12. Other Issues

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Summary

12.1 Health professionals play an important role in identifying and responding to elder abuse. As front line service providers, they have regular contact with older people. However, health professionals may often only have a small window of opportunity to assist. This may be due to an older person's reluctance to repeatedly discuss the abuse or neglect they are suffering, or due to limited opportunities to seek assistance. It is therefore important that health professionals are able to take advantage of any opportunity to assist, by for example by relying on multi-disciplinary approaches and integrated models of care to provide coordinated support and assistance for an older person suffering abuse or neglect. Health-justice partnerships in particular may have great potential in responding to elder abuse.

12.2 However, there are also barriers to identifying and responding to elder abuse. There are concerns that health professionals need training to identify and respond to elder abuse, and that duties of confidentiality and privacy laws may limit health professionals' ability to respond to elder abuse.

12.3 This chapter also considers whether the National Disability Insurance Scheme (NDIS) may be an avenue for elder abuse.

Health professionals

12.4 Doctors, nurses, pharmacists and other health professionals are often in an ideal position to identify elder abuse, since most elderly people trust them.[1] Such professionals are also well-placed to identify risks and signs of abuse as part of their clinical assessment.[2] In 2014–15, people aged between 65 and 74 years accounted for

1 A Almogue et al, 'Attitudes and Knowledge of Medical and Nursing Staff toward Elder Abuse' (2010) 51 *Archives of Gerontology and Geriatrics* 86, 86.

2 See, eg, Cohealth and Justice Connect Seniors Law *Submission 179*.

28.8 million unreferred GP visits. People aged 85 years and over accounted for 6.2 million visits.[3]

12.5 In a joint submission, cohealth and Justice Connect Seniors Law stated that 'in relation to any legal problem, not just elder abuse, nearly 30% of people will initially seek the advice of a doctor or another trusted health professional or welfare adviser.'[4] However, a number of factors limit health professionals' ability to identify and respond to elder abuse:

- confidentiality and privacy concerns;
- a limited understanding of what constitutes elder abuse;
- difficulties detecting signs of elder abuse, particularly where the signs are subtle;
- limited knowledge of reporting or referral pathways and available services; and
- views that responding to elder abuse is outside the scope of their professional responsibility.[5]

Multidisciplinary approaches

12.6 Stakeholders emphasised the need for a multidisciplinary response to elder abuse.[6] Many were supportive of the development of health-justice partnerships and other integrated care models.[7] Health-justice partnerships rely on utilising pro bono legal resources to embed legal services in a health service. Key elements are:

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3 Australian Institute of Health and Welfare (Cth), 'Older Australia at a Glance' (2016).

4 Cohealth and Justice Connect Seniors Law *Submission 179*.

5 See, eg, Ibid; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Australian Nursing & Midwifery Federation, *Submission 163*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; MIGA, *Submission 119*.

6 See, eg, National Older Persons Legal Services Network, *Submission 180*; Cohealth and Justice Connect Seniors Law *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Carers Australia, *Submission 157*; ADA Australia, *Submission 150*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; S Goegan, *Submission 115*; Leading Age Services Australia, *Submission 104*; Office of the Public Advocate (Vic), *Submission 95*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

7 See, eg, National Legal Aid, *Submission 192*; Commissioner for Senior Victorians, *Submission 187*; Hume Riverina CLS, *Submission 186*; Justice Connect, *Submission 182*; National Older Persons Legal Services Network, *Submission 180*; Cohealth and Justice Connect Seniors Law *Submission 179*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; Australian Nursing & Midwifery Federation, *Submission 163*; Carers Australia, *Submission 157*; National Seniors Australia, *Submission 154*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; Legal Aid NSW, *Submission 140*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Legal Services Commission SA, *Submission 128*; S Kurrle, *Submission 121*; North Australian Aboriginal Legal Service, *Submission 116*; S Goegan, *Submission 115*; Macarthur Legal Centre, *Submission 110*; Aged and Community Services Australia, *Submission 102*; Office of the Public Advocate (Vic), *Submission 95*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

- locating a lawyer at a health service or hospital;
- integrating the lawyer as part of the health service;
- secondary consultations with the lawyers; and
- training health professionals on legal issues.[8]

12.7 Evidence suggests that older people are reluctant to come forward about elder abuse for a number of reasons, including shame and fear.[9] An older person may be reluctant to repeat their concerns numerous times to different professionals. They may also be unable to seek legal assistance discreetly. These concerns may be magnified in smaller rural and regional communities, where an older person may face greater fears of discovery.

