**Protecting the rights of elder Australians from abuse**

**A submission in response to IP 47**

**by Lynne Barratt**

About the writer

The writer is the Chair of the Law Institute of Victoria Elder Law section, formerly Principal Solicitor of Seniors Rights Victoria, author of two chapters in a new publication entitled *Elder Law in Australia* (2015) and has previously taught Law for Social workers at RMIT and conducted seminars funded by Professional Standards Councils on prevention of Financial Elder Abuse for legal practitioners.

About the case studies

The case studies are all drawn from the writer’s case work practice.

If some of them seem familiar it is because they were previously submitted as examples in a submission from Moreland Community Legal Centre to the Australian parliamentary enquiry into Violence, abuse and neglect against people with disability in institutional and residential settings in 2015, and because they seem to have been picked up and included in the submission from the Law Council of Australia to this present enquiry.

Not all questions in Issues Paper 47 are addressed in this submission.

Lynne Barratt

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**Introduction**

Case Study - Daisy

*An older woman was brought in by a friend to seek legal advice. She was aged 93 years but was generally in good health. She said that she had a younger man living with her who had over a period of years withdrawn over $75,000 in cash from her debit account. He had also set up an internet banking arrangement in her name by which he would transfer funds out of her savings account to cover payments that were drawn out of her debit account. She had almost no funds left.*

*He also arranged for her to attend a lawyer and make a Will in his favour (she had no children herself but a nephew living overseas) and arranged for her to purchase a vehicle registered in her name which she did not drive and which was in his possession.*

*She said that she met him in a shopping centre where he was promoting the sale of products and that she got to know him and his children, who had visited her. After he separated from his wife he came live with her. He offered her no assistance around the house in terms of cooking and cleaning, personal support or gardening. He ate meals at home that she prepared for him but otherwise did not engage with her and usually read the paper while he was eating.*

*He worked as a psychiatric nurse and I was concerned that as he had access to dangerous drugs that she might be at risk of harm, particularly in view of the Will made in his favour and a low likelihood that that there would be any coronial enquiry if she passed away at the ae of 93 years. I sought instructions to seek an intervention order, start proceedings to recover the vehicle as well as the funds and to draw up another Will.*

*She was very polite but diffident about these suggestions and indicated that she did not wish to pursue any of these options. After satisfying myself that she had capacity to understand the options, I asked her whether she had a de facto relationship with him because that would change the advice I gave. She denied there was any de facto relationship.*

*At the time of her visit he had been absent for three weeks overseas on holiday. I ventured the opinion that he was not likely to return as she had no more money. She hesitated for only a moment before she regained her confidence and stated confidently ‘he will come back’ and I realized that she wanted only for him to return to live with her again.*

*I summed up what she had said. He offered her no support and had taken all her money and yet she wanted him back. I asked her bluntly what exactly she thought she would get out of the relationship?*

*For the first time, her eyes welled up with tears and she said ‘you don’t understand*, I *get so lonely, I just want someone in the house’.*

One of the significant determinants of elder financial abuse is loneliness and isolation. If government is concerned to properly address this issue then it must take steps to address the loneliness of older people.

However, if we assume that the certainty of detection and redress operates as a deterrence, the following submission is made.

Q1 *Defining elder abuse*

In 2005 the Victorian government released the *Strengthening Victoria’s Response to Elder Abuse: Report of the Elder Abuse Prevention Project report*, and in 2006 the Victorian Government developed its first Elder Abuse Prevention Strategy. The Victorian Department of Health and Human Services also produced guidelines about elder abuse[[1]](#footnote-1), to support training for agencies supporting older people.

The booklet “With respect to Age” and the training programs that were developed to promote the use of the guidelines, employed the definition of elder abuse committed by person in a “position of trust” but maintained that an exception was made for elder abuse that occurred in a care setting.

The official view at that time was that it was best to describe those types of failures as either professional misconduct or failure of care rather than elder abuse. (This approach was derived from the observation that remedies and redress in cases of professional negligence or misconduct could be obtained through established channels.)

Unfortunately this early training has resulted in a persistent reluctance by Police to investigate allegations of elder physical abuse that occurs in a care setting. See the case study of Lydia, below.

*Question 4 Gaps in the Evidence*

The 2016 AIFS report[[2]](#footnote-2) noted that the data and prevalence studies on which to model proper responses to elder abuse simply don’t exist and that this is a serious issue.

In 2009 a team from Monash University reviewed the evidence of financial abuse of older persons in Victoria[[3]](#footnote-3) and concluded that it was impossible to discern the prevalence of financial elder abuse given the differential way it is described and recorded by different agencies.

Most of the Australian statistics quoted in the past have cited and then re-cited a report based on some pioneering work done by a geriatrician called Elizabeth Kurrle in the 1990’s. While this work was pioneering and necessary, its methodology involved interviewing people who were entering aged care and required them to make a self-assessment as to whether they had been victimized. In this context it is likely that prevalence was understated as most older people don’t enter residential aged care and do not always recognise that they might be victims of abuse.

Despite the information collected most recently by the state based elder abuse hotlines, the underreporting of elder abuse is the norm. The Police keep statistics for example about victims of dishonesty offences, but not all financial elder abuse becomes a reportable dishonesty offence, in fact, most of them don’t.

Of recent times the only data presented has concerned family violence towards women. Even so, and despite all the data collected in regard to family violence, the responses such as the CRAF[[4]](#footnote-4) in Victoria are modelled on ( or skewed in favour of ) younger women with children and intimate partner violence.

The actual determinants of violence towards older men and women in families are not really known and the lived experience of violence experienced by older people is not widely shared. What is missing is not just data but any analyses of the determinants.

For example there appears to be no collation of data concerning the risks of injury or death to older people caring for adult children with a mental illness. Empirical evidence is that older parents become carers of last resort to their adult children with mental illness and can become overconfident in their ability to manage behaviour and may overlook signs that are a risk to their own safety. Lives could be saved by an examination of determinants of death of older people caring for adult children with mental illness.

A useful study could be conducted by the Australian Institute of Criminology who could analyse court files and forensic psychiatric records as well as statistics, to marshal the determinants.

