a copy was kept.

In 2013, her memory of affairs and family was becoming blank and she was diagnosed with cognitive impairment. In 2014, she was still living at home by herself and it was suggested to us that she needed to go into care. My mother turned on myself and my younger sister who were caring for her. Enter a third daughter who had been estranged from family for most of her adult life. She claimed there was nothing wrong with our mother. My mother went to live with this daughter and we were unable to see her for the next nine months.

In 2015, the five siblings were called to the State Administrative Tribunal. Three of us left this meeting still not aware of why we had been summoned to it. The outcome from the next meeting with the State Administrative Tribunal was that we needed to finalise my mother's financial affairs.

As the attorney, I sold the family home and put the money into my mother's bank account. As soon as the money from the sale of the house was deposited in my mother's account, the daughter and a younger brother removed \$200,000. Previous to this, our sister had taken mum around to the banks, removed all her money and put this into one account (she had no authority to do any of this and did not even know what an EPoA was). Her own children were financially abusing their elderly mother with dementia but the banks are as much to blame. Staff should be made aware of dementia and have to ask questions of the account holder by themselves and not have these relatives do the talking.

Fortunately, my sister and brother made the mistake of taking my mother to a lawyer to get her Will changed and a new EPoA written up. We are very grateful that the honest lawyer

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<sup>35</sup> Wuth, N. 2013. 'Enduring Powers of Attorney: With limited remedies – it's time to face the facts!' in *Elder Law Review*. 7, 1.

<sup>36</sup> Commonwealth of Australia 2007. *Older people and the law*. House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, September 2007.

smelt a rat immediately (as my mother was interviewed by herself). The Public Trustees were notified immediately and so was the State Administrative Tribunal. As you will be aware, we are now a very divided family.

We have heard this story and similar stories very regularly since this happened. It is sheer greed that drives these people, and most of them are not in need of money. The banks should be made to account for these transactions and staff trained in the handling of the elderly and families.

National Seniors believes that individuals who rely on an EPoA to manage their day-to-day affairs should have better protections against their misuse. Legislation must be strengthened to protect the rights of older people while ensuring that an EPoA remains a cost-effective and practical option for the people who use them.

There are a number of opportunities for reform.

#### *National Legislation*

#### **Recommendation 50**

***National Seniors supports calls to develop national powers of attorney legislation<sup>37</sup>.***

Powers of attorney should be fully executable throughout Australia, but are currently not<sup>38</sup>. National legislation to regulate the use of an EPoA would ensure consistency across jurisdictions making an EPoA more cost-effective<sup>39</sup>.

National powers of attorney legislation could be made through the powers available to the Commonwealth Government through the constitution<sup>40</sup>, but could also be facilitated by each state and territory government cooperating to refer responsibility for powers of attorney to the Commonwealth.

In the absence of national legislation, National Seniors urges the state and territory governments to strengthen and harmonise their own legislation to improve protections for older people.

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<sup>37</sup> Queensland Law Society 2011. *Joint issues paper: elder abuse* June 2011 Accessed 12 July 2016  
[http://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse\\_issues-paper\\_v6.pdf](http://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse_issues-paper_v6.pdf)

<sup>38</sup> Commonwealth of Australia 2007. *Op cit.*

<sup>39</sup> Wuth 2013. *Op cit.*

<sup>40</sup> Wuth 2013. *Op cit.*

## *Public Education*

### **Recommendation 51**

***National Seniors recommends that the Commonwealth consider putting in place mechanisms to prompt people to consider making an EPoA as part of an ongoing campaign to promote the use of powers of attorney.***

In order for an EPoA to be legally valid the principal must have the mental capacity to understand the nature and effect of the power given. This includes the ability to make the EPoA freely and voluntarily, which points to the need to be proactive about putting in place an EPoA long before the risk of losing one's capacity exists. Unfortunately, some people do not attempt to put in place such arrangements until it is too late. This could be done in the same way that programs, such as the National Bowel Cancer Screening Program, provide information to people at a particular age related milestone.

## *Risk Assessment Tool*

### **Recommendation 52**

***National Seniors recommends that the Commonwealth, state and territory governments collaborate to develop a mandatory risk assessment tool to minimise the risk of abuse from inappropriate attorneys.***

Appointing an attorney is not a decision that should be taken lightly. Not everyone is suitable to be an attorney. Individual's considering an EPoA should be required to complete a risk assessment process capable of categorising if they are at high or low risk of abuse.

