justice connect
Seniors Law

elder abuse

Australian Law Reform Commission Inquiry: issues paper

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introduction

Justice Connect Seniors Law (**Seniors Law**) welcomes the opportunity to respond to the Australian Law Reform Commission's (ALRC) Elder Abuse Issues Paper.[1]

Seniors Law has extensive experience working with the health and community sector to assist older people who are experiencing elder abuse. We have tried many ways to reach older people who are at risk of experiencing elder abuse, ranging from an outreach clinic model and sending lawyers in a bus to aged care facilities, to our current Health Justice Partnership (**HJP**) model. This submission is informed by our learnings from, and experience of these different ways of trying to reach people most at risk of elder abuse over seven years.

Justice Connect Seniors Law

Justice Connect exists to help build a world that is just and fair – where systems are more accessible and accountable, rights are respected and advanced and laws are fairer.

In pursuing this vision, Justice Connect:

- provides access to justice through pro bono legal services to people experiencing disadvantage and the community organisations that support them
- builds, supports and engages a strong commitment to lawyers' pro bono responsibility
- challenges and changes unjust and unfair laws and policies, using evidence from our case work and the stories of our clients to bring about reform
- undertakes legal education and law and policy reform aimed at improving access to justice

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

We provide free legal services to older people who are unable to afford legal help. Legal services are provided by Seniors Law lawyers and pro bono lawyers from Justice Connect member law firms. The objective of Seniors Law is to improve the ability of older Victorians to age with dignity and respect.

We assist clients with legal issues including guardianship and administration, housing, credit and debt, grand parenting, powers of attorney (**POAs**) and making arrangements to live with family. While these legal issues are experienced by many older people, they also tend to arise in the context of elder abuse.

For example, POAs are commonly misused by perpetrators of elder abuse and elder abuse is often experienced by older people who live with their family, particularly when they exchange assets for the promise of care. Providing legal advice to older people in these matters empowers them to make informed decisions, ensuring that their rights are protected.

collaboration with the health sector

In delivering its service, Seniors Law has developed a close connection with the health sector over seven years.

Initially, pro bono lawyers provided free legal appointments at hospitals and health centres across Melbourne. Complementing this, Seniors Law delivered training on elder abuse and other legal issues associated with ageing to health and community professionals as well as its pro bono lawyers. These sessions aimed to increase the capacity of health professionals and pro bono lawyers to work with older people experiencing abuse.

[1] Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (2016)

However, co-located legal clinics and ad hoc training sessions did not necessarily translate into enduring relationships with different professionals and the necessary change in practice to address elder abuse. We were not reaching the clients we were trying to assist early enough or at all.

Available literature and experience from the USA indicated that a more integrated service, like a HJP, could achieve better health and legal outcomes for clients.

Justice Connect has now established a HJP with cohealth (the **community HJP**) as well as with St Vincent's Hospital Melbourne (the **hospital HJP**). Building on the findings from these HJPs, Justice Connect has received funding to develop HJPs in Victoria - at Caulfield Hospital - and in New South Wales.

The Victorian Legal Services Board + Commissioner has generously funded the HJP with cohealth for three years, and La Trobe University is generously undertaking an evaluation of the partnership on an in kind basis. The Department of Health and Human Services and Victoria Legal Aid, through Seniors Rights Victoria, and St Vincent's Health Australia have contributed funding to the HJP with St Vincent's Hospital Melbourne (**SVHM**). In expanding the service, generous funding has been provided by Equity Trustees and the Department of Family and Community Services New South Wales - to establish a HJP addressing elder abuse in NSW - as well as Perpetual Trustees for a 12 month pilot HJP with Alfred Health at Caulfield Hospital.

Through our casework, Seniors Law is well placed to identify laws that adversely impact the interests of older people and their access to justice. We undertake law reform and advocacy initiatives to advocate for the reform of those laws to make them fairer.

1. 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?

Seniors Law submits the definition of 'elder abuse' should include an element of resulting "harm or distress" with further reference to the types of abusive conduct: physical, financial, psychological or emotional, social, sexual and neglect. This approach embraces the broad spectrum of behaviour that can be abusive and helps to inform interventions.

Elder abuse should not, however, be defined by the intention of the perpetrator. Doing so would impose unnecessary evidentiary burdens on an older person to receive assistance or compensation.

Finally, the definition of "elder abuse" should be confined to conduct arising out of a relationship of trust. The dynamics of abuse between trusted persons and in the context of more commercial arrangements can be very different. By making a distinction between these relationships, services will be better designed, identification more accurate and interventions better informed.

Further, prevalence data may be more accurate, as exploitation arising in commercial arrangements may be more likely to be disclosed than in family or caring arrangements (although we acknowledge that this might not be the case where the abuse occurs within a relationship of trust with a paid carer, particularly in a residential care setting).

It is vital that there are appropriate systems and services in place to prevent and respond to this type of mistreatment occurring where there is an underlying economic relationship, but we submit that elder abuse should be tightly defined to ensure that the problem can be understood and measured, and that interventions are evidence based.

recommendation 1: The definition of elder abuse should include an element of harm or distress, and should not include an element of intention. Abuse within relationships based on payment for services, whilst important and requiring an appropriate response, should not come within the definition of elder abuse.

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

As detailed in our submission, the legal response to elder abuse must be:

provided as part of a multi-disciplinary, client-centred approach

As discussed in our joint submission with cohealth responding to questions 35 and 37, health and legal professionals should work together with clients to address elder abuse.

In particular, HJPs are an ideal model of service delivery. With a lawyer located on site in a health setting, and incorporated as part of a client-centred service, relevant professionals can help address instances of elder abuse that require an immediate and flexible response.

Ongoing professional development, reinforced through the provision of secondary consultations, helps to bring about the systemic change in practice required to better identify subtle forms of abuse, earlier on, and facilitate a more holistic, preventative response for clients. This is particularly useful to identify legal issues that will often present initially as a health or social issue – such as family agreements.

A more intensive initial assessment of matters and the contribution of pro bono resources and expertise ensures resources are allocated effectively and promotes the sustainability of the HJP model.

informed by client choice and empowering

Any legal response must recognise the right of the older person to decide not to pursue legal remedies and accommodate these wishes. Any interventions that unnecessarily impose on an older person's right to autonomy and self-determination and fail to afford them the "dignity of risk" may create adverse consequences.

For example, while the availability of criminal sanctions is necessary to publicise, quantify and address acute instances of elder abuse, the risk of exposing family members to legal sanctions can be a significant deterrent to its disclosure. We have seen this in our casework. Generally, our clients prefer informal negotiations or civil remedies to resolve their matter, rather than pursuing family members in the criminal system.

While we recommend broadening the suite of legal interventions available to older people, as outlined in our responses to questions 34 and 43, the wishes and preferences of a client must be respected in pursuing these avenues.

sensitive to complex family dynamics

Lawyers can be trusted advisors for an older person experiencing abuse. Being bound by confidentiality and an obligation to follow client instructions, lawyers can inform a client of their legal rights, while respecting their desire to retain important family relationships.

However, as their duty is to the older person, a lawyer can be limited in their capacity to advance the interests of other family members. In these circumstances, it is important for clients to be engaged with other professionals – such as those specialising in mental health, alcohol and drug, housing – to support the family while the lawyer is assisting the older person.

recommendation 2: best practice legal response to elder abuse is:

- a multi-disciplinary, client-centred approach
- informed by client choice and empowering
- sensitive to complex family dynamics

2. social security

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

Given the number of older people in receipt of the aged pension, Centrelink is well placed to play a central role in the prevention, identification and response to elder abuse.

For example, assets for care arrangements, where an older person transfers assets to a family member in return for a promise of care and accommodation for the rest of the older person's life, can leave the older person vulnerable to financial abuse if they are not documented.

By identifying people intending to enter into these arrangements, appropriate responses can be implemented, including a recommendation that people considering these arrangements obtain advice and if they proceed, document the agreement.

The Centrelink Granny Flat Right or Interest Policy[2] currently recommends that people entering into a granny flat arrangement have a legal document drawn up by a solicitor as evidence of the arrangement. The Centrelink financial counsellors are also well placed to recommend that older people obtain independent legal advice, including about the impact on their pension, of the proposed agreement with their family member.

Ongoing professional development of staff is also critical to ensure that this advice is provided to people considering an assets for care arrangement.

It is also critical that Centrelink staff understand and recognise elder abuse and have the capacity to take elder abuse into consideration when applying Centrelink policies. This would require ongoing professional development for staff to identify and respond to elder abuse which is informed by an elder abuse policy.

For example, if a transfer of part of an interest in the family home to a family member was made in return for a promise for care and the right to reside in the property for life, and the family member fails to provide the promised right to reside and care leaving the older person homeless or with insufficient funds to pay for care, this should be taken into account when assessing the transfer against the gifting provisions. Refer to the case study in the Seniors Rights Victoria submission for an example of this scenario.

Clients in this situation have already lost assets that have taken a lifetime to acquire, and to lose their pension in these circumstances can be devastating. Centrelink policies should enable a consideration of the substance of the transaction to ensure an appropriate to response to older people experiencing elder abuse. We discuss this further in our response to question 10 below.

recommendation 3: ensure continuous professional development of Centrelink staff to identify and response to elder abuse, supported by an elder abuse policy.

[2] Department of Human Services (Cth), 'Granny Flat Right or Interest' (Media Release, 29 April 2016) <https://www.humanservices.gov.au/customer/enablers/granny-flat-right-or-interest>.

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?

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?

Seniors Law endorses the response to these questions in the Seniors Rights Victoria submission.

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?

In our experience, older people for whom a family member has provided an assurance of support are extremely vulnerable to experiencing elder abuse.

In circumstances where the assurer fails to support the assuree, or is abusive, the assuree is unable to access social security payment or many other social services for which eligibility is dependent upon the receipt of a Centrelink benefit. This can result in vulnerable older people being unable to escape the abuse or neglect.

Qualifying periods can similarly prevent older people experiencing abuse and neglect from seeking assistance.

Seniors Law recommends that the ALRC consider whether an amendment of Part 6, paragraph 18(d) of the *Social Security (Assurance of Support)* (FsHCSIA) Determination 2007 (Cth) to include elder abuse as a special circumstance which justifies the cancellation of support would be an appropriate mechanism to assist older people in these circumstances.

Seniors Law recommends that consideration is given to amending social security laws more broadly to ensure that older people experiencing abuse are able to access financial support and support services.

Whilst we acknowledge concerns that any changes to the law may result in older people falsely alleging violence in order to access payments[3], in our experience, the opposite is more likely. Older people are overwhelmingly concerned about not getting their abusive family member into trouble and are often reluctant to acknowledge the abuse, particularly where the disclosure may have a negative impact on the family member's visa status.

recommendation 4: That the ALRC consider amending social security laws, including Part 6, para 18(d) of the *Social Security (Assurance of Support) (FaHCSIA) Determination 2007* (Cth) to enable older people experiencing elder abuse to access financial support and services.

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

Seniors Law submits that the Department of Human Services Granny Flat Interest or Right Policy could be improved to enable older people to better protect themselves against abuse.

The policy currently recognises a granny flat interest or right in circumstances where:

- a payment is made
- for a life interest or a right to use certain accommodation for life, and
- the accommodation is to be the older person's principal home, and
- the older person must not be registered on the title of the property.