*Question 11 Aged Care*

The Legal framework for safeguarding vulnerable older person in residential care

The responsibility for safeguarding vulnerable older persons lies with state and territory governments but aged care policy direction has been taken up enthusiastically by the Commonwealth and service delivery controlled by means of tied grants. The Commonwealth does not have the constitutional power to effect comprehensive elder abuse prevention and response framework other than by funding a scheme which would administer by the states and delivered by a network of agencies and bodies.[[5]](#footnote-5) At a state level there is no single body charged with the responsibility to investigate elder abuse claims and only police have the investigative authority.

The *Aged Care Act 1997* provides for an accreditation based quality assurance system necessary for funding of service providers. Under this model the avenues of accountability are the:

1. Aged Care Quality agency;
2. Aged Care complaints line;
3. Mandatory reporting;
4. Aged Care commissioner’s office; and
5. National aged care advocacy program.

The effectiveness of the first three of these is discussed below.

The Aged Care quality standards

The standards contained in the quality of care principles have failed to be incorporated in the standard of care component of the general law of negligence as they are not viewed as ascribing rights to any other person. The author Rodney Lewis [[6]](#footnote-6) considered the case of *Rosenthal v The Sir Moses Montefiore Jewish home* (no. 2) SC NSW 31 August 1995 (unreported) in which His Honour Mr Justice Young said “a standard is not a law that creates a legal duty or creates a right. It merely sets out minimum requirements for a body to retain its licence or to retain Commonwealth funding.” His honour also made the observation that “it is abundantly clear then, whatever else the law may provide by way of relief to claimants…. It is of little assistance to complain about a breach of standards.”

On this model complaints serve as an opportunity to improve quality of care and not to uphold individual rights.

Mandatory reporting under the Act

When abuse occurs in a residential setting, the commonwealth legislations refers investigation to state agencies. s. 63 (1AA) *Aged Care Act 1997* obliges residential care providers to report to both the department and the state police “alleged or suspected unlawful sexual contact, unreasonable use of force or assault …constituting a criminal offence under the law of the state.”

The obvious restrictions are that there must be a physical or sexual assault of a standard that qualifies it as an offence under state law. The obligation lies on the provider to report and so must decide whether the conduct amounts to a criminal offence.

This restrictive approach means that neglect or failure of care that falls short of assault will not be reported. There is no obligation to report a theft of an older person’s property or an abuse of their human rights under this provision. The reluctance of police to investigate and the difficulties for them of obtaining evidence are referred to below.

The Charter of Resident Rights and Responsibilities

In a similar way the Charter of residents rights and responsibilities, enacted as a schedule to the *Aged Care Act User Rights Principles 2014* asserts that the rights of residents to have access to advocates and other avenues of redress.[[7]](#footnote-7)

It is trite to observe that we do not currently have a Commonwealth bill of rights. Under the *Aged Care Act 1997* the Charter of residents rights and responsibilities is set out in a schedule 1 of the User Rights principles (2014) pursuant to s. 23.25 of the Principles. The charter clearly provides that a resident has rights to be absent from the residence for a period of time as well as range of other rights. The issue is what is the legal status of these charter rights? Who can enforce them?

Both the charter and the complaints scheme are interpreted as simply conditions of accreditation for service providers. Accordingly the adverse consequence to the service provider of a breach is only the possibility of receiving a Notice of required action. The charter has been described as being unenforceable and does not provide for remedies to the resident for breach.[[8]](#footnote-8)

In other words, the Charter of rights as it currently stands exists as a contractual obligation between the commonwealth and the service providers it regulates. However, it does not provide enforceable rights to older residents, despite the fact of it being writ large in every facility.

This had led to the criticism that “The Charter of Resident rights and responsibilities informed the standards against which an aged care service is accredited; they are rarely raised in accreditation reviews.”[[9]](#footnote-9)

Case study - Max

*Another enquiry was taken from a man housed in residential care who had been an eminent engineer in his working life He acknowledged he had high care needs but wanted to travel interstate to attend an annual dinner which was being given his honour, (and actually named after him.) He needed assistance with his plans to travel as he was very much immobilised. He couldn’t walk out with assistance. The residential care provider refused to allow him to travel. They said he would need two people to accompany him and the people were not available. (In fact there were many people who volunteered to do this for him). The residential care facility* *misinterpreted their duty of care as extending to his absences and refused to take the risk. It was not their decision to make.*

Case study - Irma

*One of our lawyers was asked in writing to visit an older woman in residential care. She had both an Administrator and a Guardian appointed. The woman requested help in writing and wanted advice on challenging her guardianship order and the decisions made under it to decide where she would live. The lawyer contacted both the professional Guardian and the private Administrator to seek permission to visit the woman. She was granted permission and booked an interpreter and together they visited the site. The professional Guardian separately contacted the Aged care residential accommodation provider and advised them that permission was not granted and as a result they refused entry to both lawyer and Interpreter. There was no alternative but to make an application to VCAT to direct the Guardian to permit a*

*professional visit. At the tribunal the Guardian was unrepentant and insisted that it was important that the resident got “settled.” In other words, until she got accustomed to the fact that returning to home would not be possible.*

The Australian Human Rights Commission has recommended[[10]](#footnote-10) adopting the human rights developed by the Committee on Economic, Social and Cultural Rights in General Comment no. 14. This comment observed that “The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (the right to health) which includes four components: availability, accessibility, acceptability and quality.[[11]](#footnote-11)

This includes services delivered by medical and nursing and other workers on evidence based practice delivered by skilled workers in a safe environment. Accessibility necessarily includes the right to seek, receive and impart information.

It has been noted that the interests of advocates and service providers whose expertise is in social work or gerontology are frequently aligned with the interest of older persons, particularly when it comes to the provision of services or benefits. However, when it comes to negative rights (that is the right to privacy) “the interests of older adults and service providers are likely to diverge.”[[12]](#footnote-12)

It is respectfully submitted that the resident’s right to information and to an advocate should be accorded due status by making service providers (and others) accountable to a supervisory jurisdiction. For example the AHRC could be given own motion powers (and resources) to investigate third party reports of alleged infringements of human rights occurring in residential care.

