



**Submission to the Discussion Paper
Australian Law Reform Commission
on Elder Abuse**

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Acronyms

Aged Care and Assessment Services	ACAS
Australian Securities and Investments Commission	ASIC
Australian Bankers' Association	ABA
Australian Law Reform Commission	ALRC
Council on the Ageing	COTA
Culturally and Linguistically Diverse	CALD
National Ageing Research Institute	NARI
Office of the Public Advocate	OPA
Royal Commission into Family Violence (Vic)	RCFV
Seniors Rights Victoria	SRV
Victorian Civil and Administrative Tribunal	VCAT
Victorian Law Reform Commission	VLRC
World Health Organization	WHO

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Executive Summary

Seniors Rights Victoria (SRV) welcomes the opportunity to respond to the Australian Law Reform Commission's (ALRC) Elder Abuse Discussion Paper 83 (Discussion Paper).

SRV is the key statewide service that provides leadership across Victoria by addressing and responding to older people experiencing abuse and mistreatment – known as “elder abuse”. SRV is a program of COTA Victoria and services include a helpline, specialist legal services, short-term support and advocacy for individuals, and professional and community education. SRV also participates in elder abuse policy development and law reform, and work with organisations and groups to raise awareness of elder abuse. Over the past eight years of operation SRV has become the leading Victorian legal and advocacy elder abuse service. Details of SRV's operations and experience were previously detailed to the ALRC in the Elder Abuse Issues Paper – Submission 141.

In this submission SRV has responded to each chapter of the Discussion Paper, with a focus on the proposals and questions related to SRV's specific case work and policy expertise. In the process, SRV has identified some key messages for the consideration of the ALRC, as well as specific recommendations.

Funding a national body to coordinate the development of a national plan

Elder Abuse Action Australia (EAAA) is a recently created national body that brings together the knowledge and expertise of organisations currently working in the elder abuse field. Designed to facilitate co-ordination, communication and sharing of best practice, EAAA is in an ideal position to advise on a National Plan to ensure its framework is robust and outcomes achievable. It is proposed that EAAA be funded to coordinate a nation-wide evidence-based response to elder abuse as part of the National Plan.

Any response to elder abuse needs to address ageism

Ageism, and the way it is expressed in public and private life, can be considered the principal driver of elder abuse. While elder abuse most often occurs within the family, it is influenced by societal attitudes including the marginalisation of older people and of issues associated with ageing.

Elder abuse is a distinct form of family violence

Elder abuse often occurs within the family and is a recognised form of family violence. However, the drivers, risk factors and relationships of elder abuse are unique, requiring different responses to other forms of family violence.

Consideration of the needs of diverse communities

The term “older people” encompasses a diverse group of people from various generations, cultural backgrounds, and gender and sexual identities. Older people who belong to one or more disadvantaged groups may face increased difficulties in responding to elder abuse as a result of compounded layers of disadvantage.

Support for prevention and intervention services

Elder abuse is a complex area with each occurrence of abuse requiring a unique response. It is important for the funding to support the continuation of existing services for older people, and the funding of new

ones where necessary. Prevention and intervention services focused on perpetrators and potential perpetrators need to also be supported.

Further research to improve the elder abuse evidence base, including a prevalence study

The evidence base regarding elder abuse prevention and intervention is small but growing. There is an urgent need for more research about risk factors and drivers, and effective intervention and prevention measures. A prevalence study is a necessary and long overdue component of improving the evidence base.

Increased training for people who work with older people

Improved training for people in a variety of fields has the potential to reduce occurrence of elder abuse, and also to increase detection and knowledge of how to support any older person who is being mistreated. This training should not be included as an add-on or supplement but should be a mandatory component of accredited courses for those working with older people.

Specific recommendations

1. SRV recommends that the ALRC endorse a definition for the term “elder abuse” to guide further work in this area.
2. SRV recommends that elder abuse is considered a form of family violence but stresses the need for prevention and response approaches that take into consideration the unique aspects and drivers of intergenerational elder abuse.
3. SRV proposes that Elder Abuse Action Australia (EAAA) be funded to coordinate a nation-wide response to elder abuse as part of the National Plan.
4. SRV recommends ongoing funding to support the continuation of existing services that support older people, and the funding of new ones where necessary. Prevention and intervention services focused on perpetrators and potential perpetrators need to also be supported.
5. SRV recommends increased research about risk factors and drivers, and effective intervention and prevention measures.
6. SRV recommends improved training in elder abuse for every profession working with older people.
7. SRV supports giving state and territory public advocates or public guardians the power to investigate elder abuse, as long as this does not lead to mandatory reporting.
8. SRV recommends that improved training be provided to Victoria Police to enable members to respond more effectively to situations of elder abuse, and increase the numbers of police with specialist capability in this area.
9. SRV recommends that for a tribunal to make an order for Guardianship or Administration, the older person should be present (unless information explaining the person’s absence is provided by an independent party such as a GP). Failing this the tribunal should contact the older person by phone to ascertain their wishes.

10. SRV recommends all banks must provide readily available and accessible service for older people with paper statements and a face-to-face teller service without additional charge.
11. SRV recommends the development of a banking system that alerts customers when unusual banking activity occurs, particularly when a third party has authority to operate the account.
12. SRV would recommend that a national register for enduring appointments be prioritised, to enable the current reliance by banks on third party nominations to be replaced with more universal acceptance of Enduring Powers of Attorney to conduct banking transactions for the principal.
13. SRV recommends the restriction of the operation of the presumption of advancement through an amendment to Part IV of the Property Law Act 1958 (Vic) (or equivalent in other states) that will require tribunals to consider the financial contributions made by the parties irrespective of the nature of the relationship between them.
14. SRV recommends that Centrelink nominee arrangements be implemented on the same basis as enduring appointments, requiring confirmation of the capacity and understanding of the principal, and an acceptance of the appointment and an undertaking by the nominee to comply with all legal requirements.
15. SRV recommends that the Granny Flat rule be overhauled, to enable older people to retain legal ownership of a property they occupy as their principal place of residence in proportion to the financial contribution they have made.

Chapter 1 – Introduction to the Inquiry

Definition

The definition of “elder abuse” is a prominent issue in the introduction to the Discussion Paper, but it is unclear as to which approach or “definition” the ALRC will endorse in its final submission to the Attorney-General. While there appears to be considerable consensus on the attributes and characteristics of elder abuse there is an ongoing lack of clarity on this point. As the ALRC noted, the World Health Organization (WHO) definition “is used across a range of government and non-government bodies,” and appears to be the basis of proposals and recommendations under consideration in the ALRC Discussion Paper.¹

The Discussion Paper stated “that to obtain a full picture of abuse of older persons, a broad description of elder abuse needs to be used, like the WHO definition.”² Settling the definitional issues of “elder abuse” as part of the ALRC recommendations would allow the focus in the proposed National Plan and Prevalence Study to broaden beyond the issue of what amounts to elder abuse and undertake other key requirements, “that will facilitate a coordinated policy response to guide reform and action.”³

¹ Australian Law Reform Commission (2016) Elder Abuse Discussion Paper 83, 1.12, p.17.

² Ibid. p.20.

³ The National Plan proposal is to “provide a framework for a national and community approach to combat ageism, support older persons in protecting their rights and stopping elder abuse”. Ibid. 1.5, p.16.

SRV would also again stress the issues that arise in both culturally and linguistically diverse (CALD) and Indigenous communities through the use of the phrase “elder abuse” as this does not equate well to cultural understandings. The term “elder” is used in a different context within Indigenous communities, and is not necessarily linked to age. The term “mistreatment” can be more acceptable than “abuse” in some CALD communities to define the inappropriate conduct that is experienced by older people.⁴ It is critical that mistreatment of older people be understood to include issues of vulnerability, disadvantage through lack of education and illiteracy, and the significant harm experienced through abuse of trust in long established relationships.

SRV recommends that the ALRC endorse a definition for the term “elder abuse” to guide further work in this area.

Elder abuse, ageism and family violence

The underlying condition of elder abuse is ageism, which contributes to the marginalisation of older people and the way society condones certain behaviours towards older people (such as limiting decision-making and independence or controlling finances). Ageism is a strong element in understanding elder abuse as there is a considerable imbalance between a youth-focused society and the manner in which older people are regarded and often disrespected.

Professor Wendy Lacey has pointed out “the challenge for lawyers, advocates and policy makers is that the human rights of older persons have not yet been well defined in international human rights law, and governments (national, regional and local) are presently developing law and policy in the absence of a specific treaty with binding obligations to respect and protect the rights of older people.”⁵

The impact of ageism, and the consequential erosion of older people’s rights, is far broader than personal repercussions endured by an older person: “In the absence of specific legal obligations that protect them, there exists the potential for the elderly to be seen as a burden on the medical and welfare systems, rather than as rights-holders deserving of respect and dignified treatment. Without the adoption of a strong rights based approach, ageing continues to be constructed as a “problem” requiring solutions, rather than as requiring positive strategies aimed at enabling older persons to realise their inherent human rights.”⁶

The term “family violence” refers to violence that occurs within the family or household context. The majority of this violence is intimate partner violence perpetrated by men against women and children, but family violence also encompasses other forms including elder abuse, violence between same-sex partners, and violence of adolescents against their parents. The Discussion Paper recognised that elder abuse is a form of family violence, and that the behaviours of perpetrators and the safety needs of victims can be similar for elder abuse and intimate partner violence. However, while elder abuse is a form of family violence and faces some of the same barriers to prevention, the risk factors, relationship dynamics and outcomes of elder abuse are unique and cannot be properly understood within a family violence framework that focuses only on violence against women and children.

⁴ The Royal Commission into Family Violence Report (Victoria) 2016 recommendation 139 recognised the special requirements of CALD communities

⁵ Lacey, Wendy (2014) Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia. *Sydney Law Review*, Vol. 36 Issue 1, p.114.

⁶ Ibid p. 117.