12.8 Joubert and Posenelli suggest that 'the "window of opportunity" for responding to aged abuse in a health service is brief'.[10] Health-justice partnerships have great potential to use this window effectively because they can build on the trust developed between health professionals and older persons, and can provide legal advice and assistance discreetly and conveniently. In a health-justice partnership, the health professional can confer with a lawyer to determine appropriate pathways for referrals. With the consent of their patient, the health professional could also brief a lawyer of the older person's concerns and organise for a lawyer to discreetly speak with the older person either as part of a medical appointment, or in a separate consultation. An integrated care model which incorporates legal practitioners into a health practice may reduce the number of separate appointments and interactions required to seek assistance.

12.9 The case study of 'Li's story' provided by cohealth and Justice Connect Seniors Law is illustrative. Ms Li was receiving physiotherapy treatment following a stroke, when she raised concerns about pressure from her husband to access her superannuation funds and savings to make mortgage payments on a house bought in his name. Her husband is very controlling, and does not allow her to go out on her own and manages the family finances. He has also been physically and verbally abusive. Due to her complex health needs, there is limited scope for Ms Li to live independently of her husband. The police have taken out an intervention order which permits him to

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8 Cohealth and Justice Connect Seniors Law *Submission 179*.

9 See, eg, FMC Mediation and Counselling, *Submission 191*; WA Police, *Submission 190*; Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; United Voice, *Submission 145*; Townsville Community Legal Service Inc, *Submission 141*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; University of Melbourne and Multicultural Centre for Women's Health, *Submission 129*; National LGBTI Health Alliance, *Submission 116*; S Goegan, *Submission 115*; Protecting Seniors Wealth, *Submission 111*; Aged and Community Services Australia, *Submission 102*; Australian Research Network on Law and Ageing, *Submission 90*; Alzheimer's Australia, *Submission 80*; E Cotterell, *Submission 77*; National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*; Law Council of Australia, *Submission 61*; Cochrane Public Health Group, *Submission 54*; Ethnic Communities' Council of Victoria Inc, *Submission 52*; University of Newcastle Legal Centre, *Submission 44*.

10 Lynette Joubert and Sonia Posenelli, above n 9, 712.

remain in the house, but prohibits family violence. Ms Li wishes to prepare a will and protect her interest in the family home. She is concerned that her husband may become violent if he hears of her plans. Ms Li's care coordinator organised, with Ms Li's consent, for a health-justice partnership lawyer to attend her next physiotherapy appointment, who advised Ms Li on preparing a will and checked on Ms Li's ongoing compliance with the intervention order. The lawyer arranged for specialist pro bono lawyers to prepare a will and attend the next physiotherapy appointment, where Ms Li signed the will and binding death nomination form for her superannuation. The pro bono lawyers agreed to store the will at their offices so Ms Li's husband would not find it.[11]

12.10 Surveys of medico-legal partnerships in the United States of America have shown that they provide financial benefits to clients, improve their health and well-being, and increase the knowledge and confidence of health professionals.[12] In Australia, an evaluation of a health-justice partnership established in Victoria between Inner Melbourne Community Legal and the Royal Women's Hospital Victoria aimed at addressing family violence made similar findings.[13] A number of health-justice partnerships targeted at older people have been trialled, and are under development, including between cohealth and Justice Connect Seniors Law and Justice Connect and St Vincent's Hospital Melbourne. The partnership between Justice Connect and St Vincent's Hospital Melbourne is part of a broader multi-disciplinary approach to detecting and responding to elder abuse. It seeks to 'deliver an integrated and consistent approach to the detection and management of suspected elder abuse across the health service'.[14]

