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| Australian Law Reform Commission: Elder Abuse Inquiry Issues Paper (IP47) |
| Submission |

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## CrestCommissioner for Senior Victorians

# Role of the Commissioner

The Commissioner for Senior Victorians provides advice to the Victorian Government on issues relevant to senior Victorians and positive ageing and participation, as well as being an independent public voice to educate the community on seniors issues, actively promote the positive contribution of seniors and encourage seniors to fully participle in our community.

By way of example, in relation to elder abuse, the Commissioner is committed to providing advice to the Minister for Housing, Disability and Ageing and the Victorian Government on issues as outlined in the recommendations of the Victorian Royal Commission into Family Violence.

The Commissioner also promotes community awareness and understanding of other matters such as advance care planning, powers of attorney and loneliness and isolation.

# Introduction

This is a submission to the Australian Law Reform Commission’s Elder Abuse Inquiry Issues Paper (IP47). This response provides a broad overview of some of the themes and issues raised in the Issues Paper, and at times, addresses specific questions that have been put forward.

Firstly, it is important to note the anticipated growth in the number of older Victorians who are at risk of or experiencing elder abuse is driven by four factors:

* Increasing numbers of older people
* Increasing longevity
* Increasing numbers of older people with dementia
* Increasing numbers of vulnerable older people living longer at home.

This response draws on the experiences of elder abuse in the Victorian context as well as with reference to the findings of the Victorian Royal Commission into Family Violence, which reported that elder abuse is largely under-reported and unrecognised due to its unique dynamics, which include:

* Women are over-represented as victims
* A higher proportion of older men who experience family violence compared to younger men
* A higher risk of financial abuse
* The perpetrator often being the older person’s son or daughter
* The strong desire of many older people to maintain familial relationships and have abuse addressed at the same time, and
* The presence of not only gendered, but also ageist attitudes, which require a different approach to that of intimate partner violence.[[1]](#footnote-1)

Any national response to elder abuse should build on protections for the rights of older Australians whilst preserving their relationships with carers, families and informal supports, where possible. This requires a whole-of-system response across the care continuum, including Commonwealth and State-funded health, aged care, legal and welfare services.

The following outlines the specific areas that this response covers:

1. Definition of elder abuse and community understanding of elder abuse
2. Implications for the aged care system
3. Alternative dispute resolution mechanisms
4. Integrated models of care and carer/family inclusive practice models
5. Appointed decision makers.

# 1. Definition and community understanding of 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?

The definition of elder abuse in Victoria is adopted from the Australian Network for the Prevention of Elder Abuse and resembles the World Health Organisation definition stated in the Issues Paper:

*Any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.*[[2]](#footnote-2)

The Royal Commission into Family Violence recognised elder abuse as a form of family violence, as significant as that experienced by younger people. “It can be of a physical, sexual, emotional or psychological nature and be committed by an intimate partner or other family member.”[[3]](#footnote-3) The Royal Commission also found that “there is a significant lack of understanding within the community and by service providers of the nature and dynamics of elder abuse, which can create missed opportunities to intervene and provide support to victims.”[[4]](#footnote-4)

Elder abuse in any form is unacceptable, whether the abuse is perpetrated in the home by family or friends, or within service settings by paid professionals.

There needs to be a strong focus on strengthening the level of community understanding about elder abuse, and the support and advice available; and clear reporting pathways and responses to ensure abuse, when identified and reported, is addressed.

# 2. Aged care system

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

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

**Elder abuse in the context of residential aged care**

The *Aged Care Act 1997 (Cth)* specifies that suspicions or allegations of physical and sexual assaults of a person under the care of a residential aged care facility are required to be reported to the Commonwealth Department of Health and to the police. This includes physical and sexual abuse perpetrated by family members, as long as the abuse is carried out while the older person is under the care of the facility.

While there is substantial guidance for aged care providers on appropriate responses to allegations or suspicions of physical and sexual assaults, the requirements under the Aged Care Act 1997 (Cth) do not incorporate other types of elder abuse: that is, psychological abuse, financial abuse and neglect.

Consequently, there is a substantial lack of clarity about what responsibilities rest with approved providers and their staff when they become aware of, or suspect, there may be financial or psychological abuse by family members, friends or relatives. In addition, there is a lack of guidance for approved providers and their staff in regard to the reporting when aged care providers suspect financial or psychological abuse by family members, friends or relatives.