Research by Our Watch has identified gender inequity as an underlying condition of violence against women, but this is not necessarily an underlying condition of elder abuse.⁷ The majority of elder abuse victims are women and the majority of perpetrators are men. However, it is important to note that men can also often be victims of elder abuse and women can be perpetrators. This is one of the reasons that a family violence lens is not always appropriate for elder abuse.

The majority of elder abuse is not intimate partner violence (though the violence some older women experience in late life can be a continuation of behaviours experienced throughout the life course, or occur in a new relationship). The majority of elder abuse is intergenerational and perpetrated by a family member or friend. In most instances the perpetrator is the adult son or daughter of the older person.

While issues of power and control can play a role in elder abuse, other factors are at play. This includes the particular nature of the parent–child relationship, and how this relationship is affected by external pressures, family conflict, and by the changing roles and responsibilities of both parties over time, including the giving and receiving of care.

Recent research by the National Ageing Research Institute and Seniors Rights Victoria highlighted the importance of the parent–child relationship and how this bond can affect an older person’s willingness to take action.⁸ In many situations the older person wants the abuse to be resolved, but also holds concerns for the perpetrator. Many situations are complicated by external factors affecting the perpetrator such as financial difficulties, mental or physical health issues, substance abuse or insufficient housing. A history of family conflict and family violence can also affect the parent–child relationship.

Over time the roles and responsibilities of family members can change in response to circumstance. This may mean an increase in the care needs of older people as they age, but also by other family members who may require increased financial and housing assistance from their older parents over time. In this way the parent–child care relationship can be described as bi-directional. It should not be assumed that older people always require increased care as they age, or that they are only ever care recipients.

SRV recommends that elder abuse is considered a form of family violence but stresses the need for prevention and response approaches that take into consideration the unique aspects and drivers of intergenerational elder abuse.

Chapter 2 – National Plan

The reform of Commonwealth, state and territory laws that relate to the rights of older people is an integral part of addressing elder abuse, however, there are a number of priorities of prevention and intervention that fall outside of the legal frameworks. These priorities can be considered more carefully in a National Plan, which will support future planning and policy development. Consideration also needs to

⁷ Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth (2015) *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia*, Our Watch, Melbourne, Australia.

⁸ Freda Vrantsidis, Briony Dow and Melanie Joosten from NARI and Mandy Walmsley and Jenny Blakey from SRV (May 2016) *The Older Person’s Experience: Outcomes of Interventions into Elder Abuse*, Melbourne.

be given to how a national response to elder abuse will work with current family violence reforms at Commonwealth and state and territory levels.

The distribution of legal and political power between the Commonwealth and state governments has been a vexed issue since Federation, but it is apparent that in recommending a National Plan, the ALRC will encounter this issue head on. As noted by Professor Lacey, “Compounding the prevalent, yet hidden, problem of elder abuse, is a complex constitutional situation where the responsibility for safeguarding vulnerable adults lies primarily with the state and territory governments, but where responsibility for ageing and aged care has increasingly been appropriated by the Commonwealth.”⁹ Professor Lacey’s analysis also includes an assessment of the importance of a national framework in alleviating elder abuse, as she highlights “in the absence of a national framework, the states and territories have developed strategies for co-ordinated interagency approaches to responding to elder abuse, but these are presently contained in variable and relatively weak policy instruments if they exist at all.”¹⁰

As a consequence of the National Elder Abuse Conference held in Melbourne in 2015, network meetings confirmed a resolve across many Australian service providers to work collectively to progress knowledge and resources for those agencies working in elder abuse prevention and intervention. The deficiencies in legislative, legal and policy areas and gaps between Commonwealth and State programs and funding were key drivers for this initiative.

Elder Abuse Action Australia (EAAA) is this recently created national body that brings together the knowledge and expertise of those currently working in the elder abuse field. Designed to facilitate co-ordination, communication and sharing of best practice, EAAA is in an ideal position to advise on a National Plan to ensure its framework is robust and outcomes achievable.

Principal goals of a National Plan

Proposal 2-1

As suggested by the ALRC a National Plan to address elder abuse could be structured around the following principal goals:

- Promote the autonomy, dignity and agency of older people
- Combat ageism and promote respectful intergenerational relationships
- Make systems work together effectively
- Improve response to elder abuse
- Improve the evidence base

Using these goals Seniors Rights Victoria would like to highlight some key aspects for consideration of a National Plan.

Promote the autonomy, dignity and agency of older people

The autonomy, dignity and agency of all people of any age is of importance to a well-functioning society. In previous eras elder abuse has often been approached within a protectionist framework that considered older people, by virtue of their age, as vulnerable, dependent and unable to make suitable decisions regarding their own safety and care. In more recent times elder abuse has been approached with a rights-based and empowerment framework that focuses on supporting the older person’s desires and needs. A core goal of a National Plan should be to promote the autonomy, dignity and agency of older people and

⁹ Lacey op. cit. p.102.

¹⁰ Ibid.

this goal should be considered at every point including primary prevention, early intervention, and response. Any efforts that aim to address elder abuse should address this goal, including support measures for those at risk of, experiencing or in the aftermath of elder abuse.

Combat ageism and promote respectful intergenerational relationships

Ageism, and the way it is expressed in public and private life, can be considered the principal driver of elder abuse. While elder abuse most often occurs within the family, it is influenced by societal attitudes including the marginalisation of older people and of issues associated with ageing. As a result of ageism older people are often perceived in a negative light and treated as less valuable and consequently many experience a loss of autonomy, confidence and respect. This can be compounded by reinforcing factors that increase the risk of elder abuse occurring, include any loss of independence caused by physical or cognitive impairment, as well as social isolation.

The term “older people” encompasses a diverse group of people from various generations, cultural backgrounds, and gender and sexual identities. How these different groups approach and respond to elder abuse (including the terminology used) will be important aspects of a national plan, which must consider the unique needs of older people:

- from Aboriginal and Torres Strait Islander communities
- from culturally and linguistically diverse communities
- from lesbian, gay, bisexual, transgender and intersex communities
- who live in regional and remote communities
- living with disability.

People may belong to one or more of the above (or other) groups and may experience additional or compounded layers of disadvantage.

Ageism affects how older people are treated in all aspects of life, including the workforce, within family life, and as public figures. The promotion of respectful intergenerational relationships is a way of combatting ageism and demonstrating that Australia does not condone elder abuse or the mistreatment of older people.

Make systems work together effectively

Elder abuse and the mistreatment of older people is currently addressed through interventions and support delivered in different contexts including within the legal system, law enforcement, health care, aged care, family violence services, and a range of community services. Making these systems work together effectively within and across states and territories should be a primary focus of a National Plan. It would also be important to consider how other national plans have been implemented, for example, how the national plan for family violence works with state systems and reforms in this area.

Currently, prevention and intervention services are largely state-based (with the exception of those related to Commonwealth-funded aged care services) and it would be advisable for a National Plan to draw on the work currently happening in each state and territory. In order to do this effectively, we propose there needs to be funding of a national body comprised of organisations already working in the elder abuse field to facilitate co-ordination, communication and sharing of best practice. As mentioned above, EAAA is in an ideal position to fulfil this role and will be able to develop a national plan utilising the expertise of those currently working in the area.

Improve response to elder abuse

Elder abuse is a complex area with each occurrence of abuse requiring a unique response that considers the type (or types) of abuse, the relationship between the older person and the perpetrator, the intended and unintended consequences of any intervention, and risk factors for reoccurrence. Evidence shows that the most effective responses are multidisciplinary interventions that empower the older person and support them in their decision-making. These usually involve legal services (where necessary) supported by advocacy or case management that can make referrals to health and other social support services. This is the most effective way of achieving positive long-term outcomes that the older person can maintain. An example of a successful multidisciplinary intervention program is health justice partnerships.

It is important for the funding to support the continuation of existing services, and the funding of new ones where necessary.

This includes the funding of:

- services that assist older people experiencing all forms of abuse
- services that ameliorate risk factors that make older people more vulnerable to abuse
- interventions and measures within general services that address elder abuse and mistreatment of older people, such as hospitals, health services, Centrelink, police, community legal centres, family violence services, etc.

In order to improve response to elder abuse, there needs to be a consideration of why the abuse is occurring and the drivers related to the perpetrators. Prevention and intervention measures to assist people at risk of perpetrating abuse, including carers, are an important consideration of a national plan. This requires the adequate funding of services (housing, gambling, mental health, finance, etc.) to support perpetrators, and carers (counselling, respite, information, etc.) as potential perpetrators.

The Discussion Paper makes many references to the need for increased training regarding elder abuse for all people who work with older people. Improved training for people in a variety of fields has the potential to reduce occurrence of elder abuse, and also to increase detection and knowledge of how to support any older person who is being mistreated. This training should not be included as an add-on or supplement but should be a mandatory component of accredited courses for those working with older people, including:

- aged care workers, managers and assessors
- lawyers
- bankers
- health professionals
- GPs
- service providers
- police
- Aged Care Assessment Teams
- My Aged Care staff
- Centrelink staff
- family violence staff

In the Discussion Paper, “ALRC notes that police receive comprehensive and ongoing training in respect of family violence, which is the context for a majority of abuse against older persons” (4.45). While law enforcement training for family violence is continually improving there is little evidence that, across all

jurisdictions, this is currently inclusive of the needs of older people and elder abuse. While elder abuse is a form of family violence it has different drivers and requires different responses. Consideration needs to be given to how to support older people and police in situations where it is not appropriate for police to take action but something needs to be done.

As well as information specific to each profession training should include:

- the rights, autonomy and dignity of older people
- the similarities and differences to other forms of family violence
- risk factors of elder abuse, and how to identify it
- how to support an older person where elder abuse is suspected
- the proper use of Enduring Powers of Attorney and supported decision-making
- referral pathways and access to support services.

