



*SHOULD VICTORIA HAVE  
MANDATORY REPORTING  
OF ELDER ABUSE?*

*#EmpowerOlderPeople*



## ABOUT SENIORS RIGHTS VICTORIA

Established in 2008, Seniors Rights Victoria is the key state-wide service dedicated to stopping elder abuse. It is a program of Council on The Ageing Victoria (COTA) and supported by the Victorian Government. Operating under the principle of empowering older people, Seniors Rights Victoria provides information, support, advice, casework and education to help prevent and respond to elder abuse and safeguard older peoples' rights, dignity and independence. Services include a helpline, specialist legal services, short-term support and advocacy for individuals, and professional and community education. Seniors Rights Victoria also draws on 10 years of practice to support elder abuse policy development and law reform, and works to raise awareness of elder abuse.

# SHOULD VICTORIA HAVE MANDATORY REPORTING OF ELDER ABUSE?

*Callers to our service often ask why there is no requirement that a person report elder abuse, similar to mandatory reporting frameworks that exist in other countries or in other contexts, such as child protection. These callers, often frustrated by the abuse that they see and wanting to assist the older person who may be the victim of abuse, see mandatory reporting as a solution.*

As an organisation which seeks to empower older people and promote their human rights, Seniors Rights Victoria does not support mandatory reporting of elder abuse. Mandatory reporting diminishes the right of older people to make decisions about their own lives, and violates their human right to personal autonomy. Our service also does not consider that mandatory reporting will prevent elder abuse or promote the safety of older people experiencing abuse. Seniors Rights Victoria encourages other forms of intervention, including voluntary reporting as recommended by the Australian Law Reform Commission, which safeguards the dignity and independence of the capable older person.





## WHAT DO PEOPLE MEAN WHEN THEY TALK ABOUT WANTING MANDATORY REPORTING OF ELDER ABUSE?

Mandatory reporting itself includes many elements. Other than in the contexts discussed below, there is no mandatory reporting in Victoria, so this section will provide definitions and examples of who is required to report based on other locations which mandate reporting of elder abuse.

Mandatory reporting of elder abuse compels certain people or organisations, known as mandatory reporters, to inform an authority, such as a government-appointed lead agency or the police, about suspected abuse. There may be a lead agency which takes the report and may go on to conduct an investigation, make referrals or contact the police. However, it is **not** compulsory that the agency take any action. Many mandatory reporting schemes include penalties for failure to report, which can be criminal or civil in nature.<sup>1</sup> One important aspect is the definition of elder abuse. In many of the US states, where there is mandatory reporting, the definition varies; it may not include emotional abuse.<sup>2</sup>

There may not be a duty on everyone to report in mandatory reporting frameworks. It may only apply to certain categories of people such as clergy, health care providers or employees of financial institutions.<sup>3</sup> For example, in the US, 44 states and the District of Columbia have laws providing that individuals who assume the care or custody of the elderly must report suspected abuse.<sup>4</sup> Similarly in South Korea, mandatory reporters include health professionals, employees of protection agencies, and caregivers of disabled elderly.<sup>5</sup>

## IS THERE A REGIME FOR MANDATORY REPORTING IN AUSTRALIA?

At present, regimes that could be considered mandatory reporting for elder abuse exist in Australia (1) in the context of aged care and (2) in all circumstances of family violence in the Northern Territory.

Residential Aged Care providers under the federal *Aged Care Act 1997* have to report unlawful sexual conduct, assaults, and unreasonable use of force (reportable assaults) to the police and the Department of Health within 24 hours of their occurrence.<sup>6</sup> This is known as compulsory reporting under the Act. However, this reporting does not apply to community-based aged care services. Recently, reforms have been proposed in the 2017 Australian Law Reform Commission Report (the ALRC report) entitled “Elder Abuse – A National Legal Response” to create an independent oversight body to monitor the aged care provider’s response to reportable assaults<sup>7</sup> and to include incidents in home care, such as physical, sexual or financial abuse committed by a staff member against a care recipient.<sup>8</sup>

Section 124A of the Northern Territory *Domestic and Family Violence Act* requires that every adult in the Northern Territory must report to the police if they believe on “reasonable grounds either or both of the following circumstances exist:

- (i) Another person has caused, or is likely to cause harm to someone else (the victim) with whom the other person is in a domestic relationship;
- (ii) the life or safety of another person (also the victim) is under serious or imminent threat because domestic violence has been, is being or is about to be, committed.”<sup>9</sup>

Domestic relationships include people in family relationships, defined as spouses, de facto partners or relatives, including parents and children.<sup>10</sup>

In Victoria, in cases where there is a risk of imminent serious physical harm, social workers<sup>11</sup> and lawyers<sup>12</sup> rules of professional conduct permit the reporting of abuse. These reports can be made irrespective of their relationship to the older person and confidentiality requirements. Lawyers and social workers employed by Seniors Rights Victoria are bound by these requirements.