A risk management tool could take the form of a compulsory questionnaire that is completed by someone considering enacting an EPoA. Completing the questionnaire would prompt an individual to consider the risks of enacting an EPoA because it would ask questions about their personal circumstances and those of their potential attorney, as well as questions about the relationship with the potential attorney. The tool could suggest further actions that the individual could take to protect them against financial abuse from the misuse of an EPoA.

The tool could also be used as a basis for developing finely tuned monitoring systems to provide oversight of the ongoing operation of an EPoA. Under such a system, the affairs of a principal identified as being at higher risk of abuse could have their financial affairs audited on a more frequent basis.

## *Multiple Attorneys*

### **Recommendation 53**

***National Seniors recommends that a principal be encouraged to appoint multiple attorneys to ensure greater scrutiny over the financial transactions made by an attorney.***

One mechanism for reducing the risk of abuse is the appointment of multiple attorneys. Most jurisdictions allow multiple attorney's within their relevant legislation. A review of power of

attorney legislation in Victoria has recommended that the power of attorney documentation encourage the use of multiple attorneys<sup>41</sup>.

### *Monitoring*

#### **Recommendation 54**

***National Seniors believes that cost-effective monitoring and reporting mechanisms must be included in powers of attorney legislation as a means of deterring abuse.***

In general, state and territory powers of attorney legislation places no legal obligation on an attorney to regularly provide reports detailing the management of a principal's affairs. While most attorneys do the right thing, the failure of legislation to enforce even a basic level of scrutiny over the actions of an attorney increases the risk that such arrangements will be open to exploitation.

While a principal has the right to nominate a relevant private sector (e.g. accountant) or government organisation (e.g. state trustee) to review financial records at regular intervals<sup>42</sup> this places the onus of the cost squarely on individuals. This option would only likely be available for those who could afford to do so, leaving many of those with limited means with little oversight over their affairs.

An effective monitoring and reporting regime could require an attorney to provide requisite documents for review periodically by a competent and independent authority. To reduce costs, mandatory reporting could involve the use of purposeful or random sampling. This could involve, for example, the use of sampling techniques that prioritise those at highest risk of misappropriation. Risk levels could be determined through the completion of a compulsory risk management tool (as proposed above). The existence of mandatory reporting and auditing procedures could act to deter attorneys from abusing their position.

#### **Recommendation 55**

***National Seniors recommends that rigorous analysis of the costs and benefits of monitoring and reporting regimes is required to determine the most appropriate method.***

In legislating a monitoring and reporting regime, consideration must be given to the costs and benefits of mandatory options. An EPoA is clearly a low-cost option that enables older people to appoint representatives to help manage their affairs. Significant increases in the cost of nominating a decision maker could have negative implications for the uptake of such instruments.

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<sup>41</sup> Victorian Government Law Reform Committee 2010. *Inquiry into powers of attorney*. Final report of the Victorian Parliament Law Reform Committee. August 2010  
[http://www.parliament.vic.gov.au/images/stories/committees/lawreform/powers\\_of\\_attorney/Report\\_24-08-2010.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawreform/powers_of_attorney/Report_24-08-2010.pdf)

<sup>42</sup> Department of Lands 2009. *Review of the Powers of Attorney Act 2003: Issue paper*. Department of Lands: Sydney.

*Specific offences for misappropriation by an attorney*

**Recommendation 56**

***National Seniors recommends that a specific offence be included within existing criminal codes for the misappropriation of assets by an attorney.***

While legal action can be taken if an attorney exceeds their authority, it is more likely that this will not occur for a variety of reasons. Including a specific offence within existing criminal codes for the misappropriation of assets by an attorney could provide greater protections for principals or donors. This may act as an effective deterrent provided the legal implications of misappropriation are adequately communicated to an attorney<sup>43</sup>.

*Right to compensation*

**Recommendation 57**

***National Seniors recommends that a right to compensation or damages arising from the misappropriation of funds by an attorney be included in powers of attorney legislation.***

The existence of a right to compensation or damages has the potential to act as a deterrent to future abuse. Unfortunately, most jurisdictions do not provide the right to claim compensation or damages under the existing power of attorney legislation, only the power to revoke an EPoA. It is highly unlikely that private litigation would be used to recover lost funds as the costs and difficulties with such actions would be prohibitive and the outcome of litigation highly uncertain. This course of action is particularly problematic in cases where the principal has diminished capacity<sup>44</sup>.

