



## **Submission to the Australian Law Reform Commission on Elder Abuse**

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# Acronyms

Alternative Dispute Resolution	ADR
Aged Care and Assessment Services	ACAS
Australian Bankers' Association	ABA
Australian Network for the Prevention of Elder Abuse	ANPEA
Australian Law Reform Commission	ALRC
Culturally and Linguistically Diverse	CALD
Ethnic Communities' Council of Victoria	ECCV
Family Violence Intervention Order	IVO
National Ageing Research Institute	NARI
Office of the Public Advocate	OPA
Power of Attorney	POA
Royal Australian College of General Practitioners	RACGP
Royal Commission into Family Violence (Vic)	RCFV
Seniors Rights Victoria	SRV
Victorian Civil and Administrative Tribunal	VCAT
Victorian Law Reform Commission	VLRC
World Health Organisation	WHO

# Acknowledgements

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# Executive Summary

In February 2016, Seniors Rights Victoria (SRV) hosted the 4th National Elder Abuse Conference in Melbourne, at which the Hon George Brandis QC, Australian Attorney General, announced an Australian Law Reform Commission (ALRC) Inquiry into 'Protecting the Rights of Older Australians from Abuse'. This submission is SRV's response to the questions released with the ALRC Issues Paper on 15 June 2016, and is based on its staff's extensive knowledge and casework.

"Elder abuse" can be defined as any act which causes harm to an older person and is carried out by someone they know and trust. The abuse may be physical, social, financial, psychological or sexual and can include mistreatment and neglect. While elder abuse is vastly under-reported, the World Health Organisation estimates up to 10 per cent of older people worldwide experience it. Elder abuse is a form of family violence, in that most perpetrators are family members – particularly adult children. Like other forms of family violence, elder abuse is about a person or persons disrespecting the rights of another, and abusing their power and control. Elder abuse reflects gender inequality but especially the ageism that is still endemic in our society today.

Established in 2008, SRV is the key state-wide service dedicated to stopping elder abuse. It is a program of Council on The Ageing Victoria (COTA) and supported by the Victorian Government. Operating under the principle of empowering older people, SRV provides information, support, advice, casework and education to help prevent and respond to elder abuse and safeguard older peoples' rights, dignity and independence. Services include a Helpline, specialist legal services, short-term support and advocacy for individuals, and professional and community education. SRV also participates in elder abuse policy development and law reform and work with organisations and groups to raise awareness of elder abuse.

In his announcement, Senator Brandis identified elder abuse as a "symptom of attitudes which fail to respect and recognise the rights of older Australian to make decisions, to live self-determined lives, to live with dignity and live free from exploitation, violence and abuse".<sup>1</sup> The purpose of this submission is to give voice to the many victims of elder abuse SRV assists, to inform the ALRC about the positive work being done by SRV, and to suggest changes to existing legal and other frameworks that will help eradicate the scourge of elder abuse in all its manifestations. In line with the intention of the Inquiry, SRV has sought to "identify best practices for protecting older Australians, while promoting respect for their rights and preferences"<sup>2</sup>.

SRV welcomes the opportunity to make a submission with recommendations to the Inquiry, and looks forward to its outcomes.

## **Recommendations:**

What is Elder Abuse?

1. Recognise a pre-existing relationship of trust as the key determinant in defining elder abuse, as opposed to the abuse that can occur in relationships based on the exchange of money for services.
2. Commence a proper Australia-wide elder abuse prevalence study and provide funding for research that builds evidence about the effectiveness of various prevention and intervention strategies.

## Social Security

3. Address, through CPD training for all practitioners in Elder Law, lawyers' lack of knowledge of Centrelink requirements for older clients undertaking property transfers.
4. Require that Centrelink deal with an attorney appointed by an Enduring Power of Attorney and not a payment nominee to provide a more robust form of authorization for older people.
5. Introduce Random Audits for all recipients of Carers Payments, but particularly for those who "care" for recipients of Aged Pensions, to reduce abuse of the system.
6. Assist older people to report situations where they are not receiving the care they require and then ensure their matter is properly investigated.
7. Change the operation of the Granny Flat Rules in Assets for Care arrangements to enable pensioners to retain ownership of their principal residence, without it impacting their pension.

## Aged Care

8. Ensure aged care facility management and staff undertake professional education on the legal operation and requirements of Powers of Attorney.

## Financial Institutions

9. Adopt the current banking industry guidelines on elder abuse as mandatory requirements of the Banking Code of Practice.

## Family Agreements

10. Request the Victorian Government to restrict the operation of the presumption of advancement through an amendment to Part IV of the Property Law Act 1958 (Vic) that will require VCAT to consider the property contributions made by parties irrespective of the nature of the relationship between them.
11. Implement mandatory Family Agreements as part of Centrelink requirements in Assets for Care arrangements to help resolve financial arrangements should a change of circumstance occur.

## Appointed Decision Makers

12. In order to oversee the conduct of supportive and substitute decision makers:
  - Introduce a mandatory online registration scheme
  - Make the decision-maker sign a statement agreeing to comply with their responsibilities before they undertake their role
  - Make the decision-maker keep accurate separate records of all decisions made
  - Make the decision-maker submit an annual declaration of compliance with their obligation
  - Implement a national register for Power of Attorney instruments as a means of reducing elder abuse, maintained by each state's Births Deaths and Marriages Registry.

13. Create a national register for Power of Attorney instruments that is maintained by each state and territory's Births Deaths and Marriages Registry as a critical means of reducing elder abuse.

#### Public Advocates

14. Expand the functions of the Office of Public Advocate to receive and investigate complaints, and to conduct own-motion investigations, in relation to the abuse, neglect or exploitation of:
  - People with impaired decision-making ability due to disability; and
  - People who because of an attribute associated with ageing, are vulnerable to, or at greater risk of, abuse, neglect or exploitation.

#### Forums for Redress

15. Expand the jurisdiction of VCAT to enable the determination of matters relating to adult children living in their parents' homes that currently fall outside the ambit of the Residential Tenancies jurisdiction and the Co-ownership jurisdiction.

#### Criminal Law

16. Improve the training of Victoria Police to enable members to respond more effectively to situations of elder abuse, and increase the numbers of police with specialist capability in this area.
17. Resolve problems in the court system and family violence intervention order process including:
  - Lack of information flow between police, the Magistrates' Court and victims
  - Lack of support for victims before, during and after a hearing;
  - Lack of enforcement of breaches
  - The misuse of intervention orders
  - Delays at court
  - Problems with court facilities.



# Introduction

In February 2016, Seniors Rights Victoria (SRV) hosted the 4th National Elder Abuse Conference in Melbourne, which attracted over 300 national and international delegates and speakers. The Hon George Brandis QC, Australian Attorney General, delivered the Opening Address, and used the opportunity to announce an Australian Law Reform Commission (ALRC) Inquiry into 'Protecting the Rights of Older Australians from Abuse'. This submission is SRV's response to the questions released with the ALRC Issues Paper on 15 June 2016, and is based on its staff's extensive knowledge and casework. SRV is grateful to the Australian Government for putting elder abuse firmly on the national agenda.

In his speech, Senator Brandis identified elder abuse as a “symptom of attitudes which fail to respect and recognise the rights of older Australian to make decisions, to live self-determined lives, to live with dignity and live free from exploitation, violence and abuse”<sup>3</sup>The purpose of this submission is to give voice to the many victims of elder abuse SRV assists, to inform the ALRC about the positive work being done by SRV, and to suggest changes to existing legal and other frameworks that will help eradicate the scourge of elder abuse in all its manifestations. In line with the intention of the Inquiry, SRV has sought to “identify best practices for protecting older Australians, while promoting respect for their rights and preferences”<sup>4</sup>. This submission includes, for example, recommendations to fund research, change Centrelink rules, better oversee supportive and substitute decision-makers, expand the functions of the Office of the Public Advocate, and better educate police, lawyers and other service-providers on elder abuse.

'Elder abuse' can be defined as any act which causes harm to an older person and is carried out by someone they know and trust (the key determinant). The abuse may be physical, social, financial, psychological or sexual and can include mistreatment and neglect. While elder abuse is vastly under-reported, the World Health Organisation estimates up to 10 per cent of older people worldwide experience it. Elder abuse is a form of family violence, in that most perpetrators are family members – particularly adult children. Like other forms of family violence, elder abuse is about a person or persons disrespecting the rights of another, and abusing their power and control. Elder abuse reflects gender inequality but especially the ageism that is endemic in our society today.

***“There is sufficient anecdotal and research evidence to suggest that elder abuse is a global phenomenon that has clear parallels with child abuse and domestic violence. Thirty or forty years ago society, by and large, denied the existence of the latter social crimes because of the stigma associated with them. We now face a similar situation in relation to elder abuse....”<sup>5</sup>***

Dr. Alexandre Kalache, 'The Longevity Revolution: Creating a society for all ages', Director of the World Health Organisation's global program on ageing 1995-2008.

In the Victorian Royal Commission into Family Violence report released in March 2016, which extensively referenced a SRV submission, elder abuse was formally recognized as a form of family violence, and its terrible impact acknowledged. However, for complex reasons, older people who seek help from SRV rarely identify themselves as victims of elder abuse or family violence, and the scope of issues that constitute elder abuse are not still fully appreciated. Greater understanding of elder abuse in our community, through governmental and other initiatives, will help empower older people to seek help when needed and stop the perpetration of elder abuse - both intentional and not. SRV welcomes the opportunity to make a submission to this Inquiry, which is positive step forward, and looks forward to its outcomes.

# About Seniors Rights Victoria

## Mission Statement

**Seniors Rights Victoria seeks to empower older Victorians so they can take steps to live in safety, with dignity and independence.**

Established in 2008, SRV is the key state-wide service dedicated to stopping elder abuse. It is a program of Council on The Ageing Victoria (COTA) and funding is provided by the Department of Health and Human Services, the Commonwealth Attorney-General's Department and Victoria Legal Aid. SRV is an accredited Community Legal Centre and works in partnership with Justice Connect and the Eastern Community Legal Centre.

Operating under the principle of empowering older people, SRV provides information, support, advice, casework and education to help prevent and respond to elder abuse and safeguard older peoples' rights, dignity and independence. Services include a Helpline (1300 368 821), specialist legal services, short-term support and advocacy for individuals, and professional and community education. SRV also participates in elder abuse policy development and law reform and work with organisations and groups to raise awareness of elder abuse.

SRV assists Victorians who:

- Are 60 years of age or older (45 years and over for Indigenous clients), or people approaching 60 years of age with age-related disabilities and illnesses;
- Are experiencing or are at risk of experiencing elder abuse, mistreatment and/or financial exploitation within a relationship of trust;
- Have issues relating to ageing; and
- Have capacity to give legal instruction (capacity is presumed unless demonstrated otherwise).

The latest figures compiled by the National Ageing Research Institute (NARI) of SRV's data over a two-year period show that financial abuse and psychological/emotional abuse together are the most common forms of abuse reported by older Victorians (81.82%). Victims are most likely to be female (72.5%), and the perpetrators are 60% male and 40% female. 92.3% of abuse is perpetrated by persons related to the older person or in a de facto relationship and 66.8% of abuse is perpetrated by a child of the older person.

NARI and SRV have also recently published a report: ['The older person's experience: outcomes of interventions into elder abuse'](#). It is the only Australian study we know of that looks at elder abuse from older peoples' perspective and contains recommendations, formed from their advice, which are of great use to older people and policy-makers alike.

## 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?

Elder abuse is most commonly carried out against an older person by a family member and can include a wide range of behaviors. The Australian Institute of Family Studies recently identified the ongoing difficulties in reaching a common consensus on the definition of “elder abuse”<sup>6</sup>. This research report identified considerable difficulties in not having an agreed definition, yet there are similarities that provide the core components for consideration.

The World Health Organisation (WHO) defines elder abuse as:

“A single or repeated act, or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”.<sup>7</sup>

The definition used in Victoria was adopted from the Australian Network for the Prevention of Elder Abuse (ANPEA):

“Any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect”<sup>8</sup>

These definitions are representative of the practical reality of in elder abuse, and the key components in each definition comprise:

- an existing relationship of trust between an older person and perpetrator;
- an act or omission by the perpetrator that causes harm to the older person, and
- consideration of the intention of the perpetrator.

These definitions do not identify the issue of payment for services as a key determinant in elder abuse cases. SRV is of the view that these are the elements that define elder abuse and reflect the case work it has undertaken.

#### Relationship of Trust

The ALRC Issues Paper has not focused on the pre-existing relationship between the older person and the perpetrator in assessing the determinants of elder abuse, but rather focused on the outcomes identified in the common definitions. However, SRV is of the view that the familial relationship between the older person and the perpetrator is critical to determining the severity of the consequences of ensuing abuse for that older person.

**A recent analysis of SRV’s Helpline data for a two year period showed that over 90% of alleged perpetrators were related to the older person, or in a de facto relationship, with two thirds of abuse being perpetrated by a son or daughter of the older person.**<sup>9</sup>

Case work undertaken by SRV for clients is commonly characterized by the client's disbelief that the perpetrator has undertaken a course of action that has had such dire and undeserved consequences on their life. A key person in their life such as their son or daughter, son-in-law or daughter-in-law, or grandchild has violated their trust through abuse of their position and relationship with the older person, and created significant levels of grief and betrayal that at times prevent the older person from seeking assistance or redress.

