

# OUT OF THE SHADOWS: A DISCUSSION ON LAW REFORM FOR THE PREVENTION OF FINANCIAL ABUSE OF OLDER PEOPLE

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## *A Introduction*

Financial abuse of older people too often lives “in the shadows, hidden by fear and shame”.<sup>1</sup> This and the protective love between family members can screen changes that are critical to an older person’s financial and living arrangements. Rather than a single event, it is usually a series of well-intentioned but ill-considered financial acts, which at some point tips over into abuse interwoven with an intricate web of family relationships. Was a transfer of title or a loan to an adult child really misappropriation? Has thoughtlessness become undue influence or even theft?

Seniors’ support agencies find that older people call for help *after* they have transferred money or property in the expectation of future housing and care from a younger family member. By then the money has usually gone, relationships have been destroyed and serious issues of health and homelessness have arisen. These situations are preventable and this is core to Seniors Rights Victoria’s legal education project – the prevention of financial abuse of older people in situations where assets have been transferred in exchange for care.

This paper is the third of three publications produced for this project.<sup>2</sup> The previous two were *Assets for Care: a guide for lawyers to assist clients at risk of financial abuse* and a guide for older people, *Care for your Assets: money, ageing and family relationships*.<sup>3</sup>

Each of these publications reflects the experience and knowledge of Seniors Rights Victoria and the service’s rights-based, preventive approach. Prevention of financial abuse helps avoid deep personal anguish and can lessen the burden on services that respond to elder abuse.

An examination of current law and its effectiveness together with discussion of and recommendations for law and policy reform, relevant to ‘assets for care’ scenarios, are this paper’s focus. Although some reform approaches are worthwhile, many shortcomings are systemic and cannot be dealt with through law reform alone, particularly given people’s reluctance to seek legal recourse for these complex and intensely personal family issues.

## *B Legal context*

Families are too readily entering into informal, oral, agreements that involve asset transfers. These agreements “exist beneath both the legal and the law maker’s radar” and contract law “does not adequately address the inherent power differential between parties to domestic agreements such as

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<sup>1</sup> McCormally, K, Protect Yourself, Loved Ones From Financial Abuse of the Elderly in *Kiplinger Personal Finance Magazine*, November 2011.

<sup>2</sup> This project was funded by a grant from the Legal Services Board Victoria.

<sup>3</sup> Available from [www.seniorsrights.org.au](http://www.seniorsrights.org.au)

informal family accommodation agreements".<sup>4</sup> The equitable doctrines of unconscionability and undue influence, although designed to overcome unfair transactions, are of limited application in the context of the type of unequal relationships that can lead to failed 'assets for care' situations.

Not only are there personal, emotional and financial complexities in these situations, the legal environment is also complicated by the following factors:

- Planning for future income and old age;
- Longevity;
- Substitute decision-making issues;
- The accommodation options market<sup>5</sup>
- Involvement of several significant areas of the law including powers of attorney and care and accommodation arrangements.<sup>6</sup>

### 1 *Law's limitations and a proactive response - the role of law*

In acknowledging the law's complexity, it is important to also consider its limitations, in the context of the prevention of financial abuse of older people.

Older people who have suffered abuse or who are at risk of financial abuse are generally reluctant to seek legal assistance.<sup>7</sup> This reluctance may be due to perceptions of what lawyers can or cannot do for them, the cost of legal services or a desire to maintain a family relationship, however flawed. The time it takes to conduct a legal action is also significant for older people.

In a relationship in which one person is likely to want to give and the other is likely to feel an entitlement to receive, how can the law identify improper transactions?<sup>8</sup>

As it stands now, the jurisdiction for legal redress .. involves largely civil actions in the Supreme Court of Western Australia. The legal costs are notably quite high and anecdotal statements from lawyers who practice in this jurisdiction have advised us that this remedy is in reality only available to the very rich and/or to companies with access to considerable funds. We are in full agreement with this assessment and have witnessed many cases where older people have lost their family home or life savings with no chance for redress. ..<sup>9</sup>

The Australian Government Inquiry, *Older People and the Law*, tells us that there are no commonwealth or state laws specifically aimed at addressing abuse of older people.<sup>10</sup> This same

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<sup>4</sup> Herd, B., 'The Family Agreement: A collision between love and the law?' (2002), 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/06.html>> at 15 July 2009, 74-77.

<sup>5</sup> Tilse, C., Setterlund, D., Wilson, J., Herd, B., Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice in (2002) 1 *Elder Law Review* 34.

<sup>6</sup> The Victorian Law Reform Commission report stated that reform was necessary to reduce the complexity of laws in this area. Victorian Law Reform Commission, *Guardianship* Final report 24, Melbourne, January 2012.

<sup>7</sup> Many barriers affect older people. These barriers include ignorance of support agencies, social isolation, fear of consequences etc. which prevent them from identifying their situation as one of 'abuse' and accessing assistance.

<sup>8</sup> Hall, M. I., *Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable* in Doron, I (ed), *Theories on Law and Ageing: the Jurisprudence of Elder Law*, Springer Publication, 2008, quoting Dessin (2000), 117.

<sup>9</sup> Johnson, S., *Elder Abuse: The Need for Law Reform: Enduring Powers of Attorney and Family Agreements*, Northern Suburbs Community Legal Centre Inc., 2010, paper prepared for the Attorney General WA, 25.

<sup>10</sup> *Ibid.*

report states that a purely legal remedy is not effective or acceptable as people, for example, are unwilling to take action against a family member.<sup>11</sup>

The Victorian government's submission to this inquiry recognised people's reluctance to take preventive action in the form of advance care and property agreements and stated that most of the issues regarding financial abuse will be alleviated through education and research and growth in awareness of legal rights.

It is unrealistic, therefore, to expect older people to use the law. Even to expect family members to seek advice and information prior to making agreements is fraught with complexity and it is hard for family members to discuss such matters.<sup>12</sup>

Problems may be best resolved another way even if actionable legal issues are available. Older people are likely to also have medical and social issues because

.. financial abuse is almost always accompanied by emotional abuse and research suggests that older abused people can be supported to make far-reaching decisions to overcome the abuse if they receive a response from professionals that addresses the whole problem<sup>13</sup>. .. An effective practice, therefore, is to build relationships with other professionals and relevant referral agencies to provide support in areas outside your legal expertise.<sup>14</sup>

Legal solutions are frequently found to be ill-suited for situations of abuse of older people and legislative reform, such as mandatory reporting, is not seen as a major priority by writers such as Naughtin<sup>15</sup> and Moskowitz<sup>16</sup>. Rather, the systemic nature of the problem is appreciated and the need for a broader policy approach that is both preventive and protective.

Are new legal measures required at all? Do we really just need to enforce current laws better? Could we, for example, use behaviour-based disinheritance law to prevent an unworthy family member from profiting from their abusive conduct towards the deceased? Notions of unworthy heir are contained in other jurisdictions and Hamilton argues that Australia should learn from their experience and use law as an educative tool.<sup>17, 18</sup>

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<sup>11</sup> The Older People and the Law report stated that a purely legal remedy was not effective or acceptable, para. 2.67. Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, September, Canberra, 2007.

<sup>12</sup> Moskowitz, S., *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, (2003) 36 *Loyola LA Rev.* 589.

<sup>13</sup> Cripps et al. 2002, referred to in Kyle, *Assets for Care: a guide for lawyers to assist older clients at risk of financial abuse*, Seniors Rights Victoria, 2012, 6. Cripps also suggested that clients might benefit from a mediation service or from a referral to a service provider who can attend to broader social or health issues affecting the client and spend more time with them.

<sup>14</sup> Kyle, above n 11, 6.

<sup>15</sup> Naughtin, G. M., *Regulating the Risks of Elder Abuse in Australia: The Changing Nature of Government Responses*, Doctor of Philosophy thesis, University of Melbourne, 2007, 260.

<sup>16</sup> Moskowitz, S., above, n 10, 655.

<sup>17</sup> Hamilton, B, Be Nice to your Parents: or else! in [2006] 4 *Elder Law Review* 8, 12. Moskowitz also considers the value of legislation for the promotion of desirable social conduct. See Moskowitz, above n 10, 656.