The evidence base regarding elder abuse prevention and intervention is small but growing. There is an urgent need for more research in the following areas:

- Risk factors and drivers of elder abuse
- Intervention and prevention measures that support older people
- Intervention measures that support perpetrators
- Prevention measures that support family members from becoming perpetrators
- Prevention measures that support carers

To improve the evidence base new research needs to be undertaken and current services need to be properly evaluated. A National Plan would be able to provide a framework for the coordination of further research, including collaboration between organisations, and the sharing of resources and best practice.

Proposal 2–2

A prevalence study is a necessary and long overdue component of improving the evidence base. Without proper understanding of the severity and frequency of each type of elder abuse it is impossible to measure the effectiveness of a National Plan to address it.

SRV supports Proposal 2–1 and the development of a National Plan.

SRV proposes that Elder Abuse Action Australia (EAAA) be funded to coordinate a nation-wide response to elder abuse as part of the National Plan.

SRV recommends ongoing funding to support the continuation of existing services that support older people, and the funding of new ones where necessary. Prevention and intervention services focused on perpetrators and potential perpetrators need to also be supported.

SRV recommends increased research about risk factors and drivers, and effective intervention and prevention measures.

SRV supports Proposal 2–2 and the call for a prevalence study as a necessary and long overdue component of improving the evidence base.

SRV recommends improved training in elder abuse for every profession working with older people.

Chapter 3 – Powers of Investigation

The ALRC has identified that there is an “investigation gap which may limit the identification of, and response to elder abuse” and proposes a “rights-based, harm-reduction model of investigation that places the older person at the centre of decisions relating to response to elder abuse.”¹¹

Proposal 3–1

State and territory public advocates or public guardians should be given power to investigate elder abuse where they have a reasonable cause to suspect that an older person:

- a) **Has care and support needs;**
- b) **Is, or is at risk of being abused or neglected; and**
- c) **Is unable to protect themselves from the abuse or neglect or the risk of it, because of care and support needs.**

One of the key services provided by SRV is the helpline telephone advice service. Older people experiencing difficulties contact SRV to discuss issues they are experiencing and have the opportunity in appropriate cases to obtain advice from a lawyer and advocate. SRV assists and can act for the older person directly, but in many cases calls are made to the SRV helpline from concerned family and friends of an older person wishing to “report” a situation of elder abuse, and seeking an investigation or intervention in the situation. SRV has no authority to intervene in these matters, and as a legal service can only act in situations where the older person provides instructions direct to SRV. SRV will often refer these callers to the Office of Public Advocate (in Victoria), and others to the police for a “welfare check”, but at present these organisations have limited investigatory powers.

There is also a significant tension between investigatory powers being too limited (not allowing for investigation where someone has capacity, or where a person refuses intervention as they do not perceive their situation as placing them in real danger) and on the other hand providing protection for people who cannot effectively help themselves.

Whilst SRV would support expanding the role of OPA to encompass investigatory powers in situations of reported elder abuse, SRV does not support the introduction of mandatory reporting for situations of elder abuse. This highlights the tensions between recognising the need for reporting, and that formalising powers of investigation could effectively lead to mandatory reporting (as referrals to OPA for investigation become part of service providers operating guidelines). As part of the development of an investigations system, it would be critical for input to be provided by OPA direct, so that a mandatory reporting system is not developed by stealth. The key issue needs to be protection and assistance for vulnerable people, and this principle should apply to any person requiring assistance, and not just a person who is for example over 65 years of age, and considered at risk of elder abuse.

SRV supports giving state and territory public advocates or public guardians the power to investigate elder abuse, as long as this does not lead to mandatory reporting.

¹¹ ALRC op. cit. p. 61.

Proposal 3–2

Public advocates or public guardians should be guided by the following principles:

- a) Older people experiencing abuse or neglect have the right to refuse support, assistance or protection;
- b) the need to protect someone from abuse or neglect must be balanced with respect for the person’s right to make their own decisions about their care; and
- c) The will, preferences and rights of the older person must be respected.

Elder abuse responses are often veiled in issues deriving from ageism, and the autonomy of an older person can be easily lost through interventionist strategies, and a desire to “protect” an older person. The Powers of Attorney Act 2014 (Vic) has expanded the definition of “decision making capacity” in section 4, and now provides a critical qualification in s.4 (4) (d) to specify:

it should not be assumed that a person does not have decision making capacity for a matter merely because the person makes a decision that is, in the opinion of others, unwise:

The rationale for this subsection is relevant to the present discussion as respecting the will, preferences and rights of the older person includes respecting the making of decisions that others may not consider to be the best for that person: the right to decide for oneself is a critical right.

SRV supports Proposal 3–2.

Proposal 3–3

Public advocates or public guardians should have the power to require that a person, other than the older person:

- a) Furnish information;
- b) produce documents; or
- c) participate in an interview relating to an investigation of the abuse or neglect of an older person.

Any expanded investigatory role undertaken by public advocates or guardians would be ineffective without adequate powers of investigation. SRV supports the ALRC proposal “that this power only be available with respect to persons other than the older person, to ensure that the older person retains their right to refuse investigation, support or assistance.”¹² This approach would ensure the older persons right to self-determination, and is consistent with the rights-based approach advocated by SRV.

SRV supports Proposal 3–3.

Proposal 3–4

In responding to the suspected abuse or neglect of an older person public advocates or public guardians may:

- a) refer the older person or the perpetrator to available health care, social, legal accommodation or other services;
- b) assist the older person or perpetrator in obtaining those services;

¹² ALRC op. cit. p. 72.

- c) **prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or**
- d) **decide to take no further action.**

SRV commends the ALRC for articulating a “rights-based approach to all aspects of an investigation into the circumstances of an older person.” SRV believes that an older person must “determine the manner and circumstances in which they receive support and assistance.”¹³ In case work undertaken by SRV many clients decide to not take any further action, and this decision is made after receiving legal advice on their circumstances, and advocacy support for the personal issues experienced. The difficulties in implementing action that may have the effect of terminating any further relationship with the perpetrator, is unacceptable to the client, despite enduring significant levels of abuse.

Proposal 3–5

Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

- a) **liable, civilly, criminally or under an administrative process;**
- b) **found to have departed from standards of professional conduct;**
- c) **dismissed or threatened in the course of their employment; or**
- d) **discriminated against with respect to employment or membership in a profession or trade union.**

The issue of immunity from prosecution has arisen as a consequence of previous whistle-blower revelations in various corporate and government activities.¹⁴ ASIC recognises this issue as follows:

*We acknowledge that someone who approaches ASIC, often in difficult and stressful circumstance, to provide us with inside information about potential misconduct ... may do so at some risk to themselves.*¹⁵

At present the Commonwealth Joint Parliamentary Committee on Corporations and Financial Services is also undertaking a parliamentary inquiry into Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors, and a whistleblower protection regime is incorporated as a consideration in the terms of reference. The importance of this safeguard is clearly evident.

In general, a fear of unintended repercussions has led to a reluctance for people to get involved in other’s business or circumstances. Other issues that arise include potential problems from breaching privacy or professional duties of confidentiality.

SRV supports Proposal 3–5 and see it as critical to the success of any investigation undertaken by public advocate or guardian.

¹³ Ibid.

¹⁴ See for example Jeanette Van Akkeren and Julie-Anne Tarr (2015) Troublemakers and traitors – it’s no fun being a whistleblower, accessed at <http://theconversation.com/troublemakers-and-traitors-its-no-fun-being-a-whistleblower-50755> *The Conversation*, 18 November 2015.

¹⁵ Australian Securities and Investments Commission, Information Sheet 52 *Guidance for Whistleblowers*, p. 1.

Chapter 4 – Criminal Justice Responses

As a result of the Royal Commission into Family violence in Victoria, elder abuse received recognition as a form of family violence. This appears to have led to a lifting of some of the secrecy and shame that surrounded elder abuse, and has led to an increased demand for services and advice from SRV. It has also led to a preparedness by older people seeking support to undertake intervention order applications if necessary.

Clients at times continue to have difficulties in obtaining police assistance in matters of family violence, and this is more often the case with issues of economic abuse or where a family member suffers from a mental illness. Police are less likely to become involved in matters of economic or psychological abuse, even though this form of conduct is within the definition of family violence.¹⁶

SRV recommends that improved training be provided to Victoria Police to enable members to respond more effectively to situations of elder abuse, and increase the numbers of police with specialist capability in this area.

Chapter 5 – Enduring Powers

Proposal 5-1

A national online register of enduring documents and court and tribunal orders for the appointment of guardians and financial administrators should be established.

SRV has advocated for the introduction of a mandatory online registration system for enduring powers for many years. The Victorian Law Reform Commission undertook a Guardianship consultation in 2011, and SRV stated its position as follows:

SRV supports the introduction of a mandatory online registration system for enduring powers. We believe that mandatory registration of all enduring instruments could lead to a reduction in the incidence of elder abuse, as registration would prevent people from purporting to rely on powers that have subsequently been revoked. Registration coupled with other safeguards, including notification of activation, annual declarations of compliance and random audits, is likely to further reduce the incidence of abuse.¹⁷

The Victorian Government introduced the new *Powers of Attorney Act 2014 (Vic)* from 1 September 2015 that adopted many of the recommendations of the Victorian Law Reform Commission with the exception of the registration of enduring powers. The registration system mooted at that time was a state-based model, yet the benefits of extending the original proposal to a national register for enduring powers would be considerable, due to the number of matters undertaken by older people involving national organisations such as Centrelink, banks and other financial institutions. A national register would also

¹⁶ Family Violence Protection Act 2008 (Vic) S. 5.

¹⁷ SRV Submission to the Victorian Law Reform Commission regarding Guardianship Consultation Paper 10, 3 June 2011 – Submission No. 71, p. 13.

alleviate some of the considerable opportunities for financial abuse of older people that currently arise through the use of Third Party Nominee appointments that are preferred by both banks and Centrelink, and have less legal protections and legislative requirements than enduring documents.

SRV supports Proposal 5–1 the establishment of a national online register of enduring documents and orders.