*Instructions*

**Recommendation 58**

***National Seniors recommends that a principal be encouraged to consider placing specific instructions and conditions within the EPoA document.***

Currently, very few enduring power instruments set out detailed instructions or restrictions on a representative's power. Principals should be made aware that failure to set out clear instructions within the instrument makes it less likely that their wishes will be followed accordingly should they lose capacity. The Law Reform Committee in its final report examining power of attorney laws in Victoria strongly supported the view that placing restrictions on a representative's power is an important protection against abuse<sup>45</sup>.

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<sup>43</sup> Wuth 2013. *Op cit.*

<sup>44</sup> Wuth 2013. *Op cit.*

<sup>45</sup> Victorian Government Law Reform Committee 2010. *Op cit.*

**Question 30** Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?

**Recommendation 59**

**National Seniors recommends that the Commonwealth develop a national registration system for decision-making instruments, that balances functionality with protection.**

Registration of a power of attorney is not currently a feature of state and territory legislation, except if an attorney intends to sell, mortgage, lease or otherwise deal with the principal's real estate<sup>46,47</sup>. As a private document a powers of attorney instrument is generally held by individual making the document with copies shared with the attorney and other relevant parties. An attorney will be required to be presented the document when proof of attorney is required.

Mandatory registration would create a centralised place to hold powers of attorney documents to enable scrutiny by relevant parties. Ryan *et al* (2015) have summarised a number of the benefits and costs of imposing a registration regime<sup>48</sup>:

**Benefits**

- Registration notifies relevant parties of a decision-making instruments existence, scope and currency.
- Registration ensures that the enabling document is readily accessible and secure.
- Registration promotes acceptance of enduring powers by allowing verification from an authoritative source.
- Registration may assist in cross jurisdictional recognition
- Registration creates valuable data about the extent to which such instruments are being used
- Registration can play a monitoring and educational role with regard to representatives

**Costs**

- Registration would represent an additional cost burden to governments
- Registration may have a negative impact on the uptake of enduring powers due to fees, procedural burden and aversion of the public
- Registration raises privacy concerns.

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<sup>46</sup> Department of Lands 2009. *Op cit*.

<sup>47</sup> Queensland Government 2016. 'Power of Attorney' Accessed 12 July 2016.

<https://www.adelaide.edu.au/press/journals/law-review/issues/36-2/alr-36-2-ch03-ryan-baerarnold-bonython.pdf>

<sup>48</sup> Ryan, T., Arnold, B. and Bonython, W. 2015. 'Protecting the rights of those with dementia through mandatory registration of enduring powers? A comparative analysis' in *Adelaide Law Review*. 36.

<https://www.adelaide.edu.au/press/journals/law-review/issues/36-2/alr-36-2-ch03-ryan-baerarnold-bonython.pdf>

A mandatory registration system will be only be an effective tool for giving individuals control over the affairs in the future if the benefits and costs of implementation are adequately balanced. Certainty of transaction, functionality and efficiency needs to be balanced against concerns about privacy and cost<sup>49,50</sup>. It has been suggested that this balance between functionality with protection could be achieved by allowing users to customise the degree of regulation they prefer to ensure adequate privacy protections<sup>51</sup>.

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<sup>49</sup> Wuth 2013. *Op cit.*

<sup>50</sup> Ryan *et al* 2015. *Ibid.*

<sup>51</sup> Ryan *et al* 2015. *Ibid.*

## Health services

**Question 35** How can the role that health professionals play in identifying and responding to elder abuse be improved?

### **Recommendation 60**

***National Seniors recommend that clear and consistent elder abuse guidelines for GP's, nurses and other health professionals be developed, along with targeted education and training programs.***

Health care professionals, such as General Practitioners, can play a pivotal role in detecting and reporting incidents of suspected abuse. National Seniors is supportive of any moves to improve the capacity of frontline health care professionals to better detect and report elder abuse.

**Question 36** How should professional codes be improved to clarify the role of health professionals in identifying and responding to elder abuse?

### **Recommendation 61**

***National Seniors recommends that the Code of Conduct for Doctors in Australia state that "good medical practice" involves being "proactive" when dealing with older people who may be subject to abuse.***

The Medical Board of Australia's *Good Medical Practice: A Code of Conduct for Doctors in Australia* provides guidance to doctors where "those who may have additional needs (including those with impaired decision making capacity)" may be at risk of abuse<sup>52</sup>. The code also states that "Some patients (including those with impaired decision making capacity) have additional needs" and that "Good medical practice in managing the care of these patients involves: "Being aware that these patients may be at greater risk".

