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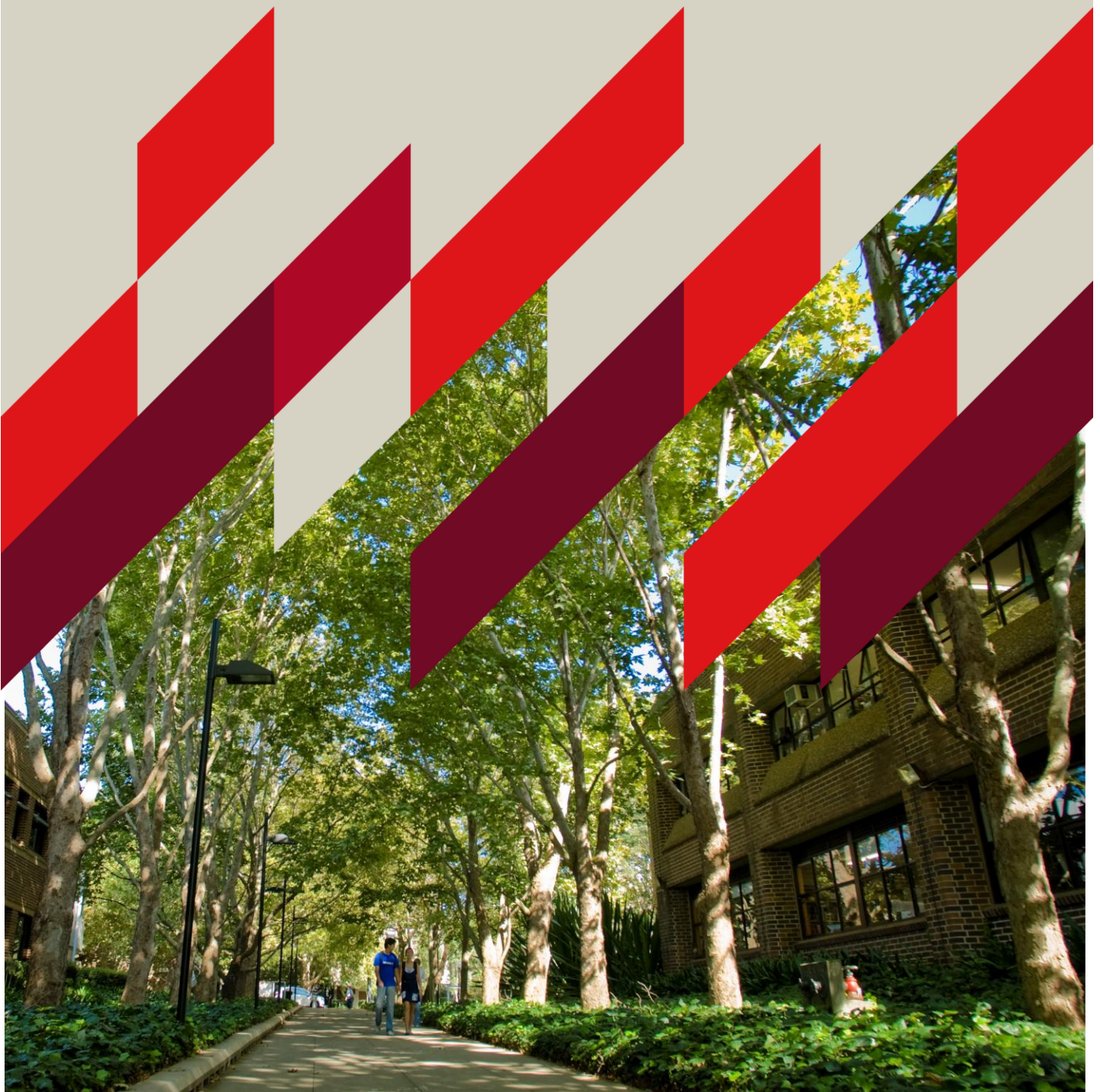


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# Macquarie Law Journal

VOLUME 18, 2018

ELDER ABUSE  
LEGAL, REGULATORY AND POLICY CHALLENGES



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VOLUME 18, 2018

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## ELDER ABUSE: LEGAL, REGULATORY AND POLICY CHALLENGES

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## EDITORS' NOTE

On 14 June 2017 the Australian Law Reform Commission ('ALRC') handed down its much anticipated final report '*Elder Abuse—A National Legal Response*.' The ALRC report demonstrated the urgent need for law reform in the elder sphere and also highlighted the need for further research in relation to elder abuse. This special edition of the *Macquarie Law Journal* is a response to the need identified by the ALRC's report, inviting contributions on issues raised by the report and, more broadly, encouraging research on legal issues that directly impact the elderly.