<sup>18</sup> Gooda, M, paper presented to *AAG Elder Abuse and Neglect Conference*, Alice Springs, 5 September 2012. Addressing elder abuse and neglect in Indigenous Australian communities, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, said to first name it and thus raise awareness of its existence as it is "our responsibility to ensure our elders are treated respectfully, with dignity and cared for ..". The government's role includes ensuring law and

The development of the common law that provides more appropriate legal remedies for this type of elder abuse may be the means by which the legal system effects change. Hull recommends litigation strategies to develop the law, for example, fiduciary duties, could be construed more broadly so that in effect the trusted person is held to a higher standard, so that any gift to the fiduciary as agent, shifts the burden to the agent to establish the fairness of the gift and its accordance with powers granted.<sup>19</sup>

Should we perhaps legislate for a filial obligation as exists in overseas jurisdictions that compels adult children to provide a measure of support in certain circumstances, as do a number of Canadian jurisdictions and the California Family Code?<sup>20</sup> Comparable Australian legislation is the *Queensland Criminal Code 1899* (s. 285) which places a duty on persons having charge of another who is “unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life ..”.<sup>21</sup> Each of these examples, however, has the limitation of not directly dealing with financial abuse. Additionally, filial support legislation has been rarely used due to a number of reasons including parents’ reluctance to take action. Some, however, consider this fertile ground for future litigation with government seeking to recover its costs of aged care and given a growing population of older people with quality of life expectations.<sup>22</sup>

## 2 Framework or principles

The Law Commission of Ontario recently proposed the creation of a principles-based framework to apply when policy or legislation is being considered where older adults might be affected or involved.<sup>23</sup>

This principle or framework approach was argued by Seniors Rights Victoria in their submission to the Victorian Law Reform Commission’s recent review of guardianship law.

The clear articulation of the importance of respecting the human rights of those with impaired decision-making capacity, and helping them to assert those rights, is an important step forward for Victoria’s guardianship laws. Seniors Rights Victoria believes that the human rights framework can help to empower older people and should inform the development and interpretation of the new laws.<sup>24</sup>

## 3 Tension between rights and protection

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policy promotes healthy relationships and we “need to hold each other accountable” to behaviour that harms our older people.

<sup>19</sup> Hull, K.G., Broken Trust: Pursuing remedies for victims of elder financial abuse by agents under power of attorney in September- October 2008, Vol 42 nos. 5-6, *Clearinghouse Review: Journal of Poverty Law and Policy*, 223.

<sup>20</sup> CAL.FAM CODE § 4400 (West 1994).

<sup>21</sup> Brian Herd made a submission to the House of Representatives Standing Committee, on this point. 2007: Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, 4. The Committee’s recommendation that further research be done on this matter was not supported in the government’s response.

<sup>22</sup> Doron, I. and Soden, A.M., *Beyond Elder Law: New Directions in Law and Ageing*, Springer Publications, New York, 120.

<sup>23</sup> Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice*, Final report, April 2012.

<sup>24</sup> Seniors Rights Victoria Submission to Victorian Law Reform Commission Guardianship review, above, n 6, 2011, 8.

The tension between protection and respecting rights of self-determination and autonomy is widely acknowledged.<sup>25</sup> Consequently any reform proposals need to avoid the counter productivity of measures that discourage family members from assisting older people, such as greater accountability for donees acting on powers of attorney.

Ageist attitudes are arguably being promoted rather than challenged if a narrow legal protection approach is taken. The mandatory reporting laws in the United States, for example, are not sufficiently weighted towards preventive strategies which maximize participation, self-determination and autonomy.<sup>26</sup>

Hall questions the need for special laws for older people.

The very idea of “law and ageing” as a discrete category of legal principle and theory is controversial: how and why are “older adults” or seniors” or “elders” (the terminology is itself fraught with difficulties) a discrete and distinct group for whom “special” legal thought and treatment is justified?<sup>27</sup>

Some see this as “inherently paternalistic, internalizing ageist presumptions through the suggestion that older persons per se are, like children, especially in need of protection of the law.” The artificial category of “older adults” can submerge more meaningful group distinctions such as disability, gender, race, poverty.<sup>28</sup>

Burns, writing on *Regulating Intergenerationally Transmitted Debt*, refers to the need to avoid any inference that old age equates with infirmity and vulnerability while also recognizing that the special vulnerabilities of older people are not attended to, due to the law’s presumption of autonomy and independent judgement.<sup>29</sup>

Yet a purely autonomous, rights-based approach has obvious limitations. What of the many factors that constrain an older person from exercising their rights such as fear of or actual social isolation; fear of losing autonomy and lack of mobility. Some older people may reject support services because they worry that accepting help indicates vulnerability and an inevitable slide towards loss of independent living. This rejection of services can jeopardize their own health and safety. A rigid rights approach and a failure to accept our interdependence may mean interventions into what are often seen as private ‘family matters’ do not occur when needed.<sup>30</sup>

And, although many family members may be guilty of nothing other than over-protectiveness, there are cases where “abuser psycho-pathology is significant”<sup>31</sup> and undue influence or worse is the reality. Naughtin thinks it optimistic to believe that empowerment and prevention strategies will lead us to self-directed action (such as family agreements – see later discussion p. 6). A focus on

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<sup>25</sup> Nerenberg, L., Developing a Service Response to Elder Abuse in *Summer (2000) Vol 24. No. 2, Generations 86, 91*; Hall, M. I. above, n 8, 119.

<sup>26</sup> Law Commission Ontario, above no 23.

<sup>27</sup> Hall, above, n 8, 107.

<sup>28</sup> *ibid*

<sup>29</sup> Burns, above, n 28, 305.

<sup>30</sup> Nerenberg, above n 27, 90.

<sup>31</sup> Naughtin, above, n 13, 229.

freedom of choice does not give due consideration to the complexities of family relationships and communication and too great a focus is given to representation rather than support.<sup>32</sup>

British Columbia has abuse and neglect legislation<sup>33</sup> which incorporates the approach of valuing autonomy, but by prioritising the protection of autonomy, it is “editing out the .. social and personal vulnerability of older adults”.<sup>34</sup> Hall recognises that the legislature is trying to situate vulnerability within a theory of law without “replicating ageist presumptions” and to protect autonomy but argues that this can be done more effectively via the conceptual framework of equitable fraud (see discussion on undue influence p. 16).

Powers of Attorney arrangements demonstrate this tension well. The privacy and relative informality and ease by which they can be arranged leaves them open to abuse<sup>35</sup>. Arguably then, greater legal protections are required (see p. 14).

#### 4 *Lawyers and understanding*

The production of Seniors Rights Victoria’s lawyers’ guide on financial abuse of older people, *Assets for Care*, involved a lengthy process of literature review and extensive consultation with legal and other advocates. Lawyers are not as aware as they need to be about the prevalence of this kind of abuse, how to detect it, what their role is or how best to respond.

Seniors Rights Victoria is concerned, for example, that some legal practitioners think it acceptable to act for the family when an older family member is considering changing their living and financial arrangements, including future care. A legal practitioner needs to decide who their client is and decline to act for family members to avoid a conflict of interest.

Lawyers’ lack of awareness about signs and risk factors can lead to inappropriate responses. This can be exacerbated where there is insufficient knowledge about why people enter into improvident transactions and the reasons they remain silent about abuse. Lawyers have been found to be negligent in cases where they have not properly advised clients, and dispositions have been set aside in cases of undue influence or unconscionability because a lawyer’s advice was inadequate.<sup>36</sup>

Legal practitioners’ duties to provide comprehensive and independent advice and to ensure their older client fully understands their situation is complicated by the need to look out for undue influence and unconscionability. Interviewing and communication skills are always important but with older people there might be particular things to be aware of such as an older client’s level of anxiety, other health issues, hearing and vision issues, not to mention language and cultural factors and ageist assumptions. Client capacity is always something a lawyer needs to be alert to but with older people can require particular caution. Not all lawyers are aware, for example, that decision-making capacity is a legal construct and not a medical or healthcare construct.<sup>37</sup>

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<sup>32</sup> Ibid, 287.

<sup>33</sup> *Adult Guardianship Act (Part Three RSBC 1996, c. 6)*

<sup>34</sup> Hall, above, n 8, 108.

<sup>35</sup> Tilse et al., above, n 5.

<sup>36</sup> Kyle, above n 11, 6.

<sup>37</sup> The Seniors Rights Victoria lawyers’ guide, *Assets for Care*, covers all these matters in detail.