Whilst these arrangements work well for many families, if unforeseen circumstances arise, such as the breakdown of the family member's marriage or relationship, or an unexpected increase in the care needs of the older person, the older person can be left unprotected. In some cases, the older person is

[3] Australian Law Reform Commission, '*Family Violence and Commonwealth Laws – Improving Legal Frameworks*', ALRC Report 117 (2011) 138

left homeless if evicted from the family member's property. Legal action to recover the funds that were transferred to the family member is complex, lengthy and expensive.

One way of an older person better protecting their interest is to be registered on the title of the property, in which case they do not fall within the current Granny Flat Interest or Right Policy.

As discussed in our response to question 8, in some cases income support is adversely affected when the older person remains registered on title and therefore does not come within the provisions of the Granny Flat Interest or Right Policy. Social security laws should be amended to the extent necessary to ensure that this does not occur, to enable older people to better protect themselves against elder abuse. The older person's entitlement to income support should not depend on how the assets for care agreement is structured.

We also recommend that consideration is given to including prominent advice in the Granny Flat Interest or Right Policy that an assets for care arrangement can also be structured so that the older person is registered on title, and include details of how Centrelink assesses arrangements structured in that way. As above, the impact on the pension entitlement of the older person should be the same regardless of how the arrangement is structured.

recommendation 5: That social security laws are amended to enable older people to be registered on title without adversely impacting their income support when entering into assets for care arrangements, and that consideration is given to providing prominent advice in the Granny Flat Interest or Right Policy that there are other ways of structuring asset for care arrangements and the social security implications of those

3. aged care

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

Our service has very limited exposure to abuse of older people in residential care settings. It is a cohort of people who are very difficult to reach. In our experience working with clients residing in aged care settings, managers for some facilities have been obstructive in allowing access to a resident. Others, however, have been very accommodating.

To provide access to legal services for this group, we trialled a "Lawyer in a bus" service. We met with eight facilities and provided training to staff and residents on legal rights. We also provided a legal clinic staffed by pro bono lawyers.

While the project succeeded in ensuring access to justice to many vulnerable and isolated older people, it also provides important evidence that overcoming isolation and dependence alone is insufficient to ensure access to justice for vulnerable older residents of aged care facilities.

The project highlighted a number of challenges when trying to provide legal help to residents of aged care facilities:

- difficulties engaging with aged care facilities because of bureaucratic decision-making processes, lack of capacity or interest, and views that their residents did not need legal help
- residents' reluctance to pursue legal remedies because of health conditions, impact on family relationships, unfamiliarity with the legal sector
- in some cases, diminished capacity to provide legal instructions

Key learnings from the project include:

- support from trusted health and aged care workers is essential to reach residents requiring legal help.

  If staff were aware of legal issues, and encouraged residents to seek assistance, residents were more likely to engage with the legal service.
- to achieve a level of familiarity with staff and older people, the service needs to be a constant – both in terms of location and service provision.

  Having a lawyer as part of an integrated team working with clients over a period of time would enable the lawyer to support the capacity of older people and build trust, creating an environment in which people may be willing to act in relation to elder abuse.

  A model encompassing these elements would provide an even more accessible service and would encourage greater participation on the part of potential clients.
- given the significant barriers to justice for residents, early intervention is the best approach to avoid legal issues arising at a later stage where options are limited, and the older person may be more dependent on the potential perpetrator.

  These preventative measures might include promoting financial literacy and understanding of substitute decision-making; as well as making family agreements, informed by independent legal advice.

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

As discussed further in our response to question 35, Aged Care Assessment Services (ACAS) assessors play an important role in identifying elder abuse and other legal risks for older people. For example, ACAS assessors often work with an older person when they are making important decisions about living arrangements, family agreements, powers of attorney, funding age care, etc.

recommendation 6: include questions aimed at identifying legal risks for older people, such as making family agreements, in ACAS assessments; train assessors to identify these legal risks and engage legal services

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?

With clients afforded greater power to decide their aged care, there is a risk others may usurp this role, either informally or by virtue of a formal appointment.

The latter situation may be regulated by legislation, such as the *Powers of Attorney Act 2014* (Vic) (**POA Act**), but the former may not. For this reason, we believe it is best practice for a service provider to insist on evidence of a formal appointment, before anyone is authorised to make decisions on another person's behalf.

In our experience, however, there is a general lack of understanding of powers of attorney and that the appointed decision maker may only have power to make one type of decisions or that the scope of the power granted may be limited.

The following safeguards may help minimise these risks:

- professional development (**PD**) for health professionals and aged care staff on decision-making capacity, legal rights to make decisions, ageism and duties of substitute decision-makers
- policies aimed at empowering older people to make health care decisions and requiring evidence of a formal appointment before dealing with someone as the older person's representative

A further potential concern in relation to the current shift to consumer directed aged care models is that by tying funding directly to client service provision, organisations will require separate funding in order to develop elder abuse policies and frameworks, to undertake risk assessments and follow up interventions.

Recommendation 7: funding for PD sessions for health professionals on decision-making capacity, legal rights to make decisions, ageism and duties of substitute decision-makers and for the implementation of polices aimed at empowering older people to make health care decisions and requiring evidence of a formal appointment of a representative.

Recommendation 8: funding for health services to develop elder abuse policies and frameworks, to undertake risk assessments and interventions.

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

In 2014, Seniors Law and Seniors Rights Victoria made a joint submission to the Australian Law Reform Commission Equality, Capacity and Disability in Commonwealth Laws Inquiry[4]. The submission referred to the Victorian Law Reform Commission (**VLRC**), *Guardianship: Final Report* (2012), which 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;

c. there is no oversight of these decisions or scrutiny of restrictive practices.[5]"

[4] Justice Connect Seniors Law and Seniors Rights Victoria,

[5] Victorian Law Reform Commission, *Guardianship: Final Report*, Report no 24 (2012) 318.

The joint submission noted that:

"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:

- the decision to enter the aged care facility; and
- 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[6]:

> *'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.'*

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.[7]

Due to the failure of current laws to provide a comprehensive framework, we support 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) (**the Vic G&A Act**)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:

[6] Ibid 329 [15.81].

[7] *Disability Act 2006* (Vic) s 3; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.

"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."[8]

recommendation 9: the development of a national or nationally consistent regulatory approach to guide the making and oversight of the decision to

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

[8] Seniors Rights Victoria, Submission to the Victorian Law Reform Commission, *Guardianship Consultation Paper 10*, 3 June 2011, 71.

4. 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?

In our experience, internal policies and procedures of some superannuation companies can compromise the safety of clients experiencing abuse and violence.

For example, superannuation funds may have a standard policy of confirming requests or changes made in relation to a superannuation fund by post.

In our experience, confirmation of changes made without the knowledge of the perpetrator of the abuse living with the older person has been made by post despite clear requests not to do so due to safety concerns. These actions impact on clients' safety and their ability to engage with services.

We recommend that the ALRC consider better mechanisms for oversight and accountability of superannuation companies to ensure the safety of their most vulnerable clients.

Witnessing requirements for many superannuation nomination forms are also inadequate, generally requiring only one adult witness. To prevent coercion, fraud and abuse, witnessing requirements should be more robust, akin to enduring powers of attorney, which require:

- one of two signatories to be authorised to witness affidavits; and
- an assessment of capacity and willingness to make the appointment.

recommendation 10: consideration of mechanisms for greater oversight of superannuation companies in their dealings with clients experiencing abuse, and the introduction of more robust witnessing requirements for the execution of superannuation nomination forms

5. financial institutions

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

73% of elder abuse cases Seniors Law assisted with in 2015/2016 concerned financial abuse and in 18% of elder abuse cases, the perpetrator was the appointed attorney of the older person. Commonly in cases of financial abuse, funds are transferred from the older person's bank account, or money loaned to a family member who fails to meet their obligation under the loan, guaranteed by the older person. As a result, banking and financial systems are well placed to identify elder abuse.

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?

Registration of formal instruments

We support the call by the Australian Bankers' Association (ABA) for mandatory registration of powers of attorney. As noted in the discussion paper, registration of formal instruments would assist in establishing the authenticity and currency of an instrument. A register is also critical to enable other measures, such as random audits, to improve oversight of the conduct of attorneys. We discuss this further below.

Better regulation of third party authorities to operate

The powers of attorney regime in jurisdictions such as Victoria provides mechanisms for oversight of the conduct of attorneys, penalties for attorneys who misuse their power and avenues for donors to recover funds that have been misappropriated.[9] Witnessing requirements are robust, with two witnesses required to be satisfied that the donor has capacity. Third party authorities to act have none of these protections in place.

Improved safeguards are necessary if banks and financial institutions continue to rely on these documents rather than requiring customers to provide a properly executed financial power of attorney.

Other proposals

Seniors Law supports the calls for all banks to provide mandatory training for staff about financial abuse and dementia.

Seniors Law also supports:

- amending relevant legislation and codes to protect financial institutions from any breach of contract, breach of confidentiality, interference with privacy and defamation suit in circumstances where elder abuse is reported in good faith
- increasing the powers of public advocates to investigate reports of suspected elder abuse. However, any concerns should at first instance be raised with the customer directly if possible, and it is then up to the customer whether to take any further action

Recommendation 11: mandatory registration of powers of attorney; improved regulation of third party authorities to operate; mandatory training for bank staff; amending legislation to protect financial institutions who report cases of suspected elder abuse in good faith; increasing powers of public advocates to investigate reports of suspected elder abuse

[9] *Power of Attorney Act (Vic) 2014*

6. family agreements

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

rising popularity

With an ageing population, a general preference for older people to remain living in the community with their family, and government policy encouraging this, we are likely to see more "assets for care" arrangements .

The Human Rights and Equal Opportunity Commission also notes financial pressures on working families and a desire to preserve the family inheritance are other contributing factors to the increase in the number of these types of family arrangements.

factors contributing to the rise of family agreements
aversion, and limited access, to 'institutional' residential aged care
older persons' preference to remain in the community
limited access to community care
ageing population
desire by older person to preserve their assets to provide inheritance and maximise entitlement to government support
high levels of workforce participation and debt among adult children

informal arrangements

The form of these agreements can range from informal conversations to more formal legal documents. In our experience, however, the majority of these arrangements are made informally with minimal contemplation of their legal implications and how they might be terminated.

This is despite the significant assets involved in these arrangements and the serious implications if they fail as described below on page 20.