While there is no mandatory obligation to report abuse doctors can be more proactive in assisting patients if they suspect abuse. As such National Seniors believes that the wording in the code should be reviewed to encourage doctors to be more proactive in assisting vulnerable older people who they suspect to be at risk of abuse.

**Question 37** Are health-justice partnerships a useful model for identifying and responding to elder abuse? What other health service models should be developed to identify and respond to elder abuse?

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<sup>52</sup> Medical Board of Australia 2014. *Good medical practice: a code of conduct for doctors in Australia*. March 2014. <http://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>



### **Recommendation 62**

***National Seniors recommends that the Commonwealth support trials of innovative service models, such as health-justice partnerships, which empower older Australians to protect themselves from elder abuse.***

Any models that strengthen the detection and reporting capacity within the health service sector should be investigated and trialled. Models which seek to empower older Australians to act to protect themselves against elder abuse or assist them to seek advice and support in instances of abuse are especially important as this enhances self-determination and serves to strengthen older people's autonomy.

## Forums for redress

**Question 39** Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?

### **Recommendation 63**

***National Seniors recommends that civil and administrative tribunals have greater powers to hear and determine matters related to elder abuse and that the commonwealth, state and territory government's work to harmonise these powers.***

Evidence suggests that courts may not necessarily be the most appropriate setting to hear and determine matters related to elder abuse. Court action is slow and time-consuming and imposes costs which may be prohibitive<sup>53</sup>. They also set unnecessarily high thresholds of proof, which can be problematic when dealing with witnesses with impaired capacity.

While legal action can be taken in response to allegations of abuse, victims can be reluctant to subject a perpetrator to criminal sanctions because they may be a close relative or friend. They may also fear that engaging in legal action will lead to retaliation or result in withdrawal of vital support that will ultimately precipitate their own institutionalisation in aged care.

These factors make it less likely that court action will be taken to achieve outcomes for complainants. Tribunals are better placed because they reduce the time and costs associated with taking action and present a less adversarial environment for resolving disputes.

While tribunals have a range of existing powers, these could be expanded. Tribunals could, for example, have greater powers to order an attorney who has misappropriated funds to pay compensation rather than having to go through the court system.

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<sup>53</sup> Seniors Rights Service 2015. *Inquiry into elder abuse: Submission*. 15 November 2015  
[http://seniorsrightsservice.org.au/wp-content/uploads/2015/11/SRS\\_ElderAbuseReport\\_2015\\_V3\\_DPS.pdf](http://seniorsrightsservice.org.au/wp-content/uploads/2015/11/SRS_ElderAbuseReport_2015_V3_DPS.pdf)

## Criminal law

**Question 42** In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

### **Recommendation 64**

***National Seniors recommends that the commonwealth, state and territory governments work together to identify specific elder abuse laws and implement these laws consistently across all jurisdictions.***

Part of the problem with existing criminal law is the lack of specific offences relating to elder abuse. With regards to financial abuse, for example, most states and territories rely on general property offences to prosecute financial abuse cases. Only Victoria and the Australian Capital Territory offer a more relevant offence of dishonestly obtaining a financial advantage by deception<sup>54</sup>.

Including specific offences within existing criminal codes could provide greater protections for older people against elder abuse provided that the burden involved with legal proceedings were limited, hence the need for greater powers within civil and administrative tribunals. Specific offences for the misappropriation of assets by an attorney, for example, should be investigated along with other relevant options relating to other aspects of abuse.

**Question 43** Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?

### **Recommendation 65**

***National Seniors recommends that the commonwealth, state and territory government's introduce specific uniform laws relating to the neglect of older people.***

The only specific offence for neglect of an older person is within state and territory laws requiring a person who has primary care responsibilities to provide the necessities of life.

In Queensland the duty of a person to provide the necessities of life has primarily been used against parents of children. There have been no convictions of a person for failing to provide necessities of life to an older person. While Queensland criminal law does recognise abuse of older persons in sentencing, this has not resulted in the development of specific offences for neglect of older people as it has with other 'vulnerable' groups<sup>55</sup>.