Costs can be an issue due to the time it can take with older people on these matters. Lawyers need to have a greater knowledge of service agency referrals and facilitate access.<sup>38</sup> They can be unwilling to take on cases due to this issue of time in addition to other factors such as the difficulty of proving undue influence and the inadequacies of the law regarding powers of attorney.<sup>39</sup>

Various writers have recognized that members of the judicial system need training to increase their awareness of the dynamics of financial abuse. Rabiner et al, for example, recommends multidisciplinary training for judges, court personnel, prosecutors, law enforcement officers, victim advocates and so on

to ensure awareness of approaches to prevention, identification and intervention.<sup>40</sup>

Many writers confirm the approach taken with *Assets for Care* in recognizing that lawyers are well positioned to identify and respond to the potential financial abuse of the elderly.<sup>41</sup>

The lawyer may be in a position to facilitate an interdisciplinary network of professional advisers, which may include a social worker, financial adviser, general practitioner, or community nurse. Lawyers need to be sure of their professional boundaries but also be able to identify issues outside of their own field in order to refer appropriately.<sup>42</sup>

### Recommendations

*Further steps need to be taken to advance lawyers' knowledge and understanding of financial abuse of older people.*

*Suggestions that arose from lawyers themselves when interviewed as part of the evaluation of Assets for Care include:*

- *Involve **lawyers' professional indemnity agency, lawyers' professional and training bodies** to promote the issue and assist educating practitioners.*
- *The **Law Institute of Victoria, Victoria Legal Aid, the Federation of Community Legal Centres, Leo Cussen Institute and the College of Law** to promote and provide professional education on financial abuse of older people including knowledge of service agencies that support older people.*

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<sup>38</sup> Tilse et al., above n 5, 10.

<sup>39</sup> Bonnie, R. J. and Wallace, R. B. (eds), *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America*, National Academy of Science, National Academies Press, Washington, 2003, 423.

<sup>40</sup> Rabiner, D. J., Brown, D., O'Keeffe, J., *Financial Exploitation of Older Persons: Policy issues and Recommendations for Addressing them in 2004 16:1 Journal of Elder Abuse and Neglect*, 65, 81.

<sup>41</sup> Lawyers need to be .. "sensitive to the potential for financial abuse when drawing up powers of attorney or other legal documents (Podnieks, 1992) .. and proactively advise clients to limit the authority granted when establishing a power of attorney (Zimka, 1997). In addition it has been suggested that steps be implemented to monitor an agent's activity by requiring an annual reporting to an outside party of the financial transactions undertaken, including a listing of income and expenses (Zimka, 1997). Another avenue is to encourage attorneys to ensure that older persons who sign financial and legal documents are fully competent to do so (Moskowitz, 1998a; Smith, 199) and have not been coerced by family members or others into inappropriately disposing of their assets (Smith, 199). Also it has been recommended that lawyers inform their older clients of their fundamental right to assert control and personal decision-making and explain to them the consequences of various legal actions (Moskowitz, 1998a), Bonnie, above n 42, 433.

<sup>42</sup> Herd, above n 4, 77.

- *The Law Institute of Victoria to develop 'Elder Law' as a practice specialty.*
- *Training in 'elder abuse' should be a requirement of lawyers' CPD and be included in **legal practical training** for law graduates prior to admission to practice:*
- *Webinars are an effective form of professional development and should be provided by **Victoria Legal Aid** and the **Law Institute of Victoria**. Case study discussions to develop practice skills need to be included.*
- *Seniors Rights Victoria can provide guidance for the development and delivery of these programs. Additional funding and resources to Seniors Rights Victoria to undertake this role.*

### *C Family agreements*

Family agreements typically involve a transfer of an older person's property (usually the home) or other assets to a trusted family member in exchange for a promise of long-term care and support. The problem with most agreements, and a reason they frequently fail despite original good intentions, is that they are usually made orally and without any legal advice or detail as to their terms, and without all the relevant issues being canvassed and agreed.<sup>43</sup>

Seniors Rights Victoria experience agrees that these agreements are "not inherently a form of financial abuse or exploitation". In fact, making this kind of association about an exchange of assets for care may discourage older people from getting advice as it infers that one would only need to obtain advice and formalise an agreement if one were in negotiation with an abuser. People tend to trust their family and feel that seeking advice indicates a level of suspicion which if communicated would hurt feelings and harm relationships.<sup>44</sup>

The problem with informal arrangements (or private care agreements) is that there is nothing to show for the assets that may have been transferred. Further, where an undocumented agreement to transfer assets in exchange for care has failed, the resulting trust which could be argued to exist is complicated by equity law presuming an 'advancement' (gift) of the assets when parent and child are involved. The older parent thus needs to demonstrate that no gift was intended.<sup>45</sup>

Written family agreements can be a preventive measure and can reduce the risk of assets transfers 'going wrong'. Properly drafted family agreements are clearly written and are the end point in a process where family members take time to consider a long list of important matters. Independent legal and financial advice should be obtained by all parties and agreements should be properly witnessed. Even if an agreement is never drafted, the mere fact that family members have got together and discussed matters (such as what care will be provided, whether the older person can bring pets with them when they move or have a separate telephone connection) can avoid future conflict.

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<sup>43</sup> See Hall, M. I., *Care for Life: Private Care Agreements Between older Adults and Friends or Family Members (2003) 2 Elder Law Review 24.*

<sup>44</sup> Hall, M. I., *Care agreements: property in exchange for the promise of care for life, Reform Issue 81 Spring 2002, Australian Law Reform Commission, 9.*

<sup>45</sup> Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How well does the law in Queensland cope?* Queensland, June 2010.

A practical and realistic suggestion was made by a lawyer interviewed for the Seniors Rights Victoria project evaluation in relation to a comprehensive, draft family agreement.

.. in practice the client found it intimidating and was concerned that it undermined the trusting relationship that existed between the parties. .. I think what people would prefer is a very short document that distils the crux of the agreement, no more than two pages.

### *1 Mediation and family agreements*

Family members are likely to have very different and strongly felt points of view. Mediation or dispute settlement services can help parties to negotiate a family agreement. The Dispute Settlement Centre of Victoria, for example, has been working closely with Seniors Rights Victoria to develop their service to facilitate family meetings for older people and their families who want to discuss future financial and living arrangements. Even if legal documents have already been signed, the centre can help family members talk to one another about the best future arrangements. The Centre is well aware of issues relating to power differentials and that parties generally need to obtain legal and other advice before negotiations can begin or continue.

If family agreements were to become more regulated then there is a concern that this could drive some arrangement-making between families underground. Mediation services may need to ramp up their informal negotiation and mediation services to families to help cater for this.<sup>46</sup> This could require special training for mediators in 'elder law' issues and sensitivity to a similar set of complexities that arise in family violence such as the guilt, shame, fear and denial commonly felt by those subject to abuse.

### *2 Regulation of family agreements*

There is currently no legislation governing or regulating family agreements. The *Older People and the Law* inquiry report recommended a review of the law to entertain greater protection including

investigation into whether formalisation, registration or mechanisms to enable the courts to dissolve Family Agreements are warranted .. . . the Government Response to this was favourable, namely that it was Accepted in Principal".<sup>47</sup>

A West Australian community legal centre has also expressed their concern that too many older people have lost their lifesavings and/or family home due to abuse of informal family agreements. In their paper to the West Australian Attorney General, the lack of specific legislative regulation of

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<sup>46</sup> All financial service providers that are members of the Financial Ombudsman Service (FOS) or the Credit Ombudsman Service Limited (COSL) are required to have an internal dispute resolution procedure for handling customer complaints. If a consumer is not happy with the response received they can contact FOS or COSL for free mediation or conciliation processes.

<sup>47</sup> Johnson above n 9, 25 referring to Recommendation 30 of the *Older People and the Law* inquiry (*supra* note 14). The inquiry approved of legislation that would enable the courts to dissolve family agreements and grant appropriate relief to the parties involved as do the provisions proposed by the British Columbia Law Institute. (British Columbia Law Institute, *Private Care Agreements Between Older Adults and Friends or Family Members*, BCLI Report No. 18, March 2002). Currently the *Family Law Act 1975* enables the Family Court to take account of the interests of older people who are parties to family agreements in property settlement proceedings (s 92). The inquiry suggests there may be a need for a specific mechanism to assist in the equitable resolution of family agreement disputes (*Older People and the Law* report, 2007, 147).

family agreements is stated to be a “systemic barrier to justice for older people”; an “affordable and accessible means of redress is desperately needed” for elder abuse prevention.<sup>48</sup>

The Queensland Law Society report also recognises that this lack of “appropriate legislative regulation schemes or accessible means of acquiring redress in cases of abuse .. leads to injustices ..”<sup>49</sup> They suggest placing family agreements on the same footing as financial agreements under the Family Law Act.