The informal nature of these arrangements can make it difficult for the older person's interest in the transfer to be recognised at law if a dispute between family members ensues. Older people can sometimes be reluctant to enforce their rights, if any, under these agreements.

types of family arrangements

Seniors Law has observed various different types of arrangements made between family members to provide care to an older person:

the granny flat

An older person, or couple, may make a financial contribution to their carer's property, with the understanding that a granny flat may be built. It subsequently becomes apparent that this living arrangement is unsuitable for the parties for a variety of reasons – the older person's care needs may increase; the carer may have substance abuse or mental health issues; matrimonial breakdown; etc.

client moves in with family

Alternatively, the older person may make a financial contribution to their carer's property and they live together in the same dwelling.

family moves in with client

A family member may move in with the older person to provide care in exchange for a financial payment – lump sum, bequest, etc – or carers' benefits but does not fulfil caring role. The family member's abuse may range from neglect to emotional, financial and physical abuse. In some cases, the older person ends up resuming the caring role.

implications

If these family agreements break down, the implications for the older person may include:

- homelessness
- loss of financial contribution made, without receiving the promised care
- loss of income, having compromised eligibility for Centrelink under the "gifting rules"

When faced with these consequences, the older person is generally reluctant to enforce their rights for fear of:

- compromising the caring relationship, and other family relationships
- being admitted to residential aged care – this may be a reality in some cases, if appropriate home and community services are unavailable
- exposing their family to legal sanctions
- compromising their immediate personal safety
- exacerbating health conditions by protracted negotiation and litigation

Further, family members can find it difficult to advocate on behalf of an older person with diminished capacity, especially if social isolation, manipulation and duress are factors. Likewise, they do not want to compromise their relationship with the older person.

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

resolving property disputes

If family agreements involve property, disputes arising from a break down in relationships may have to be heard in the Supreme Court and County Court.

The Joint Property List at the Victoria Civil and Administrative Tribunal (**VCAT**) does, however, provide a less formal, generally less expensive and more expedient jurisdiction to resolve property disputes. This appears to be a unique, and welcome, feature of the Victorian system. We would encourage the availability of similar dispute resolution mechanisms in other jurisdictions.

Property Law Act

Under the *Property Law Act 1958* (Vic) (**PLA**) a co-owner may request VCAT make an order with respect to co-owned land and goods.[10] The suite of orders available to VCAT to give effect to the division of property is far-ranging. VCAT may make any order it thinks fit to ensure that a *just and fair* sale or division of land or goods occurs, including:

- selling the land or goods and dividing the proceeds between the owners;
- physically dividing the land or goods; or
- a combination of both.[11]

Further, VCAT can order compensation, reimbursement or adjustments to interests between the co-owners reflecting each co-owners' individual contribution to the property. Contributions may be made through improvements to the property and payment of maintenance costs, rates and mortgage repayments. Conversely, interests may be adjusted to take into account damage caused to the property and the benefit that one co-owner may have had of exclusive possession.

VCAT is particularly suited to the needs of our clients for the following reasons:

- less formal and expedient procedures are less stressful for the older person and assists in preserving family relationships
- the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse
- by generally being a less expensive jurisdiction, more vulnerable older clients can access justice

common law presumptions

In determining what is a *just and fair* sale or division of land under the PLA, VCAT can be guided by common law principles.[12] In the context of inter-family transfers arising out of family agreements, detailed below, three presumptions are relevant:

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

[10] *Property Law Act 1958* (Vic) s 225.
[11] Ibid s 228.
[12] *Davies v Johnston (Revised) (Real Property)* [2014] VCAT 512 (5 May 2014) [25].

(a) presumption to create legal relations

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

Evidencing an intention to create legal relations is particularly difficult with family agreements as they are commonly created through informal conversations and are rarely reduced to writing. If an older person cannot evidence a mutual intention to create legal relations, and therefore the existence of a valid contract, they will not be able to enforce their contractual rights.

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

However, decisions in the High Court and the Full Federal Court appear to have rejected the operation of this presumption when determining the existence and nature of intention between contracting parties in special relationships.[13]

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

The Full Federal Court used a hypothetical family agreement to illustrate how family members may evince an intention to create legal relations:[14]

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

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

This shift in emphasis is balanced, however, with the Full Federal Court's warning against converting informal situations that involve love, friendship and feelings of duty or responsibility into "the stuff of daily commercial life".[15]

(b) presumption of resulting trust

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

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

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

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[13] *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8 (7 March 2002); *Evans (as executor for the estate of the late EVANS) v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237.

[14] *Evans (as executor for the estate of the late EVANS) v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237, 242 [15].

[15] Ibid 242 [16].

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

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

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

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

Generally, where a person's contribution to a property is not recognised as a *legal interest*, the law will presume the owner of the property holds the value of their contribution on trust – affording them an *equitable interest*. This is the presumption of resulting trust.

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

(c) presumption of advancement

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

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

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

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

The presumption of advancement appears grounded in the notion that such parental contributions are out of natural love and affection, and a desire to be generous to one's children. While this may be case in some instances, increasingly these inter-family transactions are for the pragmatic purposes of asset management.

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

The application of the presumption of advancement has the effect of imposing a significant evidentiary burden on older people in circumstances where the arrangements are often informal and undocumented. These arrangements are often borne out of an older person's fear of institutionalisation and loss of independence.

Further, the older person's dependence on their family for care can also give rise to a significant power imbalance when negotiating these types of arrangements. With the rise of family agreements, and the significant consequences for older people if they fail, this deficiency in the legal response to financial elder abuse will only become more apparent.

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

required with respect to the presumption of advancement.

While the presumption of advancement is a creature of the common law, its operation can be restricted through legislative guidance. For example, when construing family agreements, the mutual intention of parties in characterising property contributions must be considered, irrespective of the nature of the relationship between them.

recommendation 12: restrict the operation of the presumption of advancement, through legislative guidance to consider the mutual intention of parties in characterising property contributions, irrespective of the nature of the relationship between them

This legislative reform would be complemented by training health and community professionals in encouraging clients to consider formal family agreements. This initiative is detailed below.

promoting preventative interventions

Given the significant legal implications of family agreements, they should be informed by independent legal advice and facilitated discussions between the family members to make sure agreements are appropriately adapted. To overcome evidentiary requirements, they should also be in written form.

This means lawyers and mediators should be involved during the initial stages of making these agreements. However, this legal assistance should be coordinated with other community services to support the older person and their family in making these arrangements. A multi-disciplinary response further mitigates the risk of these agreements breaking down.

As families are contemplating these arrangements, other professions and services may be involved. For example:

- Centrelink's financial information service
- ACAS assessors for aged care services
- Office of the Public Advocate's (**OPA**) advice line
- social workers and care coordinators at time of hospital discharge or as part of Hospital Admission Risk Program (**HARP**) team

These different professionals may have varying capacity to identify whether the older person and their family are contemplating these family agreements, and the associated legal and financial consequences.

For example, as Centrelink's financial information service provides advice on how these family agreements impact on a person's eligibility for benefits, they are in an ideal position to refer the person to legal and mediation services. To promote use of written family agreements, we recommend Centrelink make it a pre-condition for receiving associated Centrelink exemptions and benefits.

For other professions the uptake and legal implications of these family agreements may be less obvious. Consequently, we recommend training relevant professionals on these family agreements, the associated legal implications and how to engage with relevant legal and mediation services.

Individuals and communities can also be empowered to understand how these arrangements work and to seek professional help. It is easy for these arrangements to be seen as a "family issue" or a "housing issue" or a "care issue", rather than a legal issue. Community legal education (**CLE**) sessions help to educate older people about why it's important to consult a lawyer about these arrangements and how they can make sure the family agreement works for them and their family.

We have delivered PD and CLE on family agreements for over seven years. For six years, this was delivered in response to ad hoc requests from health professionals and community groups. Over the past year, these sessions have been delivered as part of our HJPs. Our lawyers strategically engage with frontline professionals and community groups who are likely to identify these family agreements and provide a more immediate response to people who are considering, or have made, these agreements.

We also have the benefit of engaging our pro bono lawyers who have extensive experience in drafting agreements. We believe these relationships, streamlined referral pathways and more immediate response is necessary to complement PD and CLE sessions on family agreements.

recommendation 13: fund the delivery of PD and CLE on family agreements to frontline professionals and community groups, delivered as part of a multi-disciplinary response, such as a health justice partnership

social security assessments that reflect substance of the transaction

As discussed above, a family agreement may impact on an older persons' eligibility for social security benefits. If a financial contribution made under a family agreement is assessed as a "gift", eligibility for the old age pension or subsidised residential aged care may be compromised. A financial contribution made with the expectation of future care may not attract the same adverse consequences if it falls within the provisions of the Department of Human Services Granny Flat Interest or Right Policy.

If family agreements are reduced to writing – outlining the intention of parties, allocation of financial contributions upon termination, any care to be provided, etc – social security assessments are more likely to be accurate, based on the substance of the agreement.

In the absence of an accurate written agreement, Centrelink should be required to conduct further investigations to verify the nature of significant financial contributions made and any associated conditions or expectations – ie. a gift or assets provided for future care. This assessment could be carried out with reference to a principles-based instrument protecting the rights of the older person to live in adequate, secure housing and access to appropriate services.

more robust checks before entry to residential aged care

There are minimal frameworks regulating entry to residential aged care. This process may involve: conducting assessments to determine the person's functional status, decision-making capacity; and, if necessary, appointing a substitute decision-maker.

However, facilities are not *required* to sight such assessments or appointments, which means an older person can be involuntarily admitted into facilities without these necessary checks.

In addition to the recommendations made in regards to question 16 above in relation to the introduction of a national framework of oversight of these decisions, we recommend that aged care facilities should undertake more robust checks to ascertain who is making decisions under what authority, and to give effect to the wishes and preferences of the older person irrespective of their capacity.

recommendation 14: require more robust checks before entry to residential aged care. For example, facilities must be required to assess an application for admission in light of:

- formal, specialist assessments of functional and decision-making capacity
- directions by the older person or, if necessary, a formally appointed substitute decision-maker only
- wishes and preferences of the older person, irrespective of their capacity

7. 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?

evidence of elder abuse committed by appointed decision makers

Terry* was devastated to have discovered that the daughter he trusted enough to give his power of attorney to had abused that trust. She told him that she had purchased a home on his behalf but instead registered the property in her own name. She also used the power to misappropriate funds in excess of $20,000. After a lifetime of hard work, Terry was left with nothing except terrible grief at the loss of his relationship with his daughter. He couldn't believe that his daughter could do this to him.

*name has been changed

In seeking assistance with financial affairs, older people generally prefer informal arrangements between family members in whom they vest complete trust. This may be attributed to a limited understanding of formal substitute decision-making.[16]

While these informal arrangements may work for some families, there are many benefits to formalising decision-making arrangements in the event of legal incapacity:[17] Execution of an enduring POA:

- provides continuity of management of the older person's affairs, subject to limitations
- safeguards the best interests of the donor
- enables confidentiality to be maintained
- avoids a subsequent application to VCAT for a guardianship or administration order.

While there are benefits to formalising substitute decision-making authority in a POA , the use of POAs cannot completely prevent financial abuse.[18] In fact, research suggests financial abuse occurs in relation to 10 to 15 percent of executed POAs.[19] Seniors Law has assisted a number of clients, like Terry, whose substitute decision-maker used their appointment to perpetrate financial abuse.

When executing a POA, older people should be made aware of the obligations of the appointed attorney and how the power can be used, and misused.

While increased accountability of substitute decision-makers, and the availability of robust enforcement mechanisms, are essential to reduce the incidence of financial abuse associated with these appointments, we acknowledge that striking the balance between appropriate safeguards and excessive regulation of substitute decision-makers and supporters is a delicate one.