Proposal 5–2

The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.

SRV supports the ALRC’s comment that enduring appointments “do create risks of financial abuse – the most common form of elder abuse”¹⁸ and considers that enduring documents should be registered to be valid. The SRV submission to the VLRC Guardianship Consultation stated:

In our view, registration should be encouraged at the time the document is executed, but before the instrument is activated. VCAT should be granted the power to hear challenges to the registration of an instrument and to validate appointments made under unregistered instruments that have been validly executed.

Many SRV clients have fluctuating capacity. In some cases, capacity will fluctuate on a daily basis. In other cases, for example, a client who suffers a stroke, the client may lose capacity, but then regain the ability to make decisions after a period of rehabilitation. In our view, if a client’s capacity fluctuates on a daily basis, it will be necessary to activate the power on the register, even though they may retain the ability to make decisions on certain occasions. However we believe that it will be important for the registration system to provide for de-activation of powers on the register in circumstances where the person regains capacity. This will be preferable to requiring the person to revoke the power and go to the trouble and expense of drafting and registering a new document once they have regained capacity.¹⁹

In providing instructions for an Enduring Power of Attorney to a lawyer, a client will need to determine when the enduring document will take effect, rather than waiting for “loss of capacity” to be the starting point. Many clients prefer to elect that the enduring document have immediate effect, simply for the reason that assessing capacity can be an unwanted intrusion for some people, and they are appointing a “trusted” family member to the role of Attorney. However, more prudent clients will elect for the enduring document to take effect only in circumstances where they lose capacity.

The assessment of “capacity” can be a vexed issue with some practical differences in conflict between the legislative requirements detailed in section 4 of the *Powers of Attorney Act 2014 (Vic)*, and the various cognitive or neuropsychological tests administered by medical practitioners and neuropsychologists. This testing is critical to the issue of when the enduring document could take effect, and personal medical information would be required to be lodged with the register to support the activation of the instrument. This could raise issues of privacy for the principal, so the issue of access to the register would also be critical.

¹⁸ ALRC op. cit. p. 89.

¹⁹ SRV Submission to VLRC Guardianship Consultation op. cit.

SRV has become aware that some lawyers in Victoria have adopted the practice of only obtaining the principal's signature to an Enduring Power of Attorney at the time of execution. The Attorneys are not invited to sign the Statement of Acceptance until a later time, and this appears to be when the principal has lost capacity. This provides some means of de-facto control over the enduring document, as the lawyer appears to "hold it" until the time it is needed. There are a number of problems with this approach, including an inability of the principal to seek assistance from the Attorney at any time before he or she loses capacity, as the enduring document is not valid until it has been fully executed. In the event that the Attorney(s) are unavailable at the time the principal loses capacity, it will also prevent the proper completion of the document, and the principal will not have the Attorney(s) able to assist with his or her affairs as anticipated. In this case, it will be necessary for an Application for a Guardian and /or Administrator to be appointed instead.

Proposal 5–3

The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered, and that unregistered documents remain valid for a prescribed period

Transitional arrangements would be critical to the implementation of a radically new registration system for Powers of Attorney. These arrangements would need to be carefully considered, and a broad based awareness and training program would also need to be incorporated. The key issue that a failure to effect registration could lead to the invalidity of a legal arrangement could have dire and unintended consequences for many unsuspecting older people.

The issue of failing capacity for principals would also need to be considered, and adequate arrangements made where people were no longer able to intervene and act in their own affairs so that an enduring instrument would retain validity despite the principal failing to register.

SRV supports Proposal 5–3 regarding transitional arrangements for an online register.

Question 5–1

Who should be permitted to search the national online register without restriction?

SRV formulated a number of recommendations to the Victorian Law Reform Commission with respect to the access to the Register and privacy of the principals, making an enduring document.

We recommend implementing any or all of the following options in an effort to safeguard donor's private details and wishes:

- (1) provide substituted decision makers with a certificate that notes the powers they have been granted, rather than having them rely on the instrument itself which may contain other sensitive personal information not relevant to their role. This certificate could be given upon registration of the power of appointment and be required to be produced when making substituted decisions;*
- (2) requiring a person to pre-register before searching the system;*
- (3) when searches of the register are performed, requiring as much detail about the person performing the search as is feasible – for example, their name, address and date of birth – before information is made available to the person searching the register;*

- (4) instituting a tiered system of restricted access for third parties that could be regulated by using a PIN system, with different PINs having different access levels to the information contained in the register; and/or
- (5) requiring a person undertaking a search of the registration system to state the purpose of their search and to agree to the terms and conditions of the search.²⁰

Question 5–2

Should public advocates and public guardians have the power to conduct random checks of enduring attorneys' management of principals' financial affairs?

SRV considers adequate powers should be available to the public guardian that assist it undertake the various responsibilities required in this proposal, and this would include the ability to verify the conduct of enduring attorneys compliance in managing a principals finances. This measure would also enhance compliance by attorneys, and assist improve accountability.

SRV supports Proposal 5–2 regarding checks of attorneys' management of their responsibilities.

Proposal 5–4

Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

- a) legal practitioner
- b) medical practitioner
- c) justice of the peace;
- d) registrar of the Local/Magistrates Court; or
- e) police officer holding the rank of sergeant or above.

Each witness should certify that:

- a) the principal appeared to freely and voluntarily sign in their presence;
- b) the principal appeared to understand the nature of the document; and
- c) the enduring attorney or enduring guardian appeared to voluntarily sign in their presence.

A similar provision has been enacted in Victoria in the *Powers of Attorney Act 2014 (Vic)* section 35(1) (b) which stipulates in relation to the qualification of witnesses that “one person must be either authorised to witness affidavits or a medical practitioner.” This is a slightly broader category than that proposed by the ALRC.

Section 36 of the *Powers of Attorney Act (Vic) 2014* contains the certification requirements currently used in Victoria, and contains in subsection (a)(i) the requirement that the “principal appeared to freely and voluntarily sign the instrument in the presence of the witnesses”, but the certification about the principal's perceived understanding of the nature of the document is detailed in more comprehensive terms as the Victorian Act requires the witnesses to be satisfied that the donor had “decision making capacity” at the time of signing the Enduring Power of Attorney.²¹

²⁰ SRV Submission to VLRC Guardianship Consultation op. cit. p.14.

²¹ Decision making capacity is comprehensively defined in section 4 Powers of Attorney Act 2014 (Vic), where section 4(2) states that a “person is presumed to have decision making capacity unless there is evidence to the contrary”, and section 5 requires that in assessing capacity, a person “must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision making capacity can be assessed most accurately.”

Proposal 5–5

State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by the person’s failure to comply with their obligations under the relevant Act.

Similar provisions were enacted in Victoria in the *Powers of Attorney Act 2014 (Vic)* section 77, where both VCAT and the Supreme Court have jurisdiction to order compensation to a principal for “loss caused by the attorney contravening any provision of the Act.” At the present time there have been few decisions made by VCAT under this section, and VCAT has determined the application of section 77 is not retrospective and a claim for compensation will only arise in respect of conduct occurring after 1 September 2015, when the new Powers of Attorney Act commenced operation.

SRV supports Proposal 5–5.

Proposal 5–6

Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be a conflict between the attorneys duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney) unless:

- a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
- b) a tribunal has authorised the transaction before it is entered into.

These provisions have been incorporated in Victoria in the *Powers of Attorney Act 2014 (Vic)* sections 64 and 65, and it is noted that the ALRC has modelled this proposal on the Victorian Legislation.²²

Proposal 5–7

A person should be ineligible to be an enduring attorney if the person:

- a) is an undischarged bankrupt;
- b) is prohibited from acting as a director under the Corporations Act 2001 (Cth);
- c) has been convicted of an offence involving fraud or dishonesty; or
- d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

These provisions have been enacted in Victoria in the *Powers of Attorney Act 2014 (Vic)* section 28, but the restriction detailed in paragraph (b) has been omitted.

Proposal 5–8

Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:

- a) making or revoking the principal’s will;
- b) making or revoking an enduring documents on behalf of the principal;
- c) voting in elections on behalf of the principal
- d) consenting to adoption of a child by the principal;

²² ALRC op. cit. paragraph 5.93

- e) **consenting to marriage or divorce of the principal;**
- f) **consenting to the principal entering into a sexual relationship**

These provisions have been incorporated in Victoria in the *Powers of Attorney Act 2014 (Vic)* section 26. However the Victorian provision is broader than this proposal, and extends to the following situations:

s.26

(e) make or give effect to a decision

(i) about the care and wellbeing of any child of the principal;

(f) to enter into or agree to enter into a surrogacy arrangement within the meaning of the Assisted Reproductive Act 2008 on the principal's behalf; or

(g) consent to the making or discharge of a substitute parentage order within the meaning of the Status of Children Act 1974, on the principal's behalf; or

(h) manage the estate of the principal on the death of the principal; or

(i) consent to an unlawful act.

Proposal 5–9

Enduring attorneys and enduring guardians should be required to keep records. Enduring attorney should keep their own property separate from the property of the principal.

These provisions have been enacted in Victoria in the *Powers of Attorney Act 2014 (Vic)* section 66, which requires an attorney to keep separate records and accounts, and section 69, which requires an attorney to keep the principal's property separate from their own.

Proposal 5–10

State and territory governments should introduce nationally consistent laws, governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers

The harmonisation of laws in Australia in relation to the operation of enduring documents would facilitate an effective nationwide strategy towards overcoming many of the current financial abuses that occur through the appointment of a substitute decision maker. The Law Council of Australia has a National Elder Law and succession Law Committee, which has identified “the uniformity of enduring powers of attorney” as one of the key issues for the committee’s consideration, and are well placed to lobby the various state law societies on this matter. The resolve of State governments to undertake this strategy however will be more critical to success in this area.

SRV supports Proposals 5–6, 5–7, 5–8, 5–9 and 5–10.