### Case Studies

1. *A grandmother recently discharged from hospital after treatment for a leg ulcer was offered practical assistance by her granddaughter, and provided her with her bank key card and PIN to help with bill payments and shopping, without a second thought. This lady was subsequently devastated to find her savings withdrawn, and then had no further contact with her granddaughter.*
2. *An elderly man in his 80s came to rely on his niece for assistance as his health deteriorated. His niece took him to see her lawyer without prior discussion, for an appointment "to sign papers". At the end of that meeting, the niece became the owner of her uncle's property. The uncle was advised to obtain independent legal advice by the lawyer, but declined and signed the documents presented to him. The uncle had no understanding of the purpose of the visit to the lawyer, and had been told to "co-operate" in the meeting by his niece as she would "withdraw all further assistance" to him if he did not. The uncle proceeded to sign transfer documents for his home, without understanding what was occurring. He had been so upset by his niece's threats that he was afraid to ask questions when given the opportunity.*
3. *A generous single mother who had provided 40 years of assistance to her son ended up with a reverse mortgage on her home that was undertaken to finance her son's latest failed business scheme. This mortgage ultimately threatened to erode all the equity in her own home, and financially cripple her as her son was unable to repay the money as promised.*

### Harm or distress

The consequences of elder abuse are dire, and result in significant harm and stress to older people.

*"The personal losses associated with abuse can be devastating and include the loss of independence, homes, lifesavings, health, dignity, and security. More than half the older people [impacted] suffer debilitating long term health problems such as depression, anxiety disorders, loss of self-esteem and exacerbation of chronic health conditions, as a direct result of elder abuse. " <sup>10</sup>*

Elder abuse also damages family relationships causing isolation, loneliness, grief and great trauma to the older person. Financial abuse can erode assets and savings so that the older person may find it difficult to buy essential medications, or other health care. They may not be able to pay bills and may even lose their home and possessions. Older people who have been abused can lose their ability to live independently and require ongoing support from the health sector, or residential care. Harm and

distress in these situations is considerable, and propounded as the perpetrator was a trusted person in the older person's life at the time the abuse occurred.

Elder abuse occurs under many forms that are commonly agreed upon, and are also detailed as conduct that is defined as "family violence" in section 5 of the *Family Violence Protection Act (Vic) 2008 (Vic)*. Some actions create outcomes that are characterised as elder abuse, and others occur through default. The common types of elder abuse result in "harm or distress" to the victim" and generally occur through the action of the perpetrator, but are less commonly caused by a person receiving "payment for services". The main forms of abuse identified are as follows:

#### Mistreatment

Mistreatment involves the denial of a person's right to live safely and independently. Mistreatment generally occurs through a deliberate approach, and can involve:

- Denying a person privacy or intimacy;
- Withholding information;
- Denying a person access to other relatives and friends by stopping visitors or interfering in phone calls;
- Restricting a person's freedom by not letting them leave the house;
- Intercepting a person's mail.

#### Neglect

Neglect occurs when an older person is deprived of the basic necessities of life. There are two types of neglect, active neglect and passive neglect.

#### Active neglect

Active neglect is the deliberate withholding of basic care or necessities. It can include:

- Leaving an older person in an unsafe place or state;
- Stopping access to medical treatment;
- Abandonment;
- Not providing adequate clothing or sufficient food and liquids;
- Not treating illnesses;
- Over or under medicating.

#### Passive Neglect

Passive neglect can be characterized as an omission, and involves the failure to provide proper care due to carer stress, lack of knowledge or ability. It may occur unintentionally and may be alleviated by getting additional support to assist the carer and older person.

#### Financial Abuse

Financial abuse is the illegal or improper use of a person's property, finances and other assets without their informed consent or where consent is obtained by fraud, manipulation or duress. It most commonly occurs between an older person and a family member but can also occur with carers or friends. Financial abuse may involve:

- A family member pressuring an older person to give them a loan, but not paying the money back as agreed;
- Stealing money or using an older person's banking and credit card without consent;
- Forcefully encouraging changes to a Will or other legal document;

- Sale of any property or assets without authority or consent;
- Forced transfers of property.

#### Physical Abuse

Physical abuse includes any form of assault such as hitting, slapping, shoving, pushing and burning. It also includes physical restraint such as tying a person to a chair or bed, or locking a person in a room.

#### Sexual Abuse

Sexual abuse is any sexual activity or behaviour for which the older person does not consent or is incapable of giving consent (e.g. a person living with dementia).

Sexual assault and abuse includes a range of offences such as rape, indecent assault and sexual harassment. It can also include sexually exploitative or shaming acts such as:

- Leaving a person in a state of undress;
- Forced viewing of sexually explicit materials or images;
- Sexually suggestive comments;
- Exhibitionism;
- Inappropriate touching;
- Uninvited sexual approaches.

#### Psychological & Emotional Abuse

Psychological and emotional abuse is the infliction of mental or emotional anguish by threat, humiliation or other verbal or non-verbal conduct. Psychological abuse may make the older person feel ashamed or powerless and often occurs in combination with other forms of abuse. Psychological abuse can be misunderstood to indicate mental health issues for the older person. Psychological and emotional abuse can include:

- Verbal assaults;
- Humiliation;
- Threats;
- Harassment;
- Intimidation;
- Other abusive behaviours which result in emotional or psychological distress.

#### Social Abuse

Social abuse is preventing a person from having contact with relatives, friends, service providers and other people or restricting the person's activities, thereby increasing their sense of isolation. Social abuse can include:

- Confining a person to their home or room;
- Preventing a person from answering the phone or door;
- Deprivation of access to transport;
- Intentional embarrassment in front of others;
- Stalking.

#### Chemical abuse

Chemical abuse can involve the over medication or under medication of a person through incorrect or negligent administration of prescription medications by another person. This may occur as a deliberate action to sedate a person, or failure to obtain prescriptions and significantly impact the older person's health and well-being.

### Intention of perpetrator

Elder abuse is predominantly intergenerational abuse, but can also include abuse by a partner or carer from the same generation. Elder abuse occurs where the older person is taken advantage of by a family member in the context of the existing relationship. Abuse of older people can be subtle or extreme, intentional or unintentional, made up of one or many acts and change or escalate over time. The impact of the abuse is exacerbated by the relationship of trust which involves a heightened level of vulnerability for the older person.

Sometimes elder abuse is the continuation of long-standing patterns of physical or emotional abuse within a family. It can also be the result of stressful situations including where an adult child is the informal carer of their parent or, inversely, where a parent is an informal carer of their adult child. Abuse can also be the result of personal characteristics of the perpetrator.<sup>11</sup>

Despite the ultimate consequences for the older person, such as loss of money, loss of ownership of property or the inability to live in their place of choice, there can be significant differences in the ongoing relationship with the perpetrator if the abusive act occurred through an intentional as opposed to unintentional or ignorant circumstances. However where abuse has occurred unintentionally, the focus should be directed to the consequences experienced by the older person and not the perpetrator's intention.

SRV considers that the most significant determinant of elder abuse is the relationship of trust that exists between the older person and the perpetrator. This key attribute therefore focuses on pre-existing relationships in the older person's life, rather than abuse that can occur in relationships based on the exchange of money for services<sup>12</sup>, such as those undertaken by a service provider to an older person who then takes advantage of that situation to the detriment of the older person.

### Recommendation

- 1. Recognise a pre-existing relationship of trust as the key determinant in defining elder abuse as opposed to the abuse that can occur in relationships based on the exchange of money for services.**

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

Sometimes, SRV receives calls from service providers or members of the public who have concerns about an older person experiencing abuse from family members. SRV's practice is to give general information and then suggest that the third party encourage the older person to contact us directly. This approach is based on a rights-based and empowerment model rather than a welfare approach. SRV believes that older people are capable of making their own decisions and that respect should be accorded to their wishes rather than acting upon any perceived notion of need.

Older people are not children and should not be infantilised. As such SRV does not support mandatory reporting.

In working with older clients SRV has implemented some elements for best practice including:

- Determining what is appropriate for the client, and acting in accordance with their instructions. Elder abuse is a complex area, and the older person is often unable to overcome notions of shame about the situation they are facing. For many older parents there is a sense of disbelief at what the family member has done to them coupled with an ongoing sense of need to protect their “child”. At times this may prevent an older person undertaking steps to have an adult child leave their home despite an intolerable living situation. It can also prevent a family member seeking an intervention order, as they do not want to get the perpetrator “into trouble”
- Conflict of interest is identified as a critical issue, and SRV ensures that instructions for client matters are only received from the older person.
- Use of qualified and independent interpreters is critical where English is not the primary language for the older person.
- Adequate arrangements must be made to provide assistance for clients with disabilities. SRV finds that a significant proportion of clients over 80 have difficulty in participating in phone advice services, due to hearing or communication issues. SRV provides additional assistance to these clients by arranging home visits or meetings in venues close to the older person’s home.
- Older clients are often stressed by their circumstances, and require a timely and professional response to assist them to cope with their difficulties. The SRV multidisciplinary service model that uses both advocates and lawyers working together with a client provides them with a breadth of experience and skills and a comprehensive and sensitive service to deal with serious legal and personal issues.
- Providing clients with an appointment or contact arrangements with a lawyer that allows adequate time for the older person to provide their instructions on what is for them a devastating circumstance is critical. It is also important to reaffirm these details and their requirements at the conclusion of the appointment.
- It is also imperative that services provided to an older person have a degree of flexibility in terms of appointment times as personal and health situations can change unexpectedly. Flexibility is also required when obtaining instructions and evidence from the client and when providing legal advice.
- Many families are reluctant to seek legal advice about what they regard as family business. Older people often cite “if you can’t trust your family who can you trust?” in reflecting on why they did not seek advice prior to entering what has become a very disadvantageous arrangement for them. Sometimes where legal advice is obtained, several generations of the family attend their “family” lawyers’ office for advice to formalise arrangements as inexpensively as possible.<sup>13</sup> An older person is often “taken” to the lawyer by their adult child, and both parties see the lawyer together. However, this creates a conflict of interest for the lawyer and amounts to a breach of professional standards if the lawyer does not obtain consent to act for both parties. Older people in particular appear to have greater difficulty in understanding the importance of obtaining independent advice, and generally adopt the least restrictive approach.<sup>14</sup>
- Some clients that contact SRV have issues with cognitive decline, but have not lost capacity to the extent that they are unable to provide instructions to lawyers. In working with these clients



it is critical to identify the times of the day to meet with the client that allow them to function at their best.

### Question 3 - The ALRC is interested in hearing examples of elder abuse to provide illustrative case studies.

Elder abuse does not discriminate between cultures but cultural differences may mean additional complexity in responding to elder abuse.

Approximately one third of people over 65 years of age in Victoria are from CALD backgrounds. Whilst elder abuse is not necessarily more common in ethnic communities, as the Ethnic Community Council of Victoria (ECCV) observes, older people within these communities may be at greater risk or face additional barriers in accessing assistance. Lack of English language skills, cultural influences and smaller family networks can mean that an older CALD person is more vulnerable to abuse are less likely to identify abuse or seek support.

Adult children returning home is a common occurrence in ethnic communities, as it is elsewhere. However, additional complexities might arise for older parents due to cultural specificities such as:

- Relying on an adult child for translation of documents or banking and finance matters;
- Social stigma attached to revealing an adult child's addiction;
- Speaking out about family problems in a close-knit community with traditional values.

SRV has acted in a number of matters involving older women from CALD communities who have faced enormous struggles after the death of their husbands. Culturally these women have not lived with a sense of equality, and gender roles supporting male dominance are well entrenched. In many cases the elderly widows were the victims of elder abuse at the hands of their sons or grandsons, and lost the ability to continue to live in their own homes.

#### Case Studies

4. *SRV acted in a matter where 3 generations of the family originally lived in the grandparents' home, and the son forced his mother out of the home after her husband's death, as his wife was not prepared to assist her. The older woman was forced to live in a converted garage at her daughter's home, and had her pension significantly reduced by Centrelink as she was not living in her own home. In assessing proprietary interests in the property the son alleged financial contributions to the construction costs of the home that were difficult to assess, due to the passage of time and the limited records available. The older woman did not speak or read English and had limited documents available. The son believed he was entitled to the home and had little regard for his mother's position.*

5. *An elderly grandmother from a European background, was coerced to sign a Transfer to her property, and she was unable to read English could not understand the documents presented to her. She had been abused by both her son and grandson, and traumatized by ongoing threats and violence from them. Her situation improved when the Police applied for an Intervention Order on her behalf, removing the perpetrators from the property. SRV assisted her to lodge a caveat to prevent the registration of the Transfer.*

6. *SRV acted for an older European couple, whose adult son and daughter-in-law had moved into their home for a few weeks, wrought havoc and then refused to leave for over a year. The daughter in law had serious mental health issues, and had taken over the couple's bedroom and en-suite*

bathroom. She slept in the day, and disturbed the older couple through the night. The elderly father was forced to sleep on a couch in the living room for almost a year. The son was an unemployed alcoholic and lived in the garage with 3 dogs. The backyard was destroyed by the dogs, and the elderly mother lost safe access to the clothesline. The couple refused to make any financial contribution to household costs, and utility bills increased fourfold through the time of their occupation. The older couple struggled financially, and also suffered from stress and poor health as a result of the situation. The couple sought assistance from SRV to have the family removed, and after various efforts failed, an Application for an Intervention Order was made on the grounds of economic and psychological abuse. The IVO was eventually granted with an exclusion order on the grounds of economic abuse, and police were required to assist with the enforcement of the order.