For example, reporting pathways and responses by approved providers may be influenced by a range of factors such as:

* The cognitive capacity of the older person
* Understanding of the benefits of addressing matters within the context of the older person and their family
* Referring and linking the older person and/or their family to services
* An application and response through a tribunal.

The ALRC should consider whether aged care providers need a greater understanding of the various regulations at Commonwealth and State levels, and available services to ensure appropriate responses to suspected elder abuse by family members, friends or relatives, taking into account cognitive capacity.

**Paid professionals as trusted friends**

Across the health and aged care service systems, there are various existing reporting processes and legislation that specify that professionals have a duty of care when providing a service to an older person and their family. A legal obligation arises when there is a visible risk of harm if care is not adequately provided, and professionals may be legally liable for any damage that results from such harm.[[5]](#footnote-5) Duty of care protects the rights of older people whilst respecting their wishes and balancing the needs of family members and organisational requirements.

Definitions of elder abuse specify a relationship where there is an expectation or implication of trust. Some paid professional carers, either in the home or in a residential care setting, may become ‘trusted’ people, and then inappropriately use that trust to their advantage; for example, when an older person is vulnerable and isolated and becomes dependent on the paid professional, who uses that vulnerability and isolation for financial gain. In these cases, protection of the older person is reliant on checks and balances put in place by the service provider.

A grey area exists where a paid professional care provider develops a relationship of trust with an older person, and the carer uses that trust to perpetrate elder abuse. Given current Commonwealth Government policy is to continue to increase the level of ‘in home’ care provision under the aged care reforms (see below), there is a need for greater clarity about the responsibilities and accountability of an employing organisation for the conduct of paid professional carers in terms of the trust older people place in them; and about remedies where duty of care has been breached.

It is important that the ALRC consider what type sanctions and protections need to be introduced or strengthened to prevent paid professional carers from inappropriately befriending older people and taking advantage of their vulnerability either to perpetrate elder abuse and/or for monetary gain.

**System reform**

The aged care system is currently under reform, with a stronger focus on supporting the older person in their home. Consequently, we can expect more vulnerable older people to be living at home for longer, and that more of these older people will be vulnerable to isolation and loneliness through loss of partners and friends, or through family moving away.

In some cases, perpetrators of elder abuse use a tactic of isolation to control and dominate an older person’s life and consequently hide the abuse. Well-connected communities in which older people are aware of their rights and of the services available through the aged care system provide protective factors which can help reduce abuse and neglect.

Older people and families require an aged care system they can easily access and navigate to find the right services. It is therefore vital that aged care reforms including the My Aged Care website and central telephone line do not present barriers in terms of complexity in navigating the website or difficulties in obtaining access to information and services via the telephone line.

It is important to support older people and their carers in their homes as well as professionals working across the sector. In order to ensure that all carers for older people, informal and formal, are properly supported in their roles, a number of measures are required, including:

* Providing ongoing training opportunities for volunteers and staff who work with older people to be aware of older people’s rights and be carer and family inclusive in responding to elder abuse
* Making sure organisations and providers are aware of their responsibility to ensure that policies and procedures recognise the rights of older people, as outlined in the Aged Care Act 1997 (Cth)
* Making all staff aware of the roles and rights of carers and families and ensuring they understand relevant Commonwealth aged care legislation and State legislation, such as the *Carers Recognition Act 2012 (Vic)* and the *Mental Health Act 2014 (Vic)*, and how they impact on their work. This is imperative when dealing with suspected cases of elder abuse in which the carer presents with carer stress and is displaying risk factors associated with harming the older person
* Targeting older people directly in community education provision on the rights of older people and awareness of elder abuse; this could also be expanded to include information on powers of attorney and the rights of carers and families, and targeting of these groups for information provision as well
* Ensuring professionals and organisations are aware of the expected actions they should take when suspicions or allegations of elder abuse arise or are reported, and the assessment and referral pathways they should follow.

In addition, the ALRC should give consideration to the importance of strengthening police investigatory response to reported and identified elder abuse as identified in the Royal Commission into Family Violence, which recommended that:

*Victoria Police, with advice from the Priority Community Division, scope options for a trial of a dedicated family violence and elder abuse response team in one Victoria Police local service area. The team should have the capacity to investigate financial abuse.*[[6]](#footnote-6)

# 3. Alternative dispute resolution mechanisms

**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 older people who experience elder abuse wish to retain their familial relationships and have abuse addressed at the same time, and this may not be able to be delivered within a solely legal approach. For example, an older person who takes out an intervention order against a drug-addicted adult child may consequently lose ongoing contact with that child if there is not a parallel process for dealing with the addiction and the abuse.