Proposal 5–11

The term “representatives” should be used for the substitute decision makers referred to in proposal 5-10 and the enduring instruments under which these arrangements are made should be called “Representative Agreements”

Proposal 5–12

A model Representatives Agreement should be developed to facilitate the making of these arrangements.

Proposal 5–13

Representatives should be required to support and represent the will, preferences and rights of the principal

SRV considers that the proposals advanced by the ALRC in relation to changing the name of substitute decision making appointments from Powers of Attorney to Representative Agreements could lead to a better understanding of the nature appointment, but believes resources and support for the proposals to implement Harmonisation of Laws across the various Australian jurisdictions should be the focus for reform to combat financial elder abuse.

SRV does not consider that a change of name for the legal process establishing substitute decision making would significantly impact or lead to a reduction of financial elder abuse. A change of name could add to confusion and further misunderstanding of the instruments particularly in CALD or other disadvantaged communities.

Chapter 6 – Guardianship and Financial Administration

The legislative regimes currently in place for Guardianship and Financial Administration Orders are the prerogative of States and Territories, and considerable differences currently exist. These inconsistencies in different jurisdictions create disadvantages for the most vulnerable Australians (not only older people) in relation to the operation of the law, and rights and responsibilities. It is noted that the harmonisation of laws across Australia is a difficult reality to achieve, and needs bi-partisan support at both the State and Federal levels for any measure of progress to advance this.

As a practical way to address this issue “the ALRC envisages that the proposed National Plan on elder abuse will provide a platform for the Commonwealth to work with states and territories to develop and implement best practice models, including for guardianship and financial administration.”²³

The Victorian Law Reform Commission undertook a Guardianship consultation in 2011, but this has not yet resulted in the proposed legislative reforms for Victoria. There has also been extensive Law Reform Commission review in other states, however, significant reform is yet to eventuate. As a result of the existing work undertaken by the States and as a consequence of this Elder Abuse inquiry, the ALRC is well positioned to advocate for significant reform.

Proposal 6–1

Newly appointed guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations

SRV has highlighted the need for training throughout this submission, and would support adequate training being made available to financial administrators and guardians, to ensure that they have

²³ ALRC op. cit. p.115.

comprehensive information made available to them on the ramifications and requirements of their appointment as administrator.

It is also important to note that in making an appointment of a guardian or financial administrator for a person, VCAT must have considered the suitability of that person for the role,²⁴ and on this basis it would appear reasonable to assume that an appointed substitute decision maker would have a reasonable propensity to undertake all requirements of the role.

In Victoria, VCAT currently conducts regular monthly Free Information Sessions for New Administrators as well as providing extensive website information and links to the Office of the Public Advocate. It is also critical that the training and published resources be made available in other languages, to support CALD communities, and to ensure that the same level of assistance is available.

Question 6–1

Should information for newly-appointed guardians and financial administrators be provided in the form of:

- a) **compulsory training;**
- b) **training ordered at the discretion of the Tribunal;**
- c) **information given by the Tribunal to satisfy itself that the person has the competency required for the appointment; or**
- d) **other ways?**

In the Submission made by SRV to the Victorian Law Reform Commission regarding Guardianship Consultation – Paper 10, SRV stated: “We also agree with the VLRC that guardians and administrators should be provided with more training and ongoing support to carry out their role. ... Appropriate ... training will result in better decisions by substituted decision makers resulting in fewer applications to VCAT seeking a review of those decisions.”²⁵

However, if training was designated as mandatory, it may have the unintended consequence of discouraging people from seeking appointment to assist another in this role. It would appear that VCAT is in the best position to assess the competence of any person they are assessing as a potential substitute decision maker, and would be in the best position to assess the specific training and information requirements of the person.

Proposal 6–2

Newly-appointed guardians and financial administrators should be required to sign an undertaking to comply with their responsibilities and obligations.

SRV supports the proposal that newly-appointed guardians and financial administrators sign an undertaking that would in effect be similar to the statutory requirements imposed on enduring attorneys under the *Powers of Attorney Act (Vic) 2014*. In Victoria, an enduring attorney signs a “Statement of Acceptance of Appointment”²⁶ to validate the appointment, and verifies that:

- they are eligible for appointment;

²⁴ Refer to Guardianship and Administration Act s.24 and s47, where VCAT must determine whether a person is “suitable to act”.

²⁵ SRV Submission to VLRC Guardianship Consultation op. cit. p. 26.

²⁶ Schedule 1 Powers of Attorney Regulations 2014

- have an understanding of the obligations of the appointment and the consequences for failing to comply with the obligations of the appointment; and
- undertakes to act in accordance with the Act.

There is also a requirement of disclosure if relevant that an enduring attorney disclose if they have previously been convicted of an offence involving dishonesty.

This type of undertaking provides an impetus for a newly appointed enduring attorney to assess the responsibilities of the appointment, and confirm their understanding of the requirements. This would have significant benefits for guardians and financial administrators as well, and provide a means to clarify the extent of the role and parameters for acting on behalf of another.

SRV supports Proposal 6–2.

Question 6–2

In what circumstances, if any, should financial administrators be required to purchase surety bonds?

SRV is not able to comment on the operation of surety bonds, but is aware in many cases of financial abuse by appointed decision makers in which the represented person's assets have been squandered, and cannot be recovered for the purposes of compensation. A surety bond would provide some means of restitution where no other assets are available.

Question 6–3

What is the best way to ensure that a person who is subject to a guardianship or financial administration application is included in this process?

The ALRC has noted that "Tribunals are generally required by statute to consider the views of the person prior to making an order. All Tribunals encourage attendance of the person at the hearing where attendance is possible."²⁷

SRV is aware from case work situations undertaken that Tribunal applications for Guardianship and Administration Orders have proceeded in the absence of the person altogether. In one matter, which involved blatant elder abuse, an application for financial administration was made by a family member seeking to gain financial control of the older person's affairs for their own benefit. The Applicant failed to provide notice of the Application or hearing to the older person. This also highlights that a lack of formal service requirements can be problematic. SRV considers that changing the service requirements for Guardianship and Administration applications could assist in preventing elder abuse. In addition to placing the onus on an applicant to serve the documents on the older person, VCAT should also send documents direct to the person. Proper confirmation of service would then be essential to a matter proceeding.

Additionally, SRV is of the view that VCAT should not be able to make an order for Guardianship and Administration in the absence of the person attending the hearing, except in prescribed situations such as where medical evidence was provided direct to the Tribunal by a doctor, and not through the Applicant. If the person does not attend the hearing, and no medical evidence seeking to excuse the person from attendance has been received, VCAT should then attempt to contact that person by telephone to ascertain their situation, and ensure their preferences are properly considered.

²⁷ ALRC op. cit. p. 125.

SRV has acted in a number of recent matters where an older person has attended the Tribunal hearing, and has attempted to be engaged with the process and address the Member directly. This has been a daunting process for some clients, and there is a common problem with older people being unable to hear all that is discussed in the hearing. Members will generally speak up when requested, but in practice this is difficult to maintain. In several cases, an older person has sought to express their concerns about an Applicant, or clarify their preferences and the Member has not allowed this to occur. SRV would recommend that in all hearings a Member must satisfy themselves with receiving directions from the person about their will and preference if they are able to do so. It is also suggested that this be done informally, with the member meeting personally with the person to provide them with the opportunity to provide input out of the intimidating court room environment.

SRV has also been aware of Applicants seeking Guardianship and Administration orders deliberately attempting to exclude other family members from attending the hearing through providing incomplete or incorrect addresses for them on the application form. This has meant that Notice of the Hearing has not been received, and the applicant can then present themselves at the Tribunal as the only “interested” and “actively involved” family member. The resulting Guardianship and Administration Order made by the Tribunal has in effect then enabled elder abuse to occur.

At present VCAT conducts hearings in a number of hospitals to enable assistance to be provided to older people when most vulnerable. However SRV is concerned that an older person in an acute health crisis should not be subjected to any formal assessment, whether through neuropsychological assessment or a formal VCAT hearing, until they recover or their health stabilises. This would ensure the older person does not lose their autonomy prematurely.

SRV recommends that for a tribunal to make an order for Guardianship or Administration, the older person should be present (unless information explaining the person’s absence is provided by an independent party such as a doctor). Failing this the Tribunal should contact the older person by phone to ascertain their wishes.

Chapter 7 – Banks and Superannuation

SRV’s clients are mostly over the age of 60, and many demonstrate a deficiency in both literacy and financial knowledge. In addition, many clients prefer to undertake their banking face-to-face, and have a preference for using cash, particularly in the payment of bills and accounts. Many clients do not have computer skills or access to the internet, or have the ability to use online services or smart phone apps to undertake their banking. This places older people at an enormous disadvantage, particularly if a family member has taken over their financial arrangements and is using computer access for their banking. A further loss of autonomy occurs through the difficulties experienced by an older client to obtain a hard copy statement of their own account. These can be daunting prospects for those who prefer the traditional method of banking, particularly as banks are rapidly moving away from this form of service.

SRV believes banks must provide a readily available accessible service for older people with paper statements and a face-to-face teller service that does not impose any additional charges on the customer.

Anything less than this should be considered as a form of discrimination, particularly in an environment where internet banking makes the potential for financial abuse more likely.

Financial abuse is complex area, and is often the outcome of ongoing emotional and psychological abuse against an older person by a family member who is abusing a position of trust for their own benefit. Older people become worn down through this process and are often unable to seek assistance or support until after they have lost assets or savings, so the role of banks and financial institutions is critical in the prevention of elder abuse.

SRV recommends that a banking system product be developed as a matter of priority, that could provide an alert to a customer where for example a large withdrawal was sought or a sudden increase in a credit card balance occurs, and this would be more critical if the bank was aware that a third party (whether a nominee or EPOA) had authority to operate the account. These types of protections are currently operative on credit card accounts, and assist account holders in becoming aware of unauthorised transactions.