Brian Herd takes this suggestion further paper asking the government to recognise

the economic benefit of delegating this important function to the family and then seeking to encourage it by giving, for example, financial incentives to the family to assume the caring role. One of the downsides of Family Agreements is that there are, potentially, significant income tax and social security implications in the transfer of assets or payment of compensation from a parent to an adult child in return for care. In order to encourage such arrangements, however, the Government may very well see the benefits of discounting these implications and providing incentives by way of tax benefits to family members willing to take on this responsibility.<sup>50</sup>

### Recommendations

*Agreements between parties involving asset exchange for ongoing care need to be given greater legitimacy and protection.*

**The Federal Attorney-General** to investigate mechanisms for the formalisation and registration of family agreements and possible government incentives to encourage families to negotiate these arrangements as was agreed to in the federal government response to the *Older People and the Law* report (Government response to *Older People and the Law* report, tabled 26 November 2009).<sup>51</sup>

**The Victorian Attorney General** to ensure the Dispute Settlement Centre of Victoria is appropriately resourced to provide dispute resolution services for family members to assist them in negotiating family agreements and to assist those in dispute over family agreements. Government resources will be saved through the avoidance and resolution of such disputes.

### D Financial and banking institutions’ role and responsibilities

Financial institutions need to become more engaged in the detection and reporting of financial abuse.<sup>52</sup>

Although they are well placed to recognize and report it, Australian banking and financial institutions are not statutorily required to report suspicions of financial abuse. This leaves openings for the financial exploitation of older people.

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<sup>48</sup> Johnson, above n 9, 25-26.

<sup>49</sup> Queensland Law Society, above n 48.

<sup>50</sup> Herd *supra* note 4, 11-12.

<sup>51</sup> <http://www.ag.gov.au/Documents/GovernmentResponseToOlderPeopleandtheLaw.pdf>, accessed 11<sup>th</sup> December 2012. This report made a recommendation for the Australian Government to propose that the Standing Committee of State Attorneys general investigate the regulation of family agreements.

<sup>52</sup> Naughtin *supra* note 13, 310; Banking and Financial Services Ombudsman, *Bulletin No. 56, Banking and Finance – Financial Abuse of the Vulnerable Older Person*, Dec 2007.

The lack of reporting requirements can be attributed to:

- Lack of uniform monitoring protocols;
- Reluctance to allocate resources for detection;
- Concerns about confidentiality and privacy;
- Desire not to become involved.<sup>53</sup>

A Queensland Law Society paper suggests that a common law duty may require bank officers, for example, to report 'elder' abuse where such is observed or suspected<sup>54</sup>; questions whether abuse be reportable on a voluntary or mandatory basis<sup>55</sup> and recommends co-operative voluntary initiatives (see United States initiatives below).

The challenges faced by the banking and financial services sector are canvassed in a Loddon Campaspe Community Legal Centre (LCCLC) report. Although banks can assume they are dealing with honest people unless there are contrary indications, they are not entitled to "turn a blind eye to known facts that indicate a serious possibility that a customer is being defrauded."<sup>56</sup> In recognition of the relationship between banker and customer being essentially contractual, express contractual terms could be inserted to both promote the detection and/or prevention of abuse as well as reduce a bank's exposure to legal liability.

Other options offered in this report are:

- incorporation of a term allowing a bank to delay the execution of a client's mandate thus giving the bank time to contact the older person (customer) to verify the transaction.<sup>57</sup>
- Educating customers about risks, assistance available and what a bank can do.
- Educating staff on how to identify abuse and on resources available to assist.

This suggestion of training is supported elsewhere such as Bonnie et al,<sup>58</sup> the Massachusetts Bank Reporting Project back in 1997 that has led to enhanced cooperation<sup>59</sup> and New Zealand writers,

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<sup>53</sup> Queensland Law Society, above n 48, 13.

<sup>54</sup> Ibid.

<sup>55</sup> Over 40 jurisdictions have mandatory reporting in the USA. See Hamilton, B., Be Nice to your Parents: or else! in [2006] 4 *Elder Law Review* 8.2006: p?. Israel and South Africa also have mandatory reporting although its effectiveness is questioned (Davey et al., *Financial Abuse of Older People in New Zealand – a working paper*, Institute of Policy Studies, Victoria University of Wellington and Age Concern New Zealand, November, 2011, at p. 15. An American Bar Association paper concludes that mandatory reporting alone does not result in a significant increase in reporting by banks. Efforts are "better directed at securing the cooperation of the banking industry than toward attempting to enact a mandatory reporting law" as banks are usually willing to participate in a project but to oppose mandatory reporting, Hughes, S. L., Can Bankers Tell? – Legal Issues Relating to Banks Reporting Financial Abuse of the Elderly, American Bar Association, 2003.

<sup>56</sup> Loddon Campaspe Community Legal Centre, *Responding to the financial abuse of older people: Understanding the challenges faced by the banking and financial services sector*, August 2008, 37.

<sup>57</sup> Black suggests a similar preventive practice which could also increase the likelihood of early detection – copies of trading records and account statements to be sent to an independent third party by financial institutions. Black, J. A., The Not-So-Golden Years: Power of Attorney, Elder Abuse, And Why Our Laws Are Failing A Vulnerable Population, in [2008] 82 *St John's Law Review*, 289, 310.

<sup>58</sup> Bonnie et al, above n 42.

<sup>59</sup> The Massachusetts Bank Reporting project is a partnership between state government and the banking industry (not just an arrangement with an individual bank). The idea is to educate bank employees and consumers and increase voluntary co-operation among the financial industry, elder protective services and law enforcement; and "encourage the banking industry to develop and promote methods of protecting customers

Davey et al., to help staff recognise abuse and understand the profile of a vulnerable customer.<sup>60</sup> These writers also refer to the Banking and Financial Services Ombudsman (BFSO) bulletin which lists 'red flags' to help staff recognise when financial abuse may be occurring<sup>61</sup>.

The Alzheimer's Society in the United Kingdom agrees that more can be done by banks to be more familiar with the signs and symptoms of dementia; increase understanding of powers of attorney; and empower employees to be able to alert relevant authorities when abuse is suspected.<sup>62</sup>

Banks and financial institutions' reluctance to become involved in family financial disputes is in large part due to concerns for confidentiality and other legal and ethical responsibilities.<sup>63</sup> One suggestion is to look to the model provided by banks' credit card liability and monitoring – a combination of prior client written consent to monitor accounts, voluntary reporting and immunity provisions.

The American Bar Association has determined that there are no major legal obstacles to participation in bank reporting projects: banks have no reason to fear liability under federal law.<sup>64</sup>

The Australian Privacy Commissioner has offered guidance on the interpretation of Australia's Privacy Act 1988 with regard to banks' disclosure. In their view the Act provides a framework for the disclosure of personal information for the purposes of reporting the financial abuse of older persons. It is not their role to judge whether unlawful activity is occurring but they are required to have a reason to suspect that such unlawful activity is occurring. The National Privacy Principles "provide sufficient exceptions permitting banks and other financial organisations to use or disclose personal information where they suspect financial abuse of older persons". They infer there is no need for new law. The answer instead lies in greater understanding and awareness and the development procedures, training and acceptance of responsibility by a senior person.<sup>65</sup>

The Older People and the Law report recommended the development of protocols to deal with privacy issues.<sup>66</sup> Rather than the current piece-meal, State by State response, a uniform approach is proposed.<sup>67</sup>

### 1 Action taken overseas

Overseas' efforts to deal with financial abuse of older people include California's compulsory reporting for banks and in Saskatchewan people can 'authorise' their bank to monitor their

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and their assets". The Massachusetts Bank Reporting Project: an edge against elder financial exploitation, Price, G and Fox, C, *Journal of Elder Abuse and Neglect*, 8:4, 59-71, 59.

<sup>60</sup> Davey et al, above n 57, 16.

<sup>61</sup> Banking and Financial Services Ombudsman, *supra*, note 54. Available at

[http://www.fos.org.au/centric/home\\_page/publications/bulletins/banking\\_finance\\_bulletins.jsp](http://www.fos.org.au/centric/home_page/publications/bulletins/banking_finance_bulletins.jsp)

<sup>62</sup> Alzheimer's Society, *Short Changed: Protecting people with dementia from financial abuse*, United Kingdom, December, 2011.

<sup>63</sup> Davey et al, above n 57, 16.

<sup>64</sup> American Bar Association above n 57.

<sup>65</sup> Solomon, S, Director, Policy, Office of the Privacy Commissioner. Letter to Phil Grano, Principal Legal Officer, Office of the Public Advocate, containing policy advice regarding financial abuse of older persons and disclosure by banks, 21 May 2010.

<sup>66</sup> Commonwealth of Australia, *supra* note 14, paras 2.105-107;2.111.