12.11 The ALRC is supportive of continued work toward implementing such models of service provision.

Confidentiality and privacy concerns

12.12 The privacy and confidentiality of health information is governed by Commonwealth, state and territory legislation and the common law duty of confidence. Exemptions allowing the use and disclosure of health information under state and territory legislation are similar to the exemptions set out in the Australian Privacy Principles.[15]

12.13 A common theme in submissions was that health professionals may be reluctant to report elder abuse or discuss it with other professionals because of concerns about confidentiality and compliance with privacy laws.[16] Some stakeholders submitted that

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11 Cohealth and Justice Connect Seniors Law *Submission 179*.

12 National Center for Medical-Legal Partnership, 'Making the Case for MLPs: A Review of the Evidence' (February 2013) 3.

13 The University of Melbourne, 'Acting on the Warning Signs Evaluation: Final Report' (August 2014) 1–5.

14 Cohealth and Justice Connect Seniors Law *Submission 179*.

15 This chapter discusses the provisions in the Australian Privacy Principles, but broadly similar exemptions are also available under relevant state and territory privacy laws.

16 ` Cohealth and Justice Connect Seniors Law *Submission 179*; Seniors Rights Service, *Submission 169*; Australian Association of Social Workers, *Submission 153*.

privacy laws may need to be amended to clarify that health professionals can report instances of elder abuse to the police.[17] Stakeholders also submitted that reports or referrals to other public authorities with an investigative role should be exempt from privacy laws.[18]

12.14 However, the Office of the Australian Information Commissioner submitted that privacy is 'often named as a barrier to sharing or accessing personal information, but upon closer examination that it is not usually the case'.[19]

12.15 Although it is generally prohibited to disclose a person's sensitive personal information without their consent, there are exceptions for, among other things, where:

- the person would 'reasonably expect' the disclosure, and the disclosure is 'directly related' to the primary purpose for which the information was collected (secondary purpose exception);[20]
- the disclosure is authorised by or under an Australian law or a court or tribunal order (authorised by law exception);[21]
- the disclosure is required to prevent a serious (or in some jurisdictions 'serious and imminent') threat to the life, health or safety of a person, and it is unreasonable or impracticable to obtain the patient's consent (serious threat exception);[22] or
- the disclosure is 'reasonably necessary for an activity related to law enforcement (law enforcement exception).[23]

12.16 Under the secondary purpose exception, a health professional may, in some circumstances, be able to confer with and discuss an older person's situation with other service providers in order to assist an older person to address elder abuse. In order to rely on this exception, the health professional will need to establish clear expectations with the patient, so the patient understands how their information might be used and to whom it might be disclosed.[24] An open discussion with the older person about a care plan can establish reasonable expectations about what services may be included as part of a multi-disciplinary response to elder abuse.

12.17 A health professional may be able to report elder abuse to police or a public authority under a number of existing exemptions to Commonwealth, state and territory privacy laws. Where a common law duty of care owed by an organisation would require that a health professional report elder abuse, the disclosure would be exempt

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17 See, eg, Australian College of Nursing, Submission 147; Seniors Rights Service, Submission 169.
18 See, eg, Seniors Rights Service, Submission 169; Australian College of Nursing, Submission 147; Legal Aid NSW, Submission 140; Older Women's Network NSW, Submission 136.
19 Office of the Australian Information Commissioner, Submission 132.
20 *Privacy Act 1988* (Cth) sch 1 cl 6.2(a).
21 Ibid sch 1 cl 6.2(b).
22 Ibid sch 1 cl 6.2(c), s 16A.
23 Ibid sch 1 cl 6.2(e).
24 Office of the Australian Information Commissioner (Cth), 'Draft Business Resource: Using and Disclosing Patients' Health Information' (2015).

under the 'authorised by law' exception, as the definition of 'Australian law' includes a rule of common law or equity.[25]

12.18 Under the serious threat exception, if there is a threat to the life, physical or mental health or safety of an older person, and it is potentially life threatening, or could cause other serious injury or illness, a health professional may, without consent, disclose information to relevant authorities in circumstances where it would be unreasonable or impracticable to get the older person's consent prior to disclosure.