SRV recommends all banks must provide a readily available accessible service for older people with paper statements and a face-to-face teller service without additional charge.

SRV recommends the development of a banking system that alerts customers when unusual banking activity occurs, particularly when a third party has authority to operate the account.

Proposal 7-1

The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and in appropriate cases, reporting suspected abuse to relevant authorities.

SRV has emphasised the critical need for adequate training across many of the areas that can create the potential for elder abuse to occur. SRV has been aware of financial abuse occurring in banking situations, where clients have sought assistance after family members have forced them to provide money in extremely distressing circumstances. One client was driven to the bank on each pension day, and her daughter waited in the car for her as she was told to withdraw all of her pension in cash. The money was then handed to the daughter and the woman was then driven home. This practice had been going on for some months before the client sought assistance. Another client from a CALD background, who had become dependent on her son, was taken to the bank by him and forced her to sign a withdrawal form he completed for the amount of \$80,000. The son also stood with the client waiting for the money to be provided, and took this direct from the teller. The client was unable to seek assistance in this case, which caused her great distress.

SRV would recommend improved mandatory training for bank staff, particularly those having direct dealings with customers on the mechanics and attributes of elder abuse.²⁸ In addition a publicity campaign to improve community awareness, through advertising or prominently positioned posters in banks and other financial institutions would also be helpful in highlighting the plight of financial abuse. SRV is aware of a double-sided card that is used in American Banks that can be positioned by a teller to ask the customer to signal them if something is amiss and they require assistance.

²⁸ This would form a part of the mandatory protocols suggested previously by SRV and noted in the ALRC Discussion Paper at paragraph 7.13.

The current system is inadequate for older customers, and the ALRC has noted: “Banks and other financial institutions should be required to take reasonable steps to prevent the financial abuse of their customers.”²⁹

Proposal 7–2

The Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their accounts. For example, at least 2 people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

Amendments to the Code of Banking Practice that strengthen safeguards from financial abuse for older customers is critical to reducing the potential for elder abuse to occur. Due to the previously documented inadequacies for substituted decision making and the lack of a register for enduring appointments, the majority of banks prefer to utilise their own internal third party nomination process that enables a third party to operate another’s accounts with a lesser standard of appointment and authorisation. Generally an account holder is able to sign a form to implement this appointment, and there is no advice provided on the ramifications of this, or any requirement on the bank staff to consider whether the person signing the nomination understands the implications or is under pressure from another to undertake this.

SRV considers that this proposal improves the current banking practice – but queries whether banks would be willing to provide advice or independently assess a person’s capacity. This simply adds another layer of paperwork to provide protection to the bank and not a customer, as the customer is unlikely to indicate that they did not understand the scope of the authority.

The requirement that 2 witnesses be involved in the process is a lesser requirement than that contained in the *Powers of Attorney Act 2014 (Vic)*, as there is no onus on the witnesses to assess the person’s understanding or capacity to proceed.

SRV would recommend that a national register for enduring appointments be prioritised, to enable the current reliance by banks on third party nominations to be replaced with more universal acceptance of Enduring Powers of Attorney to conduct banking transactions for the principal.

Question 7–1

Should the Superannuation Industry (supervision) Act 1993 (Cth.) be amended to:

- a) **require all self-managed superannuation funds have a corporate trustee;**
- b) **prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;**
- c) **impose additional compliance obligations on trustees and directors when they are not a member of the fund; and**
- d) **give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?**

SRV has no experience with Superannuation Funds.

²⁹ ALRC op. cit. p.131.

Question 7–2

Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?

SRV has no experience with Superannuation Funds.

Chapter 8 – Family Agreements

SRV endorses and encourages the use of family agreements because significant problems occur for older people when they attempt to rely on verbal discussions. SRV also feels it is critical for older people to overcome their aversion to seeking legal advice so they can make appropriate arrangements for their future. However, there are further aspects to be considered with family agreements.

The ALRC has acknowledged:

A specific type of financial elder abuse of older people has been recognised in the context of family agreements. A “family agreement”, also known as an “assets for care” arrangement, has a number of forms but is typically made between an older person and a family member. The older person transfers title to their property, or proceeds from the sale of their property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing While such arrangements can fulfil a useful social purpose, there can be serious consequences for the older person if the promise of ongoing care is not fulfilled or the relationship otherwise breaks down.³⁰

Whilst this statement is a summary of the circumstances that give rise to what has become a significant form of financial elder abuse, the rationale behind Assets for Care arrangements is not based on fulfilling a “useful social purpose.” Rather, an Assets for Care arrangement is essentially undertaken by an older person facing limited financial options who wishes to maintain their eligibility to continue to receive the Aged Pension, and also address current or perceived future accommodation and support needs. This is an important distinction. The Discussion Paper, in considering Assets for Care arrangements, has not dwelt on the extreme difficulties that can be experienced by older people, including the loss of legal and financial options, where arrangements break down.

Where clients seek assistance from SRV following a loss through financial abuse, a common thread regularly emerges that is expressed as:

I didn’t want a lawyer involved. My son/daughter said everything would be fine, and I trusted him/her.

Generally, in these situations an Assets for Care arrangement has failed, and a client is seeking legal redress and also advocacy support for housing assistance or for other pressing needs.

The existing Australian legal regime is inadequate to protect the rights of older persons entering into property and financial arrangements with family members. Indeed, the status quo virtually

³⁰ ALRC op. cit. p. 145.

guarantees that the older person will be deprived of their property – and financial security – in the event of such arrangement breaking down.³¹

Social security problems

The key driver behind Assets for Care arrangements is the older person's desire to continue to receive the Aged Pension. An older person's principal place of residence is an exempt asset in regards to the pension. However, any sale or transfer of the property creates immediate problems for the older person. Under the "Granny Flat" rules, the Assets for Care arrangement requires that in order to be eligible for the pension, an older person must give up their right to be registered on title as a proprietor, and is only able to hold a "life interest" or right to reside in the property, irrespective of the financial contribution they have made to the acquisition of the property. In essence an older person is required to divest themselves of legal ownership of their property, the "Granny Flat rules assuming that they will transfer 100% of their asset to a family member, and be happy to lose their legal and financial rights. If the older person's requirements change they have lost the ability to recover their capital assets, and as well as causing financial hardship this invariably further fractures family relationships.

SRV considers a key issue in this discussion is that an older person should be allowed to retain equity in "their principal place of residence" and maintain their social security aged pension entitlement. For example, if a house is sold for \$1m and only \$500,000 is needed for the "granny flat", this \$500,000 should not be considered a gift from the older person to their adult child, but an investment in their new principal place of residence. It should therefore be exempt from the assets test. If there was recognition of the money contributed by the older person to the granny flat arrangement, as the person's principal residence, they could retain equity to cover future changes and maintain some level of income. The older person should also be entitled to retain legal ownership of this contribution and be registered on title as a proprietor in proportion to their financial contribution.

Family agreements essentially recognise that the equity in a property previously owned by an older person is translated into the costs for their ongoing care – so there is a sense of exchange where the family member has agreed to look after the parent. However, where the older person retains an independent life and does not need "care" this then becomes a very expensive exchange.

Proposal 8–1

State and territory Tribunals should have jurisdiction to resolve family disputes involving residential property under an "assets for care" arrangement.

SRV has previously outlined the provisions of the co-ownership jurisdiction of VCAT in its Submission to the ALRC Issues Paper 120, questions 27 and 28.

This jurisdiction has provided a cost effective and reasonably fast process in comparison to applications seeking equitable relief through the Supreme Court of Victoria. However, there are difficulties for older people in pursuing claims under informal family agreements, as this jurisdiction was not specifically established for Assets for Care arrangements, and deals with partition proceedings in general.

Evidentiary hurdles

SRV has identified that providing adequate documentation to support an application to VCAT is problematic for many of its clients. Some older people have lost access to relevant financial records that

³¹ Somes, T. & Webb, E. (2015). *Granny Flats and Like Family Accommodation Arrangements – Legal Pitfalls for Families*. University of Western Australia, accessed at <https://toolkit.seniorsrights.org.au/resources/third-national-elder-abuse-conference/> February 2015

are essential to support an application. In other instances where family agreements are based on verbal discussions, there is no consensus on what was actually agreed by the parties, and an older person has great difficulty in verifying their understanding of the “agreement”. This becomes even more difficult where families have been fractured through the dispute, and no independent professional advice was obtained.

In one matter before VCAT, the Respondent family member made accusations about the older person suffering cognitive deterioration, and made an Application for Guardianship and Administration orders in respect of the Applicant in an effort to establish a disability sufficient to obtain an order, as a means of discrediting the claim. The Guardianship and Administration application was dismissed by the Tribunal, but imposed considerable additional trauma on the older person, by delaying the co-ownership proceedings, and imposing unnecessary and intrusive neuropsychological testing on him.

CALD clients also face considerable hurdles in these matters where literacy and a lack of financial experience is an issue. Older people from diverse backgrounds are often unable to read English, and do not receive or retain copies of critical documents.