7. SRV has also assisted an older woman of European background who had a number of adult daughters and one son. Her son had not been able to hold down a job since leaving school, and 25 years later had returned to live with her on as he had nowhere else to go. However, this period extended into several years, during which time he became abusive as a result of drinking problems. He was unwilling to apply for a Newstart allowance, so received no Centrelink benefits during this time. The mother was also concerned that her son had undiagnosed mental health problems that caused his behavior to be erratic. His sisters were very concerned about the impact his presence had on their mother as she stopped inviting visitors to her home, and was under enormous psychological and financial pressure to provide money to her son, as well as maintain the household on her single pension. SRV was unable to provide significant assistance to the older woman, as she refused to take action against her son, and was unwilling to consider an Intervention Order. She did not want to make her son homeless as she indicated he had nowhere else to go. Her objective in contacting SRV was to organise “help” for her son.

The ECCV made a submission to the Victorian Royal Commission into Family Violence in June 2015. As part of that submission detailed consideration was given to the issue of elder abuse within CALD communities. ECCV took the view that:

*“Elder abuse is part of the family violence spectrum, recognised under the Family Violence Protections Act 2008. Like other forms of family violence, elder abuse is about one person having power and control over another person. ... There is no evidence of higher prevalence of elder abuse in Cultural and Linguistically Diverse Communities, however it is likely to be more hidden and under-reported. Migration history leading to an increased dependence on adult children may result in I increased risk of elder abuse amongst older migrants.”<sup>15</sup>*

ECCV also identified the key barriers to CALD older people reporting elder abuse as follows:

- Language and literacy;
- Fear of consequences;
- Social isolation and familial ties; and
- Social stigma

SRV endorses the findings and recommendations made by ECCV in their submission to the RCFV in relation to the circumstances of elder abuse in CALD communities.

**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?**

The WHO notes that there is little information regarding the extent of abuse in older populations, and that it is underreported. Prevalence rates or estimates exist only in selected developed countries – ranging from 1% to 10%.<sup>16</sup>

In 2011, the WHO European Office published a report on ‘elder maltreatment’ (defined as ‘physical, sexual, mental and/or financial abuse and/or neglect of people aged 60 years and older’) showing that, in the previous year in the European Region, about 2.7% of older people had experienced maltreatment in the form of physical abuse, 0.7% had suffered sexual abuse, 19.4% had experienced mental abuse and 3.8% had been subjected to financial abuse. The prevalence of elder maltreatment was observed to increase among people with disability, cognitive impairment and dependence. The report also stated that perpetration is most often carried out by caregivers who are partners, offspring or other relatives.<sup>17</sup>

In the Australian context, research indicates that elder abuse is experienced by approximately 2 to 6% of people aged 60 years and over.<sup>18</sup> There is no prevalence data for Victoria. However, in 2013-14, SRV received 2236 telephone calls on its Helpline. Of these, 1206 related to issues of elder abuse. SRV subsequently provided advice (legal and advocacy) to 343 older people.<sup>19</sup> There is need for research about the prevalence of elder abuse to nourish the development of prevention strategies and for new and existing programs to be evaluated for effectiveness.

A growing number of research studies around the world are starting to reveal the magnitude of the crisis, yet according to the WHO in August 2011:

*“... the scope and nature of the problem is only beginning to be delineated. Many risk factors remain contested, and the evidence for what works to prevent elder mistreatment is limited”.*<sup>20</sup>

In recognition of the fact that elder abuse is poorly understood, the government of Québec in Canada funded the creation of a research chair on elder abuse at the Université de Sherbrooke as part of their ‘Action Plan to Counter Elder Abuse 2010-2015’ (renewed until 2017). Mandated to promote the acquisition of new knowledge regarding prevention, detection and intervention among researchers and practitioners, SRV understands that the role is unique in the world. There is an associated website to promulgate the research.<sup>21</sup> Recent publications include a book on preventing, detecting and countering elder financial abuse.<sup>22</sup> The Research Chair, Professor Marie Beaulieu, was a key note speaker at the 4<sup>th</sup> National Elder Abuse Conference organized by SRV in February 2016 and provided expert evidence on the implementation of the elder abuse policy, as well as an evaluation of Québec’s five year action plan.

SRV has partnered with the National Ageing and Research Institute (NARI), and NARI has completed two reports that have used SRV service data.<sup>23</sup> The first report collates service outcomes and data in a limited study from SRV as the peak Victorian organisation dealing with issue of elder abuse. However it is considered critical that funding be provided for an elder abuse prevalence study that can provide data both nationally and for Victoria. This research will enable evidence to be collated about the actual prevalence of elder abuse, and the effectiveness of prevention and intervention strategies undertaken. In order for any prevalence study to be representative, it is important that researchers consult a broad range of service providers including legal, medical, local government providers, Meals on Wheels, ACAS, RDNS, case managers and banks.

## Recommendation

- 2. Commence a proper Australia-wide elder abuse prevalence study and provide funding for research that builds evidence about the effectiveness of various prevention and intervention strategies.**

# 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 the processes for identifying and responding to elder abuse?

Centrelink is a prescriptive Commonwealth government agency with mandatory requirements imposed by legislation, protocols and extensive policies. As the majority of older Australians are recipients of the Aged Pension, it has significant impact on their lives. Older people appear to have some significant disadvantages in attempting to deal with Centrelink, and are often bewildered by the “system” that is restrictively prescriptive and transactional in nature. Information about “rights”, “eligibility”, and “appeal processes” are provided to older people who may be faced with the prospect of losing their pension as a result of traumatic circumstances in such a matter of fact way that their suffering is magnified considerably

From the daily casework undertaken by SRV it appears unlikely that Centrelink has any understanding of elder abuse, and the consequences of abuse faced by Aged Pension recipients. If a rule or regulation appears to be breached, the penalties are applied immediately, and elder abuse is not an exception that will have any bearing on the process or outcome for the older person. This is particularly diabolical in the cases of financial abuse that is the most common form of elder abuse experienced. Financial abuse often means an older person may not be able to continue to receive the pension.

One common example of this issue occurs in Assets for Care arrangements. Assets for Care arrangement involves the transfer of property or application of proceeds of sale held by an older person to family members without payment. This is based on a promise to provide ongoing care with the right to live with the family for the rest of their life to the older person. The family members then become the registered proprietors of the new or existing property, In some cases the older person is not fully aware that the transaction such as a transfer of land has occurred.

This type of property transfer must comply with the Granny Flat rules, and if it does not, Centrelink will assess the matter as a breach of the Gifting rules. In such a case it would likely result in a significant reduction in the amount of pension paid to the older person. It is also likely that the older person could receive a substantial debt notice from Centrelink, based on what is then assessed to be a significant overpayment. Applications for hardship are often unsuccessful in these circumstances, and the older person is placed in a dire situation and unable to understand the Centrelink appeal process. In situations where family intergenerational relationships break down, the older person has little ability to recover their former position, as they have lost their main capital asset, had their pension reduced and incurred a debt they cannot pay. This lack of regard for elder abuse by Centrelink has diabolical consequences for the victims of elder abuse.

In 2012 SRV published “*Assets for Care: A guide for lawyers to assist older clients at risk of financial abuse*”<sup>24</sup> as there was evidence that many lawyers in private practice had little or no understanding of financial elder abuse in practice. This resource appears to have been overlooked by the legal profession. SRV has acted in several matters where clients have used private lawyers to effect the

transfer of their principal residence to family members, with no advice being provided to them of the disadvantages of the transaction or about Centrelink requirements. These transfers create dire financial consequences for the older client, and it is critical that training for professionals (including lawyers) be prioritized.

#### Case Study

8. *An older lady was taken to her lawyer by her son to implement various changes to her Will following the death of her husband. The couple had a number of children, but their son had had a difficult life, and they had agreed in the husband's lifetime that it would be best to leave their home to this son. Their other children were well off financially, and did not require the same level of support. A new Will was prepared on this basis, and with the son's knowledge. However, the son then made further appointments for his mother with the lawyer after the Will had been executed. The son and mother met with the lawyer together and provided instructions for the immediate transfer of the mother's property to also benefit the son, and his 3 daughters equally. A title search undertaken by SRV showed the mother, son and the 2 granddaughters registered as joint proprietors. It appears that the mother did not fully understand what had occurred to her property, and received no advice from the lawyer about the obvious conflict of interest that was occurring. The older lady had depended on her husband to manage their financial and legal matters, and after his death struggled to manage her affairs. She had also had few dealings with lawyers, and relied on her son to assist her, and believed that "he knew what she needed" so did not query the process undertaken or papers signed.*

*The son and 2 granddaughters lived at the property, and then moved the mother to an Aged Care facility, as they did not want to care for her, after she had a stroke. Centrelink, assessed the property transfer as a breach of the Gifting Rules, and the older lady was then further devastated when her pension was reduced and she received further notification of a significant debt from Centrelink. An application for Hardship was unsuccessful, and the older lady's residence at the nursing home became extremely tenuous as she was unable to pay for her accommodation and care. It is critical to note that she received no advice from the lawyer on the impact the transfer to change ownership of his property would have for her ongoing pension entitlements.*

#### **Recommendation**

- 3. Address, through CPD training for all practitioners in Elder Law, lawyers' lack of knowledge of Centrelink requirements for older clients undertaking property transfers.**

#### **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?**

SRV is of the view that older people can be seriously disadvantaged by the payment nominee system implemented by Centrelink, where elder abuse is at risk of occurring. In circumstances of financial abuse, or emotional or psychological abuse there is a strong likelihood that the authority to a payment nominee may not have been given freely by the older person. It is also likely that there has not been a detailed explanation of the operation or consequences of the authority to the older person. Often an older person will feel compelled to make this arrangement, particularly if they are impacted by health or mobility issues and reliant on the person nominated.

SRV suggests that the Enduring Powers of Attorney system would provide a more robust form of authorisation for older people, as proper assessment of the person's capacity would be undertaken in that process. The statutory requirements for Attorneys would also ensure better protections for the older person, and the ability to make changes if necessary.

## Recommendation

### **4. Require that Centrelink deal with an attorney appointed by an Enduring Power of Attorney and not a payment nominee to provide a more robust form of authorization for older people.**

## **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?**

The Carer payment “provides income support to people who, because of the demands of their caring role, are unable to support themselves through substantial paid employment. Carer Payment is income- and assets-tested and paid at the same rate as other social security pensions. It can be paid to people providing constant care to a person with a disability. Abuse of Centrelink payments is sometimes discovered or suspected by services that deal with financial elder abuse of older people. An adult child may be claiming a Carer Payment but not providing adequate care, is thus failing to meet Centrelink eligibility requirements.”<sup>25</sup>

SRV has had numerous clients report various abuses to the Carer Payment system. The following case study is representative of the issues faced by our clients

### Case Study

9. *An older woman had a stroke a number of years ago, and her son moved into her rental accommodation to assist her when she was discharged from hospital. He was unemployed at the time, and then obtained a Carers Payment to assist with her ongoing care needs. The client acknowledged that her son did provide considerable assistance to her at that stage, and facilitated her recovery. However over the course of several years, the son provided less and less assistance, struggled with alcohol problems, and regularly became aggressive towards her. A wall in her home was punched in by her son during an argument between them. The mother's health improved and she became more fearful of her son's unpredictable behavior. She attended an appointment at Centrelink, to advise of her improved health, and that her son no longer provided any care for her. The Carers Payment to her son was suspended. He confronted her about this, but she declined to discuss the matter with him. At the time of contacting SRV for assistance she reported that her son had become more aggressive, and unexpectedly produced papers for her to sign. She signed these documents under duress as she had again been threatened by him, and had no opportunity to read them. She later realized the documents were to reinstate the Carers Payment.*

It is suggested that the introduction of Random Audits be commenced for all recipients of Carers Payments, but particularly for those who “care” for recipients of Aged Pensions. It is also important that older people are able to safely report situations where they are not receiving the care required from the person receiving a Carers Payment, and the introduction of a policy to address this must be urgently considered.

## Recommendation

5. **Introduce Random Audits for all recipients of Carers Payments, but particularly for those who “care” for recipients of Aged Pensions, to reduce abuse of the system.**
6. **Assist older people to report situations where they are not receiving the care they require and then ensure their matter is properly investigated.**

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

SRV has no experience in this area.