12.19 Under the 'law enforcement exception', a health professional may report elder abuse to the police, but not to the public advocate or public guardian. An enforcement body is relevantly defined to mean a state or territory police force or other state or territory body with the power to conduct criminal investigations or inquiries, or impose penalties or sanctions.[26] An enforcement related activity is defined to include the prevention, detection and investigation of criminal offences.[27]

12.20 The ALRC considers that existing exemptions in privacy laws and the proposed immunity for reports to the public advocate or public guardian are sufficient. Under Proposal 3-5, health professionals who make a report of elder abuse to the public advocate or public guardian in good faith and on reasonable suspicion, should not be civilly or criminally liable, including under privacy laws. Health professionals would also not be considered to have breached standards of professional conduct under this proposal. The ALRC supports submissions calling for better information sharing and clear referral pathways to assist health professionals.[28] People with Disability Australia suggest the 'It Stops Here Safer Pathway' introduced in NSW in relation to domestic and family violence services provides useful guidance.[29]

12.21 Some submissions noted that healthcare staff may be reluctant to speak to relatives or significant others without an enduring power of attorney about the patient's situation. This is seen to be of particular concern where the person exercising the enduring power of attorney is perpetrating the abuse.[30] However, existing exemptions under the *My Health Records Act 2012* (Cth) and the Australian Privacy Principles allow health professionals to disclose information to persons other than someone exercising an enduring power of attorney or other enduring document.

12.22 Under the *My Health Records Act 2012* (Cth), a health professional may disclose information in a healthcare recipient's health records if it is 'necessary to lessen or prevent a serious threat to an individual's life, health or safety', and it would be unreasonable or impracticable to gain the health care recipient's consent.[31]

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25 *Privacy Act 1988* (Cth) s 6; Office of the Australian Information Commissioner, *Submission 132*.
26 *Australian Privacy Principles Guidelines* (March 2015) B.70.
27 Ibid B.71.
28 People with Disability Australia, *Submission 167*.
29 Ibid.
30 See, eg, Australian College of Nursing, *Submission 147*.
31 *My Health Records Act 2012* (Cth) s 64.

12.23 Under the Australian Privacy Principles, where the patient is unable to 'communicate consent', disclosure is permitted to a responsible person where necessary for appropriate care and treatment, or for compassionate reasons.[32] Such disclosure is not permitted where it is contrary to a patient's wishes expressed before they became unable to communicate consent, or contrary to wishes the health professional is or could reasonably be expected to be aware of.

12.24 'Responsible persons' for this purpose include:

- parents, children or siblings;
- spouses or de facto partners;
- an individual's relative, where the relative is over 18 and part of the household;
- a guardian;
- a person exercising an enduring power of attorney, exercisable in relation to decisions about a patient's health;
- a person who has an intimate personal relationship with the patient; or
- a person nominated as an emergency contact.[33]

12.25 If a health professional is concerned that an older person with impaired capacity is being abused by someone exercising an enduring power of attorney or by an appointed decision maker, the health professional can apply to the relevant state or territory civil and administrative tribunal for a guardian or financial administrator to be appointed or replaced.[34]

Training

12.26 Many stakeholders identified the need for training and guidance in identifying and responding to elder abuse.[35] The NSW Legislative Council in its inquiry into elder abuse recommended that the NSW Department of Family and Community Services and Ministry of Health 'develop and fund a comprehensive plan addressing the training needs of service providers, to enable better identification of and responses to abuse'.[36]

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32 *Privacy Act 1988* (Cth) sch 1, cl 6.2(d), s 16B.

33 *Privacy Act 1988* (Cth) s 6AA.

34 Chapter 5 discusses a suite of proposals targeted at reducing instances of elder abuse by a person exercising an enduring power of attorney by improving the understanding of both attorneys and third parties dealing with attorneys. Chapter 6 discusses proposals targeted at reducing instances of elder abuse by a person appointed as a guardian or financial administrator.