We are delighted with the response we have received from the academic and practitioner communities, which has enabled us to provide readers with a collection of articles addressing important legal issues facing our aging population. The articles in this edition of the *Macquarie Law Journal* focus on what we consider to be three key challenges for elder abuse law reform: confronting the difficulties of identifying elder abuse; reforming disparate areas of law affected by elder abuse; and exploring the hurdles for legal professionals who are tasked with ensuring that elder abuse is minimised.

In furthering the ALRC's research on these three key issues, this edition aims to contribute to the ongoing effort by the academic and legal communities to develop solutions, and continue the next stage of analysis in what is unquestionably one of the most pressing socio-legal problems currently facing our society. On a broader level, these conversations implicitly, and sometimes explicitly, question the accepted norms and ageist attitudes that contribute to a culture of elder abuse. This is a crucial process because, without it, many issues affecting older people would remain 'invisible' to the general population, and policies and practices that have been shaped by ageist attitudes would remain unchecked.

We are privileged to commence the edition with a submission by Emeritus Professor Rosalind Croucher, who presided over the ALRC's '*Elder Abuse—A National Legal Response*' report and Dr Julie MacKenzie, Acting Principal Legal Officer with the ALRC. Professor Croucher and Dr MacKenzie's paper, titled 'Framing Law Reform to Address Elder Abuse', outlines the challenges involved in undertaking the ALRC Elder Abuse inquiry and in framing proposals for a multidimensional issue, particularly in the context of the fragmented legal landscape created by our federal, state, and territory jurisdictions. In particular, Professor Croucher and Dr MacKenzie highlight the difficulties in creating a framework within this context that would achieve adequate protection for the elderly, while still preserving the dignity and autonomy of the individual. This overview of the work completed by the ALRC establishes a point of reference for the subsequent contributions to the journal.

Two articles, the first by Lois Bedson, John Chesterman and Michael Woods, and the second by Bill Mitchell, examine the difficulties that arise in understanding elder abuse in particular contexts, and the complications that plague attempts to measure the causes and prevalence of elder abuse. In considering our first key hurdle of identifying elder abuse, both papers suggest there are serious deficiencies surrounding current practices and approaches to information gathering. Using guardianship case data from Victoria's Office of the Public Advocate, the first article makes an important contribution to measuring instances of elder abuse among those suffering cognitive impairment, who to date have been omitted from relevant statistics. Titled 'The Prevalence of Elder Abuse among Adult Guardianship Clients', it demonstrates that older people with cognitive impairment, such as dementia or intellectual disability, and higher levels of dependency, can be vulnerable to a wider range of elder abuse, and, in particular, are more susceptible than others to financial abuse.

Bill Mitchell's article, 'Identifying Institutional Elder Abuse in Australia through Coronial and Other Death Review Processes', measures a different but equally important aspect of elder

abuse, that occurring in residential aged care services (RACS). The author proposes methods of enhancing our understanding of institutional elder abuse in residential aged care services by reviewing the systems currently in place for reporting deaths in aged care. The proposed reforms suggest reappraising the processes that generate coronial and death process reviews to allow deaths in RACS to fall within the ambit of those investigations.

Our third and fourth articles concern the second key theme of reforming the law to reduce elder abuse, especially given the diversity of legal circumstances in which such legal abuse can occur. Supporting Professor Croucher and Dr MacKenzie's emphasis on the complexity of elder abuse, the contributions – the first by Professor Eileen Webb and the second by Dr Anne Wand and Professors Carmelle Peisah, Brian Draper and Henry Brodaty – demonstrate the breadth of contexts in which elder abuse can arise. These articles address two disparate areas of the law but both analyse the impact elder abuse has on existing legal structures.

Professor Webb in her article, 'Housing an Ageing Australia: The Ideal of Security of Tenure and the Undermining Effect of Elder Abuse', explains the importance of safe and secure housing for the ageing and examines how elder abuse can deleteriously affect security of tenure and the ontological security of elderly individuals. Through a careful analysis of existing real property law, Professor Webb proposes law reforms to give greater protection to the elderly, with the aim of improving both housing and ontological security.