Any new obligations must not be so onerous or complicated as to dissuade older people from making, and ordinary people from accepting, an appointment.[20] This may lead to "perverse outcomes, such as driving people to use informal, unregulated approaches, which could increase rather than decrease the occurrence of financial elder abuse".[21]

[16] Deborah Setterland, Cheryl Tilse and Jill Wilson, *Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse*' (Queensland Law Society Incorporated, Brisbane, 2000) 30; Peteris Darzins, Georgia Lowndes and Jo Wainer, *Financial Abuse of elders: a review of the evidence* (Monash Institute of Health Services Research, Faculty of Medicine, Nursing and Health Sciences, 2009) 72.

[17] Human Rights and Equal Opportunity Commission, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006, 70-71.

[18] Above n 19, 70-71.

[19] Above n 5, 30 citing Lush, 1998.

[20] Human Rights and Equal Opportunity Commission, above n 17, 72.

[21] Darzins, Lowndes and Wainer, above n 19, 4.

powers of attorney – prevention of abuse

Given that 10 to 15% of powers of attorney are misused, it is vital that there are effective measures in place to prevent abuse, and an appropriate response in the event that abuse occurs.

targeted community education campaign

Evidence suggests that people executing POAs have a limited appreciation of how they can be misused.[22] Further, attorneys may not understand their obligations, which can lead to inadvertent financial abuse through mismanagement of finances. To guard against misuse, attorneys must have a full understanding of their role and be more accountable in fulfilling their role as an attorney.

Seniors Law supports the introduction of a targeted community education campaign directed at older people, promoting financial literacy and understanding of formal substitute decision-making. We further support training for those taking on power of attorney roles.

financial literacy for older people

Literature suggests that improving the financial literacy of older people, and promoting their confidence in managing their finances could be a successful strategy to preventing financial abuse.[23]

Professor P Darzins et al distinguished between the benefits of a general financial abuse awareness campaign and building financial literacy:[24]

> *"...while large sum of money can be spent on educating people to become more aware that they may become victims of financial abuse, this may not lead them to report the abuse. In contrast educating persons on how to best manage or protect their finances may allow them to avert being abused in the first place, or may enable them to remove themselves from situations wherein they are at risk of being abused."*

Furthermore, there is evidence that older people often require assistance managing their assets.[25] For example, the University of Queensland surveyed older people on the financial management of their assets. The older people surveyed cited that they received help with:[26]

- paperwork – 72.4%
- paying bills – 54.6%
- accessing money and banking – 41%
- pensions and management – 36.9%
- property management – 30.8%

One of the major reasons older people required assistance was a lack of confidence in doing it themselves.

By investing in financial literacy programs, older people will be more confident to manage their own affairs and to respond to abuse in the event that it occurs.

[22] Setterland, Tilse and Wilson, above n 16, 30.
[23] Ibid; Human Rights and Equal Opportunity Commission, above n 17, 49.
[24] Setterland, Tilse and Wilson, above n 16, 32.
[25] Ibid 28
[26] Human Rights and Equal Opportunity Commission, above n 17, 19.

education for attorneys

Seniors Law supports the introduction of training for those taking on the role of attorney, detailing their duties and obligations as an appointed attorney.

recommendation 15: targeted community education on:

- financial literacy for older people
- the duties and obligations of attorneys for people taking on the role of attorney

improve legal systems and protections

In Victoria, significant progress has been made in the regulation of POAs, with the new POA Act including provisions to increase the accountability of attorneys, with the introduction of criminal sanctions and the ability for VCAT to order compensation where an attorney has misused his or her power.

Still lacking, however, is a more systemic oversight of POAs – involving a register of POAs, annual declarations of compliance and random audits – which we believe will reduce the incidence of abuse without being overly onerous.

It would also be worth considering the introduction of more robust requirements around the evidence that needs to be provided to whom on activation when the POA commences on lack of capacity.

powers of attorney – response to abuse

improve accountability measures

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

Increased accountability of appointed decision-makers, and the availability of robust enforcement mechanisms, are essential to reduce the incidence of financial abuse associated with these appointments.

In Victoria, the POA Act, which commenced on 1 September 2015, consolidates legislative provisions for POAs and enduring powers of guardianship which previously fell within the *Instruments Act 1958* (Vic) and the G&A Act, respectively.

The POA Act creates robust enforcement mechanisms by:

- creating new offences where an attorney dishonestly obtains, revokes or uses a POA to gain a financial advantage for themselves or cause a loss to the principal
- expanding VCAT's powers, especially the new power to order compensation

While the introduction of the new POA Act is welcome, literature highlights the following ongoing deficiencies with the Victorian POA regime:[27]

- no system to verify an appointed person's understanding of their role and responsibilities
- no current requirement for the appointed person to produce annual reports or have them audited or be subject to a regime of random auditing
- no register of POAs

The accountability regime should also apply to Tribunal appointed substitute decision makers as well as to personally appointed decision makers.

[27] Setterland, Tilse and Wilson, above n 16, 30.

recommendation 16: improve accountability measures for attorneys including

- consider the introduction of the new offences and expansion of the powers of the Victorian Civil and Administrative Tribunal in the Victorian Powers of Attorney Act 2014 to other jurisdictions that do not have equivalent provisions
- establish a national register of powers of attorney
- require attorneys to lodge an annual statement of compliance with their obligations
- establish a process of random audits of attorneys

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?

register of powers of attorney

Seniors Law supports the introduction of a national mandatory online registration system for enduring powers of attorney. Whilst we acknowledge concerns that a register of itself may not reduce the incidence of elder abuse, we believe that mandatory registration of all enduring instruments as part of a broader system of protections could lead to a reduction in the incidence of elder abuse in a number of ways.

Registration could prevent people from purporting to rely on powers that have subsequently been revoked and discourage former attorneys from attempting to rely on powers that have been revoked.

An easily searchable register of powers of attorney may make it less likely that institutions rely on their own third party documents which in most cases have less robust witnessing requirements and protections.

Finally, registration is a necessary foundation for the implementation of a suite of safeguards that together would work to decrease the incidence of elder abuse. This suite of safeguards should include a requirement to notify when a POA has been activated, a requirement to submit annual declarations of compliance together with a regime of random audits. The prospect of being audited may act as an incentive for attorneys to comply with their obligations, without requiring all attorneys to submit annual reports or statements.

We submit that these proposals balance the need for oversight with the need to ensure that the role does not become so onerous that members of the community will be reluctant to accept the appointment.

hosting and management of the register

We support the recommendation of the Standing Committee on Legal and Constitutional Affairs in the Inquiry Into Older People and the Law Report for state based registers as a precursor to the

establishment of a national register for enduring POAs.[28]

Similar recommendations were made in the Final Report of the Victorian Parliamentary Law Reform Committee Inquiry into Powers of Attorney in 2010[29] and by the Victorian Law Reform Commission in the Guardianship Final Report in 2012.[30]

Seniors Law submits that the initial state based register should be hosted and managed by an existing agency which has expertise in managing registers containing sensitive information.

As recommended by the Victorian Parliamentary Law Reform Committee[31] and VLRC [32], we submit that the Registry of Births, Deaths and Marriages in each State would be an appropriate body to host and manage the register of powers of attorney.

Recommendation 17: the establishment of a national online register of powers of attorneys, maintained by the Registry of Births, Deaths and Marriages within each State.

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?

In the experience of our clients, it is most often the appointed decision maker themselves who is the perpetrator of the abuse. Any expansion of statutory duties of attorneys and other appointed decision makers to give them a greater role in protecting older people from abuse by others would not prevent abuse by the attorney. From our experience, there is no evident need for the expansion of duties.

Furthermore, the imposition of expanded duties may result in trusted family members being unwilling to take on the role of attorney. We submit that it would be preferable to establish a regime of oversight of the conduct of attorneys as described in our answer to question 29 to ensure compliance with existing duties, for example the duties contained in the *Powers of Attorney Act* 2014 (Vic).

[28] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, (2007), 103.
[29] Victorian Parliamentary Law Reform Committee, *Inquiry into Powers of Attorney Final Report* (2010) 233.
[30] Victorian Law Reform Commission, above n 5, 362
[31] Victorian Parliamentary Law Reform Committee, *Inquiry into Powers of Attorney Final Report* (2010), 248
[32] Victorian Law Reform Commission, *Guardianship Final Report 24* (2012),366.

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

evidence of elder abuse committed by guardians and administrators

Seniors Law has assisted clients who have experienced elder abuse by a family member who had been appointed guardian or administrator to seek a review of the appointment. However, as a legal service we are only able to assist older people who have capacity to provide instructions to a lawyer.

Older people who have appointed decision makers who do not have decision making capacity are particularly vulnerable to abuse, as they may be dependent on an interested third party taking action. As social isolation is a key risk factor for elder abuse, older people in this situation without support are at risk.

guardians and administrators – prevention of abuse

Given the special vulnerability of people under guardianship or administration orders, greater education and support for appointed decision makers and more active oversight is warranted.

Seniors Law recommends the introduction of a suite of measures to help prevent abuse and to ensure older people are able to access appropriate remedies in the event that abuse occurs, as recommended by the VLRC in the Guardianship Final Report 24[33].

Proposed preventative measures include:

- the introduction of decision making principles for administrators and guardians to guide good and proper decision making
- the provision of training particularly for non-professional people assuming these roles, and for police regarding enforcement
- ensure that bodies such as State Trustees and the Office of the Public Advocate are adequately resourced to properly undertake their role

decision making principles

We recommend the introduction of a provision along the lines of section 21 of the POA Act (Vic) into guardianship legislation in all jurisdictions.

That section provides a list of principles that a person exercising power under the Act must apply, including:

- decisions must be least restrictive
- the principal must be given support to participate in decisions as much as possible
- decisions must give all practicable and appropriate effect to the principal's wishes
- encourage the principal to participate in decision making
- promote the personal and social wellbeing of the principal, including by; recognising the inherent dignity of the principal, having regard to the principal's existing supportive relationships, religion, values and cultural and linguistic environment; and respecting the confidentiality of confidential information relating to the principal

The introduction of principles highlighting our obligations under the Convention on the Rights of Persons with a Disability, particularly if covered as part of a mandatory training program, would have the effect of setting expectations and providing guidance and support to decision makers as they carry out what can be a complex and demanding role.

[33] Ibid 412.

training

guardians and administrators

Seniors Law supports mandatory training for all non-professionals appointed to the role of guardian or administrator.

Whilst the civil and administrative tribunals and public advocates currently provide voluntary support and training to professional and non-professional guardians, we agree with the VLRC that guardians and administrators should be provided with more training and ongoing support to carry out their role.[34]

Whilst we recommend mandatory training for non-professional guardians and administrators, in the absence of that, we would support an expansion of the powers of civil and administrative tribunals to enable a condition that the proposed guardian or administrator undertake training be included on any order.

police

Seniors Law submits that where new criminal laws are introduced, it is important that there is a directed campaign educating police and courts and tribunals around the application and use of these laws.

Whilst the introduction of offences under the POA Act are to be applauded in creating specific offences against those misusing the power, and the Act has only been in operation for a short time, anecdotally, they have brought few prosecutions.

For new offences to be an effective protection from, and potential deterrent for misuse of powers, they must be used. In order to be used, police and the courts must both know about them, and how to use them.

funding and resourcing

It is also necessary to adequately fund bodies such as State Trustees and the Office of the Pubic Advocate and their equivalents in each State. Adequate funding is critical to ensure that the case load of guardians and administrators is such that they are able to communicate and consult with represented persons to ascertain their will and preferences in order to properly carry out their role.