35 See, eg, Cohealth and Justice Connect Seniors Law *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Australian Nursing & Midwifery Federation, *Submission 163*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; Capacity Australia, *Submission 134*; S Kurrle, *Submission 121*; MIGA, *Submission 119*; Leading Age Services Australia, *Submission 104*; Aged and Community Services Australia, *Submission 102*; H Vidler, *Submission 12*.

36 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 5.

12.27 The Clinical Guidelines published by the Royal Australasian College of General Practitioners (RACGP) include specific guidance on elder abuse.[37] An example of useful material prepared using the guidance provided by the RACGP is a GP toolkit developed through a joint partnership between the City of Canterbury-Bankstown Council and members of the Bankstown and Canterbury Domestic Violence Liaison committees. It is an eight page infographic document which discusses intimate partner family violence, including how to discuss the issue with a patient, safety planning, and referrals. Further, specific guidance is provided about immigration family violence provisions to allay fears of 'partner visa' applicants from culturally and linguistically diverse backgrounds.[38]

12.28 Training for health professionals should be included in the National Plan discussed in Chapter 2.

Other issues

12.29 The Federation of Ethnic Communities' Councils Australia submitted that in interacting with older people from culturally and linguistically diverse backgrounds, there is a need for 'appropriate language support to facilitate accurate communication'.[39] It noted that the use of family and friends as interpreters could give rise to concerns relating to the accuracy of the interpreting, confidentiality and potential conflicts of interests.[40]

12.30 Cohealth and Justice Connect Seniors Law also recognised that language barriers, and other factors such as increased isolation and limited engagement with mainstream services, make engagement with older people from culturally and linguistically diverse backgrounds more complex. It recommended greater coordination and integration of community workers from culturally and linguistically diverse communities in the delivery of health services.[41] Such strategies could be coordinated through the National Plan discussed in Chapter 2.

The National Disability Insurance Scheme

12.31 The National Disability Insurance Scheme (NDIS) supports people with a 'permanent and significant disability'.[42] Although a person must be under the age of 65 at the time they seek to become a participant in the NDIS,[43] if a person is already in the NDIS when they turn 65, they may elect to remain in the NDIS or enter the aged care framework.[44] It is therefore likely that some older people will be in the NDIS.

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37 Royal Australasian College of General Practitioners, 'Clinical Guidelines—Abuse and Violence: Working with Our Patients in General Practice' (February 2014) 10.1.
38 Women's Legal Service NSW, 'A Toolkit for GPs in NSW' (2013).
39 Federation of Ethnic Communities' Councils of Australia, *Submission 89*.
40 Ibid.
41 Cohealth and Justice Connect Seniors Law *Submission 179*.
42 *National Disability Insurance Scheme Act 2013* (Cth) s 24.
43 Ibid s 22(1)(a).
44 Ibid s 29(1)(b).

12.32 A number of stakeholders noted that at this early stage of the rollout of the NDIS, they have had limited experience with the scheme.[45] Legal Aid NSW and the Law Council of Australia noted that 'it is not aware of any elder abuse being experienced by participants in the NDIS'.[46]

12.33 The government is in the process of developing a national 'Quality and Safeguards' framework, which

> will make sure the national scheme will provide good quality supports, and will maximise the choice and control of participants. It will also be important that the rights of people are protected and participants are safe from harm.[47]

12.34 Some stakeholders expressed preliminary concerns about the potential for abuse and sub-standard care under the NDIS.[48] However, the ALRC considers that it is too early to tell whether the scheme is an avenue for elder abuse, or test whether there are effective safeguards against elder abuse in place.

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45 Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; The Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Federation of Ethnic Communities' Councils of Australia, *Submission 89*; Law Council of Australia, *Submission 61*.

46 Legal Aid NSW, *Submission 137*.

47 Disability Reform Council, 'Consultation Paper—Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework' (February 2015) 3.

48 Office of the Public Guardian (Qld), *Submission 173*; NSW Ombudsman, *Submission 160*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Legal Aid NSW, *Submission 137*.