<sup>67</sup> This call for uniform approach is matched by calls for the harmonisation of laws around Australia regarding Powers of Attorney and guardianship law to reduce the opportunities for abuse and catch it earlier.

accounts.<sup>68</sup> If consumers can empower their professional advisers, such as their accountant, lawyer or bank manager, to declare in writing that they can talk to each other where financial abuse is suspected, this can nullify privacy legislation that can sometimes “be exploited to muzzle professionals from sharing their suspicions of POA abuse.”<sup>69</sup> In the United States advance directives are used that “specifically permit banks to notify account holders and other named parties of activity that is inconsistent with the account holders’ usual banking patterns”.<sup>70</sup> Fraud prevention programs have also been developed with the banks.

Demonstrating a successful model of inter-agency collaboration, Philadelphia Adult Protective Services established a fraud prevention program with a local bank. The Director of Protective Services, after approaching the bank, learnt that the bank’s major concern was customer privacy and the potential for litigation for breach of privacy. Discussions regarding jurisdiction removed this impediment.<sup>71</sup> In the training that followed staff expressed relief to have a protocol in place to deal with cases, where before they were frustrated by banking practices that prevented them from acting when they knew something was amiss. Since this programmes’ inception, Philadelphia has convened a Financial Exploitation Prevention taskforce headed by the Philadelphia Corporation for Ageing, including district attorney, police department, financial institutions and legal service providers<sup>72</sup>.

### Recommendations

*Seniors Rights Victoria endorses the Loddon Campaspe Community Legal Centre report<sup>73</sup> recommendations which include:*

- ***Australian Bankers’ Association Incorporated*** to amend the banking code requiring banks to implement appropriate training for all staff of a financial institution to learn about factors such as signs of abuse (for example unusual internet account activity), vulnerability, protocols to deal with abuse and a better understanding of POAs and administration orders.
- ***Australian Bankers’ Association Incorporated*** to work with Seniors Rights Victoria to develop new protocols.
- ***The federal government*** needs to amend privacy legislation to protect financial institutions from actions such as defamation or breach of contract or confidentiality in the event of them reporting suspected abuse in good faith.
- ***State and federal governments*** to resource dispute resolution services to expand their services to assist in the resolution of financial disputes between family members;
- ***State and federal governments*** to resource an agency with responsibility for the monitoring of abuse, to develop solutions to combat abuse and to provide a focal point to address the issue;

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<sup>68</sup> Commonwealth of Australia, *supra* note 14, para 2.102.

<sup>69</sup> Gotlieb, R., Stealing from Mom and Dad, in (2011) Vol 124, Issue 27, *Maclean’s*.

<sup>70</sup> Bonnie and Wallace, *supra* note 42, quoting Tom, 433.

<sup>71</sup> Snyder, J., Strategies for Banks to Protect Elderly Clients from Themselves and Others, *Summer, 2012, Vol. 36. No. 2, Generations: Journal of the American Society on Aging*, 98, 99.

<sup>72</sup> Snyder, above, n 73, 100.

<sup>73</sup> Loddon Campaspe Community Legal Centre, above n 58.

- **State and federal governments** to increase funding to community legal centres so that there is greater access to legal services for older people and so that further educational materials can be produced.
- Specific funding from the **Victorian government** to Seniors Rights Victoria to train other community legal centre lawyers and advocates in how best to respond to financial abuse.

### E Guardianship and Administration

.. the goal of guardianship legislation should be for the represented person to continue to live the life that they would have lived and for decisions to be made as they would have been made by the person but for their incapacity. Key means of achieving this goal include provision for supported decision making by older people, greater participation of older Victorians in guardianship proceedings, increased accountability of substitute decisions makers and improved community education.<sup>74</sup>

Guardianship and Administration is intended to safeguard the assets of impaired older persons but too often these substitute decision making mechanisms are providing a means for exploitation. The law requires simplification to assist in the safeguarding of older people's rights and to promote the understanding and responsibility of people providing decision making assistance. The need to maximise participation and promote dignity, self-determination and autonomy has been recognised by a report of the Victorian Law Reform Commission (VLRC).<sup>75</sup>

If, for example, preference was given to personal appointments of supporters and decision makers rather than tribunal or automatic appointments, this would be a more respectful and less intrusive means to maximise an older person's independence.

The VLRC report also proposes that:

- Principles guide the interpretation of new legislation so that people are enabled to take reasonable risks and make choices that others may disagree with. Limitations on decision making rights should be justified, reasonable and proportionate.<sup>76</sup>
- A more realistic and flexible view of capacity that accommodates for changing levels of capacity. New supported decision making and co-decision-making arrangements are suggested and capacity assessment principles that are decision and time specific.<sup>77</sup>

The report recognises the need to balance autonomy and protection. Also to be balanced is the need to avoid discouraging people from accepting decision making responsibilities by placing onerous burdens upon them, with the need to make guardians and administrators more accountable and to encourage good practice.<sup>78</sup> Failure in getting this balance right can result in people being appointed

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<sup>74</sup> Seniors Rights Victoria submission to Victorian Law Reform Commission, review of Guardianship, June 2011 at, 4-5.

<sup>75</sup> Victorian Law Reform Commission review of Guardianship, Jan 2012. Seniors Rights Victoria agrees that rather than drastic and protective and intrusive guardianship and/or administration orders, measures that are more respectful and less intrusive on an older person's independence are welcomed.

<sup>76</sup> The reference to principles for interpretation of legislation and capacity assessment are similar to the framework approach of the Ontario Law Commission recommendations referred to above n 23.

<sup>77</sup> A person, for example, may be quite capable of making decisions about where they live and who can visit them but not to make decisions about their finances. Some people's capacity is better in the early part of the day.

<sup>78</sup> Dr. Chris Atmore, presentation at Victorian Legal Assistance Forum at Victoria Legal Aid, 19 July 2012.

who are not sufficiently reliable or trustworthy or who do not have the requisite skills. On the other hand, if guardianship and administration is too restrictive of an older person's rights, or the duties too onerous, the negative stigma associated with the arrangement makes it an unattractive alternative.<sup>79</sup>

The review proposes, for example, for appointments and decision making arrangements to be registered to improve accountability. A proposal for periodic reporting is, however, considered to be unnecessary and likely to deter people from assuming the role.

Instead, we propose a system of education and statutory declarations of compliance coupled with random audits. Private guardians would be required to undertake training in relation to their role and lodge an annual declaration that they have complied with their responsibilities. A body such as OPA would then be charged with conducting random audits of decisions made by a sample of private guardians each year. VCAT should also have the power to order the repayment of misused funds and to impose penalties for misuse of powers.<sup>80</sup>

The Victorian Civil and Administrative Tribunal (VCAT) is currently limited in the remedies it offers with parties having to seek expensive and complex actions to the Supreme Court for alleged abuse of powers. The review recommends a more 'one stop shop' situation offering simpler and cheaper remedies and better access to legal representation. The lack of accessible review arrangements to challenge orders was raised in a submission to the review and is an ongoing concern to Seniors Rights Victoria.<sup>81</sup>

Other significant review proposals include:

- a new civil penalty – a new public wrong for a person with responsibility to care for a person with impaired decision making capacity regarding the abuse, neglect or exploitation of that person.
- Expanded role for the Office of the Public Advocate including investigatory powers.<sup>82</sup>

### Recommendations

*The Victorian state government needs to:*

- *Introduce mandatory training for private administrators to improve their understanding of their role and responsibilities and require an annual statutory declaration of compliance.*

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<sup>79</sup> Bonnie and Wallace, above n 42, 429.

<sup>80</sup> Seniors Rights Victoria submission to guardianship review, June 2011, 6.

<sup>81</sup> Victorian Equal Opportunity and Human Rights Commission submission to Victorian Law Reform Commission Review of Guardianship, June 2011.

<sup>82</sup> Recommendations for similar reforms to law and policy were made in a paper by Rabiner et al recognising that United States courts were not resourced to review the qualifications and responsibilities of guardians nor to assure their powers are not abused. They suggested:

- Pre-appointment safeguards such as background checks;
- Posting bonds to guarantee adherence to fiduciary responsibilities
- Mandatory and enforced annual reporting requirements
- States to designate a single office of fiduciary services to provide services for families and professionals and assure oversight of guardians etc. Rabiner et al, above n 43, 80.

- *Enable random audits of administrators by better resourcing Office of the Public Advocate or State Trustees or a new independent statutory body.*
- *Enhance the role of VCAT to facilitate challenges to administration arrangements, make orders for repayment and impose penalties.*
- *Ensure there is better access to legal representation for older people.*
- *Ensure VCAT members are provided with the necessary training to upgrade their skills to deal with expanded powers and responsibilities.*

#### F Human Rights

Elder abuse is a human rights issue. If not for ageism and discriminatory attitudes towards and assumptions about older people, much of this abuse would not occur and more adequate mechanisms would be available to prevent and redress its occurrence.