Recommendation 18:

- the introduction of decision making principles for administrators and guardians to guide good and proper decision making,
- the provision of training particularly for non-professional people assuming these roles, and for police regarding enforcement
- ensure that bodies such as State Trustees and the Office of the Public Advocate are adequately resourced to properly undertake their role

[34] Victorian Law Reform Commission, *Guardianship Final Report 24* (2012), 413

guardians and administrators – response to abuse

We recommend the introduction of the following proposed measures to improve the response to abuse:

- the introduction of merits review of decisions of guardians and administrators
- expand the power of civil and administrative tribunals to order repayment of misappropriated funds
- the introduction of civil penalties for the misuse of powers

merits review

The Vic G&A Act does not currently provide for merits review of decisions.

In our submission, it is vital that there is a quick, easy and accessible means of challenging the decisions of a guardian or administrator. Like Victoria Legal Aid, we often receive inquiries from people under guardianship and administration orders who do not want the order revoked, but are unhappy about a particular decision that their guardian or administrator has made.[35]

Given the vulnerability of people under an order, there must be a mechanism for them or their advocate to have a voice when this occurs.

A specialist guardianship and administration review list at VCAT or its equivalent should hear applications for a merits review of a decision of a guardian or administrator.

Seniors Law agrees with the VLRC's proposal that new guardianship laws should permit merits review of decisions by guardians and administrators equally.[36]

The option of making an application to VCAT seeking a review of the relevant decision should be available only after all internal mechanisms of review, if applicable, have been exhausted.

Where existing review mechanisms have been exhausted or a review mechanism is not available, an interested person may apply to VCAT or its equivalent to have the decision reassessed rather than reviewed.

Seniors Law shares the VLRC's view that the represented person and people with a special interest in their affairs should be entitled to apply for merits review of a guardian's or an administrator's decision.[37]

We suggest that an approach similar to that in New South Wales should be adopted in relation to defining what constitutes a "reviewable decision". The New South Wales guardianship laws provide that a reviewable decision includes all those decisions made by guardians and administrators in connection with the exercise of their powers under guardianship laws.

expanded powers

Seniors Law submits that civil and administrative tribunals should be empowered to make orders requiring administrators to repay funds that have been misappropriated. Without these powers, older people are required to initiate separate proceedings in a different, more formal jurisdiction, creating additional costs and stress.

We propose the introduction of a power similar to that provided in section 77 of the Vic POA Act in respect of personally appointed attorneys. This power would alleviate the need to commence new proceedings, avoiding further stress and expense for the represented person.

civil penalties

We also support the introduction of civil penalties to guardianship legislation for the abuse, neglect or exploitation of a represented person by guardians or administrators. We endorse the recommendations made by the VLRC.[38]

Recommendation 19:

- the introduction of merits review of decisions of guardians and administrators,
- expand the power of civil and administrative tribunals to order repayment of misappropriated funds
- the introduction of civil penalties for the misuse of powers

[35] Ibid 430.
[36] Ibid 433.
[37] Ibid 434.
[38] Ibid 422.

8. public advocates

Question 33: What role should public advocates play in investigating and responding to elder abuse?

Each Australian jurisdiction has legislation in place designed to protect adults with diminished decision-making capacity where abuse or misuse has come to the attention of health professionals or concerned family members. There is a gap, however, in protection for vulnerable adults where abuse is hidden or where the perpetrator isolates the older person as a part of the pattern of abuse.

OPA's current investigatory powers allow it to investigate where a person has, or is likely to be, a candidate for a guardianship order. There is a need for a body empowered to conduct investigations more broadly and, considering OPA's unique position in terms of understanding the jurisdiction, it is well placed to fulfil that function.

expanding OPA's investigatory powers

Seniors Law supports the expansion of the investigatory powers of public advocates to ensure that concerns about the possible of abuse of vulnerable people are adequately investigated. Whilst we do not support mandatory reporting, it is important that there is a body charged to follow up concerns expressed in relation to vulnerable members of our community.

We understand that currently organisations and individuals are able to seek assistance from Victoria Police to conduct "welfare checks" on individuals who may be at risk of abuse. This usually occurs where a case officer has concerns about the safety or well-being of an individual. It appears, however, that the power to conduct safety checks is not prescribed by statute but rather is based on a discretionary power that the police can exercise when they determine it is appropriate.

However, concerned members of the community may not wish to invoke a police response, particularly for what might be seen as less serious cases. In our submission, it is more appropriate in the first instance for a public advocate to investigate concerns with a view to linking the older person with appropriate services and support. This is particularly the case for more subtle forms of abuse.

Given the lack of clarity over when welfare checks will be undertaken and the potential reluctance of members of the community to approach the police particularly for more subtle cases, we believe that public advocates should have clearly identified powers to investigate cases of suspected abuse of vulnerable people. The legislation should set out clear guidelines on when the use of such powers are appropriate and ensure appropriate records are kept regarding the use of the powers.

In his 2013 Churchill report, John Chesterman concludes that OPAs powers of investigation should be expanded, as recommended by the VLRC, to:

> "...investigate (following a complaint, or on its own motion) the abuse, neglect or exploitation of people with impaired decision making ability..."[39]

recommendation 20: expand the powers of public advocates to investigate the abuse, neglect or exploitation of vulnerable adults

A further benefit of widening the mandate of public advocates around the protection of vulnerable adults, is to provide members of the community with a central point for complaints around the mistreatment and abuse of older adults:

> *"One important side effect of broadening OPA's investigatory powers will be the social capital one of providing members of the general community with a place where they can register concerns about people in their own communities..."* [40]

[39] John Chesterman, 'Responding to Violence, abuse, exploitation and neglect: improving our protection of at-risk adults' (Churchill Fellowship Report, Office of the Public Advocate, 30 July 2013) 81.
[40] Ibid.

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

Seniors Law supports the consideration of a range of measures to protect vulnerable adults with diminished capacity. As considered in question 33, and in more detail below the ALRC should consider the merits of broadening the powers of public advocates, including to investigate cases of suspected abuse and make appropriate referrals, and direct the provision of services for vulnerable adults.

Where a person is found in a situation of neglect or abuse, but cannot be assisted through the interventions of the public advocate, the relevant civil and administrative tribunal should be empowered to make protective orders to support and protect the vulnerable person from abuse.

investigatory powers

Difficulties in accessing some vulnerable older people mean that in some cases, concerns of abuse are left unaddressed. At Seniors Law, we are often contacted by family members concerned that their loved one is being taken advantage of by someone close to them. As a legal service, able only to take instructions from the aggrieved party, we are unable to assist unless we can speak to the older person. Our health partners report that in many complex cases, health professionals are unable to access patients, with those close to an older person blocking access to services.

Where a vulnerable adult finds themselves in a situation they are unable to escape the abusive situation, options are limited. As noted above, the ALRC should consider the place of public advocates to investigate such matters, looking at a range of powers needed to conduct investigations and facilitate services.

documentation and information

Legislation should empower public advocates to compel the production of documents and information as part of an investigation. Adult Protection Services in Washington State have powers which allow investigation and information gathering where a person is determined to be a "vulnerable adult" and

> *"the alleged behaviour meets the criteria that warrants their involvement (that is, that there is an apparent case in question of 'abandonment, abuse, financial exploitation, neglect or self-neglect')"*[41]

The Revised Code of Washington (RCW 74.34.067) which governs investigatory powers, provides:

> (1) Where appropriate, an investigation by department may include a private interview with the vulnerable adult regarding the alleged abandonment, abuse, financial exploitation, neglect or self-neglect.
>
> (2) In conducting the investigation, the department shall interview the complainant, unless anonymous, and shall use its best efforts to interview the vulnerable adult or adults harmed, and consistent with the protection of the vulnerable adult shall interview facility staff, any available independent sources of relevant information, including if appropriate the family members of the vulnerable adult.[42]

Seniors Law submits similar provisions would be essential for effective investigations in Australia.

powers of entry

We submit that public advocates should have the power to enter premises with a warrant issued by a judicial officer, (more specifically a civil and administrative tribunal Member), where there are reasonable grounds for suspecting a person has been neglected, abused or exploited on the premises.[43]

recommendation 21: empower public advocates to enter premises with a warrant issued by a judicial officer – a tribunal Member – where there are reasonable grounds for suspecting a person has been neglected, abused or exploited on the premises

[41] Ibid 29.
[42] Ibid 28-29.
[43] Ibid 40; *Adult Protection Act*, RSNS 1989 c 2, s 8(2).

referrals and inter-agency protocols

As detailed in the Chesterman Report, OPA is well placed to conduct investigations around neglect and abuse of older people as:

> *"OPA is able to utilise a supportive intervention approach in conducting its investigations... OPA investigators will see it as key to their role not only to report on what they have found, but to make immediate support referrals as soon as they begin investigating.."*[44]

This practise is in line with adult protection jurisdictions internationally (particularly Scotland).[45]

Public advocates must work together with key adult protection agencies to develop Inter-agency protocols to assist with appropriate and smooth referral process.

reporter anonymity

To encourage cooperation and assistance with the investigation of potential abuse, neglect or exploitation, we recommend that anonymity be provided to people who report concerns about the potential abuse of a vulnerable person. 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.

wishes of the vulnerable person

In all investigations, the wishes of the vulnerable person should be paramount.

civil order regime

Seniors Law recommends consideration of the introduction of a dedicated regime of protection orders, alongside the existing Intervention Order system.

Where protective and health concerns are not able to be addressed by way of investigation by the relevant public advocate and intervention, Seniors Law proposes that the public advocate be empowered to apply to the relevant civil and administrative tribunal for one of a series of civil orders to engage the provision of service and/or protect the vulnerable person.

adult protection orders v intervention orders

Intervention orders, along with guardianship orders, are one of the key protective orders currently used in Victoria.[46] An intervention order prohibits conduct constituting violence or abuse, a proven breach of an order resulting in criminal penalties. It is an important tool in protecting vulnerable people from positive acts of abuse.

Seniors Law recognises the limitations of the intervention order, however, in its inability to address omissions leading to the neglect of a protected person. As it stands, the intervention order regime is designed to protect a protected person from positive acts (or "behaviour towards a person") constituting violence. Seniors Law asserts that where a respondent subject to an Intervention Order does nothing (that is, omits to do an act), there is no (or at least no effective) mechanism for breach.

The *Family Violence Protection Act 2008* (Vic) can make an intervention order to protect a person from acts of family violence. Section 5 of the Act, defines family violence as :

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

  (i) is physically or sexually abusive; or

  (ii) is emotionally or psychologically abusive; or

  (iii) is economically abusive; or

  (iv) is threatening; or

  (v) is coercive; or

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

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

It might be argued that physical and emotional abuse, even financial abuse, may be perpetrated by an omission. Further, the Royal Commission into Family Violence took the view that the intervention order in its current form can protect a person from neglectful behaviour. However, Seniors Law recognises difficulties in the notion that an

[44] Chesterman, above n 39, 81.
[45] Ibid 27.
[46] Ibid 82.

intervention order is able provide protection from omissions to act, and submits further legislative reform is needed to address this gap.

the appropriate judicial body

An intervention order is not designed to impose positive obligations on parties but rather, to prohibit the respondent's abusive conduct- — that is, to *stop* the respondent from doing certain things.