Case study Liana

*One client reported that she had found her mother blue in the face due to a badly fitting neck collar and on a number of occasions choking on liquid feed administered in a Percutaneous endoscopic gastronomy (PEG) feeding apparatus because of faulty positioning despite her putting a big diagram on the wall to indicate the right position for PEG feeding. She also developed pressure sores which were not properly attended to and became much more severe. When she started attending more frequently she was threatened with being banned from attending to her mother altogether because the staff claimed she was bullying them. One staff member refused to attend to her mother in her presence saying she had to leave the room, and would not work under her observation. When she made a complaint to the Aged Care Complaints Line she was threatened by the aged care provider that she would be banned from attending.*

Media reports have canvassed similar approaches by facility management to banning family members’ oversight using the excuse of worker health and safety.

1. Aspects of Aged care - Safety

In a recent journal article a study has found that between 2000 and 2013 in Victoria almost 90% of death arising from external causes of aged residents in care were caused by falls.[[13]](#footnote-13) These deaths were described as preventable. The article does not speculate as to the cause but recommends further study to discover the risk factors leading to these deaths, and notes that in other areas of life such as workplace injury, the development of a reliable evidence base has led to changes and improvements in safety.

While the study does not speculate about possible causes of this number of falls, our clients tell us that that their aged parents are often so heavily medicated that falls and injuries are a result.

2. Aspects of aged care – Compulsory reporting

Australia’s aged care program is in currently in transition with a new focus on service delivery in the home and a return of negotiating power to the older person to engage a provider of their choice and to assess their own needs.

There is currently amending Bill before the Parliament.[[14]](#footnote-14) What is missing from the amending act is any reference to the issue of whether compulsory reporting of elder abuse will be extended to funded care in the home. (See response to Q 45 mandatory reporting abuse)

*Question 12 ACAS*

Empirical experience indicates that individual ACAS workers (known as ACAT in other states) take a protectionist approach to an assessment for aged care entitlements.

If observations are made about a risk of neglect or abuse in an older person’s own home, often a recommendation is made that the person be transferred from home into residential care regardless of whether they wish to leave their home. This approach fails to deal with the perpetrator who oftentimes remains in the family home. In other words their response to elder abuse is to remove the victim and not the perpetrator.

Empirical experience also indicates that individual ACAS workers sometimes present a barrier to an older person receiving care in their own home, if they form the view that the person would not be able to support themselves at home without a high level of care they are more likely to recommend that the person move to residential care and disregard the person’s will and preferences. Negotiations for a recommendation for more support services to support a home-based lifestyle choice are usually fruitless. This approach is not consistent with older persons’ autonomy and their right to assess risk and take on a degree of risk themselves.

On the other hand the preference for home based consumer directed care may not be made on the will and preference of the older person (although it often is their preference). It might be a preference to support the financial plans of the adult children who may wish to resist the necessary sale of the parents’ home to facilitate paying for their care (inheritance preservation).

Assessment of these influences could be assessed by ACAS . It might become necessary for the older person to explain what their financial circumstances are and their plans for payment of aged care into the future, but this would necessary in any event in order to ascertain the older person had the requisite capacity to make financial decisions about accommodation.

*Question 15 Quality of Care Principles*

Quality of care principles should be amended to increase the ratio of trained nursing staff to personal care staff. The justification of having a low ratio of trained nursing staff to personal care staff is that residential care provides (exactly what it states) a residence rather than hospital care. No doubt objections will be raised in regard to costs and funding.

Nonetheless, the risk of injury to older people and the requirement to keep good records of any injuries necessitates more trained nursing staff the skills of observation, note-taking and nursing care should be employed in the field.

*Question 16 Restrictive Practices and Restraints*

Case study - Mavis

*Another lawyer visited a woman who had been placed in residential care after a stroke. After a period of time she wanted to return home. Her daughter did not want her to return to home because she wanted to eject the mother’s long time domestic partner from the home before he had a chance to assert any equitable rights to the home. Enquiries revealed that the woman had been prescribed Respiridone, a very powerful anti-psychotic drug and was housed in a locked ward. This treatment was considered appropriate as she was judged a flight risk because she had expressed the desire to return to her home. The daughter had made all these decisions under the belief that she was authorised to do so under a financial power of attorney. Again the residential care staff acted on the belief that such directions were binding on them.*

Recent high profile cases of behaviour modification of youth in detention centres seems to have alarmed the public whereas the use of chemical restraint on older people has been long-standing and largely unreported.

Empirical evidence suggests that the medical profession has long been complicit with the medication approach to behaviour management. There is wide spread overreliance on prescription of anti-anxiety tablets and anti-psychotic medication for older people who simply express a desire to return home or who exhibit symptoms of situational depression, finding themselves in circumstances where they are confined in a place where they don’t want to be and can’t leave. This is one of the most distressing aspects of trying to support people in aged care.

In addition to chemical restraint, other restraint devices are used such as secure ( locked) areas, and sensitized mats placed next to the bed so that when a resident gets out of bed and stands on the mat an alarm goes off causes staff to put the resident back into their bed. That resident is thus restricted to their bed.

Part of this difficulty is that the funding structure for aged care incorporates classification of aged care residents with particular behavioural problems or needs as being entitled to be funded support at a higher rate. So the aged care provider is actually rewarded by classifying an older person as having a range of behavioural difficulties.

In this context, a person who persistently expresses a wish to return home is often described as a “wanderer” and, kept in a secure ward and denied their right of freedom of movement.

*Question 17 – Compulsory Reporting*

There is a difference between mandatory reporting and compulsory reporting. Mandatory reporting is mandated by statute and usually imposes an obligation to report suspicions of abuse on certain classes of professional person. Compulsory reporting is imposed by contract as a condition of funding by the Commonwealth to the aged care provider.