General Law Principles

*There is a dearth of authority in Victoria concerning the principles that apply in determining claims for the partition of property under Part IV of the Property law Act 1958. In broad terms Part IV permits a co-owner of land or goods to apply for orders in respect of that land or those goods. VCAT has the power to “make any order that it thinks fit to ensure that a just and fair sale or division of land or goods occurs.” (s.228). The Tribunal must order the sale of the land or goods unless it considers it would be more just and fair to order the division of the land or goods (s. 229(1). In *Sherwood v Sherwood* [2013] VCAT 1746 the Tribunal considered and applied general law principles in determining how property should be partitioned. Senior Member Riegler said that “I approach the task at hand having regard to and being informed of the general law, rather than simply imposing some form of instinctive justice.”³²*

As a consequence of this approach it will be critical to revoke the impact of general law principles such as the “presumption of advancement” that can defeat claims made by older people against their adult children where Assets for Care agreements fail.³³ It is also important that other common law principles that work against an older person such as the “presumption of a resulting trust”, and the “onus to prove an intention to create legal relations” are also displaced. Without legislative reform, these presumptions would continue to apply, and work against the older person and by default perpetrate elder abuse. A recent headline in the Queensland newspaper the *Courier Mail* on 12 March 2017 showed a smiling Murray Berghan with the headline – “Parents take ‘sponging son’ to court”. The article went on to state:

A son who “shamelessly sponged” on his elderly parents who lent him and his struggling business more than \$280,000 will never have to pay them back despite being taken to court. A judge found Murray Berghan “cynically abused” his parents generosity but they lost their case because they could not prove they had legally enforceable loan agreements with him.”³⁴

³² Hay, R. (2013) VCAT applies general law principles in property partition under Part IV, accessed at <https://roberthaypropertybarrister.wordpress.com/2013/12/03/vcat-applies-general-law-principles-in-property-partition-under-part-iv/>, 9 December 2013

³³ Reference to this common law presumption was made by SRV in its Submission to the Issues Paper. SRV Submission 120 ALRC Issues Paper on Elder Abuse op. cit. pp. 31–2.

³⁴ Dibben, K. Parents take sponging son to court, in *The Courier Mail*, 12 March 2017.

This case was determined in the District Court of Queensland³⁵ and despite noting that the defendant's evidence to be "self-serving" and that he was "not a credible witness"³⁶ the court determined on the basis of the authority in *Ermogenous v Greek Orthodox Community of SA (Inc.)*³⁷ that "the plaintiffs had not discharged the onus of proving an intention to enter into legally enforceable loan agreements with the defendant."³⁸

These common law presumptions were referred by SRV to the ALRC previously in its submission to the Issues Paper, and have been detailed at length by Justice Connect Seniors Law in its submission to the Victorian Royal Commission on Family Violence.³⁹ Amending the jurisdiction of tribunals to determine matters relating to Family Agreements will not of itself be adequate to overcome issues arising from elder abuse.

SRV recommends the restriction of the operation of general law presumptions through an amendment to Part IV of the Property Law Act 1958 (Vic) (or equivalent in other states) that will require tribunals to consider the financial contributions made by the parties irrespective of the nature of the relationship between them.

Contributions made by all parties

At present there have been a considerable number of decisions in VCAT that have determined the financial contributions made to the acquisition of a property, and the ongoing outgoings to determine whether a party holds an equitable interest such as a constructive or resulting trust or equitable lien.⁴⁰

SRV would recommend that in reviewing the tribunal jurisdiction for Family Agreement disputes, consideration should be given to the broader range of non-financial contributions that are made within families for the care and support needs of other members. This would be analogous to the assessments made in family law property matters.

The difficulty in portraying "older people" as a "category" is that it invariably leads to ageist perceptions and attitudes. Most older people lead independent and diverse lives and are not the "frail aged" who require considerable support and assistance. Where independent older people enter Care for Assets agreements, very little "care" is provided to the older person, in exchange for the considerable "assets" that have been provided to family members. Older people often also contribute significantly to the family unit through providing care for grandchildren and undertaking other essential household matters such as shopping, cooking, cleaning, school pickups and deliveries. Alternatively, this consideration would also apply regarding care needed and provided to an older person, for example, where a daughter stops her paid employment to care for her parents, to her own financial detriment.

Real and personal property

It is important to note that Part IV of the *Property Law Act 1958 (Vic)* applies to "Co-owned Land and Goods", and there is potential for claims to be made in respect of personal chattels and severable fixtures under the Victorian legislation.

³⁵ Berghan & Berghan v Berghan [2017] QDC47 per Everson DCJ

³⁶ Ibid. paragraph 27

³⁷ (2002) 209 CLR 95, 105 [24]

³⁸ Berghan, op. cit. paragraph 29

³⁹ Justice Connect Seniors Law RCFV Submission 2015 SUBM.0566.001.0001

⁴⁰ Mainieri & Comande v Cirillo [2014] VSCA 227

SRV recommends that this definition for co-ownership claims be maintained in any proposed legislative amendment to tribunal jurisdiction, and not limited to “real property”.

These non-financial contributions are considered relevant factors in family law, so should also be part of elder abuse considerations where Care for Assets agreements have broken down.

Question 8–1

How should “family” be defined for the purposes of “assets for care matters”?

The ALRC has suggested that a broad definition for “family” be adopted in issues relating to Family Agreements, so that “*individuals living in non-traditional families should not be excluded.*”⁴¹

SRV considers that in Assets for Care matters, defining “family” is unnecessary. The determination of standing to initiate proceedings should be based on the actual parties to the agreement. The agreement originated from a relationship of trust, which gave rise to the elder abuse occurring. By basing it on the parties to the agreement rather than the relationship of one party to the other would then enable an older person to make an application against a “friend” outside the recognised legal definition of “family” where that person has become the transferee of property, or the beneficiary of the sale proceeds from the older person’s home.

Chapter 9 – Wills

Case study

At times SRV has encountered clients who have revealed the immense pressure to change their Will that has been brought upon them by a family member. Often this will follow an escalation of tensions between adult siblings.

In one case a daughter-in-law took her mother-in-law to her own lawyer without discussing the matter with her prior to the visit, and gave “instructions” to her lawyer of the changes required to her older family member’s Will. The older person was at an enormous disadvantage in this situation, as she had no prior warning of the reasons for visiting an unknown lawyer. She was from a CALD background and had little experience in dealing with lawyers and limited literacy in English, so was placed in a difficult position, and given inadequate legal advice. Her daughter-in-law was at that time her main carer, and provided transport and assistance she relied on. The Will that was produced appointed her daughter-in-law as Executor and also as a beneficiary along with other family members. The older woman was placed under enormous stress through this process and could not voice her concerns or disapproval.

The lawyer should not have accepted instructions in this manner, and it was unclear in retrospect who the actual client was, as the daughter-in-law had paid the lawyer’s account. A lawyer must receive instructions for a Will from the Testator direct, and also be satisfied of the client’s capacity to provide those instructions.

Equally the conduct of any lawyer who undertakes instructions that alter the legal and financial standing of older people through instigating transactions they regard essentially as transactional matters, is seriously in breach of their ethical and professional conduct standards. The lawyer in this case has, by

⁴¹ ALRC op. cit. p. 157.

default, sanctioned elder abuse against an older client. It is also important to note that in considering “elder abuse” in this example, the issue of “harm and distress” to the older person was considerable, and this was also noted in the Discussion Paper.⁴²

After the family relationships subsequently broke down, the older woman revoked this will, and was able to then make another Will in accordance with her own wishes.

Proposal 9–1

The Law Council of Australia, together with state and territory law societies should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:

- a) common risk factors associated with undue influence;**
- b) the importance of taking detailed instructions from the person alone;**
- c) the importance of ensuring that the person understands the nature of the documents and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and**
- d) the need to keep detailed file notes and inquiries regarding previous wills and advance planning documents.**

The ALRC has noted the role lawyers play in “assisting older persons in their estate planning and the instruments that give effect to such plans”⁴³ and the potential this creates for inadvertent elder abuse to occur. However, specific guidelines for lawyers acting in Wills and Estates matters do not currently exist. *The Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015*, does not contain practice stipulations along the lines of those items detailed in Proposal 9–1, nor for example are there practice guidelines for practitioners on these matters from the Law Institute of Victoria. (LIV). The LIV released a detailed “Capacity Guidelines and Toolkit” in December 2015, and this outlines best practice directions for the taking of instructions for wills, and recommends that practitioners take instructions for wills with the client privately away from the input and interference of potential beneficiaries.

The Law Council of Australia “in recognition of Australia’s ageing population and the related growth and demand for elder law legal advice and services, ... has a National Elder Law Committee to respond to the issues of national significance in this growing area of the law”.⁴⁴ At this stage it is not clear whether this Committee would recommend the introduction of specific practice guidelines for practitioners, but the Committee has identified “issues relating to elder abuse including capacity issues, undue influence, entering into guarantees and reverse mortgages in the interests of others, and misuses of influence by carers”⁴⁵ as critical issues for consideration.

Despite a national recognition of the need for review by the legal profession in Australia, there is also a disappointing history in terms of national implementation of reforms. For example the Legal Profession Uniform Law received extensive consideration by Law Societies around Australia, yet has only been introduced in Victoria and New South Wales at this stage. The matter could be better implemented through Continuing Professional Development courses for practitioners.

⁴² Ibid. p. 160.

⁴³ ALRC op. cit. paragraph 9.23

⁴⁴ Law Council Legal Policy Division – National Elder Law Succession Law Committee. Accessed at www.lawcouncil.asn.au

⁴⁵ Ibid.

Proposal 9–2

The witnessing requirements for binding death nominations in the Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should be equivalent to those for wills.

SRV does not have experience in working with clients in the area of binding death nominations, but considers the witnessing requirements for testamentary type documents should be consistent, and would support this proposal.

Proposal 9–3

The Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.

SRV agrees with this proposal and suggests that this be linked to Proposal 5–8.

Chapter 10 – Social Security

Centrelink is positioned front and centre in its ability to initiate and influence key elder abuse prevention strategies. As Centrelink holds considerable financial control in the lives of older people it must proactively respond to the growing issue of financial elder abuse. The ALRC has identified that Centrelink is a “primary site for the detection and prevention of elder abuse, especially financial abuse”⁴⁶ as 80 per cent of older people received the Aged Pension in 2012. From client case work SRV has identified a number of areas of concern in relation to social security issues for older people experiencing elder abuse.

Proposal 10–1

The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.