In New South Wales, failing to provide a dependent person with the necessities of life carries a maximum penalty of five years. There have been three prosecutions for this offence since

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<sup>54</sup> Wuth 2013. *Op cit.*

<sup>55</sup> Queensland Law Society 2011. *Op cit.*

2012<sup>56</sup>. Submissions to the recent NSW parliamentary inquiry into elder abuse recommended that the NSW Criminal Code be amended to include specific offences for neglect with appropriate and serious penalties<sup>57,58,59</sup>. Unfortunately, no recommendation to this effect was made in the final report<sup>60</sup>.

It is not known if convictions have resulted from the offence of failing to provide the necessities of life in other states and territories, but given the limited prosecutions in Queensland and New South Wales, it would appear reasonable to assume that that new laws addressing the specific circumstances faced by older people are required to address situations of neglect.

#### Question 45 Who should be required to report suspected elder abuse, in what circumstances, and to whom?

The question of capacity and autonomy makes it problematic to implement mandatory reporting requirements in the case of elder abuse. Mandatory reporting of elder abuse is restricted to the residential aged care setting where approved providers are required to report alleged or suspected cases of physical or sexual assault only.

It may be attractive to adopt wider approaches to mandatory reporting as is taken in child protection. In the Northern Territory, for example, every person has a mandatory responsibility to report child abuse or neglect. Such a widespread responsibility would likely raise the profile of elder abuse as a phenomenon and put on notice those who might likely engage in the abuse of older people. As it has been said of mandatory reporting for children:

*Mandatory reporting requirements reinforce the moral responsibility of community members to report suspected cases of child abuse and neglect. The laws help to create a culture which is more child-centred, and which will not tolerate serious abuse and neglect of vulnerable children.*<sup>61</sup>

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<sup>56</sup> New South Wales Government Legislative Council 2016. *Elder abuse in New South Wales* Legislative Council General Purpose Standing Committee No. 2 Report 44. June 2016.

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6063/Report%2044%20-%20Elder%20abuse%20in%20New%20South%20Wales.pdf>

<sup>57</sup> Seniors Rights Service 2015. *Op cit*.

<sup>58</sup> Lewis, R. 2015. *Submission No 59*. Inquiry into Elder Abuse in New South Wales. Legislative Council General Purpose Standing Committee No. 2, 11 November 2015.

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/53714/0059%20Rodney%20Lewis.pdf>

<sup>59</sup> NSW Elder Abuse Helpline and Resource Unit 2015. *Submission No 33*. Inquiry into Elder Abuse in New South Wales. Legislative Council General Purpose Standing Committee No. 2, 14 November 2015.

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/53721/0033%20NSW%20Elder%20Abuse%20Helpline%20and%20Resource%20Unit.pdf>

<sup>60</sup> New South Wales Government Legislative Council 2016. *Op cit*.

<sup>61</sup> Australian Government Australian Institute for Family Studies 2016. *Mandatory reporting of child abuse and neglect*. CFCA Resource Sheet, May 2016. <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>

Mandatory reporting would likely compel those who might otherwise be hesitant to report a suspicion, which would enable a service response to investigate the claim.

While a mandatory reporting regime may appear attractive, it is likely to be counterproductive and could even be harmful. A mandatory reporting regime is likely to lead to over reporting from well-meaning individuals worried they might be prosecuted if they do not. This could be extremely problematic if there were inadequate resources available to field and investigate high volumes of reports<sup>62</sup>.

Mandatory reporting of elder abuse is also problematic because it undermines the rights of older people to make their own decisions. The Elder Abuse Prevention Unit in Queensland has rejected mandatory reporting on the grounds that it “denies the rights of seniors to make their own decisions, thereby reinforcing ageist stereotypes of all older people”<sup>63</sup>. While there is nothing stopping an individual who suspects or witnesses a crime from reporting this, the creation of blanket mandatory reporting for elder abuse would likely reinforce unwelcome stereotypes about older people as being frail victims. In cases where capacity is clearly diminished there are existing duty of care obligations on health, justice and social service professionals which negate the need for legislative changes<sup>64</sup>.

#### **Recommendation 66**

***National Seniors suggests that health, justice and social service professionals have an obligation to raise concerns about elder abuse and give advice directly to an older person.***

Rather than mandatory reporting, it may be more beneficial to institute a “mandatory disclosure” regime. Mandatory disclosure would place an obligation on relevant professionals to raise any concerns they may have directly with an older person who they suspect is a potential victim of abuse. This would place an obligation on the relevant professional to provide a safe space to discuss concerns and provide relevant information and referral advice so that an older person could be empowered to make their own decision.