The compulsory reporting regime currently included in s. 67 (1) AA Aged Care Act (1997*)* requires reporting of suspected sexual and physical assault of residents. It does not require:

1. Reporting of suspected financial abuse or other crimes such as theft
2. Reporting of suspected human rights abuse – breach of rights
3. That any report is supported by evidence.

Thus aged care providers are not encouraged to make notes of observations of injuries which might be subject to later investigation.

Case Study - Lydia

*Lucia lived in residential care. Her daughter discovered she had a very large bruise and swelling approximately two inches in diameter on one side of her face. She also complained of pain in her arm. Her daughter made enquiries as to how her mother could have gotten these injuries and was met with blank faces There were no nursing notes to indicate how the injuries occurred and no one could provide any information.*

*The daughter called in the treating GP who examined her mother. He confirmed that there was bruising and swelling on the cheek and a fractured upper arm. He ventured that the fractured arm could be possibly consistent with a fall as it was a horizontal fracture but there was no explanation that he could think of to explain the bruising. It was not internally caused by of her other conditions.*

*Our lawyer requested the care provider report pursuant to s 67 (1) AA of the Aged Care Act within 24 hours, as this had not been done. This was done reluctantly after our intervention, however the obligation on the provider is only to make the report.  They collected no evidence and did not substantiate the report with any photographs or any other evidence and, as a consequence the police declined to investigate.*

*When we forwarded the medical report and photographs to the police and invited them to investigate further, they responded that it was a matter for referral to the Health Services Commissioner. (It was not within the purview of the Health Services Commissioner.) [[15]](#footnote-15)When we persisted that Police refer the report to a forensic physician for investigation they said it was not a criminal matter but a civil matter of negligence.*

The difficulties in pursuing a provider in negligence are discussed above.[[16]](#footnote-16)

*Question 18 – the Aged Care Complaints Investigation Service*

The case of Lydia (above) was raised in a complaint to the Commonwealth Investigation Service along with other complaints about the service delivery of the provider. The Commonwealth Investigation Service officers chose to deal with the complaint of the unexplained injury as another agenda item in a mediation between the provider and Lydia’s daughter, which they were authorised to do

The option of treating serious assaults as matters which may be the subject to mediation similar to a consumer issue is unacceptable. All assaults, and all unexplained injuries should be reported.

There has been criticism of the complaints scheme that it lacks impartiality, is not viewed as being independent of the department that administers aged care and that it focuses on dispute resolution rather than investigation.[[17]](#footnote-17)

The perceived lack of co-ordination of the responses by the Complaints system has led to a lack of comprehensive data:

“Even where data is collected, there is little information regarding how or even whether, cases are mediated, prosecuted or resolved in some way. This may be a consequence of the soft frameworks in place, where the agency responsible for receiving enquiries or claims of elder abuse essentially co-ordinates referral and/or advocacy services rather than operating as a coordinator of agencies with investigative responsibilities” [[18]](#footnote-18)

*Question 19 the Sanctions Regime*

The sanctions regime applied to the aged care provider is also imposed by contractual agreement and operates to revoke the providers accreditation and presents a risk to its revenue.

Empirical evidence is that inspections operate like audits and are carried out “on the papers” with a reliance on written evidence of compliance rather than actual observation and inspections.

*Question 25 Banks*

Banks can certainly play a part in the prevention of financial abuse of older people by their family members or people whom they trust. Banks can do a great deal in preventing financial abuse of elders by simply questioning the purpose for which an older person seeks to transfer or mortgage an asset and questioning how well the older person understands the financial risks associated with their proposed course of action.

However banks can be complicit in the abuse and perpetuate financial abuse as a result of their own internal requirements and guidelines.

For example, banks are often reluctant to abide by instructions given by an Attorney acting under an Enduring Financial Power of Attorney in circumstances where the Principal also has computer access to funds.

Loan criteria is often another source of elder financial abuse. When an older person wishes to renovate their home, they must often approach a bank for a loan. Older people find it difficult to borrow money for legitimate purposes as they do not meet the banks’ affordability criteria. They generally retire from work and don’t have sufficient income to support a loan.

While it is possible to provide loan funds and request a guarantee, since the case of Amadio[[19]](#footnote-19) it has become commonplace for banks to insist that all borrowers become joint borrowers. This results in the necessary transfer of property from the older person to the co-borrower, usually the adult child.

This has a range of consequences. Once assets are partly owned in the name of other people the assets are exposed to third party rights such as bankruptcy and family court proceedings which may diminish the value of the property. Transfers also affect the older persons entitlement to income support and to aged care support as these transfers are treated as gifts. Joint proprietorship results in the acquisition of the entire property by the surviving co-borrower on death of the older person, which might not have been the older person’s intention.

Banks also cause grief for older married women in particular as a result of a common practice of having a single account in the husband’s name into which two pensions are deposited. The law regarding joint ownership of personal property in bank deposits is complicated and banks treat the entire sum of cash in such accounts as the legal property of the person with the account title or designation.

In other words, beneficial interests as a result of contribution are not taken into account by banks (while this presents no problem for Centrelink). This has resulted in older women being subjected to neglect combined with financial abuse, being denied access to their savings and thus denied access to services by means of their husbands controlling the purse strings.

A simple acknowledgement by the banks that contribution from different sources into one back account results in joint ownership would be of assistance. Alternatively, Centrelink could insist that pension payments are made into a single name designated account.

*Question 27 – Family Agreements*

The writer supports a standardised approach to family agreements similar to the standardised disability support trust document developed and promoted by Centrelink.

Role of lawyers

Lawyers have a role in the prevention of abuse of older people in relation to family agreements and other agreements for transfer of assets, particularly in the face of an agreement which does not appear to benefit the older person or is patently risky.

Legal practitioners owe duties in tort as well as in contract. [[20]](#footnote-20) Practitioners can owe a duty or care to non-clients.[[21]](#footnote-21) Practitioners have a duty as a professional advisor to warn[[22]](#footnote-22) which requires the solicitor to take positive steps:

“beyond the specific professional task or function agreed in the instructions to avoid a real and foreseeable economic loss to the client”[[23]](#footnote-23).

So practitioners should warn clients about entering arrangements against their interests.