## WHY NOT MANDATORY REPORTING?

Seniors Rights Victoria does not consider that mandatory reporting of elder abuse would offer solutions that prevent or respond to the abuse of older persons for the following reasons:

### *Capable older persons can make their own decisions:*

Mandatory reporting by its nature disempowers older adults. It does not give capable people a choice about whether a report is made about them, and fails to respect the older person's autonomy to remain in situations that others may see as unwise. Clients have told our service that it is their right to choose, and in the case of personal relationships that they would rather continue their relationship with their children or grandchildren even if those relationships are problematic.

Moreover, it would be discriminatory to exclude mandatory reporting for other forms of family violence in which adults are involved and require mandatory reporting where the affected party is an older person. Such a regime would reinforce ageist stereotypes about the weakness and the decision-making ability of older people.<sup>13</sup> While some protection may be necessary, it must always be with the consent of the capable older person.

### *Older persons lacking capacity have a separate regime which can assist:*

Capacity is a complex issue. We recognise that in some instances an older adult may not have the capacity to make the decision to report. All adults are presumed to have the capacity to make decisions for themselves, unless there is evidence to the contrary.<sup>14</sup> In those instances where an older person has lost capacity, the person's attorney, guardian or administrator can make the decision to take action on the abuse. Where it is the person's attorney, guardian or administrator committing the abuse, other parties can challenge their actions at the Victorian Civil Administrative Tribunal (VCAT). In this scenario, a separate mandatory reporting scheme would be unnecessary as there are mechanisms which exist to address people who become incapable.



*There is no proof that mandatory reporting leads to better outcomes for the older person.<sup>15</sup>*

Even in countries where mandatory reporting exists, only a small percentage of abusive incidents are reported to the authorities, and of those, only a few cases have ever resulted in criminal prosecution or civil litigation.<sup>16</sup> There is no evidence as to whether mandatory reporting actually limits the prevalence of elder abuse. There is no evidence that where mandatory reporters are punished for a failure to report, there are more reports, more investigations or more proven cases of elder abuse than where there is no mandatory reporting.<sup>17</sup>

There has been some indication that mandatory reporting

schemes lead to the over-institutionalisation of older adults,<sup>18</sup> or to costly and draining guardianship proceedings. In cases where there is someone abusing the older person, the reporting agency may be left with no choice but to recommend aged care or guardianship for older persons. This can be the case where the abuser has been the primary caregiver and there is a dearth of services in the home and the older person may have trouble caring for themselves. Nevertheless, this recommendation may go against the wishes of the older person.

Mandatory reporting seeks to force people to respond to elder abuse rather than do nothing. In our experience, this is not the problem; most people would want to help in some way. Rather, the issue is that these people may be unsure of how to broach the topic

with older people, or are not sure whether reporting may assist to achieve the best outcomes for the older person.

*Reporting may affect the relationship with the older person:*

Front line workers may be hesitant to violate the trust of their client and affect their relationship.<sup>19</sup> Such required reporting may lead older people to not seek services. They may not discuss the abuse with others, for fear that they will have no say in how the situation will be handled once they disclose the abuse.

*Established coordinated community services are more important than requiring people to report, and would render mandatory reporting unnecessary:*

Even where abuse is recognised, the reporter often does not know whether it will lead to increased wellbeing of older people.<sup>20</sup> Therefore, when reports are made, it is essential that established, coordinated community services exist to address the abuse.<sup>21</sup> It is necessary to have organisations to provide coordinated services to assist the older person experiencing abuse, including

accommodation, health care, emotional support and financial assistance, just to name a few. If those organisations do not exist, making a report would be futile as the older person would not have any services to assist them to address the abusive situation.

Furthermore, reporting is often affected by the older person's perception of the circumstances.<sup>22</sup> They may often feel shame as a result of the abuse, they may not identify the conduct as abusive, they may not want to harm the relationship with the abuser or other members of their family, or they may fear that they will have no other assistance where the abuser is also their caregiver. Having coordinated supports can encourage the older person to seek assistance themselves, as they know there is a group of people there to help them.

## IF NOT MANDATORY REPORTING, WHAT IS THE ALTERNATIVE?

We recognise that the push for mandatory reporting comes from a place of deep concern for the safety of older adults. Service providers and family members often do not know where to turn when they feel that someone is being abused.

First and foremost, we strongly encourage speaking to the older person first to understand how they feel about the situation. They may want assistance in reporting the abuse themselves or may need some time before they feel prepared to take action. In these circumstances, an offer of help may keep the doors of communication open with the older person. It is important to respect the older person in what may be a process to decide to make a change in their lives.