Where the law governs an obligation to do a positive act towards another person, it must generally be established that a duty of care is owed.[47]

Whilst it might be possible to amend intervention order legislation to allow for the imposition of positive obligations, it would be complicated.

The intervention order regime relies heavily on parties resolving matters, with respondent parties often consenting to orders on the basis that they do not admit to allegations made in the application. Such resolution would be far less likely, certainly on legal advice, where consent to an order suddenly requires positive actions. What those actions would be would also require a much more in depth and complex approach than can generally be offered in an intervention order duty list in a busy Magistrates' Court.

Civil and administrative tribunals, have developed expertise in dealing with situations where one person has positive obligations towards another through their work in the guardianship lists.

Although tribunals cannot force an unwilling carer to complete tasks, it works with willing carers and family members to allocate tasks, and has the expertise to impose services where there is a gap in care. To empower tribunals to make civil orders would act to extend such powers, rather than introduce them to a completely new decision making body. Given their wider jurisdiction, Seniors Law submits civil and administrative tribunals are the appropriate body to make orders around the protection of vulnerable people.

Seniors Law submits orders protecting older people should be tailored to their needs. Following his investigation of Adult Protection regimes internationally in 2012, John Chesterman recommends the introduction of further powers to VCAT to make protective orders specifically for vulnerable older people, namely:

- orders enabling entry and assessment
- removal and placement orders
- provision of service orders; and
- banning orders[48]

Seniors Law submits, while intervention orders have a role in protecting vulnerable people from violent behaviour, the addition of a more tailored regime of orders, and appropriate penalties for breach of those orders, is needed in the protection of vulnerable older people.

civil orders made by VCAT

The G&A Act (Vic) currently empowers VCAT to make various orders as part of a guardianship order. A limited guardianship order – made under sections 22 and 25 of the G&A Act – can allow a guardian to make decisions about one of all of the following: healthcare, employment, accommodation, access to services and access to persons.

In conjunction with expanded powers of investigation for public advocates, Seniors Law proposes civil and administrative tribunals be given the power to impose orders to protect vulnerable people creating a more defined system of adult protection. In line with a rights-based approach, however, Seniors Law recommends adopting legislative provisions that 'recognise the ability of individuals to object to the placing of protective orders on them' as seen in Scotland.[49]

entry and assessment orders

We submit that civil and administrative tribunals should be empowered to issue a warrant allowing entry to premises where there are reasonable grounds for suspecting a person has been neglected, abused or exploited on the premises. See paragraph titled 'powers of entry' on page 34 above.

provision of service orders

Seniors Law proposes that civil and administrative tribunals be empowered to make orders for the provision of services to a vulnerable older person.

Nova Scotia's adult protection regime allows the court to order that the 'Minister' provide a form of care plan relating to the implementation of services, where an adult is found to be in need of protection.

Section 9.3 of the *Adult Protection Act* provides:

[47] Lanham, Bartel, Evans & Wood, *Criminal Laws in Australia*, Federation Press, 2006, 3
[48] Chesterman, above n 39, 84.
[49] Chesterman, John, 'Responding to Violence, abuse, exploitation and neglect: improving our protection of at-risk adults', Churchill Report, 2013, 48, citing s35 of the *Adult Support and Protection (Scotland) Act 2007*

"Where the court finds, upon the hearing of the application, that a person is an adult in need of protection and either

(a) is not mentally competent to decide whether or not to accept the assistance of the minister; or,
(b) is refusing the assistance by reason of duress,

the court shall so declare and may, where it appears to the court to be in the best interests of the person, make an order authorising the Minister to provide the adult with services including placement in a facility approved by the Minister which will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect."[50]

banning orders

Similar to the intervention order's power to exclude persons from an area or premises, and VCAT's power to make orders regarding 'access to persons' under the guardianship regime, Seniors Law submits that civil and administrative tribunals be empowered to make banning orders, stopping certain persons from contacting and seeing the vulnerable adult.

Again, Nova Scotian courts are empowered to make a 'protective intervention order directed to any person who, in the opinion of the court, is a danger to the adult in need of protection'[51] as can the Sheriff under s19 of *the Adult Protection and Support (Scotland) Act 2007*.

The imposition of a banning order, rather than an intervention order, allows a decision making body familiar with the jurisdiction, and armed with complimentary powers, to intervene and ban contact in a less formal setting (than the Magistrates' Court).

In the context of delicate family relationships, consequences of breach are also relevant, with breach of intervention order not uncommonly attracting a term of imprisonment. Those protected by such an order may be more likely to report a breach where prison was not a threat, though a breach might be penalized by a civil penalty. (for further discussion, see Question 50 below).

As a caveat to this power, however, Seniors Law submits that any legislation must take a rights based approach, and as per the Scottish Legislation, that a protection order must not be made if the affected adult opposes it. (See 'consent to orders' below).

removal and replacement orders

Also similarly to guardianship provisions – section 27 of the G&A Act (Vic) – Seniors Law recommends removal and replacement orders should be available to allow the short term removal of a vulnerable person, for treatment or protection.

consent to orders

As a caveat to any application for a civil order, Seniors Law recommends that the relevant civil and administrative tribunal be required consider the wishes of the vulnerable adult before making a civil order.

Section 35 of Scotland's *Adult Protection and Support (Scotland) Act 2007* recognises the 'ability of individuals to object to the placing of protective orders over them':[52]

'(1) The sheriff must not make a protection order if the sheriff knows that the affected adult at risk has refused to consent to the granting of the order.

(2) A person must not take any action for the purposes of carrying out or enforcing a protection order if the person knows that the affected adult at risk has refused to consent to the action.

(3) Despite subsections (1) and (2), a refusal to consent may be ignored if the sheriff or person reasonably believes—

(a) that the affected adult at risk has been unduly pressurised to refuse consent, and

(b) that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.

(4) An adult at risk may be considered to have been unduly pressurised to refuse to consent to the granting of an order or the taking of an action if it appears—

(a) that harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust, and

[50] *Adult Protection Act*, RSNS 1989 c 2, s 9(3).
[51] Ibid s 9(3)(d).
[52] Chesterman, above n 39, 48

(b) that the adult at risk would consent if the adult did not have confidence and trust in that person.'

The Scottish legislation recognises the importance of maintaining a balance between the rights of a vulnerable person and the community's responsibility to protect those most vulnerable. Seniors Law submits that new legislation must take this approach.

Recommendation 22: expand the powers of civil and administrative tribunals to make civil orders protecting vulnerable adults

9. health services

Please refer to our submission co-authored with cohealth in relation to questions 35 and 37 of the Health Services section of the Issues Paper.

10. forums for redress

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

Civil and administrative tribunals are particularly suited to the needs of our clients for the following reasons:

- less formal and expedient procedures are less stressful for the older person and assists in preserving family relationships
- the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse
- by generally being a less expensive jurisdiction, more vulnerable older clients can access justice
- generally have expertise to deal with a wide range of legal issues experienced by older clients – such as substitute decision-making and property

For these reasons, these tribunals should have greater jurisdiction to hear and determine matters related to elder abuse, including:

- disputes arising from the breakdown of a family agreement, as outlined in our response to question 28
- civil orders protecting vulnerable adults, as outlined in our response to question 34

Seniors Law endorses the recommendation made by Seniors Rights Victoria that the jurisdiction of civil and administrative tribunals should also be expanded 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.

recommendation 23: the jurisdiction of civil and administrative tribunals be expanded to include determination of matters related to elder abuse including:

- disputes arising from the breakdown of a family agreement, as outlined in our response to question 28
- civil orders protecting vulnerable adults, as outlined in our response to question 34
- disputes arising from adult children living in their parents' homes that currently fall outside the ambit of the Residential Tenancies jurisdiction and the Co-ownership jurisdiction.

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?

Many of our clients would benefit from accessing mediation services to resolve family disputes, especially those specialising in elder mediation. Examples of these services are: the Dispute Settlement Centre of Victoria , the Family Mediation Service and Relationships Australia, which is trialling an elder relationship service in limited locations.

While some clients accept referrals to mediation services, some are not convinced such a service will be able to assist. To improve uptake, especially for complex clients engaged with multiple services, mediation services should be co-located with other services commonly used by older people.

For example, DSCV is co-located at the Neighbourhood Justice Centre in Collingwood, where a wide array of support services and community initiatives are co-located with a multi-jurisdictional court.

Recommendation 24 : mediation services should be co-located with other services commonly used by older people

11. 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?

improvements to criminal laws

Seniors Law submits that the introduction of criminal sanctions in relation to breaches of duty in the POA Act (Vic) have brought significant improvements to the Victorian criminal law relevant to elder abuse. Whilst it is as yet unclear how these new provisions are being used, the mechanism for prosecution of misuse of power of attorney is now in place.

As relates to Australian criminal laws more broadly, most states and territories have legislation requiring that where a person has 'charge' of another, and fails to provide that person the 'necessaries of life' leading to harm, then that person is liable.

Seniors Law recommends that the ALRC consider whether similar legislation should be introduced in Victoria to bring Victoria in line with other states around the provision of "necessaries of life." *(see Question 43 below, for further discussion on this point.)*

Seniors Law does not believe that the creation of offences otherwise identifying age-specific victims will improve the criminal law in Australia, but that rather offences relating to assault, injury, fraud, theft (and other relevant offences) are adequate, without the introduction of special laws for groups based on age.

educating police

Rather than introducing additional offences, Seniors Law submits that the administration of justice around situations of elder abuse would be improved by greater police education and training on the issue.

Elder abuse occurs mostly within a family context, where conflict between parents and children has been traditionally understood as a private affair. Just as police education, and subsequent intervention in situations of intimate partner forms of family violence has increased in recent years, so must police be educated in when and how to approach and intervene in situations of elder abuse, with education also addressing the barriers caused by ageism.

Seniors Law recognises work by Victoria Police in Croydon, Victoria in the police approach to elder abuse as a separate form of family violence. Seniors Law refers to the submission made by Eastern Community Legal Centre on this issue.

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

regulating neglect

necessaries of life and other provisions

As noted in the ALRC issues paper, most jurisdictions in Australia have legislation which provides that where a person has 'charge' of another, and fails to provide that person the 'necessaries of life' leading to harm, then that person is liable.

For example, the *Tasmanian Criminal Code Act 1924* (Tas) provides, at section 144:

> (1) It is the duty of every person having charge of another, who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, to provide such necessaries for that other person.

(2) It is immaterial how such charge arose.[53]

Section 285 *Queensland's Criminal Code 1899* (Qld) similarly provides:

> It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result in the life or health of the other person by reason of any omissions to perform that duty.

The *Guardianship and Administration Act 1993* (SA) criminalises ill treatment or neglect of a person with mental incapacity under section 76, and several states create 'aggravated' offences where the victim of an offence is vulnerable or disabled. [54]

In cases of neglect or omission resulting in death or serious injury, the common law principle of criminal negligence applies. Under this principle, a court can find an accused culpable for murder where there is a duty of care that gives rise to a legally recognised duty to act, and omits to fulfil that duty to the standard of the reasonable person in the same situation.[55] Legally recognised duties to act are found at common law.[56]

Section 14 of South Australia's *Criminal Law Consolidation Act 1935* (SA) reflects this, creating a specific offence of 'criminal liability for neglect where death or serious harm results from unlawful act, which includes a definition of 'vulnerable adult.'