In Dominic v Riz [[24]](#footnote-24) a practitioner was not found to be negligent in advising about an improvident investment where he had clearly referred the client for financial advice. However, the Court observed;

“the circumstances in which solicitors have a responsibility to act outside the retainer are less than clear. It acknowledged that if a solicitor sees something outside the retainer that could adversely affect the client then the solicitor may be obliged to inform the client about it”

In Spiteri v Roccisano[[25]](#footnote-25) a legal practitioner was found to be negligent when he failed to adequately advise about the adequacy of a security in a commercial property transaction.

Legal practitioners should not be tempted to characterise these cases as

commercial investments or to rely on distinctions between legal and financial advice.In the case of any patently unsuitable transaction a lawyer really should advise a client about the likely risks.

Lawyers can legitimately seek further instructions by asking about the purpose of a mortgage or guarantee. This can be done routinely as the lawyer needs sufficient information to satisfy himself that the client has capacity to make the financial decision in hand. As part of the capacity assessment process is to ascertain what are the financial risks of the transaction in order to ascertain whether the older client understands and can weigh up the risks.

Legal Practitioners should be educated to recognise that any family agreement that did not include at the minimum the following matters would be too risky to recommend to clients and to do so would be professionally negligent.

1. A term regarding the exchange of care for payment
2. A description of the value ascribed to the care
3. A description of the amount and nature of care to be provided and the manner in which it is provided
4. Provision for how funds/assets will be dealt with in the event of a failure of the contract
5. Provision for how funds/assets will be dealt with in the event of a breach of the contract
6. Charging clause to impose a charge on the transferred property showing the property interest of the older person

Legislative recognition of new type of property interest

The writer would also support the registration of a new type of real property interest to acknowledge the older persons’ property rights under a family agreement.

Currently in Victoria it is possible to register a charge on title but not possible to register an equitable interest.[[26]](#footnote-26) A caveat is generally not considered sufficient as it is a form of notice rather than a form of property interest.

However it is possible however under the *Transfer of Land*  Act for the Registrar of titles to register a ‘Queen’s Caveat’ on real estate owned by people who are protected persons and subject to Administration orders. This costs nothing and alerts third parties who may be dealing with the person.

A similar form of protective caveat which protects a person who has transferred an interest in land in exchange for care pursuant to a family care arrangement might be achievable.

*Question 30 Appointed decision makers*

Attorneys under a power of an Attorney

Power of Attorney instruments could be registered as they once were in Victoria.

The Supreme Court could be the repository of these documents and if it was, the initial assessment of their validity should be conducted by the Court prior to registration. The Court would need to be resourced for the purpose of maintaining the register.

The duties and responsibilities of Attorneys have been upgraded in Victoria since the enactment of the *Powers of Attorney* *Ac*t (2014) (Vic) [[27]](#footnote-27). Legal practitioners could take responsibility to explain to the appointed Attorneys the scope of their duties but these steps would not extend to the large number of instruments created by non-lawyers.

Alternatively it would be possible to create an internet based on-line education module and test about Attorney’s responsibilities and duties, similar to online modules employed by organizations for use by employees to test their knowledge and understanding of access and equity and safety in the workplace.

If there was a central repository of instruments at the Supreme Court, the Court could ascertain if the putative Attorney had completed the module as a condition of registration.

Advance Care Directives

In January 2016 the Victorian Health and Human Services Department released a position paper in relation to Advanced care directives in order to support advanced care planning program[[28]](#footnote-28). Curiously though, the focus on “wills, preferences and rights” recommended in the United Nations convention on the rights of persons with disabilities has not been entirely adopted and instead a hierarchy of “preferences, wishes and rights” has been adopted[[29]](#footnote-29).

In the DHHS 2016 position statement, it is proposed that in the event that an older person has no pre-expressed wishes in writing which can be understood and be located and are accessible, reliance is placed on the person’s wishes, and if their wishes cannot be determined a decision is to be made consistent with rights.

With respect to the learned authors, this places us in the same position we have been for decades, that is, grappling with the difficult issue of assessing the competing claims of pre-expressed oral preferences. The position paper is silent as to who has the responsibility for assessing these competing claims.

The third component of that preferred hierarchy described as “a decision consistent with rights” is a best interest test in another guise. While claiming to move from a best interest model to a rights model the authors of the position statement appear to be taking a backwards step.

*Question 32 Guardians and Administrators*

1. Guardians

Empirical evidence suggests that some Guardians tend to take a protective and interventionist line however as Guardians come from a wide range of backgrounds some are more or less inclined to respect to an older person’s dignity of risk, but some are particularly risk averse and will make decisions completely inconsistent with the older person’s right of freedom of movement, such as restricting their access to people who might give them information that they need to make essential decisions. See the case of Irma (above)

1. Administrators

Professional Administrators are entitled to charge fees and can charge as much as 4% of capital value (excluding real property) per year. In very few cases the represented person under administration holds a large fortune but evidence exists that when they do have substantial assets, there is a tendency for real property to be sold rather than maintained as per the older person’s wishes and property investments being reduced to cash, thus being available to be calculated in the fee. Insufficient attention is paid to investing such cash in superannuation, which would be more tax effective.

Represented persons also report difficulty with the mechanics of release of funds by the professional Administrator as there is sometimes a reluctance to make cash available. In these circumstances and in order to make a purchase of for example a new bed, the represented person must:

* visit a trader
* negotiate a contract to purchase,
* request and obtain a tax invoice from the trader, and then
* ask the Administrator to pay the tax invoice and then
* arrange to collect the item.

Not all represented person are able to manage this.

There is also the notorious case[[30]](#footnote-30) of a social worker resorting to the attempted use of an Administration Order (with support of a professional Administrator) to force the sale of a represented person’s home in order to ensure that the represented person could not ever return there, in order to ensure his compliance with a mental health medication regime in a supervised accommodation environment which was thought to be in his best interest.

*Question 33 Role of the public advocate in investigation*

In Victoria the Office of the Public advocate already has an own motion power to investigate any complaint that a person has been exploited or abused.[[31]](#footnote-31) but does not exercise the power due to a lack of resources.