In an important and thought-provoking article titled 'The Nexus between Elder Abuse, Suicide and Assisted Dying', Dr Wand and her team consider the new Victorian legislation that legalises assisted dying. The authors apply their significant combined expertise in psychiatry to identify concerns about the potential for undue influence and abuse to erode the autonomy of decision making of an elderly person in the context of a decision to end one's life. They stress the need for greater understanding of the factors involved in decision making in end of life decision making to eliminate the potential for Victoria's new legislation to be co-opted as a means of elder abuse.

This leads to the final theme of our special edition, which relates to obstacles facing the legal profession. It begins with 'Addressing Elder Abuse: Perspectives from the Community Legal Sector in the ACT', an examination by Dr John Boersig and Dominic Illidge of the role of the legal aid solicitor, and the key position Legal Aid has in providing legal services to elderly clients at risk of abuse. In line with the recommendations of the ALRC, the authors explain the approach of the ACT Legal Aid office in implementing strategies to improve legal services to elderly clients. They argue that, in the context of developing an appropriate legal strategy, a rights-based approach should be adopted that focuses on the needs and views of the client. Whatever law reforms follow the ALRC's report to reduce incidences of elder abuse, the role of lawyers will be paramount in giving those reforms effect.

Finally, Margaret Castles' article, 'A Critical Commentary on the 2017 ALRC Elder Abuse Report: Looking for an Ethical Baseline for Lawyers', takes up the theme started by Bedson, Chesterman and Woods in their article on issues concerning the elderly with cognitive impairment, but considers it from the legal practitioner's perspective. The author raises some intriguing questions concerning a practitioner's ethical responsibilities when dealing with clients exhibiting signs of mental incapacity, and the potential for these clients to be subject to influence or abuse. She highlights the tension between the duty to protect the human rights of a vulnerable client and a practitioner's duty of confidence to their client. Castles' article questions traditional norms of practice and the duties of solicitors in the context of the profession's dealings with the elderly and matters affecting elderly people. The contributions by Boersig and Illidge, and Castles, to this special addition are a timely reminder that legal practitioners play an integral role in the manner in which law reform is developed and applied.



The special edition is rounded off by two case notes, authored by members of the Macquarie Law School student editorial team. Both cases demonstrate how the interpretation of existing law is being shaped by the heightened awareness of issues concerning the elderly. The case note on *Katsis v The Queen* [2018] NSWCCA 9, by Harriet Gresham, explores the extent to which a court may have the capacity to take the age and vulnerability of a victim into consideration when sentencing offenders. The second, by Mikaylie Page, reviews the decision of *Public Trustee (WA) v Mack* [2017] WASC 325, in which a court extended the forfeiture rule to prevent an accused from indirectly benefiting from his mother's estate through the death of his brother.

The ALRC's Report '*Elder Abuse—A National Legal Response*' has drawn attention to the deficiencies in the law as it affects older people. This special edition of the Macquarie Law Journal represents one step in ensuring these topics become part of the social conversation and contribute to growing awareness throughout the community of elder abuse and its ramifications for society. While the process of revealing the nature and extent of elder abuse is at times confronting, it is ultimately a positive step. The academic and professional interest in exploring the difficult issues surrounding elder abuse, and seeking solutions to complex and dynamic problems, provides hope that we will be able to translate the growing pressure on law and policy makers into sophisticated and nuanced reforms which balance the needs of the elderly with their rights to maximum dignity and autonomy.

We would like to express our gratitude to the authors who contributed to this special edition, as well as to the academics and experts who provided peer review of submissions. The breadth and quality of the published papers underpin the strength of this edition's contribution to the growing body of much needed research in the elder law area. The high calibre and significant diversity of legal, medical, academic, and practice expertise represented by the authors of this edition are truly impressive.

Finally, we wish to express our thanks to, and commend the excellent efforts of, the Student Editors who have worked diligently to make this publication possible.