Seniors Rights Victoria reported to the Royal Commission into Family Violence the reluctance among older people to become involved in legal processes:

*People say, ‘I don’t want the police involved. I don’t want my son and daughter to be charged by the police.’ There is a reluctance to engage in legal solutions. There is a sense of protecting and supporting the son or daughter in whatever way they can. So there’s a sense, I guess, of … what we call a protective love as a parent in being very reluctant to then take action against the family member, usually the adult child.*

Further, the Eastern Elder Abuse Network said that:

*a punitive or retaliatory approach is seldom the appropriate response. Such an approach could cause further anxiety and stress to the older person’*. Instead, *‘responses to family violence against older victims should be sensitive to their familial relationships and their choices.[[7]](#footnote-7)*

Many older people do not know where to go for appropriate help and a gap is dispute resolution and restorative justice systems for older people experiencing elder abuse, and their families, that endeavours to support familial relationships. That is, to resolve the dispute in a manner that does not widen the gap between the older person and their family members. This was recognised by the Royal Commission into Family Violence, which found that:

*Restorative justice…may be of particular benefit to older victims of family violence, who wish to preserve their family relationships or avoid a criminal justice response.[[8]](#footnote-8)*

Because of the wish of many older people to retain familial relationships, family mediation and relationship counselling services are vital as a form of early intervention. Evidence suggests that these types of early intervention approaches can offer an older person and their family an opportunity to resolve issues before they become so pronounced that they require a legal remedy.[[9]](#footnote-9)

The ALRC should give consideration to the need for creation and expansion of alternate dispute resolution approaches, and provision of adequate funding and resources for services such as counselling and mediation services to better respond to elder abuse in the early stages, building on the 2007 recommendation of the Standing Committee on Legal and Constitutional Affairs in its report, *Older People and the Law*:

*The Committee recommends that the Australian Government, in consultation with its state and territory counterparts, provide additional funding for mediation and dispute resolution services to assist older people to resolve financial disputes within the family situation.*[[10]](#footnote-10)

**4. Integrated models of care and carer/family inclusive practice models**

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

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

Family members who provide care for older people, and who have multiple roles and demands due to everyday life, may find it difficult to provide suitable care for the older person, particularly if the older person has a cognitive impairment. These circumstances may lead to unintentional elder abuse.

Older people who are at risk of or experiencing elder abuse require access to integrated models of care, which bring together components of the health, financial, legal and aged care systems in family inclusive approaches to address a person’s needs, with decision-making undertaken in partnership with the individual, their carers and their family. These models are supported by the Royal Commission into Family Violence, which reported on partnerships between health and other service providers that deliver improved responses to family violence.[[11]](#footnote-11)

The following lists some examples for the ALRC to consider in relation to how the role of health professionals can be improved to identify and respond to elder abuse:

* Integrated care models within Victoria’s health system, for example the health-justice partnerships located at cohealth, St Vincent’s Hospital Melbourne, Alfred Health and Monash Health.
* Victoria’s Department of Health and Human Services has funded the Bouverie Centre to train professionals working across the health and aged care system to prevent and respond to elder abuse using a client-centred framework involving carers and families. This model responds to a number of important issues for older people:
* The training will focus on capacity building for health and aged care professionals. As highlighted in the Royal Commission into Family Violence, “health professionals … are best placed to identify family violence since most older people trust them.”[[12]](#footnote-12)
* The number of opportunities will increase for disclosures of elder abuse and appropriate responses across the system. The Royal Commission into Family Violence highlighted that many people experiencing family violence may not be in a position to access specialist family violence services, but will instead disclose to universal services, such as a health service.[[13]](#footnote-13)
* It supports the findings of the Royal Commission into Family Violence that older people often prefer not to pursue the justice system but rather preserve and restore family relationships.[[14]](#footnote-14)
* Victoria is also establishing elder abuse prevention networks in five locations.[[15]](#footnote-15) In addition to raising community awareness, these networks provide opportunities for local service professionals to meet and exchange stories, build skills and develop inter-agency protocols and partnerships to increase awareness to ensure better responses to suspected elder abuse. Older people benefit from these networks when the professionals they are seeking support from, such as General Practitioners, can meet regularly and develop their skills to detect and respond to elder abuse.