The Universal Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights” (Article 1). Age does not diminish this equality. Older people, however, are not explicitly recognised under international human rights laws.

Although human rights law is not particularly effective in dealing with private relationships between family members, the principles contained such as the right to self-determination, to participation and to privacy can provide meaningful context for decision-makers when matters that affect the rights of older persons are under consideration.

For example, Justice Vickery drew on the *United Nations Convention on the Rights of People with a Disability* in formulating a more flexible test for testamentary incapacity due to undue influence in the case of *Nicholson v Knaggs [2009] VSC 64*.<sup>83</sup> Vickery’s decision reflects the shift in approach to persons with disabilities as people with rights rather than “objects of social protection”.<sup>84</sup>

The *Victorian Charter of Human Rights and Responsibilities Act (2006)* has encouraged a “rights culture” in Victoria and a greater recognition of civil and political rights<sup>85</sup>. Many submissions to the 2011 review of the Charter recognised it as a powerful education tool and one which has led to greater government accountability and a legitimisation of advocacy work such as that of Seniors Rights Victoria and Council on the Ageing.<sup>86</sup>

Seniors Rights Victoria raised *Charter* principles to argue for the provision of a welfare organisation’s services to a client denied such services: equality before the law, the right not to be treated in an inhumane and degrading manner and the right to privacy.

Seniors Rights Victoria believes the recognition of older people’s rights is paramount and is in accord with the *United Nations Principles for Older Persons* which include:

- Independence

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<sup>83</sup> McCallum R, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections*, Legal Studies Research Paper, No. 10/30, March 2012, University of Sydney Law School.

<sup>84</sup> *Nicholson v Knaggs [2009] VSC 64*, Vickery J at para 13.

<sup>85</sup> Office of the Public Advocate submission to the Scrutiny of Acts and Regulations Committee review of the Victorian Charter of Human Rights and Responsibilities Act, June 2011, 6.

<sup>86</sup> Council on the Ageing (COTA) submission to the Scrutiny of Acts and Regulations Committee review of the Victorian Charter of Human Rights and Responsibilities Act, June 2011, 3.

- Participation
- Care
- Self-fulfillment
- Dignity.

Human rights imposes an obligation to ensure older people are protected from poverty through the provision of social security income which can be threatened by financial abuse, for example, where an older person's Centrelink nominee abuses their powers and accesses a bank account or takes a payment for themselves. (See Centrelink discussion on p. 17).

A number of organisations around the world, including community legal centres, are working towards the creation of a United Nations Convention on the rights of older persons. This campaign is supported by the Honourable Susan Ryan, Australia's Age Discrimination Commissioner.

Meanwhile, the efforts of people and organisations in education about human rights, is an important contribution to the prevention of financial abuse of older people. The National Association of Community Legal Centres, for example, publishes a checklist for guardians in *How guardians can protect, respect and promote human rights*.

#### Recommendations

*The Australian Government to support the entrenchment of the United Nations Principles for Older Persons as an enforceable convention on the rights of older persons.*

*The **Victorian government** to support the Victorian Human Rights and Equal Opportunity Commission in its role to support older people's rights through education and awareness- raising programs to challenge ageism and promote awareness of the Victorian Charter.*

#### G Powers of Attorney

Financial elder abuse happens in the grey area between thoughtless practice and outright theft.<sup>87</sup> It is the same with abuse of powers of attorney.

In line with Seniors Rights Victoria experience, that too often legal action commences after abuse has occurred, the Queensland Law Society identified that "one of the main limitations of .. the current substitute decision making regime is that it is responsive rather than preventive. A need for reform is indicated by the ease with which these arrangements can be misused "especially in circumstances where the older person lives an isolated life" or has a "limited support network".<sup>88</sup>

Yet for enduring powers of attorney (EPOAs) to operate successfully they depend on "trusted" persons and "reasonable" decisions being made by these trusted persons<sup>89</sup>.

The Older People and the Law report discusses accountability mechanisms in addition to a statutory requirement that EPOAs be executed with advice from a solicitor. It also pinpointed the lack of a

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<sup>87</sup> Kyle, 2012, *supra*, note 11, 7.

<sup>88</sup> Queensland Law Society, above, n. 48, 13.

<sup>89</sup> Johnson, *supra* note 9, 7.

national registration system for powers of attorney.<sup>90</sup> The view that uniform legislation and mutual recognition is necessary is widely shared (for example, the Victorian Parliamentary Law Reform Committee<sup>91</sup>). Registration may add to the costs but is also likely to reduce the administrative and financial burden on service and support agencies such as the Office of the Public Advocate. Education about the usage and limitations of EPOAs should be part of any new reforms.<sup>92</sup>

Seniors Rights Victoria supports the introduction of a mandatory online registration system for EPOAs as it 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. Seniors Rights Victoria considers that a donor should be able to specify in the POA that certain people or regulatory authorities be notified when a power is activated but this should not be mandatory.<sup>93</sup>, <sup>94</sup>

Hardy agrees that there be notification requirements so that, for example, people connected with the principal be notified when an attorney commences to act.<sup>95</sup> Similarly, a “specific oversight clause” could be incorporated in POA documents. Such clauses could, for example state that the principal’s bank accounts be held solely in the principal’s name thus prohibiting the POA from having the authority to go to the principal’s bank to have his/her name added jointly. The clause could also specify the records to be kept and the third parties to whom records should be sent.<sup>96</sup>

Canadian research considers a system of oversight of POA would be too expensive. A simpler strategy is suggested whereby a clause is placed in the POA document stipulating the involvement of a financial adviser (if they are willing and in good standing). In this way the older person retains a sense of control and a check is in place against a self-serving POA. This is far more effective in a preventive sense than taking legal action after the event.<sup>97</sup>

Preventive strategies can be more effective and practical than legislative protections introduced elsewhere. The Californian legislature, for example, introduced greater protection for POA donors into its Probate Code by “enhancing the liability of an attorney-in-fact who breaches (their) duties to the principal ..”.<sup>98</sup> Breach can lead to an attorney being charged interest for any loss or depreciation in the value of property, or for any profit made through the breach or any profit that would have

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<sup>90</sup> Seniors Rights Victoria recommends that any state register introduced be capable of being adapted to a national register.

<sup>91</sup> Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney, 2009.

<sup>92</sup> Clare, M., Black Blundell, B., and Clare, J., *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data*, Crime Research Centre, University of Western Australia, April 2011, 7.

<sup>93</sup> Seniors Rights Victoria submission to Victorian Law Reform Commission review of Guardianship, 2011, 14.

<sup>94</sup> *Ibid* at p. 13. Seniors Rights Victoria’s submission draws upon the experiences in Tasmania, the United Kingdom and Scotland and endorses the Tasmanian practice of free registration of enduring guardians. As in England and Wales, mandatory registration of powers of attorney for both personal and financial matters should be required.

<sup>95</sup> Hardy, S., Protecting the rights of your elder client’s interests in transactions and setting aside transactions, paper presented at *Legalwise Seminar*, Melbourne, March, 2011.

<sup>96</sup> Black, J. A., The Not-So-Golden Years: Power of Attorney, Elder Abuse, And Why Our laws Are Failing A Vulnerable Population, in [2008] *82 St John’s Law Review*, p. 289, 310.

<sup>97</sup> Gotlieb, above n 71.

<sup>98</sup> Deaver, E., Chapter 48: Protecting Vulnerable Adults from Predatory Power of Attorney Practices in (2010-2011) *42 Mc George L. Rev.* 677, 680.

accrued to the Principal.<sup>99</sup> Given that most attorneys carry out their duties faithfully, Deaver offers a cautionary note stating that it is not desired for this reform to discourage people from using them or discouraging people from taking on these responsibilities.<sup>100</sup>

A New Zealand paper, based on experience, confirms this cautionary note. An amendment to their *Protection of Personal Property Rights Act 1988* in 2007 to require a donor and nominee to seek independent legal advice was intended to strengthen witnessing and other requirements, but the increased costs and bother of doing so only discouraged people from making EPOAs.<sup>101</sup>

### Recommendations

*The Federal Attorney General to encourage state and territory Attorneys-General to implement uniform legislation on POAs; a national registration system for POAs and mandatory registration of EPOAs as agreed to in the government response to the Older People and the Law report.*

*The Victorian government to introduce POA safeguards including:*

- *annual declarations of compliance;*
- *random audits.*

*The Law Institute of Victoria to enhance lawyer education regarding POAs to encourage careful drafting of clauses to incorporate safeguards such as a clause regarding notification when a POA is activated.*

### H Presumption of Advancement - Presumption of Trust

Where an informal agreement to transfer assets in exchange for care has failed and no legal title equivalent to their contribution was given, equity law can presume that the transfer was intended to be a gift (presumption of advancement). Demonstrating the necessary evidence of contrary intention to rebut this presumption can be a major obstacle for an older person.