### **Question 9 - What changes should be made to residence requirements or waiting periods for qualification for social security payments, or the assurance of support scheme for people experiencing elder abuse?**

SRV has had several cases involving intergenerational family violence in situations where an older person is living in Australia on a Parent Visa. Often the older parent has provided significant financial resources to the family to assist them settle in Australia, and they in turn have guaranteed support for the older person enabling them to come to Australia. In one case where relationships broke down, the adult children became so abusive, that the parent was unable to continue to live with the family. The parent had no other relatives in Australia, and had nowhere else to go. The reality can be that the older person can become homeless and be without any financial support. At present there is no exemption to these Visa requirements in circumstances of family violence or elder abuse that would enable an older person to receive a pension from Centrelink. Services for older people are usually only available if the older person receives a pension and has a source of income. Elder abuse in these circumstances renders an older migrant destitute.

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

The “Granny Flat” rule creates considerable injustice to older people, who are seriously disadvantaged if a “Assets for Care” arrangement fails through a relationship breakdown. The granny flat arrangements vary considerably, but include “ *transferring property to adult children, or selling property to invest the proceeds in the children’s property or business, in exchange for living with and being cared for long term by adult children and their families.*”<sup>26</sup>

One feature of the Granny Flat rule, is that the older person who often provides the bulk of funds for the purchase of the property shared with the family, cannot be registered on title as a proprietor. The older person is able to hold a “life interest” in the property, yet in practice this is often inadequate

security for the considerable financial investment made. Whilst a life interest is recognized as an “equitable interest” and would be capable of supporting a caveat, it can also be documented by the Land Registry under section 32 *Transfer of Land Act 1958 (Vic)* through an Application for a New Folio of the Register - for the life interest and the remainder expectant interest. This process appears to be rarely followed in practice in Victoria, but provides a mechanism that would facilitate the life tenant to potentially deal with their interest in the property, whilst clearly defining the interest of the family member

Due to the disengagement of older people in the legalities of this process, and a keenness by the adult children to procure funds for a better property or home, the parties rarely seek adequate legal advice, and often fail to appreciate the disadvantages of both instructing the same family lawyer. From a proprietary interest perspective this means that the “life interest” that should be held by the older person becomes a lesser interest that equates to a contractual “right to reside for life”. Problems arise for an older person if an intergenerational family relationship breakdown occurs, or where their health needs increase to the point that they need to recover their financial contribution to pay for Aged Care. The recovery of their financial contribution is difficult and overwhelming for older people in the face of family conflict.

### Recommendation

**7. Change the operation of the Granny Flat Rules in Assets for Care arrangements to enable pensioners to retain ownership of their principal residence, without it impacting their pension.**

## Aged Care

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

SRV has limited case experience in this area.

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

SRV has limited case experience in this area.

**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?**



SRV has limited case experience in this area.

**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?**

SRV has limited case experience in this area.

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

SRV has received calls from a number of residents in Aged Care facilities relating to the constraints imposed on them by the facility as a consequence of instructions provided by their “Power of Attorney”. There appears to be a significant lack of understanding about the “powers” granted to a person who becomes an attorney for another person. This is further exacerbated in some instances by the management of Aged Care facilities also lacking understanding about the legal rights held by an Attorney under an Enduring Power of Attorney for a resident.

Many facilities request an older person to provide a copy of any Powers of Attorney of Enduring Powers of Guardianship they have implemented before moving into Aged Care. Some facilities make this a mandatory requirement prior to entry. In Victoria a person is able to make a variety of Powers of Attorney, each with specific purposes and limitations, but new legislation operative from September 2015<sup>27</sup> has allowed Principals to make an Enduring Power of Attorney in respect of both financial and personal matters in the one document. Prior to this, a separate Enduring Power of Attorney (Financial) and Enduring Power of Guardianship were required. The Enduring Power of Attorney (Medical) remains a separate document and is governed by separate legislation.<sup>28</sup>

Older people have reported having their liberty curtailed by their Attorney who has instructed the facility, that without their prior consent, the older person is NOT to:

- Leave the facility;
- Have a telephone;
- Have any (or particular) visitors

Sometimes these restrictions were imposed in situations where this approach was contrary to the older person’s expressed wishes and preferences, and often imposed by the Attorney under an Enduring Power of Attorney (Financial). These types of decisions can only be made by a Guardian, and are outside the scope of decisions that can be made by a person holding Financial Power of Attorney. This clearly demonstrates a lack of knowledge about the role of an Attorney by the person in that position, and also by the Aged Care facility in accepting and acting on these instructions. The basic position that an Attorney must act in accordance with the known wishes and best interests of the Principal is ignored for what is often seen to be easiest for the attorney. This ageist and paternalistic approach appears to be used against the interests of the older person and often has severe personal, social and psychological repercussions.

**Recommendation:**

- 8. Ensure aged care facility management and staff undertake professional education on the legal operation and requirements of Powers of Attorney.**

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

In 2014, SRV and Justice Connect (Seniors Law) prepared a joint submission to the ALRC Equality, Capacity and Disability in Commonwealth Laws Inquiry<sup>29</sup>, drawing from previous work by the Victorian Law Reform Commission, *Guardianship: Final Report* (2012) where it was noted:

- a. many people who lack capacity to make decisions about their accommodation and restrictive practices live in facilities such as nursing homes with the informal consent of a family member or friend;
- b. there is no common law or statutory authority permitting this practice;

There is no oversight of these decisions or scrutiny of restrictive practices.<sup>30</sup> Based on our casework, Seniors Law has identified two key decisions where regulation is required to clarify the person responsible for making the decision and safeguards and oversight of those decisions:

- a. the decision to enter the aged care facility; and
- b. the decision to use restrictive practices while the person resides at the aged care facility.

These decisions may result in the deprivation of liberty of vulnerable older people in aged care facilities, many of whom have no means of seeking independent advice. In response to the VLRC review, Aged Care Crisis submitted that:

*older people who are perceived to have cognitive impairment are the only group of people who can be placed in locked facilities, against their will, without any reasonably accessible procedures for appeal. Clearly, people must be kept safe but we are aware of several instances where the basic human right, not to be kept locked away or otherwise restrained without due process, has been disregarded. We can think of no other group of people where this situation would be regarded as acceptable.*<sup>31</sup>

### Case study

10. *An older man was frustrated with an aged care facility that would not allow him to return home in circumstances where his children did not support his desire to do so. The man's capacity was not impaired, but the facility was concerned about their duty of care. The man was told that if he attempted to leave the facility the police would be called.*

The VLRC Final Report identified the complex law, standards and practices that currently regulate the deprivation of liberty of an older person at an aged care facility:

- The writ of *habeas corpus*;
- The tort of false imprisonment;
- The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**);
- Statutory authority to deprive liberty, including under the *Mental Health Act 1986* (Vic) and *Disability Act 2006* (Vic);
- Regulation of residential services under the *Aged Care Act 1997* (Cth) and *Supported Residential Services (Private Proprietors) Act 2010* (Vic); and
- Aged care assessment service.

Some of these avenues may not be appropriate for legal and practical reasons. For example, provisions in the *Disability Act 2006* (Vic) do not extend to disabilities solely related to ageing and the Charter does not provide a stand-alone cause of action – it must rely on an existing cause of action,

such as a writ of *habeas corpus* or the tort of false imprisonment, which present their own practical barriers to justice.<sup>32</sup>

Due to the failure of current laws to provide a comprehensive framework, SRV and Seniors Law reiterated support for the development of a national or nationally consistent regulatory approach to guide the making and oversight of these important decisions. In developing the appropriate regulatory response, the following principles should be considered:

- The older person is presumed to have capacity to make decisions;
- If the capacity of the older person is in doubt, the proposed decision-maker must have Medical evidence that the older person lacks capacity before making the decision;
- The decision-maker should comply with the proposed National Decision-Making Principles and consider options that promote the older person’s liberty and autonomy – admission to an aged care facility and use of restrictive practices are measures of absolute ‘last resort’;
- The possibility of supported decision-making is to be explored before imposing substitute decision-making;
- These decisions should be reviewable and regularly reassessed by a tribunal or court; and
- If an older person does not consent to entry to the aged care facility or use of restrictive practices, the proposed decision-maker can only make these decisions under formal appointment as a substitute decision-maker.

When identifying the appropriate decision-maker, principles from existing statutory regimes should also be followed. For example, section 37 of the *Guardianship and Administration Act 1986 (Vic)* details the priority of people who are eligible to be a ‘person responsible’. When a decision-maker has not been appointed, the spouse of the older person takes priority over other relatives. As noted in our submission to the VLRC review, this approach is not regularly followed;

*“current practice in relation to medical decision-makers often involves an element of ageism, in that elderly spouses are regularly discounted by staff at medical facilities or carers when a person responsible is needed. This, combined with the potential for a conflict between the represented person and family members in relation to decisions to admit the older person into care, increases the risk of abuse and the need for the types of safeguards discussed in the Consultation Paper.”<sup>33</sup>*

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

SRV has limited case experience in this area

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

SRV has limited case experience in this area

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

SRV has limited case experience in this area

**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 response to elder abuse?**

SRV has limited case experience in this area

**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?**

SRV has limited case experience in this area

## National Disability Scheme

**Question 22 - What evidence exists of elder abuse being experienced by participants in the National Disability Insurance Scheme?**

As the NDIS is still being rolled out, SRV has not had opportunity to work in this area to date

**Question 23 - Are the safeguards and protections provided under the National Disability Insurance Scheme a useful model to protect against elder abuse?**

SRV does not have the necessary experience in this area to comment

## Superannuation

**Question 24 - What evidence is there of older people being coerced, defrauded or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and redressed?**

SRV has not had any casework experience in this area as most of our clients do not have superannuation funds.

## Financial Institutions

**Question 25 - What evidence is there of elder abuse in banking or financial systems?**

The “Profile of Elder abuse in Victoria: Analysis and Data about people seeking help from Seniors Rights Victoria”<sup>34</sup> data analysis undertaken of SRV’s work by NARI between July 2012 and June 2014 indicated that 117 clients or 15.5% of calls made to SRV involved “Banking Matters” as the form of abuse experienced. “Banking Matters” was a broad category and “included a failure of the bank to report financial abuse, home repossession, release of money without customer authority, and unspecified matters”<sup>35</sup>.

A number of “common” scenarios have been identified through both SRV’s client cases and helpline advice. Clients are dismayed at the ease with which trusted family members abuse the access they have provided to their money. Some situations occur through coercion, undue influence or other forms of psychological abuse such as an older person going to the bank and withdrawing significant amounts of money at the instruction of and for a perpetrator of elder abuse.

Alternatively, an older person may provide their bank card (either debit or credit) and PIN to a family member to help them with financial matters (such as cash withdrawals or bill payments) following a period of ill health, and then subsequently discover that their savings have been withdrawn, or their credit card has been used for the family members own purposes.

Another common situation arises where a more formal step has been taken - a Third Party Nomination form completed at the bank to enable a family member to “assist” an older person with their banking requirements. This situation raises some legal questions, as access to the account occurs through simply signing a form without any of the safeguards and legal requirements that are mandatory for a client undertaking Enduring Powers of Attorney. Essentially no “advice” about what may occur as a result of the authority is provided by the bank to the older person, and no consideration is given to the capacity of the person giving the authority.

### Case Studies

11. *An older client had consistently lived a particularly frugal lifestyle with her husband, and amassed considerable savings to support their needs in old age. After her husband’s death, the older woman was grateful for the assistance provided by her eldest son. As she lived a distance from the shops, her son began to assist her by driving her each week to the shops and bank. He would often sit in the car and wait for her. However after a few months, the son began to insist that he accompany her to the bank and would stand with her as she completed her banking with the teller. The mother’s health at this stage had started to decline, and at times she was forgetful and confused. Some weeks after this commenced, the son completed a withdrawal form in the bank and had his mother sign this. She could recall that he stood very close to her at the teller and this made her feel uncomfortable. The son took the money, but did not visit her much after the incident in the bank, and also stopped helping her with her shopping trips. The woman was shocked to later discover that her son had withdrawn \$50,000 from her account.*

12. *An older woman lived with her daughter and son-in-law, after she sold her home, she used the proceeds of sale to purchase a new home for the family to live in. After her daughter lost her job, the older woman was driven to the bank each “pension day” and forced to withdraw all of her pension in cash for her daughter’s use.*

13. *An older couple had a mortgage on their property and struggled to make the mortgage payments on the aged pension. The wife was diagnosed with dementia, and placed in Aged Care, so the husband decided to accept his daughter’s suggestion to sell the house and then move in with her and her new partner. The house was sold, and proceeds of sale deposited into the older couple’s joint account. Shortly after the settlement, the daughter using an Enduring Power of Attorney for her mother,*

*transferred all of the sale proceeds, to her own account, and then drew a bank cheque for the whole amount, payable to her partner. The father was told to leave the daughter's home as he was a nuisance, and he is now struggling to find accommodation he can afford.*

Online banking has also provided opportunities for enterprising family members to gain access to an older person's account in situations where the older person does not even have a computer.