The ALRC has documented three areas of concern in the Discussion Paper where “social security laws and legal frameworks can intersect with older persons experiencing, or at risk of abuse.”⁴⁷

Nominee arrangement

The Discussion Paper has highlighted that two types of nominees can be appointed by an older person in receipt of Centrelink benefits, namely a Payment Nominee and a Correspondence Nominee (which can be the same person).⁴⁸ However, there appears to be a level of ignorance about the ramifications of nominee arrangements that can seriously disadvantage older people susceptible to financial elder abuse. The arrangement is often adopted from a convenience perspective, to overcome health and mobility issues, or because of an inability to read English and deal with various notification requirements. The appointment of a nominee should provide peace of mind to those in need of assistance, but some significant issues can arise for older people including the increased potential for financial abuse to occur.

⁴⁶ ALRC, op. cit. p. 174.

⁴⁷ Ibid.

⁴⁸ Ibid.

In situations where a correspondence nominee has been appointed, all correspondence goes to the nominee from Centrelink, and if the nominee does not forward this information to the older person (principal), or discuss it with them, the older person may have no knowledge of various requirements. This could be critical information for the principal to know about and could lead to problems which affect the principal rather than the nominee. Some nominees advise Centrelink that the principal has “dementia” or “comprehension” or “language problems” as a strategy to stop Centrelink contacting the principal, and this can result in no further consideration or independent evidence being sought by Centrelink in relation to the position of the principal.

A serious problem can arise where the payment nominee has the older person’s pension paid directly into their own account, as in practice this exposes the principal to the greatest risk of financial abuse. The statutory requirements on the nominee in this payment arrangement are detailed in paragraph 10.13 of the Discussion Paper, but SRV is aware that some nominees apply the payments for their own benefit, the principal may not fully understand this, and if the principal did know and confronted the nominee the nominee is likely to deny wrongdoing. An example of one instance of this abuse has been provided in the SRV Case Study detailed at paragraph 10.15 of the Discussion Paper.

SRV has identified that nominee arrangements can disadvantage older people, and expose them to risk of financial abuse. It is critical that the older person understands the nature and consequences of the nomination, and also that the nominee be held to account for the actions taken and money received on behalf of the principal. At present there are no safeguards to ensure this.

SRV recommends that the nominee arrangements be implemented on the same basis as enduring appointments, requiring confirmation of the capacity and understanding of the principal, and an acceptance of the appointment and undertaking by the nominee to comply with all legal requirements.

Carer payment

SRV has identified cases where the carer payment system is abused by recipients, and considers that this system should have regular review by Centrelink. In particular, SRV believes that principals must have the opportunity to confirm that the level of care is required, and is in fact being provided by the person receiving the payment. This review would require both independent medical assessment as well as information from the principal about their circumstances, without input or pressure from the carer. This review could also be an opportunity for the older person to speak with an independent person or engage directly with Centrelink, so that if any abuse was identified, the Centrelink staff member could then make a comprehensive assessment of the older person’s circumstances.

SRV is also aware that in any review process, checks and balances are required, but it is critical that there be a means to require regular and independent review. From the carer’s perspective as well, it would be important to ensure that the system is not excessively burdensome, or act a deterrent to prevent family members being willing to take on a role as carer. The focus in any review would need to focus on the needs of the older person and the extent of care required and to ensure that matches what is actually provided.

Gifting rules

“In social security terms, ‘gifting’ means to give away assets for less than their market value. Centrelink gifting rules aim to limit the potential for individuals to divest themselves of assets or funds to gain income support, including the Age Pension.”⁴⁹

SRV has previously informed the ALRC of its concerns for Centrelink’s application of the gifting rules in the face of elder abuse⁵⁰, and through the Assets for Care (or Granny Flat) rules.⁵¹ Older people are particularly anxious to retain receipt of the Aged Pension, which is generally their only source of income. Any changes to eligibility creates confusion and anxiety, particularly in situations where they may have been coerced into “helping” a family member or changing ownership of assets without adequate or any financial or legal advice. The gifting rules operate in a particularly restrictive manner: while an older person continues to occupy their “family home” there are generally few issues. However, problems occur once a significant life-changing event occurs, such as the death of a partner, or serious health issues, that require or force the older person to change their living arrangements. Few older people consider the current pension consequences where they are under serious stress, and fail to appreciate that their change of circumstances may in fact result in the loss of their property assets and a significant reduction in pension entitlements.

There is also considerable uncertainty as to the status of the interest that an older person can hold in a granny flat. This occurs as a result of the difference between a “right to reside” and a “life interest”. SRV has raised its concerns to the ALRC about this aspect of the operation of the granny flat rule in its Submission to the Issues Paper Question 10, in which SRV highlighted current problems, including a failure to utilise the current protections that do exist in Victoria in relation to registering life interests on title.

SRV recommends that the Granny Flat rule be overhauled, to enable older people to retain legal ownership of a property they occupy as their principal place of residence in proportion to the financial contribution they have made.

Proposal 10–2

Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

SRV believes that Centrelink should speak or deal with the older person direct – but in practice, SRV has been advised that many clients find it enormously difficult to engage with Centrelink on any level. Telephone calls involve long wait times, and visits to the Centrelink office also pose difficulties and delays. Older people with health or mobility issues do not wish to queue for periods and can be confused by the reporting requirements or the information that is provided to them. There is also a preference to undertake online communication that isolates older people further, as many do not have any computer literacy or skills. In many ways the lack of an easily accessible service drives people to appoint nominees as a means to avoid this process.

⁴⁹ ALRC op. cit. p. 181.

⁵⁰ ALRC op. cit. p. 182.

⁵¹ See ALRC op. cit. Chapter 8 – Family Agreements

Proposal 10–3

Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.

Refer to SRV's recommendations in relation to changes to the Nominee arrangements detailed in 10.1.

Proposal 10–4

Centrelink staff should be trained further to identify and respond to elder abuse

SRV has identified that training issues across the board is a key message for any review of issues pertaining to elder abuse. As the peak organisation dealing with older person's financial affairs, Centrelink must undertake a rigorous training program for Centrelink staff dealing with older people. It is critical that the risk of financial abuse is properly understood by staff, and if necessary additional resources are deployed to introduce a user-friendly and more accessible service to all older people.

SRV recommends that adequate resources be applied to ensure comprehensive and relevant training is provided to all Centrelink staff to prevent, identify and address elder abuse.

Chapter 11 – Aged Care

As elder abuse that occurs within an aged care setting and is perpetrated by professional staff does not fall under the remit of Seniors Rights Victoria, the organisation does not have extensive experience in this area. Elder abuse in this context is sometimes regarded as a "failure of care" of the provider or professional misconduct, and is primarily addressed through the Commonwealth Government and the Aged Care Act 1997. However, there are aspects of elder abuse and mistreatment of older people receiving community and residential aged care that SRV has some experience with.

As mentioned earlier in this submission, all people working with older people – including through residential and community aged care services – should receive training in identifying and responding to elder abuse in line with the older person's wishes. In recent years residential aged care service providers have increased their reliance on less-skilled personal care attendants and decreased the number of nurses employed.⁵² Most organisations require personal care attendants to be enrolled in a Certificate III of Aged Care. While National Guidelines indicate this qualification should take one to two years to complete, many organisations offer it in fewer than fifteen weeks. This short timeline is indicative of the low quality of training, with few safeguards for assessment that many workers receive, which can have negative consequences for the people receiving care.

It is noted that a Senate Inquiry into the future of Australia's aged care sector workforce is currently underway with the Senate Community Affairs References Committee due to report on 28 April 2017. It is hoped that this inquiry may be an opportunity to lift standards of care and training in the aged care sector.

⁵² King, D. et. al. (2013) *The Aged Care Workforce 2012*, National Institute of Labour Studies, Flinders University for Department of Health and Ageing, Canberra.

Proposal 11–1, 11–2 and 11–3

Aged care legislation should establish a reportable incidents scheme.

SRV supports the establishment of a reportable incidents scheme and a broadening of what should be reported. It is hoped that requiring providers to complete a full investigation and response will address personal experiences of assault and also allow for systemic change in aged care settings.

SRV supports the removal of the exemption regarding the reporting of incidents by a person with a pre-diagnosed cognitive impairment.

Proposal 11–4 to 11–6

Employment screening.

SRV has no experience in this area.

Proposal 11–7

The Aged Care Act 1997 (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used: (a) when necessary to prevent physical harm; (b) to the extent necessary to prevent the harm; (c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and (d) as prescribed in a person’s behaviour management plan.

SRV considers the use of restrictive practices a human rights issue. Casework with clients has demonstrated that there are sometimes situations an older person’s wishes are not considered and they are deprived of the ability to leave a residential care facility due to improper use of an Enduring Power of Attorney. On multiple occasions it has been shown that aged care providers operate on the belief that an Attorney (even a financial one) can make decisions about lifestyle and give ‘permission’ for the older person to do things such as leave the facility at will. This is an issue with Attorneys intentionally misusing their powers, or believing they have the ability to restrict the person’s movements – rather than understanding that their role is purely for legal and financial matters, and that they are required to act in accordance with the wishes and preferences of the older person. It is also an issue with aged care providers enabling this behaviour by seeking the authority of the Attorney, and following through on instructions provided by the Attorney for matters they should have no hand in.

In other situations SRV advocates and lawyers who have been contacted by an older person residing in an aged care facility have had difficulty meeting with their client as aged care managers restrict access to residents. When SRV staff visit an older person aged care staff sometimes ask whether the person’s Attorney is aware of the visit. This creates issues around maintaining the older person’s privacy, particularly as the older person may be seeking advice regarding the role and behaviour of the Attorney. In these situations the aged care service is restricting the older person’s right to seek legal or financial advice and assistance.

Proposal 11–8

Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

SRV supports this proposal and believes no aged care provider should be able to require that a care recipient has appointed a decision maker.

Proposal 11–9

Community visitors scheme

SRV supports this proposal to provide policies and procedures for community visitors to follow if they have concern about elder abuse. As stated elsewhere in this submission, SRV believe that training about elder abuse should be required of all those working with older people, including on a volunteer basis.

Proposal 11–10 and 11–11

Official visitors scheme

SRV support the proposal for an official visitors scheme, as this increases the opportunity for people residing in residential aged care to access independent information and advocacy.