States' laws do then, at least in theory, penalise neglect.

Seniors Law submits, however, that despite their existence, in practise many of these laws remain largely unutilised.

prosecutions under 'necessities of life' laws

Australian child protection laws and related criminal provisions place obligations on parents and carers to provide 'the necessities of life' to children in their care.[57] Infringements of these laws have resulted in recent criminal prosecutions.[58]

Where adults are concerned, however, much of the case law dealing with 'necessaries' or 'necessities' of life has related to medical duty of care. These cases have looked at issues around artificial life support, considering provision of ventilation or life support and non-voluntary euthanasia, in a medical context.[59]

Prosecutions for neglect of adults, by carers, including adult children, have largely remained unprosecuted.

neglect leading to death

As mentioned in the adjacent paragraph, in cases of neglect or omission resulting in death or serious injury, the common law principle of criminal negligence applies. Under this principle, a court can find an accused culpable for murder where there is a duty of care that gives rise to a legally recognised

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[53] See also: *Criminal Law Compilation Act 1913* (WA) s 262 of Appendix B; *Criminal Code Act 1983* (NT) ss 149, 183 of Schedule 1; *Criminal Law Consolidation Act 1935* (SA) ss 30, 14; *Crimes Act 1990* (NSW) s 44.

[54] See for example, *Criminal Law Consolidation Act 1935* (SA) s 5AA(j); *Criminal Code Act 1983* (NT); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(l).

[55] Common Law Test for Negligent Manslaughter by Omission: *R v Lavender* (2005) 222 CLR 67; See for example *R v Miller* (1983) 2 AC 161; *R v Instan* (1893) 1 QB 450; *R v Stone & Dobinson* (1977) QB 354; *R v Taktak* (1988) 14 NSWLR 226; *R v Russell* [1933] VLR 59.

[56] Legally recognised duties to act: for example, Relationship duty: *R v Russell* [1933] VLR 59; voluntary assumption for helpless persons (*R v Taktak* (1988) 14 NSWLR 226; *R v Stone & Dobinson* (1977) QB 354).

[57] See, eg, *Crimes Act 1900* (NSW) s 43A(2); *Criminal Code* (Qld) s 364; *Criminal Law Consolidation Act 1935* (SA) s 30; *Criminal Code Act 1924 (Tas)* ss 144, 145; *Criminal Code Act 1983* (NT) s 183; Australian Law Report Commission, *Report on Family Violence – a National legal Response*, Report No 114 (2010), 933-978.

[58] *R v McPartland & Polkinghorne* [2014] SASCFC 84; Candice Marcus, 'Boy locked up and starved by parents was days away from death', *ABC News* (online), 29 October 2014 <http://www.abc.net.au/news/2014-10-28/boy-starved-by-parents-was-days-away-from-death/5847244; Ruth Lawrence & Penelope Irvine, Redefining Fatal Child Neglect, The Australian Institute of Family Studies Child Abuse Prevention Issues No 21, 2004, 7. https://aifs.gov.au/cfca/sites/default/files/publication-documents/issues21.pdf

[59] See eg *Brightwater Care Group v Rossiter* (2009) 40 WAR 84; *Auckland Area Health Board v Attorney General* (1993) 1 NZLR 235; *Airedale NHS Trust v Bland* [1993] AC 789; for discussion of futile provision of life support: *Wilmott, White & Downey* (2013) 20 JLM 907 regarding 'withholding and withdrawal of futile life sustaining treatment: Unilateral Medical decision making in Australia and New Zealand'.

duty to act, and omits to fulfil that duty to the standard of the reasonable person in the same situation.

R v Instan

The 1893 English case of *R v Instan* [1893] 1 QB 450 deals with the death of an elderly aunt found to have been neglected by her niece:

> Miss Instan was a spinster living with and maintained by her aunt, who was 73 years old. Until a few weeks before her death, the aunt was healthy and able to look after herself. Shortly before her death, the aunt suffered from gangrene in the leg, which rendered her unable to attend to herself or to move about. No one knew of her condition but the accused who continued to live in the house and take in the food supplied by tradesman, but did not procure medical or nursing attendance or notify the neighbours of the aunt's illness. The aunt died after 10 days, the cause of death being exhaustion from the gangrene but substantially accelerated by want of food, nursing and medical care. These wants could have been supplied if the accused had notified any of the neighbours or the aunt's relations who lived within a few miles.
>
> The accused was indicted for manslaughter of the aunt, and the judge left it to the jury to say whether, in the circumstances, the accused did not impliedly undertake either to provide care for the aunt herself or to notify others of her helpless condition; and that if the jury found such an implied undertaking and that death was substantially accelerated by failure to carry it out, the charge of manslaughter was made out.

Coleridge CJ in his judgement stated (*emphasis added*):

> *It would not be correct to say that every moral obligation involves a legal duty, but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by the deceased own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was a therefore a common law duty imposed upon the prisoner which she did not discharge. Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased if it did not actually cause it. There is no case directly in point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principal, or as to the present case being within it.* ***The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty.*** *It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at.*[60]

In the current Australian context, however, successful prosecutions of this type are rare. Wendy Lacey discusses the case of Cynthia Thoreson in her 2014 article 'Neglectful to the point of cruelty':

> Ms Thoresen died in a Brisbane hospital on 3 January 2009, one week shy of her 89th birthday. She had underlying medical conditions including osteoporosis, Alzheimers and coronary atherosclerosis, all of which contributed to her death. However, according to the Coroner's Report, her death was ultimately caused by pulmonary thromboembolism, caused by a broken leg that she had sustained in a fall. The Coroner also reported that Ms Thoresen had endured the pain of a broken leg for up to 12 weeks, during which she had been bedbound and immobile. When she arrived at hospital, she was in a state of 'filth', covered in faeces and urine, with numerous pressure sores on her body and in a state of moderate to severe malnourishment. As one of her doctors noted and, as the Coroner subsequently reported, Ms Thoresen's treatment at the hands of her 'carer' (her daughter) was considered 'neglectful to the point of cruelty in a distressed, demented and totally dependent patient.'[61]

Similarly, Silvia Swales, a 76 year old Queensland resident died in comparable circumstances, when found in August 2009, "she appeared emaciated and was allegedly covered in head lice, bed sores, grime and bodily waste" a result of apparent neglect at the hands of her daughter, Susan Gray.[62]

[60] Wayne T. Crofts et al., 'Chapter 6: Involuntary Manslaughter' in *Waller & Williams Criminal Law Text and Cases* (Lexis Nexis, Chatswood, 2013) 331-332.

[61] Wendy Lacey, 'Neglectful to the Point of Cruelty' (2014) 36 Sydney Law Review 99, 110-113.

[62] Peter Michael, 'Daughter on manslaughter charges walks', *The Courier-Mail* (online), 28 September 2011

In the first case, the "investigating officer considered there was insufficient evidence to support a successful prosecution having regard to other recent prosecutions."[63]

In the latter case, although Silvia's daughter and carer Susan Gray was charged with manslaughter and failing to provide her mother the necessities of life, the court "deemed there was insufficient evidence" After a two year legal ordeal, the Queensland DPP decided not to go to trial and dropped the charges. [64]

As discussed in the commentary around these two cases, Australian prosecutions of this type rarely proceed. In cases where neglect leads to harm, but short of death or serious injury, there is an even smaller likelihood of criminal prosecution.

Canadian law

Canadian Criminal Law includes similar (though slightly broader) 'necessaries of life' provisions to those in Australian jurisdictions:

Section 215 (1) of the *Criminal Code of Canada* provides:

> "Every one is under a legal duty
>
> (a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;
>
> (b) to provide necessaries of life to their spouse or common-law partner; and
>
> (c) to provide necessaries of life to a person under his charge if that person:
>
> (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
>
> (ii) is unable to provide himself with necessaries of life."

However, these provisions *are* used, with a number of prosecutions relating to neglect of older people by their carers, also in situations of non-life threatening injuries and circumstances caused by neglect.

R. v. Chartrand

R v Chartrand found a carer guilty of neglect leading to non-life threatening injuries to an older man:

> Earlier this year, a paid caregiver by the name of Daniel Chartrand was sentenced to 12 months in jail after endangering the life of the older adult, Harry Matthews, under his care. Although the caregiver was paid very generously, he squandered much of Mr. Matthew's assets. Mr. Chartrand also failed to look after Mr. Matthews on a daily basis despite his declining health. The paramedics arrived at Mr. Matthew's apartment after receiving a call from a neighbour to find him on his back lying in his own urine and feces. Mr. Matthews was not suffering any physical injuries but the emergency room doctor testified that the senior was living in a life threatening situation. The judge ruled that Mr. Chartrand blatantly neglected and disregarded Mr. Matthew's needs. As Mr. Chartrand was keenly aware of the senior's needs, he knew or should have known that he was not meeting those needs and he was found guilty of failing to provide the necessaries of life.[65]

R. v. Peterson

In the case of R v Peterson, Dennis Peterson was found responsible for the neglect of his elderly father who lived in an adjoining apartment:

> Dennis Peterson, his sister and 84-year-old father resided in the same building but the doors between the apartments were locked. Mr. Peterson lived on the second floor, the sister stayed on the third floor while the father stayed in the basement. The father's apartment and living conditions were not sanitary: he did not have a working kitchen or toilet; the apartment was full of cockroaches; the dirt floor was covered in dog faeces; and both his clothes and person were unwashed. Police found the father lost on the street and advised his son about community agencies that could help look after his father but none were contacted. Two days after being released from the hospital because he collapsed, a gas company employee found Mr. Peterson and a dead dog in the house. Mr. Peterson was then admitted to a long-term care home. The court found that Mr. Peterson controlled his father's living conditions and personal care. He kept his father in an unsafe environment and chose not to make decisions that would ensure that his father would be provided with the necessaries of life. Mr. Peterson was sentenced to six months

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< http://www.couriermail.com.au/ipad/daughter-walks-free/story-fn6ck51p-1226148449407#content>.

[63] Lacey, above n 62, 110.

[64] Michael, above n 63.

[65] Lisa Romano, 'Elder Abuse: Failing to Provide the Necessaries of Life to Older Adults is a Crime' (Advocacy Centre for the Elderly's Fall 2009 Newsletter, 2009) 2 (*R v Chartrand* 2009 9 CanLII 20709 (ONSC)).

imprisonment, two years probation and 100 hours of community service.[66]

Like Australia, until relatively recently Canada did not use these provisions in the prosecution of elder abuse cases, but as police and courts become educated about elder abuse, prosecutions have increased. The Canadian organisation Advocacy Centre for the Elderly comments:

> *"Section 215 of the Criminal Code has been underutilized in the past to prosecute elder abuse. However, these recent cases indicate that this offence will be used more frequently in the future as police and Crown attorneys become more familiar with it. Educational programs will hopefully increase awareness of the crime, as well as the responsibilities that individuals and families have towards their elderly parents.* [The Advocacy Centre for Elderly] *would also like to see the courts make sentences which truly reflect the seriousness of this crime."*[67]

a cautious approach to sentencing

Whilst it might be argued that the practise of prosecuting cases of neglect is a positive step in the protection of vulnerable older people, prosecution and sentencing of those who are considered to have assumed a duty of care must be approached with caution.