### Case Study

14. *After suffering a stroke a client faced considerable uncertainty. His daughter applied for a Guardianship and Administration Order to manage his affairs. The client had some significant physical limitations, but managed his everyday life with support services. The daughter visited her father and indicated she could help him with banking arrangements. On checking his statements later, the client noticed a number of internet banking transactions withdrawing several thousand dollars in his daughter's name. He had not authorized this, and did not use internet banking himself. It appeared that his daughter had set up on-line access to his accounts for her own benefit.*

### **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?**

Banks have the potential to play a significant role in the prevention and detection of elder abuse given their role providing front line services to their customers. Standards of banking practice are detailed in the Code of Banking Practice (the Code), but do not impose any specific obligation on a bank to identify, report or protect a customer against an incident of financial abuse. The Code does however contain general provisions that could be relevant in the context of abuse. These include the obligation to act fairly and reasonably, exercise the care and skill of a prudent banker before offering or giving credit facilities, and to refrain from accepting a person as a co-debtor under a credit facility when it is clear that the person will not receive a benefit under the facility.

Apart from the general duties stipulated in the Code, the Australian Bankers' Association (ABA) has also produced an industry guideline entitled, 'Protecting vulnerable customers from potential financial abuse',<sup>36</sup> which advises bank staff to watch out for vulnerable customers who regularly visit their branches. Some of the suggested recommendations for dealing with these situations include delaying a transaction where fraud is suspected, getting a customer's consent to discuss the matter where abuse is suspected, checking third parties authorisation to act, and referring the matter to senior staff or management where abuse is suspected. SRV understands that banks are expected to implement industry guidelines, but as they are not mandatory, and the ABA does not monitor them, the exact levels of implementation are unknown.

There is currently no legal obligation for banks to report incidents of abuse or suspected abuse. The reporting of such matters may even carry some liability for banks given their obligations relating to privacy, confidentiality and potential actions in defamation.

Significant changes to the banking industry are required to enable the consideration and prevention of elder abuse to be a more serious priority. This could be affected through the implantation of standard mandatory protocols that would enable:

- Early intervention in suspected cases of financial abuse of older people including internet banking, and referral to senior officers within the bank;

- Better training for customer service officers in detecting and dealing with suspected elder abuse situations;
- Referral to the police for investigation.

The current focus on preserving privacy prevents banks from potential intervention and also absolves banks from having any responsibility for acting to assist customers facing difficulties. It is critical to implement exceptions through amendments to the Privacy Act and provide banks with immunity from acting in situations of suspected financial abuse.

The Senior Safe Act of 2016 has been passed by the USA House of Representatives and is currently before the Congress. The purpose of the Bill is to “provide immunity from suit for certain individual who discloses potential examples of financial exploitation of senior citizens”<sup>37</sup> This means that banks and other financial advisors would be protected from legal liability if they “disclosed financial exploitation of senior citizens to a regulator.”<sup>38</sup> This Act when passed will also require bank officers and financial advisors to “receive training on the identification and reporting of suspected elderly exploitation ... in order to be immune”.<sup>39</sup>

### Recommendation:

- 9. Adopt the current banking industry guidelines on elder abuse as mandatory requirements of the Banking Code of Practice.**

## Family Agreements

### Question 27 - What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

Financial abuse is statistically the most common type of abuse encountered at SRV. According to NARI’s analysis of SRV’s Helpline data from July 2012 to June 2014, 37% of clients reported financial abuse, closely followed by psychological or emotional abuse at 35.8%. The two types often go together.

Financial abuse of older people is an area where research has been carried out in Victoria and Australia and hence SRV has some understanding of its prevalence and risk factors. State Trustees commissioned Monash University to conduct a three year research project entitled: *Protecting Elders Assets Study (PEAS): Ethical Management of Older Persons’ Financial Assets (2009-2011)*.<sup>40</sup> The study found that up to 5% of Australians over 65 have experienced financial abuse. The research also found that older women over the age of 80 are most at risk and that the older person’s own children are most likely to be the perpetrators. Characteristics identified as making an older person most vulnerable to financial abuse were:

- Diminished capacity due to dementia and other related illnesses;
- Isolation and dependence on others;

- Reliance on others for translation, transaction and services relating to the management of their finances, particularly if they are from a CALD background.<sup>41</sup>

Other research involving a national online survey of aged care service providers in 2010 identified certain difficulties in detecting financial abuse of an older person by a family member.<sup>42</sup>

- Older people not reporting abuse for fear of recrimination or breakdown in family relationships;
- Older people and family members believing that financial issues are a private matter;
- Family members becoming abusive toward workers when inquiries were made;
- Workers feeling reluctant to intrude in the older person's life;
- Difficulty obtaining an older person's consent to take action.

### SRV's experience

The difficulties identified by the above research resonate with SRV's experience and also extend to the reluctance shown by older people to undertake Family Agreements in Assets for Care arrangement. The pervasive view of older people reluctant to consider legal ramifications is that '*financial matters within families are a private matter*' and '*if you can't trust your own family – who can you trust?*'.

### 'Assets for care' arrangements

Older people who come to SRV have often transferred part or all of their home to a family member, or sold it and provided the money to a family member in expectation of future care, without first seeking independent legal and financial advice or entering into a formal agreement such as a Family Agreement. An older person may have felt they had no choice, may not have understood the potential ramifications of the decision or may have held a genuine desire to help their adult children, trusting that things would work out. Unfortunately, circumstances change and things can go wrong when there are good intentions.

The benefits of formally documenting arrangements for care by an adult child in exchange for a parent's assets are clear.<sup>43</sup> SRV believes that a shift towards openly talking about and formally documenting arrangements for the future care of an older person is necessary to safeguard their financial wellbeing.

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

Victoria appears to be in an enviable position with respect to the significant amendments made to the *Property Law Act 1958 (Vic)* as a result of the Victorian Law Reform Commission's Disputes between Co-owners Report in 2001.<sup>44</sup> "*The main changes that were made are that much of the jurisdiction of the Supreme Court in these disputes was transferred to VCAT and there was substantial codification of the law by amendments to Part IV of the Property Law Act 1958.*"<sup>45</sup> This jurisdictional change has provided "co-owners" with a much greater ability to institute proceedings to resolve disputes through less expensive and onerous processes than previously existed for Supreme Court matters. This has also provided a significant benefit to older people where Assets for Care situations have failed, and they seek to recover their financial contribution to the purchase of a property in conjunction with other family members. However, the failure to consider implementing a Family Agreement to document the arrangements made with family members created significant problems for the older person when things did not work out with the family.

### Case Studies



15. *A grandmother took responsibility for the care of a grandson during his childhood after the death of his parents, and continued to provide a home for him as an adult. The grandmother owned her own home, but considered the possibility of downsizing after living on her own for a period. As her grandson and his family wanted to upgrade to a new and larger home with a swimming pool for the children, he suggested that his grandmother could sell her home and then live with the family “for the rest of her life”. These arrangements were made, but no definite understanding about the ownership of the property was reached. The new home was purchased in the names of the grandson and his wife. Within a year, the relationship with the family had broken down, and the grandmother found her living environment intolerable. She was forced to leave and move in with her daughter. An application to VCAT was made in relation to her equitable interest under the co-ownership provisions, and the matter settled through a compulsory conference.*

16. *A widowed grandmother struggled after the death of her partner with loneliness, and suggested to her daughter and son-in-law that she could sell her unit, and purchase a larger family home for them with a self-contained granny flat. The grandmother was also concerned about her family’s financial position as they were living in a very small rental apartment with 3 young children. Her unit was sold quickly, and a new home found with all the amenities required by the extended family. The grandmother contributed 75% of the purchase price from the proceeds of sale for her unit, and the younger couple arranged a mortgage for the balance. The grandmother initially spent a lot of time caring for the grandchildren, and undertaking shopping and meal preparation for the family. Things soured after a serious argument with her son-in-law six months after moving to the new property. The grandmother was locked out of the main house, and then prevented from seeing her grandchildren. The daughter was unable to intervene and things became worse. The grandmother became very depressed and left the property to live with a friend as her health was seriously impacted by the toxic situation.*

*On reviewing the title to the property, it was discovered that the 3 adults were registered as tenants in common in equal shares, despite the unequal financial contributions. The lawyer assisting with the matter had made incorrect assumptions about the relationship between the parties, and had also failed to obtain proper instructions from the grandmother.*

*An application was made to VCAT under the co-ownership provisions, and the matter was resolved through a protracted mediation process. The younger couple initially took the view that the home should be theirs on the basis of “entitlement” as the inconvenience to them through being forced to sell the home was unreasonable. The matter settled through mediation, but a redraw on the mortgage by the younger couple prior to the problems developing impacted the equity in the property, and the grandmother recovered less than her initial contribution.*

Both the matters outlined these case studies were ultimately resolved through ADR mechanisms instigated through the VCAT process and provided a timely and cost effective resolution for these clients. However in the event that applications cannot be resolved and the matter proceeds to a hearing, there are a number of common law presumptions that are applied in this jurisdiction<sup>46</sup> that can effectively act against the interests of the older person and perpetuate further elder abuse. This is particularly the case with “*presumption of advancement*”.<sup>47</sup>

The “presumption of advancement” applies in respect of contributions made by parents towards property owned by their children, and presumes such contributions were intended to be a gift. The presumption arises by way of the special relationship that exists between a parent and child on the basis of natural love and affection and a desire to be generous to one’s children. However, the presumption can also be applied against the financial interests and prospects of recovery by an older parent in the co-ownership jurisdiction when they are in dispute with the child involved.

Justice Connect - Seniors Law made a Submission to the Royal Commission for Family Violence in May 2015 that articulated the difficulties that arise from the application of the presumption of advancement, and made the following recommendation:

*“Restrict the operation of the presumption of advancement, through an amendment to Part IV of the PLA requiring VCAT to consider the mutual intention of parties in characterizing property contributions irrespective of the nature of the relationship between them.”<sup>48</sup>*

This is another area requiring further changes to safeguard the interests of older people and SRV affirms this earlier recommendation of Seniors Law:

#### **Recommendation:**

**10. Request the Victorian Government to restrict the operation of the presumption of advancement through an amendment to Part IV of the Property Law Act 1958 (Vic) that will require VCAT to consider the property contributions made by parties irrespective of the nature of the relationship between them.**

#### **Recommendation:**

**11. Implement mandatory Family Agreements as part of Centrelink requirements in Assets for Care arrangements to help resolve financial arrangements should a change of circumstance occur.**

## Appointed Decision Makers

**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?**

The complex interaction between increasing longevity, ageist attitudes, generational expectations, economics and greed is resulting in a societal trend of “early inheritance syndrome”. This is where an adult child (often in their 50s or 60s but it can be any age) decides to swoop in on mum or dad’s assets in order to pay off their own debts, invest in their own business venture or otherwise spend money that does not belong to them yet.<sup>49</sup>

The adult child may obtain an Enduring Power of Attorney (financial) and take over their parent’s finances in order to benefit themselves and without acting in the best interests of the parent, in breach

of the fiduciary relationship. In some cases, the attorney may simply be misguided as to the nature and extent of their duties. In any case, the older person suffers financial loss that they should not have.

In the analysis of SRV's helpline data undertaken by NARI in 2014, 61% of clients who reported abuse reported financial abuse, and of those matters, 11% involved the misuse of Powers of Attorney including those who failed to consult with an older person where they had capacity.<sup>50</sup> Similarly on the basis of research undertaken by Seniors Law it was suggested that "*financial abuse occurs in 10-15% of cases involving Powers of Attorney*"<sup>51</sup>. In these circumstances, adequate oversight of attorneys is critical, and despite the introduction of a new Powers of Attorney Act in Victoria in 2015, a number of alarming concerns have not been addressed.

SRV made a submission to the Victoria Law Reform Commission's (VLRC) Inquiry into Powers of Attorney in 2009 calling for measures to support the appropriate use of powers of attorney, and highlighted the deficiencies in the current position relating to oversight of attorneys under the *Powers of Attorney Act 2014 (Vic)*<sup>52</sup>

One concern with appointing a supported or substitute decision maker is the level to which that person is able to divorce themselves from their own bias and concerns, and act in accordance with the will and preferences of the supported person. For example, a UK study of support workers found that decisions were typically made in accordance with the personal values and goals of the supporter rather than the supportee.<sup>53</sup> A survey conducted by the ACT organisation 'Advocacy for Inclusion' (in relation to substitute decision making) determined that 'there are cases where people feel decisions are being made for them without consideration of their expressed wishes.'<sup>54</sup>

SRV supports the submission of Justice Connect to the RCFV in 'Recommendation 8: providing for greater oversight of attorneys'.<sup>55</sup>

## **Recommendation:**

### **12. In order to oversee the conduct of supportive and substitute decision makers:**

- **Introduce a mandatory online registration scheme;**
- **Make the decision-maker sign a statement agreeing to comply with their responsibilities before they undertake their role**
- **Make the decision-maker keep accurate separate records of all decisions made**
- **Make the decision-maker submit an annual declaration of compliance with their obligation**
- **Implement a national register for Power of Attorney instruments as a means of reducing elder abuse, maintained by each state's Births Deaths and Marriages Registry.**

### 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?

Powers of Attorney (POA) instruments are private documents and there is often no knowledge of the existence of an instrument beyond the principal, attorney and possibly family and friends. A consequence of the private nature of such instruments is that upon presentation of the instrument to a third party such as a bank or aged care facility, the third party has no way of confirming that the instrument is valid and has not been subsequently revoked.