Secondly, concerned individuals can always report elder abuse to the police where the abuse is a crime, such as assault, theft, or fraud. The high threshold of evidence required to prosecute criminal offences and refusal by the victim to cooperate may prevent the perpetrator from being charged. Nevertheless, unlike the crimes noted above, the family violence intervention orders are civil orders. The magistrate making the order does not require proof beyond a reasonable doubt, but on a lower standard of proof. It must be established on a balance of probabilities that the perpetrator of the abuse has committed family violence against the older person and is likely to continue to do so or do so again.<sup>23</sup> Where an intervention order is breached, the perpetrator can be charged with a criminal offence.



We also consider training, coaching and mentoring an essential part of addressing elder abuse. There is no substitute for ongoing training and resources for frontline workers to recognise elder abuse including police, health professionals,<sup>24</sup> banking staff and anyone who has regular contact with older adults. Just as important is training for management on how to support frontline workers who have noticed indicators of elder abuse. Without support from the entire organisation, and systems in place to respond to incidents of suspected elder abuse, staff who observe elder abuse can often feel that they have no outlet for a response.<sup>25</sup> High levels of interagency connection and supportive services are also necessary to make any reporting regime effective.

## WOULD VOLUNTARY REPORTING ASSIST?

To this end, our service supports the creation of a voluntary reporting framework to an organisation that is **mandated** to investigate instances of elder abuse, as recommended by the Australian Law Reform Commission (ALRC) in their report on elder abuse.<sup>26</sup> The process recommended by the ALRC is that investigators would begin by speaking to the older person. If the older person agrees or does not have the capacity to make a decision to report the abuse that is taking place, an investigation would be conducted. The outcomes would depend on the older person's consent, where the person had capacity, and the circumstances that are creating the abusive environment, and could include referring the older person to social work assistance, recommending family mediation, making a complaint to the police about the abuser, or attending at VCAT to seek that a guardian be appointed in cases of incapacity. This would mean that there is an agency that people can go to if they want to report elder abuse, but there is no necessity that they **must** make a report.

No older person should experience any form of abuse. However, requiring people around the older person to report suspected elder abuse is not the solution when less oppressive and more effective approaches can be taken. Seniors Rights Victoria will continue to advocate, to the greatest extent possible, that older people continue to be empowered to make their own decisions about how to live their lives.

## USEFUL RESOURCES

If you or someone you know is experiencing elder abuse, contact the Seniors Rights Victoria free and confidential helpline on 1300 368 821. If you are in immediate danger, contact emergency services on 000.

<u>Seniors Rights Victoria</u>	1300 368 821
<u>Safe Steps Family Violence Response Centre</u>	1800 015 188
<u>Men's Referral Service</u>	1300 766 491
<u>Victims of Crime Helpline</u>	1800 819 817

### For information on elder abuse

- Seniors Rights Victoria website accessed at [seniorsrights.org.au](http://seniorsrights.org.au)
- With Respect to Age (2009) State of Victoria, Department of Human Services accessed at <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/with-respect-to-age-2009>
- Elder Abuse: Understanding issues, frameworks and responses (2016) Australian Institute of Family Studies accessed at <https://aifs.gov.au/publications/elder-abuse>
- The Victorian Government delivers online elder abuse prevention professional education, which can be accessed at [elderabuseprevention.e3learning.com.au](http://elderabuseprevention.e3learning.com.au)