It must also be observed that for the most part public advocates do not have training in relation to investigation and tend to rely on the Police, who can only be enlisted for support when the circumstances of abuse are so compelling as to amount to a crime.

If the Office of the public advocate were to be given additional own motion powers the office would have to be resourced with trained investigative officers.

*Question 34 – Adult Protection Legislation*

It’s a little known aspect of adult protection legislation which applies generally to all vulnerable adults such as that that adopted in overseas jurisdictions, is that the most commonly referred subjects are adults who are self-abusing or self-neglectful.

This often occurs in jurisdictions with concomitantly less reliance on mandatory mental health intervention and treatment than we are prepared to support in Australian jurisdictions. The overlap between adult protection orders and compulsory mental health treatment would have to be clarified.

Vulnerable adults who do not have mental health issues but are vulnerable due to their own risk behaviour, for example hoarding behaviour, are commonly a target of these types of orders where the adult protection legislation is used by housing authorities in those jurisdictions to remove them.

By contrast the definition of elder abuse employed in W.H.O.[[32]](#footnote-32) definition does not include self –harm or self-neglect. While it’s true that these adult protection models are characterized by a single entry point, the adoption of an adult protection model is a significant departure from the framing principle expressed in the issues paper:[[33]](#footnote-33),

the principle that laws and legal frameworks should provide appropriate protections and safeguards for older Australian, while minimising interference with the rights and preferences of the person.

*Question 35   Health Professionals*

Health professionals could benefit from training in identifying injuries that might be an indication of physical elder abuse and also from training around the proper approach to investigation of abuse. Empirical evidence suggest that health workers may be first responders to a reporting of elder abuse but take it on themselves to analyse whether abuse has occurred rather than reporting up and requesting forensic enquiry.

Case Study Betty

*A home care worker attended an older woman and identified that she appeared to have bruising around her neck. She was living in her own home with her grandson and her grandson’s de facto wife and a small child.*

*The home care worker reported to her superiors as she is trained to do and an ACAS worker went out to investigate and inspect the bruises which were readily visible. There are some health difficulties that older people experience which may have the appearance of injuries such as skin discoloration resulting from certain medications but to an experienced eye these are easily discernible and differentiated from bruising.*

*When asked how the injuries occurred the grandson explained that he had caused the injuries when he grabbed his grandmother around the neck because she was choking on something. The ACAS worker accepted the explanation on its face and declined to refer to forensic physician for further investigation.*

This should be considered a failure of care.

*Question 38 – Hospitals*

Co-ordination in response and promotion of safety planning and the collection of data is welcomed, subject to the observation made above about health professionals being given training in observation skills and in forensic investigation requirements.

Empirical evidence suggests that hospital social worker’ response to evidence of elder abuse is to make a recommendation that an older person not be returned to a dangerous home situation and instead be transferred to residential care, possibly against the older person wishes. It is rare that the hospital social worker will enlist the support of lawyers to support an application to remove the perpetrator of family violence from the home in order to make the home safe.

*Question 39 – options for redress and forums for redress - VCAT*

Forum

As observed most avenues for redress in property matters involve costly applications to the Supreme Court. The superior courts have expertise in complex property transactions but are beyond the financial reach of most people.

Apart from the issue of which courts have equitable jurisdiction, one of the reasons why the Supreme Court jurisdiction will persist is because it is common in cases of financial elder abuse for the request for legal assistance to come at the last moment after third-parties such as banks have commenced litigation to exercise their rights, which recourse usually lies with the Supreme court of each jurisdiction.

The Family Court has jurisdiction to hear claims for support by parties who are married to each other although it is rarely used when the marriage is still live. It has jurisdiction to hear from third party intervenors and is occasionally used by adult children seeking to protect their interest in an asset owned by their family members, but rarely used by older family members in the same way.

It also has jurisdiction to hear matters involving third parties. This jurisdiction is currently used mostly by banks and trustees in bankruptcy, even though the Parliament clearly contemplated that it could be used by family members.[[34]](#footnote-34) However recourse to the Family Court is also very expensive.

However, recourse to a Civil Administrative Tribunal for adjudication of complex matters while less expensive, might not be the answer. Such tribunals adjudicate cases in specialised lists such as property lists and Human rights lists. The Human Rights list hearing matters such as Guardianship and Administration often employs tribunal members that are not legally trained and without a sophisticated understanding of complex property disputes as their expertise might be in other aspects of disability.

Two suggestions are: that the superior courts could waive their fees in cases where there is an allegation of elder abuse and that superior courts direct that cost capping orders be made.

Criteria for legal assistance

The Commonwealth Department of Justice imposes the criteria for Legal Aid assistance applied by state based legal aid commissions in regard to both means and as to merits of funded cases. Traditionally means criteria exclude any applicant with means to own their own home and merits criteria exclude any application which relates to the recovery of property. The criteria for legal assistance could be changed to grant legal assistance in cases of financial elder abuse on certain conditions, for example for a registrable charge to be taken and repayable once the person passes away and costs capping orders being obtained.

Service orders, protection orders and placement orders

If such orders are directed to agencies to provide services to specified persons, it might be difficult to give any Court jurisdiction to make orders in respect of service provision when agencies have to observe entitlement criteria as a pre-condition of their funding.

Alternatively, if such orders are directed to individual person to enlist the support of services, and take up placements as offered, such orders would the Court to be given power to make orders in the nature of adult protection, which we currently don’t have in any Australian state.

*Question 42 – The legal framework of dealing with elder abuse by neglect*

**Criminal Law**

There are numerous barriers to employing criminal law in order to suppress both financial elder abuse and physical elder abuse.

Investigation by police

Police are generally reluctant to investigate because the primary victims often aren’t able to explain to them the manner in which the injury occurred . Police often begin with an impression (possibly discriminatory) that an older witness is an unreliable historian, or a reluctant historian or subject to family intervention and family pressure to change their story or withdraw their claim, and that such investigations are a waste of resources.

The quality of the investigation by local police can be reformed by advocacy and intervention rather than legislative reform, exactly as a system wide cultural reform has seem the introduction of a new model of response to family violence. Some injuries speak for themselves if investigated by a forensic physician.