Barkehall Thomas discusses the inconsistent treatment afforded voluntary transfers of land (of the assets for care variety) compared to the situation where a parent pays the purchase price for land put in a child's name. In the former, the applicable legal remedies are the difficult doctrines of undue influence or unconscionability, whereas the latter can more easily argue a resulting trust. Her proposal is for voluntary transfers of property from a parent to an **adult** child to be treated as raising a presumption of trust in the parent's favour, as in Canadian law<sup>102</sup>.

The law in Canada is reflected in the judgement in the case of *Pecore v Pecore* [2007] 279 DLR (4<sup>th</sup>) 513.

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<sup>99</sup> Ibid. 681.

<sup>100</sup> The Californian legislature has tried to provide protection without destroying the "usefulness and attractiveness" of POA arrangements by providing that a court release an attorney from liability where they acted in good faith, Deaver, *ibid.* 685.

<sup>101</sup> Davey et al above n 57.

<sup>102</sup> Although the presumption (of trust) appears weak and courts look for evidence of actual intention. See Barkehall Thomas, S., Parent to Child Transfers: Gift or resulting trust? in (2010) 18 APLJ 75.

.. voluntary transfers of land and payment of purchase price both give rise to the presumption of resulting trust and the presumption of advancement no longer applies in relation to transfers from parents to adult children (The court held that the presumption of gift between parents and children should be confined to between parents and **minor** children).

The reasons for thus restricting the presumption were given in *Pecore*.

.. it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs.<sup>103</sup>

It has been contended that the *Pecore* principal could be argued in cases where the presumption of advancement may be rebutted if the evidence indicates that the purpose of the transfer by an elderly parent was to assist the parent and not the child and hence, there would need to be actual evidence of an intended gift.<sup>104</sup>

Barkehall Thomas concludes that it may be best for reform to be conducted by parliament rather than the courts, given changes in society, social norms and family relationships which underscore the need for reforms. She also indicates other advantages to this proposal for a presumption of trust:

- Parents wishing to make gifts will need to seek legal advice if they are wishing to make a gift to adult children as they will need to ensure they can demonstrate 'donative intent'. A possible outcome is for formalised family agreements to become more prevalent.
- Gifts as part of an illegal purpose will be harder to carry out. For example, divesting oneself of property in order to avoid paying a bond for aged care will not escape means testing as the parent will still have a beneficial interest in the property.
- The harmonisation of Australian laws.<sup>105</sup>

### Recommendation

*The Victorian Department of Justice needs to consider legislating for reform to the operation of the common law presumption of advancement to a presumption of trust, where the arrangement is between parents and older children.*

### I Undue Influence

This common law doctrine (in addition to the doctrine of unconscionability) is designed to achieve fairness in transactions by providing remedies to overcome the effect of an unfair transaction.<sup>106</sup> Yet

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<sup>103</sup> at p. 527, quoted by Barkehall Thomas, above n 6.

<sup>104</sup> Wilson, R., quoted in Nhan, A., Exchanging Assets for Care: a growing trend in Australia, unpublished paper, Seniors Rights Legal Clinic, Public Interest Law Clearinghouse, Melbourne, 2012, 20. Nhan is quoting Wilson, a Melbourne barrister, from his presentation *Elder Abuse – property, accommodation issues affecting older people: caveats and equitable interests in land*, Seniors Rights legal Clinic Workshop, 18 August, 2011.

<sup>105</sup> Barkehall Thomas, above n 103, 12.

<sup>106</sup> Davis, D., Family Agreements, Paper presented at the Elder Abuse Prevention Association Conference, 3 October, 2008, 50.

it is quite difficult to make out a case of undue influence or unconscionable conduct in Australia for the care arrangement scenarios that are the subject of this research.

Some jurisdictions have introduced protective legislation<sup>107</sup> but these add little to the equitable fraud doctrines (undue influence and unconscionability) as it does nothing for what is usually the most significant problem in these scenarios – a “disruptive presence of a family member”; for example, an adult son living with his aged mother or a daughter forcing the hand of her father to sell his home and move in with her. Codifications merely replicate “ageist assumptions that increase social vulnerability” whereas the doctrines provide a model for understanding vulnerability as relational and situational and specific to each individual.<sup>108</sup>

*Vulnerability arises through the power dynamics of the relationship together with factors of dependence and inequality.*<sup>109</sup>

Discussion of the limitations of the doctrine of undue influence in relation to testamentary dispositions are of interest although not directly relevant to ‘assets for care’ scenarios where the interests of the living, testator or not, are the focus. Burns, for example, wants to modify the elements of the rebuttable presumption of undue influence and include evidentiary factors such as relationships and health and susceptibility<sup>110</sup>.

In equity law undue influence can be ‘actual’ or ‘presumed’. Actual undue influence may arise as a result of physical coercion which prevents the exercise of independent judgment. Certain relationships may give rise to an automatic presumption of undue influence, however, a relationship between an older person and their adult child is not one of these. Instead, certain factors need to be shown such as evidence of a strong relationship of trust and a disadvantageous transaction.<sup>111</sup> Consequently, an older person’s age, state of health and vulnerability factors may help raise the presumption as can the closeness of a relationship and opportunities for influence.<sup>112</sup> If the presumption is raised, the other party then needs to show that the transaction was a result of the donor’s independent and informed judgment. The importance of whether an older client initially obtained independent legal advice about the nature and effect of a transaction is thus underlined.

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<sup>107</sup> The state of Maine, for example, has codified a presumption of undue influence which will arise where an elderly dependent person has transferred assets for less than full consideration to a person falling within a set of particular kinds of relationships including family and fiduciary relationships. The transfer may then be set aside unless the older adult was legally represented in the transfer. 33 ME REV STAT ANN (West) § 1022(1)(2001), referred to in Hall, M, *Equitable Fraud: Material Exploitation in Domestic Settings* in [2006] 4 *Elder Law Review* 7, 10.

<sup>108</sup> Hall, M. I., *Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable* in Doron, I (ed), *Theories on Law and Ageing: the Jurisprudence of Elder Law*, Springer Publication, 2008, 109.

<sup>109</sup> *Ibid*, 110.

<sup>110</sup> Burns, F. *Reforming Testamentary Undue Influence in Canadian and English Law* in (2006) 29 *Dalhousie L.J.* 455. Her discussion makes reference to the traditional authority of the case of *Boyse v Rossborough* [1857] 6 HLC 1, which, interestingly, has since been overturned in Victoria by Justice Vickery in *Nicholson v Knaggs* [2009] VSC 64. In this judgement, the *Boyse* principle for applying the standard of proof for undue influence, is replaced with one less difficult to meet. Justice Vickery uses the *Convention on the Rights of Persons with Disabilities* to formulate a more flexible test with the result that “the rules governing testamentary incapacity due to undue influence are sufficiently flexible to protect persons with disabilities and other vulnerable persons from having their testamentary wishes overridden. See McCallum R, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections*, Legal Studies Research Paper, No. 10/30, March 2012, University of Sydney Law School.

<sup>111</sup> Burns, F., *Undue influence, inter vivos and the elderly in Australia*, (2002) 29 *Melbourne University Law Review*, 517.

<sup>112</sup> Kyle, L. above n 11, 46.

## Recommendations

*The significance of relationship and situational elements are most significant in 'assets for care' scenarios, where people frequently enter into unwise financial and living arrangements due to relationship pressures and what is sometimes referred to as 'protective love' factors. This reality needs to be the focus of any consideration of the elements of undue influence doctrine applicable in these cases.*

*Lawyers representing clients and decision-makers in tribunals and courts need to look to human rights frameworks for guidance.*

### *J Social Security (Centrelink)*

'Assets for care' arrangements can lead to older people becoming ineligible for social security payments because they are assessed as though they still own their assets when, in fact, they have been lost through financial abuse.

Centrelink places restrictions on the amount of assets that older people on age pensions can 'gift', for example, no more than \$30,000 over five years. Gifting more than the allowed sum may lead to a reduction in pension entitlement and increased aged care accommodation fees. People can be assessed as having 'gifted' money when they were ignorant of these rules, where they intended it to be a loan, or where they have been exploited. If it is their home, they can be at risk of homelessness; if money, they could be living in poverty. Often it is both.