For this to be effective health, justice and social service professionals would need to be supported with appropriate training and information. Consistent policies, procedures and protocols would also be required to assist relevant professionals.

**Question 46** How should the police and prosecution responses to reports of elder abuse be improved? What are best practice police and prosecution responses to elder abuse?

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<sup>62</sup> Australian Government Australian Institute for Family Studies 2016. *Ibid*.

<sup>63</sup> Elder Abuse Prevention Unit 2006. *Position Statement on Mandatory Reporting of Elder Abuse*. March 2006. [http://www.eapu.com.au/uploads/research\\_resources/Mandatory\\_Reporting\\_Position\\_Statement\\_MAR\\_2006-EAPU.pdf](http://www.eapu.com.au/uploads/research_resources/Mandatory_Reporting_Position_Statement_MAR_2006-EAPU.pdf)

<sup>64</sup> Elder Abuse Prevention Unit 2006. *Ibid*.

As it has been noted earlier, there are significant concerns about the capacity of police to deal with reports of alleged or suspected elder abuse in residential care settings. Similar concerns have been raised more generally in submissions to the recent NSW parliamentary inquiry into elder abuse. In the inquiry's final report it was stated that police responses range from "exemplary" to "less than adequate". The report noted a number of issues with police responses. These include<sup>65</sup>:

- significant delays in police follow up
- under resourced and inadequately trained police
- difficulties faced by police when interviewing older people with diminished capacity
- unwillingness of police to become involved without clear evidence of physical mistreatment
- failure to treat allegations as police matters
- ingrained beliefs that older complainants were not good witnesses
- lack of knowledge about elder abuse and the appropriate mechanisms to respond to it
- lack of sensitivity to older person's care needs and independence when intervening in abuse situations
- the lack of necessary powers to enter a property and search for evidence of abuse
- lack of clinical skills to look for physical indicators of abuse or neglect

Clearly, police require additional training and support to assist them to identify and respond to elder abuse.

### **Recommendation 67**

***National Seniors recommends that state and territory governments promote the use of a multidisciplinary investigation team approach to elder abuse.***

National Seniors supports calls for the police to have access to multidisciplinary investigation teams, which include clinicians with specialist aged care and elder abuse skills to assist in their investigations<sup>66</sup>. There is some international evidence of the benefits of multidisciplinary teams<sup>67</sup>, which warrants trials of this concept.

### **Question 47    How should victims' services and court processes be improved to support victims of elder abuse?**

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<sup>65</sup> New South Wales Government Legislative Council 2016. *Op cit.*

<sup>66</sup> NSW Elder Abuse Helpline and Resource Unit 2015. *Op cit.*

<sup>67</sup> Darzins, P., Lowndes, G., Wainer, J., Owada, K. and Mihaljcic, T. 2009. *Financial Abuse of Elders: A review of the evidence*. Protecting elders assets study, Melbourne Monash University June 2009.  
[https://www.statetrustees.com.au/wp-content/uploads/2015/05/199-170-3.3.1-Financial-abuse-of-elders\\_A-review-of-the-evidence\\_2009.pdf](https://www.statetrustees.com.au/wp-content/uploads/2015/05/199-170-3.3.1-Financial-abuse-of-elders_A-review-of-the-evidence_2009.pdf)

### **Recommendation 68**

**National Seniors recommends that victims of elder abuse be given greater support to feel safe when participating in court proceedings related to a case of elder abuse.**

Mechanisms to protect the safety of an elder abuse victim and reduce the fear and anxiety they experience is needed. Elder abuse victims are likely to have significant fear and anxiety as a result of their experiences which will only be heightened as a result of participation in the court system. Older people may have concerns about being victimised which stop them from reporting abuse, let alone carrying through with court action. Participation in court processes is likely to be intimidating for a victim, not least because it will present an opportunity to relive events and face a perpetrator.

The Australian Law Reform Commission has already made a number of recommendations to state and territory governments to improve the way that courts deal with domestic violence cases based on the practices in specialised family violence courts<sup>68</sup>:

- a. *identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law act and child protection matters;*
- b. *providing victim and defendant support, including legal advice, on family violence list days;*
- c. *assigning selected and trained judicial officers to work on cases related to family violence;*
- d. *adopting practice directions for family violence cases;*
- e. *ensuring that facilities and practices secure victim safety at court; and*
- f. *establishing a forum for feedback from, and discussion with, other agencies and non-government organisations.*

Such features should be adopted in all elder abuse cases in recognition of the existence of real or perceived threats by victims. It will also be critical that support services have adequate funding to assist victims involved in court proceedings, including access to psychological support services.