In practice, an attorney could potentially purport to rely on the original document to exercise powers that have since been revoked. In the absence of the revocation document, a certified copy of a POA document could still be purported to be evidence of a valid POA although it is a clear abuse of power.

SRV submits that issues of this nature can only be overcome by the introduction of a national registration system for POA instruments. A central database of all POA instruments and their status – active – revoked –expired would allow third parties to quickly confirm the validity of an instrument and the powers of an attorney in respect of a donor. The national registration system is also critical for banks, financial institutions and Centrelink, and would assist in reducing the preference of these institutions for third party or nominee documents that are unregulated and problematic for older people.

It is also submitted that the Register should be maintained by Births Deaths and Marriages in each State.

#### Recommendation:

**13. Create a national register for Power of Attorney instruments that is maintained by each state and territory's Births Deaths and Marriages Registry as a critical means of reducing elder abuse.**

#### Case Study

17. *A son was operating his father's financial affairs using an enduring power of attorney (EPOA), but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him, and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father. As the son knew he would not be responsible for any debt under Centrelink legislation, he dropped his father off at his sister's house, emaciated and with only the clothes he was wearing. Before the administrator could get involved in the retrieval of the rent money and protecting the remaining assets the son sold his father's house and moved interstate. Both the nominee form and the EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.*

**Question 31 - Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?**

While it is always preferable for family members and friends with a longstanding relationship and knowledge of the person's wishes and preferences to act as a supporter or representative, there will be instances where a person has no such support available. One of the key risk factors of elder abuse is isolation.<sup>56</sup> In our experience, many vulnerable older people do not have family members or friends willing to take up the role of supporter or representative.

The statutory duties of attorneys are already considerable. Under the *Powers of Attorney Act 2014 (Vic)* the "principles to be applied by persons acting under Powers of Attorney are detailed in section 21. In SRV's experience it is the person appointed under an Enduring Power of Attorney that has the greatest opportunity to commit financial abuse against an older person. Expanding the roles and requirements of an appointed Attorney will not combat this phenomenon, as it is considered that the new compensation provisions introduced in section 77 of the Act will provide the greatest benefit to victims of abuse.

Expanded statutory duties of attorneys and other decision makers may result in family members and friends being less willing to take up the role of attorney or nominate themselves as an appointed decision maker.

### **Question 32 - What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?**

Although SRV has had some involvement in Guardianship and Administration matters in VCAT, and with clients impacted by these orders it is only possible for SRV to act for a client if it is clear that the person has capacity to provide instructions.

Generally however, the decisions made by Guardians and Administrators are not reviewable and require an application to be made to VCAT for review. It is recommended that one area that would improve greater accountability by Guardians and Administrators would be regular random audits of decisions made on behalf of the affected person by their representative.

SRV has had involvement with clients who have appointed a person as their Enduring Guardian with serious consequences for the client.

#### Case Study

*18. An older man was hospitalized for a routine observation due mainly to her age and increasing frailty. Whilst in hospital he contracted a Staph Infection that badly impacted his health and cognition and caused some concern for medical staff and his nephew whom he had previously appointed as his Enduring Power of Attorney and Guardian. The man's recovery was slow, and during this time, he was referred for a Neuropsychological Assessment at the hospital. No information was provided to the older man about the purpose of the testing, or why he was required to answer such personal questions, and he remained guarded throughout the test. The assessment determined that he lacked decision making capacity, and his nephew as Guardian then undertook discussions with the hospital about a discharge plan. This determined that future accommodation in Aged Care was required.*

*The older man was placed in a Patient Transfer Vehicle and then driven over 100km from his home and friends to a facility that was in close proximity to his nephew who previously had had little to do with his uncle. The Guardian also instructed the facility to remove the telephone from his room as he "had dementia and was a nuisance" and also prohibited any visitors or calls. This caused enormous stress to the older man. The matter was taken to VCAT for urgent assessment, and the situation was*

*immediately changed by the Tribunal. The Guardian was particularly dismissive and defensive about the course of action he had adopted and stated that he believed he was doing “what was best” for the older person. However, he chose to completely disregard the known and expressed wishes of his uncle for what was easier for himself.*

This case study is a clear example of the potential abuse that can be inflicted on older people through the decisions made by Guardians. Abuse is more likely in situations where the wishes of an older person are not considered.

19. *A son had moved into his 90 year old father’s home after taking him to a lawyer to appoint him as Enduring Power of Attorney. The son then began what appeared to be a deliberate campaign to convince his father that he was losing “his marbles” (competency). The older man advised SRV that precious belongings in his home had “disappeared”, but he was told that “he was imagining it”. His son arranged for the gas to be disconnected from the stove “as he was forgetful” and this meant he could not cook his food, despite no previous mishaps. His mobility scooter was sabotaged so that he lost his independence and could not leave the house himself. The son also arranged several significant loans for himself from the father including the purchase of a new car.*

*The son took the father to medical appointments and convinced his father’s GP that he was exhibiting signs of dementia, which led to the introduction of medication that produced a sedative like effect on his father. Other family members questioned what was happening, and attempted to intervene as they were shocked at what was occurring.*

*The son then arranged a Neuropsychological Assessment and drove his father to the appointment after ensuring he had taken the “dementia medication” Unsurprisingly, the father was deemed to lack decision making capacity as a result of this assessment.*

*Following this report, the son made an application to VCAT for Guardianship and Administration Orders to effectively thwart family members and improve his position of control over his father. A VCAT Order was then made, appointing the son as Guardian and Administrator.*

*As part of an ongoing medical review, the father was subsequently taken off the dementia medication and his condition improved markedly. Over a period of approximately 18 months, he endured five separate neuropsych assessments, and was consistently determined to have capacity. In a hearing where VCAT was about to revoke the previous orders, the Applicant then applied for a Rehearing. This caused great stress to the older man, and appeared to be instigated as an abuse of process rather than on the basis of merit. After another specialist report was completed, the Applicant then attempted to withdraw the Rehearing application at the 11<sup>th</sup> hour, and his lawyers then ceased to act. This process for VCAT hearings, medical testing and legal fees for representation cost the father over \$40,000.*

*SRV provided legal assistance with the Rehearing Application as the client was unable to pay any further legal costs. SRV was instructed that the applicant was unemployed, in financial difficulties, and wanted to take control of his affairs to stop any future sale of his home. The father believed this was a ploy to gain financial control of his affairs and strip him of his assets*

*VCAT ultimately revoked all orders and noted the acrimony that had been created in the family through this process. The father was then able to appoint his own attorneys under a new Enduring Power of Attorney. The considerable financial cost of this lengthy proceeding was mainly borne by the father despite the vexatious nature of the matter. VCAT as a limited cost jurisdiction is problematic in these circumstances.<sup>57</sup>*

# Public Advocates

## Question 33 - What role should public advocates play in investigations and responding to elder abuse?

In delivering SRV's advocacy and legal services based on an empowerment model where we give advice to, and act in accordance with the wishes of, an older person, SRV has noticed a gap in service provision around assertive outreach and investigation of situations of concern raised by third parties. Sometimes, SRV receives calls from service providers or members of the public who have concerns about an older person experiencing abuse from family members. SRV's practice is to give general information and then suggest that the third party encourage the older person to contact us directly. This approach is based on a rights-based rather than welfare approach. SRV believes that older people are capable of making their own decisions and that respect should be accorded to their wishes rather than acting upon any perceived notion of need. However, there are instances where a third party raises genuine concerns and it is unlikely that the older person will contact us themselves. The only option at present is for the police to undertake a welfare check.

In the submission SRV made in 2011 in relation to the VLRC review of Victoria's guardianship laws, SRV voiced support for the inclusion of investigatory powers in new laws to ensure that concerns about the possible abuse of people with a disability – beyond cases concerning guardianship and administration – are adequately investigated.<sup>58</sup> The VLRC subsequently recommended expanding the functions of the Public Advocate to receive and investigate complaints, and to conduct own-motion investigations, in relation to the abuse, neglect or exploitation of people with impaired decision-making ability due to a disability.<sup>59</sup> SRV understands that the Public Advocate continues to support the expansion of her powers in this regard and SRV refers the Commission to the report, 'Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults', by Dr. John Chesterman, Manager, Policy and Education, Office of the Public Advocate.<sup>60</sup>

To build upon the reform recommended by the VLRC and to ensure that older people without impaired decision-making ability do not fall through the cracks, SRV suggests that the Public Advocate be further empowered to investigate the abuse, neglect or exploitation of people who, because of an attribute associated with ageing, are vulnerable to, or at greater risk of, abuse, neglect or exploitation. In this way, services could become involved to assist an older person even where that person is not in a position to proactively seek help on their own account. This would enable services to help older people in situations of elder abuse/family violence who might otherwise not be reached.

Finally, as stated in SRV's submission in relation to the VLRC's review of Victoria's guardianship laws, SRV believes that anonymity should be accorded to people who report concerns. This would increase the likelihood of members of the community reporting instances of suspected abuse and protect people who do report concerns from adverse consequences.

By way of an interesting comparison, SRV notes that the NSW Elder Abuse Helpline (which operates differently to SRV and is primarily a helpline and referral service rather than an integrated social work and legal service) is anonymous and receives notifications from neighbours and friends who have concerns about an older person. Because of its different set up, the NSW Helpline has scope to respond to calls from concerned third parties about neglect of an older person. Indeed, about 17% of the calls they receive are about neglect whereas SRV rarely receives such calls (NARI's analysis of SRV's Helpline data across the two-year period of July 2012 to June 2014 indicates that 0.8% of SRV

clients reported neglect). Such a comparison on a purely statistical level shows that there is probably a service provision gap in Victoria.

The practice of the NSW Helpline in responding to notifications of neglect is to contact local police to conduct a 'welfare check'. SRV agrees that a police 'welfare check' is appropriate in the absence of other dedicated services. However, a 'welfare check' is discretionary and it is SRV's submission that a body such as the Office of the Public Advocate be statutorily mandated to investigate such situations of concern.

### Recommendation:

**14. Expand the functions of the Office of Public Advocate to receive and investigate complaints, and to conduct own-motion investigations, in relation to the abuse, neglect or exploitation of:**

- **People with impaired decision-making ability due to disability; and**
- **People, who because of an attribute associated with ageing, are vulnerable to, or at greater risk of, abuse, neglect or exploitation.**

### Question 34 - Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?

SRV would refer the ALRC to consider the report of Dr John Chesterman prepared for the Winston Churchill Memorial Trust in 2013 on this point.<sup>61</sup>

## Health Services

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

Health care professionals who may benefit from targeted elder abuse education and training include hospital staff and GPs. Units about elder abuse should be included in relevant tertiary education courses.

#### Hospital Staff

Hospitals are a 'window of opportunity' for detecting and responding to cases of elder abuse. Groundbreaking work has been undertaken at St Vincent's Hospital in Melbourne to deliver an integrated and consistent approach to the detection and management of suspected elder abuse,



following a UK model. In March 2013, the hospital introduced a new Policy for the Protection of Vulnerable Older People, a model of care and a governance structure which included the establishment of a multidisciplinary Vulnerable Older People Coordination and Response Group.<sup>62</sup>

Initially, St Vincent's identified the following barriers for staff in responding to suspicions of elder abuse:

- Lack of understanding of what constitutes elder abuse;
- Lack of understanding of their legal obligations;
- Lack of confidence about how to conduct an assessment;
- Lack of skills to investigate the issues.

In response, St Vincent's identified the following strategies to improve confidence to act on suspicion of elder abuse:

- Training and education;
- A model of care;
- Opportunities for case discussions;
- Access to expert consultation.

In the little more than three years since St Vincent's introduced these innovative measures, approximately 160 notifications of suspected elder abuse have been made. There was a marked increase in notifications as three levels of training were implemented, demonstrating the crucial importance of education and training around how to recognise elder abuse. Anecdotally, St Vincent's social workers now have situations of elder abuse brought to their attention every single day.

Substantial progress has been made at St Vincent's and SRV understands that its approach is unique in Australia. SRV strongly supports the work that has been done. We believe that its future sustainability should be assured in addition to a Victorian Government commitment to replicate the model in all Victorian hospitals.

#### General Practitioners

The Australian Medical Association's 'Position Statement on the Care of Older People 1998 – amended 2000 and 2011' states that:

*Education and training programs on the recognition, intervention and management of elder abuse should be available to all health professionals involved in the care of older people. Medical practitioners, especially general practitioners, have a pivotal role in the recognition, assessment, understanding and management of elder abuse and neglect, with effective reporting mechanisms available when required.*<sup>63</sup>

The Royal Australian College of General Practitioners (RACGP) in its Clinical Guidelines further notes that:

*GPs are often the first independent professional to see an elderly victim of abuse. There are a number of reasons why medical practitioners may not have been more involved in managing cases of abuse. These include lack of awareness, insufficient knowledge regarding identification or follow-up of a potential case, ethical issues, time constraints, and the victim's potential reluctance to report the abuse.*<sup>64</sup>

SRV believes that the current climate of growing political and societal awareness and condemnation of family violence provides impetus to improve the ability of GPs to recognise and respond to elder abuse.