There has been some concern that Canadian prosecution of elder abuse has dealt out overly harsh punishment to those found responsible for neglect of the older person.

In *R v Peterson*, on appeal, the Ontario Court of Appeal found the trial judge's sentence to be within range. At 59:

> *"Sentences for this type of offence generally appear to fall between four and eight months incarceration with a period of probation following... the sentence of six months imprisonment imposed by the trial judge was within the range of sentences for this type of offence and was not demonstrably unfit."*[68]

Borins JA dissenting, however, was of the view that a term of imprisonment was overly harsh:

> *"In my view, as this is the first time an appellate court has considered the fitness of a sentence imposed on a child who has failed to provide the necessaries of life for his elderly parent, to uphold the trial judge's sentence of six months imprisonment would set the benchmark for sentencing children who fail to provide their parents with the necessaries of life in circumstances similar to those in this case. To affirm the sentence imposed in this case as a fit sentence would mean, in all future cases, that a jail sentence would be difficult to avoid given a similar failure by a child to care for an elderly parent. Indeed, the prospect of caregiver being imprisoned may have the effect of discouraging older children from becoming the caregivers of ageing parents. In my opinion, for a child advanced in years to be found guilty of criminal neglect of an aging parent, particularly in the absence of any physical abuse or failure to provide medical care, is punishment enough. I view the sentence imposed in this case as unduly harsh..."*[69]

Canadian legal commentary on the Peterson decision has questioned the very grounds on the prosecution in this case. Referring to the victim, Lawyer Lloyd Duhaime notes:

> *"Even though the 84 year old refused to be placed in a care home and was 'fiercely independent,' the son was convicted!"*[70]

Whilst it is important to recognise the serious nature of neglect and the circumstances surrounding it, it is essential to balance a desire for punishment. The risk of discouraging adult children from caring for elderly parents, as noted in Justice Borins dissenting judgement and the need to recognise an older person's wishes, and an alleged offender's capacity (or lack thereof) to provide proper care, are important considerations in approaching any possible prosecution.

Discussion with our health partners on this question raised further issues about the complexities of family relationships and possible ambiguities around duties of care, creating potential issues for Canadian-like criminal prosecution:

1) Where a wife has suffered family violence by her husband throughout her marriage, and he becomes ill, she is often reluctant to care for her former abuser. In circumstances where both parties are late in life, and chose to remain in the home together, where the husband is unwell, would the wife then be

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[66] Romano, above n 66, 3 (*R v Peterson* 2005 CAnLII 37972 (ONSC)).to Older Adults is a Crime" Advocacy Centre for the Elderly's Fall 2009 Newsletter, 3
[67] Romano, above n 66, 3.
[68] *R v Peterson*, 2005 CAN LII 37972 (ONSC) [59].
[69] Ibid [76].
[70] Lloyd Duhaime, *Parental Support: The Obligation to Support a Parent in Canada* (26 July 2008) duhaime.org <http://www.duhaime.org/LegalResources/FamilyLaw/LawArticle-353/Parental-Support-The-Obligation-to-Support-a-Parent-in-Canada.aspx>.

taken to have responsibility for her husband, despite being an unwilling carer? And how would she remove herself from this position without having to leave the house?

2) Different medical conditions have different levels of complexity and require different levels of care. Where a vulnerable person has diabetes, for example, and it is recommended that their carer check blood sugar levels three times per day, but check only once and this results in further health issues, is this neglectful? Or just a mistake given a lack of medical knowledge and understanding?

It is perhaps more important to focus on creating a system where at-risk adults can be identified earlier and offered the supports and interventions they might need to address their risk of abuse to prevent the situations from escalating to the point where a criminal prosecution is warranted.

Where circumstances warrant police intervention and prosecution, police and the courts should approach with caution. Additionally, rather than create a new suite of criminal laws referring to older people, police and judicial officers should be trained to recognise and deal with cases of elder abuse and their complexities, using existing laws, and combatting notions of ageism, as part of day to day practise.

Seniors Law recommends that the ALRC consider the introduction of 'necessaries of life' provisions in Victoria and looks at education to courts and police to encourage criminal prosecution of elder abuse matters.

Seniors Law proposes that any prosecutions should, however, be approached with caution, given the complexities of family relationships. Sentencing options should be balanced to take into account the nuances of family relationships, the complexities of care and the wishes of the vulnerable person, while imposing a penalty that reflects the seriousness of elder abuse and neglect.

recommendation 25: introduce the necessities of life provisions into Victorian criminal law

recommendation 26: deliver comprehensive education and training for police and the courts to facilitate better understanding of elder abuse, its complexities and appropriate enforcement of the law through prosecution

civil penalties

As discussed above in question 34, Seniors Law recommends empowering civil and administrative tribunals to impose a series of civil orders in situations where a person is not receiving proper care. If the ALRC was to consider extending the power of tribunals in this way, Seniors Law recommends the Commission also look at whether civil penalties should be part of that regime, upon breach of a civil orders.

recommendation 27: consider whether civil penalties should be part of a regime of protective civil orders to be administered by the relevant civil and administrative tribunal.

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

As referred to in question 34, intervention orders and guardianship orders are key protective orders currently used in Victoria.[71] Seniors Law confirms that intervention orders are being used to protect older people from abuse.

What has been found however, is that older people are reluctant to go to court unless the abuse they are suffering is significant, and the relationship had deteriorated. Additionally, once an order is in place older people can be reluctant to report breaches, due to fear of the consequences for the breaching party.

As recommended on page 38, a regime of civil orders with VCAT as the responsible dispute resolution body would allow orders to be made without involving criminal penalty. Rather, civil penalties may be imposed. See our response to question 50 for further discussion.

While we agree intervention orders have a role to play in protecting older people against abuse, as discussed on page 35, they are limited in their application. Seniors Law recommends empowering civil and administrative tribunals to make orders addressing additional concerns.

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

Seniors Law does not support mandatory reporting.

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

As discussed above, should the ALRC consider extending the power of civil and administrative tribunals to make civil orders for the protection of vulnerable people, Seniors Law recommends that the Commission also look at whether civil penalties should play a part in the enforcement of orders in this regime.

[71] Chesterman, above n 39, 82.

references

A Articles/Books/Reports

Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (2016)

Australian Law Report Commission, *Report on Family Violence – a National legal Response*, Report No 114 (2010)

Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011)

Chesterman, John, 'Responding to Violence, abuse, exploitation and neglect: improving our protection of at-risk adults' (Churchill Fellowship Report, Office of the Public Advocate, 30 July 2013)

Crofts, Wayne et al., 'Chapter 6: Involuntary Manslaughter' in *Waller & Williams Criminal Law Text and Cases* (Lexis Nexis, Chatswood, 2013)

House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, (2007)

Human Rights and Equal Opportunity Commission, Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, December 2006

Justice Connect Seniors Law and Seniors Rights Victoria, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Inquiry*, June 2014

Lacey, Wendy, 'Neglectful to the Point of Cruelty' (2014) 36 Sydney Law Review 99

Lanham, Bartel, Evans & Wood, *Criminal Laws in Australia*, Federation Press, 2006

Seniors Rights Victoria, Submission to the Victorian Law Reform Commission, *Guardianship Consultation Paper 10*, 3 June 2011

Victorian Law Reform Commission, *Guardianship: Final Report*, Report no 24 (2012)

Victorian Parliamentary Law Reform Committee, *Inquiry into Powers of Attorney Final Report* (2010)

B Cases

Davies v Johnston (Revised) (Real Property) [2014] VCAT 512 (5 May 2014)

Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8 (7 March 2002)

Evans (as executor for the estate of the late EVANS) v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs (2012) 289 ALR 237

Wilmott, White & Downey (2013) 20 JLM 907

Child Neglect
R v McPartland & Polkinghorne [2014] SASCFC 84

Necessaries of Life- medical
Brightwater Care Group v Rossiter (2009) 40 WAR 84
Airedale NHS Trust v Bland [1993] AC 789
Auckland Area Health Board v Attorney General (1993) 1 NZLR 235

Negligent Manslaughter by Omission & Duties of Care:
R v Instan (1893) 1 QB 450

R v Lavender (2005) 222 CLR 67
R v Miller (1983) 2 AC 161
R v Russell (1933) VLR 59
R v Stone & Dobinson (1977) QB 354
R v Taktak (1988) 14 NSWLR 226

Canadian
R v Chartrand 2009 9 CanLII 20709 (ONSC)
R v Peterson 2005 CAnLII 37972 (ONSC)

C Legislation

International

Adult Protection Act, RSNS 1989
Adult Protection and Support (Scotland) Act 2007
The Criminal Code of Canada, RSC 1985, c C-46
The Revised Code of Washington (RCW)

Domestic

Charter of Human Rights and Responsibilities Act 2006 (Vic)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Crimes Act 1990 (NSW)
Criminal Code 1899 (Qld)
Criminal Code Act 1924 (Tas)
Criminal Code Act 1983 (NT)
Criminal Law Compilation Act 1913 (WA)
Criminal Law Consolidation Act 1935 (SA)
Disability Act 2006 (Vic)
Family Violence Protection Act 2008 (Vic)
Guardianship and Administration Act 1986 (Vic)
Guardianship and Administration Act (SA) 1993
Power of Attorney Act 2014 (Vic)
Property Law Act 1958 (Vic) s 225

D Other

Darzins, Peteris, Georgia Lowndes and Jo Wainer, *Financial Abuse of elders: a review of the evidence* (Monash Institute of Health Services Research, Faculty of Medicine, Nursing and Health Sciences, 2009)
Department of Human Services (Cth), 'Granny Flat Right or Interest' (Media Release, 29 April 2016) <https://www.humanservices.gov.au/customer/enablers/granny-flat-right-or-interest>

Duhaime, Lloyd, *Parental Support: The Obligation to Support a Parent in Canada* (26 July 2008) duhaime.org < http://www.duhaime.org/LegalResources/FamilyLaw/LawArticle-353/Parental-Support-The-Obligation-to-Support-a-Parent-in-Canada.aspx>

Lawrence, Ruth and Penelope Irvine, *Redefining Fatal Child Neglect*, The Australian Institute of Family Studies Child Abuse Prevention Issues No 21, 2004, 7. https://aifs.gov.au/cfca/sites/default/files/publication-documents/issues21.pdf

Marcus, Candice, 'Boy locked up and starved by parents was days away from death', *ABC News* (online), 29 October 2014 <http://www.abc.net.au/news/2014-10-28/boy-starved-by-parents-was-days-away-from-death/5847244>.

Michael, Peter, 'Daughter on manslaughter charges walks', *The Courier-Mail* (online), 28 September 2011 < http://www.couriermail.com.au/ipad/daughter-walks-free/story-fn6ck51p-1226148449407#content>

Romano, Lisa, 'Elder Abuse: Failing to Provide the Necessaries of Life to Older Adults is a Crime' (Advocacy Centre for the Elderly's Fall 2009 Newsletter, 2009)

Setterland, Deborah, Cheryl Tilse and Jill Wilson, *Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse*' (Queensland Law Society Incorporated, Brisbane, 2000)