**Question 48    How should sentencing laws and practices relating to elder abuse be improved?**

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<sup>68</sup> Australian Law Reform Commission 2012. *Op cit.* 'Specialisation' <http://www.alrc.gov.au/publications/20-specialisation/best-practice-courts-generally>

**Recommendation 69**

***National Seniors believes that sentencing laws should take into account the vulnerability of the victim in line with community expectations.***

Elder abuse victims are likely to be vulnerable to abuse because they have diminished physical or mental capacity. Given that elder abuse perpetrators hold positions of trust and use this trust to abuse or take advantage of an older person, it is entirely reasonable that sentencing laws reflect these circumstances in the absence of any specific offence for elder abuse related crimes.

The Sentencing Council in the United Kingdom recently adopted guidelines covering fraud, money laundering and bribery, which place the victim at the centre of sentencing considerations. These guidelines increase an offender's culpability if they target people who are vulnerable. This includes considerations about age and capacity. This has been done, in part, in recognition of the potentially larger impact that such actions have on a vulnerable victim<sup>69</sup>. Similar approaches should be considered in Australia.

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<sup>69</sup> Action Fraud National Fraud & Cyber Crime Reporting Centre 2016. 'Tougher sentencing laws for fraudsters targeting vulnerable victims' Accessed 15 August 2016. <http://www.actionfraud.police.uk/tougher-sentencing-laws-for-fraudsters-targeting-vulnerable-victims-may14>



Question 49 What role might restorative justice processes play in responding to elder abuse?

**Recommendation 70**

***National Seniors supports the use of restorative justice processes where appropriate.***

As a practice that attempts to address the relationships between victim and perpetrator, restorative justice may have merit in cases where the relevant parties are open to engaging in such processes. Restorative justice should not be the primary means of dealing with elder abuse but simply a method of intervention that can be used under the right circumstances. A restorative justice approach may also be more suitable in situations in which the risk to the victim is low or where this approach suits a particular cultural setting. More evidence is required to ascertain if a restorative justice approach is appropriate.

Question 50 What role might civil penalties play in responding to elder abuse?

**Recommendation 71**

***National Seniors recommends civil penalties be introduced as an added deterrent against elder abuse in substitute decision making arrangements.***

The introduction of civil penalties could act as a deterrent against elder abuse<sup>70</sup>. When included within the legislation covering substitute decision makers, for example, the threat of civil penalty has the capacity to effect greater compliance, reducing the risk of malfeasance.

Civil penalties may be a more appropriate and accessible alternative to criminal proceedings. As civil penalties are administered through civil court proceedings this lowers the threshold of proof when compared with that required within criminal courts. It also removes any risk of criminal culpability<sup>71</sup>, which may help to allay a victim's reluctance to take action against a person known to them. There is also the opportunity to pass any financial penalty to a victim as a form of compensation<sup>72</sup>, which can assist with restitution of lost money or assets.

While civil penalties may be a more appealing way of holding a potential perpetrator to account, it is important to recognise that civil penalties may act to discourage an individual from taking on a substitute decision making role. It is also important to ensure that civil penalties are not used as a substitute for or as an excuse to avoid criminal proceedings where the severity of the abuse warrants such remedy. The presence of civil penalties

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<sup>70</sup> Australian Law Reform Commission 2002. *Principled Regulation: Federal Civil & Administrative Penalties in Australia* Report 95 December 2002 <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC95.pdf>

<sup>71</sup> Victorian Law Reform Commission 2011. Guardianship Consultation Paper. March 2011. [http://www.lawreform.vic.gov.au/sites/default/files/Guardianship\\_CP\\_Part\\_7.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_CP_Part_7.pdf)

<sup>72</sup> Victorian Law Reform Commission 2011. *Ibid.* [http://www.lawreform.vic.gov.au/sites/default/files/Guardianship\\_FinalReport\\_Full%20text.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf)



increases the requirement for adequate vetting and education of substitute decision makers and should not negate the need for ongoing monitoring and reporting of substitute decision makers as recommended earlier.