Matters of proof

In criminal matters there is the added difficulty of the requirement for proof beyond reasonable doubt. Cases are usually characterised by a lack of independent evidence. There is usually a lack of witnesses, as there is in every circumstance of abuse. Surveillance device evidence is not generally permitted to be collected by person other than police.

Mens rea

All criminal cases carry the requirement that the prosecution must prove that the alleged offender committed the acts alleged and at the time had the requisite intention. it can be difficult in cases of financial abuse to establish the required degree of subjective dishonesty, for example in cases of theft, and in circumstances where family members may profess or honestly believe some sense of entitlement to funds or property or that the material was made by way of a gift.

However, dealing with the issue of subjective dishonesty is not new to investigating police. All that is required is that they are;

1. Prepared to obtain independent evidence before questioning such as bank statements;
2. Prepared to improve their knowledge of the effects and scope of certain instruments and orders such as guarantees or VCAT administration order.
3. Prepared to use pertinent questioning for example about the purpose of each transfer or withdrawal,

In cases of assault what must be established is, not so much the intention to cause the injury, but the intention to commit the act which caused the injury.

Causation

In circumstances where it is alleged that medical attention was not sought, the problems of causation arises in that the claim may be made that death was not caused by the injury or omission but by the intervening illness.

Causation also becomes an issue if an older person has declined medical treatment that is onerous to them such as chemotherapy, or the older person preferred a treatment option that was more culturally relevant, or it is claimed that the older person simply refused to eat or drink.

In cases of positive physical assaults resulting in death, (as opposed to negligence) there is a difficulty establishing causation in circumstances where there is more than one potential assailant who possibly committed the assault. The parties may blame each other or alternatively may each claim that one was the actor and one was the observer.

Negligence and the offence of Manslaughter by criminal negligence

Unlike the code states, Victoria does not have a law that imposes an obligation to provide necessaries. Nonetheless it is still occasionally asserted in academic circles[[35]](#footnote-35) that the common law imposes a duty of care which arises in circumstances where a person has voluntarily taken on obligations of care. This assertion relies upon the application of the New South Wales case of *R v Tak Tak* [[36]](#footnote-36) .

With respect to the learned authors, this is to misunderstand the difference between civil negligence and criminal negligence.

The law has its origins (or at least was early on enunciated) in the sad case of *R V Clarke and Wilson* (1959) VR 645. A child victim of an assault which caused her death was living with two adults who were not her parents but who took responsibility for her care. The child had multiple injuries and the prosecution could not determine which was the fatal blow. Each defendant blamed the other and claimed to be the onlooker.

It was clear that the prosecution could not obtain a murder conviction because of lack of causation linked to one assailant and  lack of evidence of acting in concert.  Instead both were charged and punished for criminal negligence. It was observed at the time that all that was required of both defendants was that they should have summoned an ambulance.

This principle was affirmed recently in the case of *Reid v the Queen* ( 2010) VSCA 234 in a case of alleged assault causing family violence causing a fatal injury which could not be proven beyond reasonable doubt, where the Court said:

When will the duty of care arise? For the purpose of this case there are two circumstances where at law a duty arises. The first is ... where a person by his deliberate wrongful act places another in peril or in danger, he has a duty to take reasonable steps to remove that danger or peril. So that is the first one. The second one which arises, or potentially arises in this case is...where persons live together as domestic partners and one of them is rendered helpless through illness or injury the other has a duty [to] take reasonable steps to provide the helpless person with proper attention....And it is not just any breach of the duty which is sufficient here, because we are dealing with criminal negligence. A breach of a duty of care is not sufficient. What is required is such a great falling short of the standard that a reasonable person would have exercised, that is the standard that the duty of care required, and involved such a high risk of causing death or really serious injury, that it deserves to be criminally punished.

So the current state of the criminal law regarding criminal negligence disappoints in two ways. Firstly it appears to be an avenue of last resort taken up by the prosecution when it is considered that it is unlikely that an offence of positive intention can be proven. Secondly, the standard of care is set at a very low standard as the requirement only to summon an ambulance.

Aggravation as a sentencing factor

A Victim’s age, and or disability status could be become a factor to be considered in sentencing an offender. Currently in Victoria a summary assault [[37]](#footnote-37) can considered aggravated and subject to harsher punishment if the victim is female or a male under the age of 14 years. This could be extended to victims who are older persons, or persons with a cognitive disability.

The common law of sentencing in relation to theft already regards the circumstance of a breach of trust as an aggravating factor but is most commonly seem in cases of theft from employer.

Surveillance devices

Legislators should consider permitting independent third-party evidence such as that obtained from surveillance devices.

Some recent high profile cases involving brave whistle-blowers who have paid a heavy price for employing such devices. Instances have resulted in the whistle-blower being threatened with legal action for breach of privacy or quietly dismissed from employment for breaching employment guidelines.

Currently in Victoria the *Surveillance Devices Act* outlines the circumstances where persons who are authorised by warrant may employ them[[38]](#footnote-38) but does not provide any exemption for a person operating a device in their own home, or for the purpose of gathering evidence to support a report to police or a civil claim for negligence. This legislation lags the technological development and the now widespread use of dashboard cameras said to be relied upon as evidence in the event of a motor vehicle collision.

The current Act could be amended to permit the use of devices. That is to say the permission for use of devices should not be restricted to those who are professional investigators, and a defence or exception could be included that referred to obtaining evidence to support a complaint in the future and not just a matter currently being investigated by authorities.

The introduction of surveillance device recordings in residential care would be fiercely resisted in the industry. Predictably the resistance would be based on the claim that it would be a breach of privacy of staff and residents, but in my submission such claims should be met with the defence that residential care is intended to be the resident’s home and should be justifiable if it is for the purpose of gathering evidence for presenting a brief to the police or preparing for a civil claim.

Whistle-blower protection and immunity should be offered to staff who use surveillance devices for the purposes of obtaining evidence of elder abuse and workplace protection should be afforded them against unlawful termination as a result.