## ENDNOTES

- 1 Daly, Jeanette M. Daly RN and PhD , Gerald J. Jogerst MD , Margaret F. Brinig JD and PhD & Jeffrey D. Dawson ScD (2003) Mandatory Reporting: Relationship of APS Statute Language on State Reported Elder Abuse, *Journal of Elder Abuse & Neglect*, 15:2, 1-21., 38 states in the US specify a penalty for failure to report. In California, for example, under the EADACPA, the failure to report physical abuse is a misdemeanor (See Cal. Welf. & Inst. Code §. 15630, H(3)) and failure to report financial abuse can result in a fine, §. 15630.1, 2(f). In Korea, there is no penalty specified for failure to report.
- 2 *Ibid.*
- 3 *Elder Abuse and Dependent Adult Civil Protection Act (“EADACPA”)*, Cal. Welf. & Inst. Code §. 15630, F(2)
- 4 Daly, *supra*, note 1, Amy N. Schmeidel BA , Jeanette M. Daly RN, PhD , Marcy E. Rosenbaum PhD , Gretchen A. Schmuck MSW & Gerald J. Jogerst MD (2012) Health Care Professionals’ Perspectives on Barriers to Elder Abuse Detection and Reporting in Primary Care Settings, *Journal of Elder Abuse & Neglect*, 24:1, 17-36; See Rebecca A. Oswald BA , Gerald J. Jogerst MD. Jeanette M. Daly RN and PhD & Suzanne E. Bentler MS (2005) Iowa Family Physician’s Reporting of Elder Abuse, *Journal of Elder Abuse & Neglect*, 16:2, 75-88 for the situation in Iowa. See C Cooper, A Selwood, G Livingston, Knowledge, detection, and reporting of abuse by health and social care professionals: a systematic review, (October 2009), *American Journal of Geriatric Psychiatry* 17:10.
- 5 Sondra SeungJa Doe PhD MSW MScEcon , Hye Kyung Han PhD & Rosemary McCaslin PhD ACSW (2009) Cultural and Ethical Issues in Korea’s Recent Elder Abuse Reporting System, *Journal of Elder Abuse & Neglect*, 21:2, 170-185, 174. The Older Adult Welfare Law (OAWL) defines the scope of mandatory reporters to include professional staff, such as medical doctors, dentists, herbal doctors, nurses, employees of APS agencies, social workers, caregivers of the disabled elderly, and domestic violence counselors.
- 6 *Aged Care Act 1997*, No. 112, 1997, 63-1AA. (*Cth*)
- 7 ALRC Report 131, Elder Abuse – A National Legal Response, Recommendation 4.4
- 8 *Ibid*, Recommendation 4.4
- 9 *Domestic and Family Violence Act, 2007* (NT), s. 124(A)
- 10 *Ibid.*, s. 9 and 10, Section 9 states that “A person is in a domestic relationship with another person if the person:(a) is or has been in a family relationship with the other person...” There is limited research on the effect of mandatory reporting, and none that appears to discuss elder abuse. See *Evaluation of the impact of mandatory reporting of domestic and family violence Northern Territory Department of Children and Families* (August 2012), online [https://justice.nt.gov.au/\\_data/assets/pdf\\_file/0012/171201/evaluation-impact-mandatory-reporting-domestic-family-violence.pdf](https://justice.nt.gov.au/_data/assets/pdf_file/0012/171201/evaluation-impact-mandatory-reporting-domestic-family-violence.pdf)

- 11 AASW Code of Ethics, 5.2.4 Information privacy/ confidentiality (e) “if by revealing information to relevant third parties an actual, identifiable risk of harm to a specific person or persons can be prevented.”
- 12 *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules* 2015 under the Legal Profession Uniform Law, 9.2.5
- 13 Dyana Lee, Mandatory Reporting of Elder Abuse: A Cheap but Ineffective Solution to the Problem, 731 *Fordham Urban Law Journal* Volume 14, Number 3 1985 723 - 771
- 14 *Borthwick v Carruthers* (1787) 99 ER 1300 and *Re Cumming* (1852) 42 ER 660 at 668.
- 15 Michael A. Rodríguez, MD, MPH, Steven P. Wallace, PhD, Nicholas H. Woolf, PhD, Carol M. Mangione, MD, MSPH, Mandatory Reporting of Elder Abuse: Between a Rock and a Hard Place, *Annals of Family Medicine* 2006;4:403-409; Brandl, B. (2005). Mandatory Reporting of Elder Abuse: Implications for Domestic Violence Advocates. National Clearinghouse on Abuse in Later Life/Wisconsin Coalition Against Domestic Violence.
- 16 Arlene D. Luu and Bryan A. Liang, “Clinical Case Management; A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse, (2005) *Cornell Journal of Law and Public Policy*, Volume 15, Issue 1, pg. 167.
- 17 Daly, *supra*, note 1, pg. 10
- 18 Mark S. Lachs, Christianna S. Williams, Shelley O’Brien, and Karl A. Pillemer, “Adult Protective Service Use and Nursing Home Placement,” (2002) *The Gerontologist* Vol. 42, No. 6, 734–739
- 19 Schmeidel, *supra*, note 4. Rodríguez, *ibid*.
- 20 Luu, *supra*, note 16, pg. 187; Schmeidel, *supra*, note 4.
- 21 Daly, *supra*, note 1
- 22 Rosalie S. Wolf, PhD,<sup>1</sup> and Donglin Li, MD, MPH<sup>2</sup>, Factors Affecting the Rate of Elder Abuse Reporting to a State Protective Services Program, *The Gerontologist* 1999 Vol. 39, No. 2, 222-228, 223
- 23 *Ibid*.
- 24 Cooper, *supra*, note 4.
- 25 Often may not know the procedures for reporting within their agency: Schmeidel, *supra*, note 4.
- 26 This has been recommended in the ALRC Report “Elder Abuse – A National Legal Response.” See Recommendation 14.



## Seniors Rights Victoria

 1300 368 821

 [info@seniorsrights.org.au](mailto:info@seniorsrights.org.au)

 Level 4, 533 Little Lonsdale Street,  
Melbourne, VIC 3000

 [www.seniorsrights.org.au](http://www.seniorsrights.org.au)

A service of:



*We gratefully acknowledge the Victorian Government for supporting the ongoing work of Seniors Rights Victoria.*