SRV recognises that difficulties exist because of limited consultation time and the fact that some people today are less likely or able to consistently see the same doctor throughout their lives. However, SRV is keen to work with the RACGP to help develop appropriate techniques to identify elder abuse in families.

Particular attention should be given to better equipping GPs in relation to capacity assessment and in identifying when an older person has diminished financial capacity. This is an important issue because older people with cognitive impairment and/or dementia leading to diminished financial capacity are particularly vulnerable to financial abuse.<sup>65</sup> Conversely, families may sometimes be too hasty to have an older person's capacity brought into question and in these situations the GP should act as an independent gatekeeper. The development of standards and guidelines for the assessment of financial capacity of older patients is needed to ensure better outcomes for patients, families and carers.<sup>66</sup>

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

SRV has limited experience in this area

### **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 responds to elder abuse?**

SRV endorses the Submission made to Australian Law Reform Commission on Elder Abuse by Justice Connect – Seniors Law

### **Question 38 - What changes should be made to laws and legal frameworks, such as privacy laws to enable hospitals to better identify and respond to elder abuse?**

SRV has limited experience in this area

## Forms for Redress

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

#### **Adult Children at Home**

It is not uncommon for adult children to return home to live with their parents or to never leave home. A factor contributing to this is high rental and house prices meaning that younger people are finding it difficult to enter the real estate market.

Sometimes when adults return to their parents' home, it is triggered by something going wrong in their own lives, such as a relationship breakdown, financial distress, problems with alcohol, other drugs or gambling, or illness. The request to come home may be sudden and unexpected, giving their parent/s little time to think about it or to discuss how living arrangements will work. Indeed, parents may not get any warning at all – an adult child may just turn up on the doorstep.

Some of the problems that adult children may be experiencing create enormous difficulties for an older parent when the adult child returns to live with them. These issues include:

- Violence: leaving a violent situation or being forced to leave due to aggressive behaviour.
- Mental health issues: from depression and anxiety to a psychotic breakdown, they may be finding it difficult to function well.
- Alcohol and other drugs: being misused or used to excess, affecting behaviour.
- Gambling: when problematic, can cause financial stress or mood swings associated with wins and losses.
- Hoarding behaviours: excessive collecting of objects causing the home to be uncomfortable, unsafe or unhealthy.

SRV works to empower parents with adult children living at home to prevent abuse from occurring. SRV advises clients to set boundaries and discuss mutual expectations around such things as payment of board or for food or contributing in other ways to the maintenance of the household. However in many situations the situation in the parents' home has become so desperate that SRV is instructed by the parents to assist them "evict" the adult child.

Whilst there is no formal lease arrangement in place, SRV has given formal notice to the adult child, that their licence to reside at the property has been revoked, and they will be required to move out within a stipulated period. In some situations an amicable result occurs, and the adult child finds other accommodation. In some cases, parents have obtained the required result through an IVO for economic abuse with an exclusion order. However, older people tend to have a perception that an IVO is a criminal rather than a civil matter. Concerns about their adult child having a criminal record and possibly losing or being unable to gain employment as a result of an IVO prevent some older people from seeking one.

In some cases where an adult child refuses to co-operate, or the parents are unwilling to proceed with an IVO, the only other recourse is for an application to be made to the Supreme Court of Victoria for a Writ of Possession. This is a difficult and costly process, and well beyond the means and time frames that can be endured by most SRV clients.

#### **Recommendation:**

**15. Expand the jurisdiction of VCAT to enable the determination of matters relating to adult children living in their parents' homes that currently fall outside the ambit of the Residential Tenancies jurisdiction and the Co-ownership jurisdiction.**

#### **Question 40 - How can the physical design and procedural requirements of courts and tribunals be improved to provide better access to forums to respond to elder abuse?**

The layout of courts and their accessibility and user friendliness (or lack thereof) for older people is a relevant issue for SRV. We would like improvements made to court buildings and facilities to better accommodate older clients.

It can be problematic for applicants and respondents in IVO matters to enter and exit the court building using the same entrance and exit. Similarly, victims and perpetrators usually wait in the same areas within the court. SRV believes that having to see a perpetrator of family violence on multiple occasions before, during and after a hearing forces a victim to experience additional and unnecessary anguish. The Victorian Magistrates' Court response to family violence 2015-17 policy contains an initiative to improve waiting areas in courts for applicants and children to increase safety and this should involve applicants and respondents waiting in different areas.

For some courts, appropriate shelter from the outside elements and access to facilities like toilets is unsatisfactory or non-existent. In particular, this is the reality at Mansfield Magistrates' Court which provides antiquated facilities with no privacy or comfort for parties.

SRV believes that the physical design at Ringwood Magistrates' Court is an example of a court that we consider to be well set up. Recent modifications at the Heidelberg Magistrates Court have implemented recommendations made by the Royal Commission into Family Violence and demonstrate the Victorian Governments willingness to implement these recommendations.

#### **Question 41 - What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services and where should they be located?**

SRV receives calls to its Helpline from older people experiencing abuse in a range of common situations. As the abuse is most often perpetrated by a family member, the majority of callers express a reluctance to take action against the perpetrator, despite facing horrendous issues. There is a reluctance to take any action against a family member that may "get them into trouble" or have them removed from their home if "they have nowhere to go". At the heart of this response there is an ongoing parental desire to "protect" their albeit adult children, and also the desire to protect the familial relationship. Indeed the prospect of losing relationship with an adult son or daughter is incomprehensible for many older parents, and they will endure almost anything to avoid this.

Alternative Dispute Resolution on some levels provides a welcome option for addressing issues of elder abuse in some situations. The process usually involves a formal mediation process, where family members can meet with an independent mediator to identify and resolve the matter in issue. Superficially, it appears to be an ideal outcome when a resolution is obtained. However in practice ADR often poses enormous difficulties for an older person where there is an unequal position of bargaining power. Generally the perpetrator holds a position of strength, and it is critical that the older person is properly supported to gain an appropriate understanding of the process, and potential outcomes, and has the time to develop resilience and the ability to remain firm on what is the best outcome for them.

Whilst there is a preparedness by the older person to do "whatever needs to be done" this is often not the case for the perpetrator, and they are often unwilling to engage with the process. It is a means of challenging the parent to see if they will give in.

# 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?**

SRV is of the view that there should be no need for specific elder abuse offences as existing offences should cover elder abuse. This view appears to be an extension of the ageist attitudes to older people that lead to the violation of their basic human rights to dignity and autonomy. The present difficulty with elder abuse is the failure or lack of preparedness to enforce existing laws for offences perpetrated against older people, most often by family members.

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

There appears to be considerable difference between the attitudes to neglect in the various Australian states. SRV does not have specific case work experience in this area, and is not in a position to comment on the different State and Territory laws.

## **Question 44 - Are protection orders being used to protect people from elder abuse? What changes should be made to make them better safeguard against elder abuse?**

SRV provides extensive advice and assistance to older people facing difficulties in obtaining or enforcing Intervention Orders (IVO) in Victoria. Initially there is enormous apprehension for a parent to seek an IVO due to the complex family dynamics at play, but for many people there is no other option, and the order is often obtained with Police involvement.

In some cases, the Respondents take little notice of the prohibitions imposed by the order, and this creates additional issues for the older person in having to decide whether they report what is occurring. It is imperative that Police act promptly on reports of Orders being breached.

### Case study

20. *An older woman was assisted by Police after a period of ongoing abuse by her son who had a mental health problem. The Police applied for an Intervention Order which was granted by the Magistrates Court. The Order was enforced by the Police, and the son removed from the property. The woman received abusive text messages from her son after he left the property, which increased to over 20 per day. The woman contacted the Police, and was told to "ignore the messages". The woman ignored the messages, but their frequency increased even further, and the woman's brother also received abusive messages. A number of reports were made to the Police before the matter was addressed. The woman continued to live in fear despite the IVO being granted, and it was not until the Police took further action that the situation improved for her.*

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

SRV does not support the implementation of mandatory reporting, as discussed earlier in this submission.

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

In SRV's experience, police are inconsistent in responding to situations of elder abuse. While sometimes the level of understanding and response is exemplary, at other times it is disappointing and leads to further suffering by victims.

Whereas the leadership by Victoria Police on family violence and elder abuse is commendable, SRV is not convinced that this has filtered down to its members. SRV welcomes the recent establishment of the Victoria Police Seniors Portfolio Reference Group and hopes that it will provide an avenue to address police training and attitudes and develop strategies that embed cultural change.

Better understanding of family dynamics in elder abuse cases, as well as the specific circumstances and needs of victims, should help members of Victoria Police respond more effectively and with greater consistency to situations of elder abuse, leading to improved outcomes for victims.

There is also need for police with specialist capability, such as Family Violence Liaison Officers. In addition to improvements in training generally, SRV recommends an increase in the numbers of police with specialist capability in elder abuse.

#### **Recommendation**

**16. Improve the training of Victoria Police to enable members to respond more effectively to situations of elder abuse, and increase the numbers of police with specialist capability in this area.**

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

For older victims of family violence, entering the court system can be a strange and frightening experience. To ensure just outcomes, systems should accommodate the frailties and needs of older victims so far as possible.

SRV's experience in Magistrates' Court proceedings has mostly involved representing older people who are applying for IVOs in cases of physical, emotional and financial abuse and commonly where there are multiple kinds of abuse occurring at the same time. SRV observes that the changes made to the intervention orders regime by the *Family Violence Protection Act 2008* (Vic) were extremely important in assisting victims of forms of abuse other than physical violence; expanding the definition of 'family violence' to include a broad range of problematic behaviours has been one of the most

important reforms to the family violence system introduced in the last ten years. However, SRV is not convinced that the broader legal definition of ‘family violence’ is reflected in the community’s definition and understanding nor, even more worryingly, in Magistrates’ practice.

SRV has identified areas of improvement needed in relation to court systems and the IVO process as follows:

- Magistrates’ attitudes and behaviour in family violence intervention order proceedings;
- Community understanding of family violence intervention orders;
- Difficulties in the IVO process.

### Magistrates and IVO proceedings

SRV has found the attitudes of Magistrates in dealing with older people to be inconsistent. Sometimes, the understanding that Magistrates have shown towards the “frailties” of older people has been admirable. Personal attendance at court has been excused on medical grounds and older people have been permitted to give evidence in a flexible way that takes into account their physical or emotional state. However, at other times, Magistrates have shown a disappointing lack of understanding of elder abuse and the particular physical or emotional needs of older people. For example, a Magistrate discounted name calling and controlling behaviour as falling within the definition of family violence, despite the particularly negative impact it had on an older female applicant. Another called an older applicant’s capacity into question when she had hearing and language difficulties that were compounded by being in a stressful situation. The process for her then getting a capacity assessment was onerous and indeed unnecessary.

SRV is concerned that Magistrates do not use the full potential of the legislative definition of ‘family violence’ in making IVOs. SRV has rarely obtained (or observed others obtaining) IVOs for threatening, coercive, controlling or dominating behaviour. There is accordingly a concern that the legislation is not being used to its full potential. SRV would be reassured to know that Magistrates appreciate how damaging *all* the forms of family violence can be and that there is a professional willingness to make orders on the basis of any aspect of the family violence definition, where appropriate.

SRV welcomes the Magistrates’ Court response to family violence 2015-17 policy, which details six initiatives including professional development of all Magistrates.<sup>67</sup> However, SRV would like to see Magistrates achieve better understanding of the dynamics and complexities of elder abuse, of the decision-making capacity of older people and of the different or additional difficulties that older applicants might face in going to court to get an IVO compared to younger people.

In addition to increasing just outcomes, the professional development of magistrates in regard to elder abuse would ensure that older people are treated with dignity during court proceedings.

In assisting clients through the IVO process, SRV has experienced a number of difficulties including:

- Lack of information flowing between police, the Magistrates’ Court and victims;
- Inconvenience of multiple procedural hearings;
- Need for victims to have better support before, during and after a hearing;
- Misuse of intervention orders;
- Delay at court;
- Lack of enforcement of breaches
- Problems with court facilities

Each of these difficulties is addressed below.

### *Information flow between police, the Magistrates' Court and victims*

In assisting clients who have made an application for an IVO, or where police have made an application on their behalf, SRV is sometimes frustrated by the lack of information provided about the status of the application and court dates.

In relation to police, SRV sometimes find that officers who make an application for an IVO on behalf of an older person do not follow up appropriately. They do not contact the older person to update them about the status of the application or court dates. When SRV attempts to contact the police on behalf of a client, difficulties are encountered because the officer responsible is unavailable (due to circumstances such as changing shift times or long periods of leave) and a different officer cannot assist because there are no written records. Sometimes the matter is transferred to another officer, the applicant is not informed and the new officer does not follow up, meaning the application is 'lost'. This results in considerable frustration and distress for SRV's clients.

In relation to courts, there is again an information flow problem - victims do not receive notification of court dates, resulting in anxiety and stress.

SRV notes that improved use of technology and information sharing is one of the initiatives listed in the Magistrates' Court response to family violence 2015-17 policy. However, it does not expressly mention improving communication between the police, courts and IVO applicants.