**Family violence approach**

The writer made a submission to the Victorian Royal Commission into Family Violence In Victoria in 2015 that as neglect was not currently part of the definition of “family violence” and unless alleged neglect could be linked in some way to financial abuse it could not alone form a ground for obtaining an intervention order. The Act currently states:

**FAMILY VIOLENCE PROTECTION ACT 2008 - SECT 5 Meaning of family violence**

    (1)     For the purposes of this Act, ***family violence***is—

        (a)     behaviour by a person towards a family member of that person if that behaviour—

              (i)     is physically or sexually abusive; or

              (ii)     is emotionally or psychologically abusive; or

              (iii)     is economically abusive; or

              (iv)     is threatening; or

              (v)     is coercive; or

(vi)     in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b)     behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

The submission[[39]](#footnote-39) was made that:

there can be no doubt that there is an expectation that people in a marriage-like relationship have an obligation to care and support each other and so a failure to meet the standard should be properly described as family violence. In a similar way, it could be argued that if adult children live with parents, they thereby assume the obligations of support and care of a close relationship, and that falling short of the standard of support and care should also be defined as family violence.

The RCFV commission declined to recommend any expansion of the definition of family violence because:

While neglect can be a form of family violence, we do not consider that the Family Violence Protection Act needs to expressly refer to it. Many forms of neglect, such as withholding an older person’s medication or restricting their mobility, would be caught by the current definition of family violence (which includes behaviour that is physically abusive, coercive or in any other way controls or dominates a family member). Such behaviour may also be covered by the criminal law; for example, offences of causing injury intentionally or recklessly. In our view, making explicit reference to neglect in the Act is not necessary’[[40]](#footnote-40)

With respect to the Royal Commission on Family Violence this simply fails to acknowledge the difficulty in making a Court recognise those forms of elder abuse as being worthy of court intervention. The difficulty of employing the criminal law is referred to above.

Third party applications for family violence protection orders

Another practical difficulty that presents is that the courts are reluctant to accept applications from third parties, although they have some jurisdiction. Third party applications can only result in limited orders unless they’re made by Police. Police are also reluctant to intervene to make family violence applications on behalf of older persons and when asked to do so will make the usual merry-go-round of referrals.

**Negligence**

Currently the civil law of negligence does not recognise a duty of care owed to older family members.

Neither does the law does not recognise the standards contained in the quality of care principles as being incorporated in the standard of care component of the general law of negligence as they are not viewed as ascribing rights to any other person.[[41]](#footnote-41)

“a standard is not a law that creates a legal duty or creates a right. It merely sets out minimum requirements for a body to retain its licence or to retain Commonwealth funding.” And “it is abundantly clear then, whatever else the law may provide by way of relief to claimants…. It is of little assistance to complain about a breach of standards.”

The law of negligence in Victoria is statutory and could be amended to include recognition of a duty of care towards older family members and could establish a set of standards for the purpose of establishing a breach of the duty of care in any case involving an allegation of negligence by a care provider.

**Family Law**

The Family law Act does recognise an obligation of maintenance by parties to a marriage towards each other and of support of minor children but it does not impose a duty of maintenance towards older parents.

**Suggestion - New laws imposing positive obligations**

The criminal law and family violence laws concern themselves with prohibiting certain conduct. The family law and the law of Negligence recognise and uphold positive obligations of care but do not thus far extend to positive obligations to maintain and care for older persons.

If government is committed to resolving this issue it should be possible for each state Parliament to introduce legislation that not only prohibited certain behaviour but imposed an obligation of support and also specified both the parameters of responsibility and the standard of care expected. In other countries, such as China, positive obligations of support have been imposed by law.

However it must be noted that in those countries, in some cases such obligations have caused financial hardship for families where there may be only one income earner to support four parents or where breadwinner is well enough to work in order to support the older parents.

*Question 45 Mandatory Reporting*

In 2005 when the Victorian government released the *Strengthening Victoria’s Response to Elder Abuse: Report of the Elder Abuse Prevention Project report*, consideration was given to the implementation of a mandatory reporting regime similar to that imposing obligations to report on certain professions mandated to report known or suspected abuse of children.

However, it was considered at the time that this represented an unjustified abridgement of the human rights of the older person who were not to be treated as a child and whose asserted their independent agency.

The release of the elder abuse prevention strategy adopted and promulgated the view that legal Practitioners be encouraged to use Family Violence Protection Legislation to assist older people to address elder abuse..

Empirical evidence suggests that this approach has been unsuccessful, with Magistrates reluctant to grant intervention orders in cases that involve neither young women with children or intimate partners. There is a general lack of understanding of the way in which family violence manifests itself amongst older people such as the nuanced social isolation and psychological abuse often linked with financial abuse and experienced at the same time.

We are moving into an era where older persons comprise a larger section of the community and so it follows that a proportion of those will be vulnerable to abuse. At the same time government aged care policy is committed to the promotion of consumer directed care provided to those people in their own homes.

In those circumstances older people may be unaware of their rights or unable to assert their rights. We must take steps now to ensure that they will be safe in their own homes.

In the writer’s respectful submission we’ve had almost ten years of the Family Violence model which has failed older persons. It would seem an opportune time for the issue of mandatory reporting to be investigated and the debate concerning the choices between mandatory reporting and the recognition of independent agency to be aired in the wider public arena.

Lynne Barratt

c 2016

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6. Rodney Lewis*, Elder Law in Australia* (LexisNexis 2nd ed 2011) 211. [↑](#footnote-ref-6)
7. *Aged Care Act 1997* (Cth) sch 1 cl 1(t). [↑](#footnote-ref-7)
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16. *Rosenthal v The Sir Moses Montefiore Jewish home* (no. 2) SC NSW 31 August 1995 (unreported) [↑](#footnote-ref-16)
17. Lacey, above n 2, 126. [↑](#footnote-ref-17)
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32. ALRC Issues paper 47 p13 [↑](#footnote-ref-32)
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39. ???p 67 [↑](#footnote-ref-39)
40. ??? p 93 [↑](#footnote-ref-40)
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