The ALRC should give consideration to elder abuse prevention and response models for older people at risk of or experiencing elder abuse that:

* reflect the whole of a person’s needs, across the legal, health and aged care continuum,
* work in partnership with clients through person-centred approaches, and
* are inclusive of families.

# 4. 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?

One essential element in the objective of preventing elder abuse is the creation and use of powers of attorney instruments. These have a vital role to play in ensuring the wishes of older people are properly understood and that a 'trusted' power of attorney can act at all times in accordance with the wishes of the older person who appointed them.

However, it is also evident that there are cases where the powers of attorney instruments can be used by perpetrators of elder abuse either as a smoke screen for their actions or as the means by which the abuse is perpetrated, for example financial abuse through the misuse of enduring powers of attorney. When these cases of abuse are publicised, it may unintentionally encourage other people to perpetrate abuse in similar ways; or it can deter them of there are adequate safeguards against abuse and remedies available.

Victoria recently introduced new powers of attorney legislation (*Powers of Attorney Act 2014 (Vic)*), which includes improved safeguards against abuse, such as more formal requirements to making powers of attorney, imposing higher duties on attorneys and restrictions on giving gifts, selling property and conflict transactions. There are also new offences for dishonestly obtaining or using an enduring power of attorney of up to five years’ imprisonment. The Act also provides for the Supreme Court or the Victorian Civil and Administrative Tribunal (VCAT) to order an attorney under an enduring power of attorney to compensate the principal for a loss caused by the attorney contravening any provision of the Act, relating to enduring powers of attorney when acting under the power of attorney. The Act also includes other safeguards such as having strict witnessing requirements when a power of attorney is made, setting out duties of attorneys, prohibiting conflict transactions, subject to exceptions, and providing increased powers to VCAT.

In considering preventing and responding to suspected elder abuse by people acting as appointed decision-makers, the following points should be considered:

* Elder abuse in this context is not necessarily a result of gaps in legislation. Under reporting and gaps in prosecutions for elder abuse may be due to inadequate legal remedies but also a reluctance on the part of the victim to report abuse by family members and/or a lack of understanding of what action can be taken.
* It may also be due to the way messages relating to putting these legal instruments in place and how they operate are communicated. Any communication should ensure information is easily accessed and understood by the older person so that they can make informed choices regarding their future planning.
* It is important that older people are provided with adequate information due to the fact that in some instances it may not be in their best interests to appoint a particular person, such as a family member, as their attorney, where there is a risk that they will abuse the principal in that role. For example, an older person who has a difficult relationship with their adult child should be aware of the legal authority the adult child will have if they are an appointed decision-maker.
* A power of attorney can provide a safeguard against abuse by enabling a person to express their wishes and appoint someone they trust to make decisions on their behalf, particularly in circumstances where they lose capacity to make their own decisions. It is important that a person carefully considers who they appoint as their attorney. The older person may need to consider others in the community to be their attorney, such as their lawyer or a friend. Communication should also clarify that having an appointed decision-maker is not a compulsory requirement, but may nevertheless provide an opportunity to plan ahead.
* Communication should encourage people to have discussions about future planning with their families and informal supports. This may provide opportunities to express what matters most to them. Only after this should documentation be put in place if it suits the older person’s interests.
* Future planning discussions can be difficult for an older person and their family to have due to the sensitive nature. As a society we are not good at discussing “grief and loss” matters. It may be useful to consider options that may be available to assist in facilitating these discussions.
* Communication directed to appointed decision-makers should also be considered. Appointed decision-makers should be fully informed of their roles and responsibilities, to adhere to the wishes of the older person whilst making decisions in their best interests. The Victorian Powers of Attorney Act sets out the duties of attorneys, and principles to be applied by persons acting under the Act or an enduring power of attorney. The Act requires an attorney and supportive attorney to accept their appointments in writing and to comply with the Act in carrying out their duties. Also, they must understand that it is the older person’s choice whether and who to appoint as an attorney.

**Entities accepting powers of attorney**

**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?

There is currently a lack of consistent appropriate mechanisms within businesses, entities and organisations, such as financial institutions, for checks and balances when working with decision-making instruments such as powers of attorney. If financial institutions, including banks, real estate agents and accountants, had stronger responsibilities and obligations, this may help in preventing and responding to suspected elder abuse. For example, in our current system, if a financial institution is working with a power of attorney, how do they establish that it is a true power of attorney and that the attorney is making decisions in the older person’s best interests whilst adhering to their wishes?