### *Procedural hearings*

SRV considers that requiring older applicants to attend procedural hearings can cause them undue physical and emotional stress. SRV would like a more common practice of excusing older people from attendance at procedural hearings. SRV would also like IVO processes streamlined to avoid, so far as possible, the need for multiple procedural hearings.

### *Support before, during and after court*

SRV is able to help older people through the IVO process, however not all older people seek its services. Furthermore, SRV is limited in numbers to two advocates and three lawyers. This means that it is important for services to exist at court to offer support to applicants before, during and after a proceeding. The availability of Magistrates' Court staff to inform, explain procedures and outcomes of hearings, and to offer referrals to other services as necessary, needs to be more consistent rather than ad hoc, which is currently the case.

In its response to its Family Violence 2015-17 policy, the Magistrates' Court has committed to expanding dedicated family violence services to all headquarter courts across the state which will include specialised Family Violence Registrars, applicant support workers and respondent support workers. SRV strongly supports these measures.

### *Misuse of family violence intervention orders*

The justice system must be alert to the misuse of IVOs and the fact that sometimes they are used as a tool of abuse by perpetrators of family violence.

SRV encounters adult children who, savvier than their elderly parents, sometimes obtain an IVO for improper purposes, for example, in an attempt to obtain an exclusion order to make a parent move out of a residential property.

Perpetrators also often use court processes in an abusive manner by contesting an IVO then deliberately turning up late, or frequently not turning up at all, leading to continuous adjournments and increased anxiety and stress for their victims. Misusing the system is another way in which perpetrators



of family violence attempt to exercise power and control over their victims and mechanisms to stop this from occurring should be implemented.

#### *Delay at court*

Waiting all day at court to have an IVO matter heard can be an arduous experience for any applicant but it may have a particularly negative effect on an older person with physical limitations or ill-health. To reduce waiting at court, the Magistrates' Court should stagger start times.

Delay also occurs when a respondent fails to attend court on time and the matter is stood down for several hours until the respondent attends or the Magistrate starts a warrant process. This delay takes an unfair toll on older applicants and alternative procedures should be considered to minimize delay caused by a respondent's late or non-attendance.

#### *Delay in obtaining a final intervention order*

Delay in obtaining a final IVO can be a cause of anxiety and stress for applicants. One reason for delay in obtaining a final order is the need to wait for concurrent criminal proceedings involving the respondent to be finalised. SRV looks forward to the development of a listing model that will see family violence related criminal charges listed before a court within set time frames, as set out in the Magistrates' Court Family Violence 2015-17 policy.

#### *Enforcement of breaches*

It is disappointing to note that police often do not take action when an IVO is breached. Whether this is because of a lack of time and resources or an attitudinal issue SRV cannot say, but it results in victims losing faith in the police and justice system. There is also potential for an escalation of breaches by the perpetrator which could otherwise be prevented.

## **Recommendation**

### **17. Resolve problems in the court system and family violence intervention order process including:**

- **Lack of information flow between police, the Magistrates Court and victims;**
- **Lack of support for victims before, during and after a hearing;**
- **Lack of enforcement of breaches;**
- **The misuse of intervention orders;**
- **Delays at court**
- **Problems with court facilities**

### **Question 49 - What role should restorative justice processes play in responding to elder abuse?**

The Royal Commission for Family Violence recently considered the ramifications of Restorative Justice in its Report. The Commission stated that restorative justice options should proceed cautiously:

*“Restorative justice processes can provide opportunities for a victim to confront the perpetrator in a safe environment to describe what impact the abuse has had on them; for the perpetrator to acknowledge the harm they have caused; and for the parties to decide what action might be taken to repair the harm. There are a number of potential benefits associated with a restorative justice approach: it has potential to deliver better outcomes for victims than the adversarial justice system.*

*The Commission is persuaded that, with robust safeguards in place and as an additional option for (not a substitute or precondition for) pursuing action through the courts, a restorative justice process should be made available to victims who wish to pursue such an option. Restorative justice processes have the potential to meet a broad range of victims’ needs that might not always be met through the courts and to help victims recover from the impact of the abuse they have suffered.”<sup>68</sup>*

Restorative Justice in theory provides older people with an opportunity to preserve family relationships, as many older people bear the brunt of abuse at the same time as wishing to preserve their relationship with the perpetrator. However, the issue of power imbalances between the older person and perpetrator must be adequately assessed before this is implemented.

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

SRV welcomes the new penalties introduced in the *Powers of Attorney Act 2014* whereby Attorneys can now be ordered to compensate Principals for losses they have caused in undertaking the role of attorney. This is a significant shift in recognizing the abuse that can occur, and the need for accountability by perpetrators who are abusing formal appointments to the detriment of older people. The imposition of civil penalties should have a significant deterrent impact and be commensurate with the abuse.

# Notes

Media Release – Attorney General 24 February 2016

<sup>3</sup> Ibid

<sup>4</sup> Media Release – Attorney General 24 February 2016

<sup>5</sup> Alexandre Kalache, *The Longevity Revolution: Creating a society for all ages* (2013) 68.

<sup>6</sup> Kaspiw, R. Carson, R. & Rhoades, H “Elder abuse; Understanding issues, frameworks and responses” Australian Institute of Family Studies Research Report 325 2016

<sup>7</sup> World Health Organisation, *Elder Abuse: What is elder abuse?* <[http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/)>.

<sup>8</sup> Victorian Government Department of Health: Elder abuse prevention and response guidelines for action 2012-2014 (2012) 1

<sup>9</sup> National Ageing Research Institute in partnership with Seniors Rights Victoria, *Profile of elder abuse in Victoria: Analysis of data about people seeking help from Seniors Rights Victoria – Summary Report* (June 2015) 5.

<sup>9</sup> Seniors Rights Victoria, *Annual Report 2013-14*.

<sup>10</sup> Elder Abuse and Neglect – AgeConcern

<[https://www.ageconcern.org.nz/ACNZPublic/.../Elder\\_Abuse\\_and\\_Neglect.aspx](https://www.ageconcern.org.nz/ACNZPublic/.../Elder_Abuse_and_Neglect.aspx)>

<sup>11</sup> Victorian Government Department of Human Services, *With respect to age – 2009: Victorian Government practice guidelines to health services and community agencies for the prevention of older abuse* (2009) 4.

<sup>12</sup> The exception being where the perpetrator is a family member who is in receipt of a Commonwealth Carer’s pension, and is not providing the care required by the older person, or who has undertaken actions that cause harm to the older person

<sup>13</sup> The issue has been recognised by CPA Australia, and a “Financial Abuse of Older People” toolkit developed to assist accountants. <http://cpaaustralia.com.au>

<sup>14</sup> An example of this type of circumstance is illustrated in *Cirillo v Mainieri [2013] VSC 399, Mainieri v Cirillo [2014]VSCA 227*

<sup>15</sup> ECCV Submission to the Royal Commission into Family Violence; June 2015 pp7-8

<sup>16</sup> Op cit n6

<sup>17</sup> World Health Organisation Regional Office for Europe, *European report on preventing elder maltreatment* (2011) viii.

<sup>18</sup> National Ageing Research Institute in partnership with Seniors Rights Victoria, *Profile of elder abuse in Victoria: Analysis of data about people seeking help from Seniors Rights Victoria – Final Report* (July 2015) 5.

<sup>19</sup> Seniors Rights Victoria, *Annual Report 2013-14*.

<sup>20</sup> Above n 1, 31.

<sup>21</sup> Research Chair on Mistreatment of Older Adults, ‘Welcome to the Chair’s website’

<<http://www.maltraitancedesaines.com/en/>>.

<sup>22</sup> Research Chair on Mistreatment of Older Adults, ‘News’ <<http://www.maltraitancedesaines.com/en/news/417-publishing-of-the-book-l-exploitation-financiere-des-personnes-aines-prevention-resolution-et-sanction-financial-abuse-of-older-adults-prevention-resolution-and-sanction-under-the-direction-of-raymonde-crete-ivan-tchotourian-and-marie-beaulieu>>.

<sup>23</sup> “Profile of Elder Abuse in Victoria; Analysis of data about people seeking help from SRV” Report July 2015; “The Older Person’s Experience: Outcomes of Interventions into Elder Abuse” June 2016

<sup>24</sup> Seniors Rights Victoria “Assets for Care: A guide for lawyers to assist older clients at risk of financial abuse” (2012)

<sup>25</sup> Ibid p38

<sup>26</sup> Ibid p 37

<sup>27</sup> *Powers of Attorney Act 2014 (Vic)*

<sup>28</sup> *Medical Treatment Act 1988 (Vic)*

<sup>29</sup> ALRC Equality, Capacity and Disability in Commonwealth laws – Chapter 8 Restrictive Practices

<sup>30</sup> Victorian Law Reform Commission, Guardianship Final Report, p329; Submission CP 38 (Aged Care Crisis).

<sup>31</sup> *Disability Act 2006 (Vic)*, s3; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s39

<sup>32</sup> SRV submission to the VLRC review, p71.

<sup>34</sup> Refer to note 14; p18

<sup>35</sup> Ibid p27

<sup>36</sup> Australian Bankers’ Association, *Financial abuse prevention: Banking industry package helps to combat this silent crime* <<http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>>.

<sup>37</sup> Senior Safe Act of 2016 (H.R.4538) <https://www.govtrack.us/congress/bills/114/hr/4538>

- <sup>38</sup> <http://wealthmanagement.com/legal/house-passes-senior-safe-act>
- <sup>39</sup> Ibid
- <sup>40</sup> State Trustees, 'Financial elder abuse research' <<https://www.statetrustees.com.au/community/financial-elder-abuse/financial-elder-abuse-research/>>.
- <sup>41</sup> State Trustees, 'Financial elder abuse' <<https://www.statetrustees.com.au/community/financial-elder-abuse/>>.
- <sup>42</sup> Valerie Margaret Adams PhD, Dale Bagshaw PhD, Sarah Wendt PhD & Lana Zannettino PhD., 'Financial Abuse of Older People by a Family Member: A Difficult Terrain for Service Providers in Australia' (2014) 26:3 *Journal of Elder Abuse & Neglect*, 270-290, 282.
- <sup>43</sup> Rosslyn Monro, 'Family Agreements: All with the best of intentions' (2002) 27:2 *Alternative Law Journal* 68; Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002) 27:2 *Alternative Law Journal* 72.
- <sup>44</sup> Property (Co-ownership) Act2005 No71/2005
- <sup>45</sup> John Warren "Current Issues in Co-ownership Disputes" *Greens List Barristers* p.1
- <sup>46</sup> *Davies v Johnson (Revised) (Real Property)* [2014]VCAT 512 at para 25
- <sup>47</sup> Justice Connect Seniors Law Submission – Royal commission into Family violence May 2015 pp25-28
- <sup>48</sup> Op cit recommendation 7 at p. 28
- <sup>49</sup> Sarah Russell, 'Keeping an eye on the bank of mum' (8 May 2015) <<http://onlineopinion.com.au/view.asp?article=17325>>; Adele Horin, Ageing parents: siblings go to war (4 March 2013) <<http://adelehorin.com.au/2013/03/04/ageing-parents-siblings-go-to-war/>>.
- <sup>50</sup> Above note p 20
- <sup>51</sup> Above n34 p29
- <sup>52</sup> Seniors Rights Victoria, *Inquiry into powers of attorney: Submission to the Victorian Law Reform Committee* (21 August 2009).
- <sup>53</sup> Dunn, M. C. et. al., 2010, A Life Like Ours?, *Journal of Social Welfare and Family*. 54(2):144-160
- <sup>54</sup> Advocacy for Inclusion, Supported Decision making, Legal Capacity and Guardianship (2012).
- <sup>55</sup> Above n34 p29
- <sup>56</sup> ALRC Equality, Capacity and Disability in Cth laws (*extracted: 9 Seniors Rights Victoria, Submission to the Victorian Law Reform Commission Guardianship Paper 10, (2011) ) p5*
- <sup>57</sup> s.109 VCAT Act
- <sup>58</sup> Seniors Rights Victoria, *Submission to the Victorian Law Reform Commission regarding Guardianship Consultation Paper 10* (3 June 2011).
- <sup>59</sup> Victorian Law Reform Commission, *Guardianship: Final report* (18 April 2012) Recommendations 328 and 329.
- <sup>60</sup> Above n 45, 7, 73 and 81.
- <sup>61</sup> Dr John Chesterman "Responding to violence, abuse, exploitation and neglect; improving our protection of at-risk adults" [https://www.churchilltrust.com.au/media/fellows/Chesterman\\_John\\_2012\\_Report.pdf](https://www.churchilltrust.com.au/media/fellows/Chesterman_John_2012_Report.pdf)
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- <sup>65</sup> Above n 30, 273.
- <sup>66</sup> Paul A Gardiner PhD, Gerard J Byrne MB BS(Hons), PhD, FRANZCP, Leander K Mitchell DPsych, Nancy A Pachana PhD, FASSA, 'Financial capacity in older adults: a growing concern for clinicians' (2015) 202:2 *Medical Journal of Australia*, 82-85.
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- <sup>68</sup> Royal Commission into Family Violence – Summary and Recommendations March 2016 p30