Contact with Financial Information Service officers (FISOs) has informed us that FISOs frequently receive calls from relatives of older people 'clearly up to no good'. The officers recommend that they not take the action proposed, that they take care to meet their responsibilities to act in the interests of the older person and seek legal advice.<sup>113</sup>

Seniors Rights Victoria would like to work with Centrelink to raise awareness of these situations to try to reduce the sometimes tragic circumstances that arise from the strict application of Centrelink rules.

There are cases of family members collecting their aged relative's Centrelink payments. A family member can arrange to be appointed as their older relative's nominee. The completion of an

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<sup>113</sup> Personal communication with Financial Information Services Officer, 6<sup>th</sup> June, 2011. No statistics are kept of these calls.

authorisation form available from the Centrelink website is all that is needed for a person to act on another's behalf. While in most cases these arrangements work for the benefit of all parties, the community and Centrelink need to be more alert to these arrangements being exploited and of the appropriate action to take when this occurs.

### Recommendations

*The Commonwealth Department of Human Services needs to work with seniors' advocacy agencies in each state to improve the department's response in cases where financial abuse may be evident.*

*The Federal Government needs to resource older person's advocacy agencies, such as Seniors Rights Victoria so that these agencies can work with Centrelink to raise awareness of 'assets for care' financial abuse scenarios and how the strict application of the rules can lead to poverty and homelessness for older people.*

### K Conclusion

There is no one pathway to reform that will reduce the risk and prevalence of financial abuse in 'assets for care' situations. Transferring a home or using assets from its sale to build a 'granny flat' on an adult child's property in exchange for a promise of long term care, is usually an arrangement based on trust. Relationships of a personal and complex nature are the dominant factor in these situations, not legal issues.

It is necessary to bring financial abuse of older people 'out of the shadows'. United Nations recognition via a new convention is important to fight ageism and promote the rights of older people and can have educative outcomes. The crucial role of relationships and the need for support for those constrained by family bonds and isolation, however, means the presumption of autonomy needs to be balanced with protective and preventive measures.

While the Victorian Government's public support for recent reviews of guardianship and powers of attorney is welcome, there is much work to be done to introduce features such as a national registration system of POAs, regulated reporting and audits which will help bring abuse out into the 'light of day'.

Collaborative responses are required. Banking and financial institutions, Centrelink and seniors' advocacy agencies need to work co-operatively to improve responses to cases where financial abuse is evident.

Lawyers not only need to be better at detecting abuse; they need to act more effectively, which, in many cases will require appropriate referral. Informal family agreements, for example, are risky. Ideally all parties need to obtain independent legal and financial advice. The availability of competent mediation services can assist family members to be realistic about their plans and formalise their agreement. The legal system needs to give these agreements greater legitimacy and protection and the government has a role in providing incentives.

Seniors Rights Victoria anticipates a time when equity law is more effective in protecting older people, such as through reform in the operation of the common law presumption of advancement

to a presumption of trust, and when reference to human rights frameworks in decision-making is the norm.

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## Appendix A

### List of recommendations

#### Lawyers and understanding

Further steps need to be taken to advance lawyers' knowledge and understanding of financial abuse of older people.

Suggestions that arose from lawyers themselves when interviewed as part of the evaluation of *Assets for Care* include:

- Involve **lawyers' professional indemnity agency, lawyers' professional and training bodies** to promote the issue and assist educating practitioners.
- The **Law Institute of Victoria, Victoria Legal Aid, the Federation of Community Legal Centres, Leo Cussen Institute and the College of Law** need to promote and provide professional education on financial abuse of older people including knowledge of service agencies that support older people.
- The **Law Institute of Victoria** needs to develop 'Elder Law' as a practice specialty.
- Training in 'elder abuse' should be a requirement of lawyers' CPD and be included in **legal practical training** for law graduates prior to admission to practice:
- Webinars are suggested as an effective form of professional development to be provided by **Victoria Legal Aid** and the **Law Institute of Victoria**. These should include case study discussions to develop practice skills.
- Seniors Rights Victoria can provide guidance for the development and delivery of these programs but will need additional funding and resources to do so.

#### Family agreements

Agreements between parties involving asset exchange for ongoing care need to be given greater legitimacy and protection.

**The Federal Attorney-General** needs to investigate mechanisms for the formalisation and registration of family agreements and possible government incentives to encourage families to negotiate these arrangements as was agreed to in the federal government response to the Older People and the Law report (Government response to Older People and the Law report, tabled 26 November 2009).<sup>1</sup>

The **Victorian Attorney General** needs to ensure the Dispute Settlement Centre of Victoria is appropriately resourced to provide dispute resolution services for family members to assist them in negotiating family agreements and to assist those in dispute over family agreements. Government resources will be saved through the avoidance and resolution of such disputes.

#### Financial and banking institutions role and responsibility

Seniors Rights Victoria endorses the Loddon Campaspe Community Legal Centre report<sup>1</sup> recommendations which include:

- **Australian Bankers' Association Incorporated** to amend the banking code to require banks to implement appropriate training for all staff of a financial institution to learn about factors such as signs of abuse (including recognising unusual internet account activity), vulnerability, protocols to deal with abuse and a better understanding of POAs and administration orders.
- **Australian Bankers' Association Incorporated** to work with Seniors Rights Victoria to develop new protocols.
- The **federal government** needs to amend privacy legislation to protect financial institutions from actions such as defamation or breach of contract or confidentiality in the event of them reporting suspected abuse in good faith.
- **State and federal governments** need to resource dispute resolution services to expand their services to assist in the resolution of financial disputes between family members;
- **State and federal governments** need to resource an agency with responsibility for the monitoring of abuse, developing solutions to combat abuse and to provide a focal point to address the issue;
- **State and federal governments** need to increase funding to community legal centres so that there is greater access to legal services for older people and so that further educational materials can be produced. Specific funding to Seniors Rights Victoria, to train other community legal centre lawyers and advocates in how best to respond to financial abuse, is required.

#### (Guardianship and) Administration

The **Victorian state government** needs to:

- Introduce mandatory training for private administrators to improve their understanding of their role and responsibilities and require an annual statutory declaration of compliance.
- Enable random audits of administrators by better resourcing Office of the Public Advocate or State Trustees or a new independent statutory body.
- Enhance the role of VCAT to facilitate challenges to administration arrangements, make orders for repayment and impose penalties.
- Ensure there is better access to legal representation for older people.
- Ensure VCAT members are provided with training to upgrade their skills to deal with expanded powers and responsibilities.

#### Human rights

The Australian Government needs to support the entrenchment of the United Nations Principles for Older Persons as an enforceable Convention on the rights of older persons.

The **Victorian government** needs to support the Victorian Human Rights and Equal Opportunity Commission in its role to support older people's rights through education and awareness- raising programs to challenge ageism and promote awareness of the Victorian Charter.

#### Powers of Attorney

The **Federal Attorney General** needs to encourage **state and territory Attorneys-General** to implement uniform legislation on POAs; a national registration system for POAs and mandatory

registration of EPOAs as agreed to in the government response to the *Older People and the Law* report.

The **Victorian government** needs to introduce POA safeguards including:

- annual declarations of compliance;
- random audits.

The **Law Institute of Victoria** needs to enhance lawyer education re POAs to encourage careful drafting of clauses to incorporate safeguards such as a clause regarding notification when a POA is activated.

#### Presumption of advancement – Presumption of trust

The **Victorian Department of Justice** needs to consider legislating for reform to the operation of the common law presumption of advancement to a presumption of trust, where the arrangement is between parents and older children.

#### Undue Influence

The significance of relationship and situational elements are most significant in ‘assets for care’ scenarios, where people frequently enter into unwise financial and living arrangements due to relationship pressures and what is sometimes referred to as ‘protective love’ factors.

This reality needs to be the focus of any consideration of the elements of undue influence doctrine applicable in these cases.

**Lawyers** representing clients and **decision-makers** in tribunals and courts need to look to human rights frameworks for guidance.

#### Social Security

The **Commonwealth Department of Human Services** needs to work with seniors’ advocacy agencies in each state to improve the department’s response in cases where financial abuse may be evident.

The **Federal Government** needs to resource older person’s **advocacy agencies**, such as Seniors Rights Victoria, so that these agencies can work with *Centrelink* to raise awareness of ‘assets for care’ financial abuse scenarios and how the strict application of the rules can lead to poverty and homelessness for older people.