In addition, it appears that financial institutions often do not detect or act on unusual withdrawal patterns that may occur as a result of power of attorney misuse. It is not currently clear what actions are taken by financial institutions when this kind of abuse is suspected.

Specific obligations, responsibilities and penalties need to sit with entities that accept powers of attorney from appointed decision-makers to facilitate actions on behalf of older people.

These entities (eg. financial institutions) ought to be held accountable if, through their negligence, a power of attorney is misused. It is the responsibility of the entity allowing the power of attorney to ensure it is being used in the best interest of the older person and there should be appropriate penalties if entities act upon a power of attorney which results in loss or abuse.

The Commonwealth House of Representatives report, *Older People and the Law* (2007), recommended protocols for reporting alleged financial abuse and development of a training program to assist banking staff to identify suspicious transactions.[[16]](#footnote-16)

**Decision-making capacity**

In many cases, the loss of decision-making capacity by an older person does not disappear on a given day - capacity fluctuates and is decision-specific. For many people, there is a gradual loss of capacity which occurs over time or in more complex situations when an individual can capably make some decisions and not others. For example, they can no longer make complex financial decisions but can make decisions relating to daily living. There are also disability and medical issues which can affect a person’s cognitive impairment, such as delirium and depression, where capacity may be impaired for a specific time and return once the person has received the right treatment.

The ALRC should give consideration to many of the cases related to the complexities of power of attorney by implementing best practice guidelines that promote that powers of attorney should actively provide support to empower an individual to maximise their decision-making capacity, in accordance with their wishes whilst acting in their best interest.

Some areas of decision-making capacity may be lost only temporarily and may return – powers of attorney instruments should reflect this accordingly.

# Conclusion

In preparing this response attention was paid to the voices of older people who have provided stories of the paramount importance of familial relationships and that responses to elder abuse should uphold the human rights of older people whilst balancing these relationships.

An alternate system of dispute resolution is critically important so that older people have a range of remedial options. Greater community education and clear reporting pathways are essential. The service system responding to older people needs to be better integrated to coordinate a whole-of-system response to elder abuse. If service providers are adequately trained and responses better coordinated and strengthened to recognise abuse of older people, this will provide the best avenue to uphold the rights and dignity of older people.

1. State of Victoria, *Royal Commission into Family Violence: Report and recommendations* (2016) Vol III 280; Vol V 67, 81-82. [↑](#footnote-ref-1)
2. Department of Health (Vic), *Elder abuse prevention and response guidelines for action 2012–14* (2012) 1. [↑](#footnote-ref-2)
3. State of Victoria, *Royal Commission into Family Violence: Report and recommendations* (2016) Vol V 67. [↑](#footnote-ref-3)
4. Ibid Vol V 67. [↑](#footnote-ref-4)
5. Department of Human Services (Vic), *With respect to age 2009: Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse* (2009) 99. [↑](#footnote-ref-5)
6. State of Victoria, *Royal Commission into Family Violence: Report and recommendations* (2016) rec 155. [↑](#footnote-ref-6)
7. *ibid* p.80 Volume 5 [↑](#footnote-ref-7)
8. *ibid* p.92 Volume 5 [↑](#footnote-ref-8)
9. The Victorian Government was informed by Relationships Australia and Family Mediation and Counselling Victoria on separate occasions about the positive outcomes of providing counselling and mediation to older people and their families in preventing and responding to risks of elder abuse. [↑](#footnote-ref-9)
10. Commonwealth House of Representatives, *Older people and the law*, Standing Committee on Legal and Constitutional Affairs (2007) rec 2. [↑](#footnote-ref-10)
11. State of Victoria, *Royal Commission into Family Violence: Report and recommendations* (2016) Vol IV 25. [↑](#footnote-ref-11)
12. State of Victoria, *Royal Commission into Family Violence: Report and recommendations* (2016) Vol V 81-82. [↑](#footnote-ref-12)
13. Ibid Vol IV 1. [↑](#footnote-ref-13)
14. Ibid Vol V 92. [↑](#footnote-ref-14)
15. Minister for the Prevention of Family Violence, *More Victorians To Stand Up To Elder Abuse* (2016) <http://www.premier.vic.gov.au/more-victorians-to-stand-up-to-elder-abuse>. [↑](#footnote-ref-15)
16. Commonwealth House of Representatives, *Older people and the law*, Standing Committee on Legal and Constitutional Affairs (2007) rec 5. [↑](#footnote-ref-16)