Teresa Somes  
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# FRAMING LAW REFORM TO ADDRESS ELDER ABUSE

ROSALIND F CROUCHER AM\* AND JULIE MACKENZIE\*\*

*In the inquiry that led to the final report, Elder Abuse—A National Legal Response, the Australian Law Reform Commission (ALRC) had to balance two key ideas: the principle of autonomy – promoting and supporting older people’s ability to participate equally in their community and access services and advice – and the challenge of ensuring that laws and legal frameworks provide appropriate protections and safeguards for older Australians against misuse or advantage taken of informal and formal supporter or representative roles. This article provides insights into the challenges of framing law reform responses within this conceptual setting, and locating those solutions within a federal system where relevant laws sit either within the federal or state and territory domains. The article also provides a summary of the conclusions reached as reflections of the conceptual framework set for the inquiry.*

## I INTRODUCTION

The ALRC’s Elder Abuse Inquiry was most timely – given the problem, the challenge, and indeed the opportunity, of an ageing demographic. The Australian population, like other developed countries, is an ageing one. The statistics are quite confronting however they are approached: whether in terms of the numbers of workers that will be needed to support an ageing population, or the extent to which health services, aged care services and disability services will be needed, an ageing demographic presents an intense focus for public policy. It is not surprising that a 2007 parliamentary report referred to the ‘inescapable demographic destiny’ of an ageing population.<sup>1</sup>

In the Elder Abuse Inquiry, the ALRC was asked to consider reform to existing Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The main areas of interest concerned financial arrangements and superannuation, enduring documents and powers of attorney, aged care, guardianship, social security, and aged care arrangements.

The ALRC was also asked to examine the interaction and relationship of Commonwealth laws in areas such as aged care and social security with state and territory laws. This involved considering guardianship and administration, laws dealing with ‘private’ appointments of substitute decision makers through enduring powers of attorney and enduring guardians, as well as considering the adequacy of existing criminal laws for responding to elder abuse. A great deal of the work therefore involved state and territory bodies and agencies who were willing participants in shared aspirations for reform.

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\* Emeritus Professor, Macquarie University. The material in this article is drawn from the Australian Law Reform Commission’s work that culminated in the report, *Elder Abuse—A National Legal Response*, Report No 131 (2017). Professor Croucher led the inquiry and was the President of the Australian Law Reform Commission until the end of July 2017, then taking up the position of President of the Australian Human Rights Commission.

\*\* Dr Julie MacKenzie is Acting Principal Legal Officer at the Australian Law Reform Commission.

<sup>1</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) vii.

On 15 June 2016, coinciding with World Elder Abuse Awareness Day, the ALRC released the first consultation document for the Inquiry, an Issues Paper, and on 15 June 2017 the Final Report was launched by the Attorney-General.

As stakeholders observed, elder abuse is ‘complex and multidimensional’ and thus requires a ‘multi-faceted response’. The ALRC contributed to that response with a set of 43 recommendations aimed at achieving a nationally consistent response to elder abuse. The ALRC also developed a conceptual template to guide future reform through a National Plan to combat elder abuse. In February 2018, the Attorney-General announced that the Australian Government would implement this key recommendation of the Inquiry, and develop/implement a National Plan to address elder abuse.<sup>2</sup>

The Australian Government has also announced that it will implement another set of key recommendations from the report: the introduction of a serious incident response scheme in aged care to respond to abuse and neglect of aged care recipients.<sup>3</sup>

Law reform writing is a particular form of policy work, the conclusions being expressed as recommendations for reform. Terms of Reference are often an expression of a particular policy objective, usually contained in the preamble words of the Terms of Reference themselves. Therefore, in working out what is required for a particular project – determining the scope of the Terms of Reference – one needs to know the public policy context. As the Law Commission of England and Wales observed in a 2011 report, ‘law reform must operate within the broader context of Government policy’.<sup>4</sup>

Nonetheless, in any Inquiry the ALRC must do considerable work in contemplating how its suite of reform recommendations represent a cohesive response to a policy issue, within the broad policy direction set by the Terms of Reference. An Inquiry also offers the opportunity to reflect critically on the principles underpinning policy objectives. In this case, the ALRC devoted particular attention to critically considering how best to achieve the broad goal of promoting the ‘autonomy’ of older Australians.

This essay provides a brief outline of a number of conceptual or framing issues for the Inquiry, all of which shaped the ALRC’s approach to reform. First, defining elder abuse. Second, the question of how to frame law reform responses to a problem with fragmented legal responsibilities. And third, how the ALRC conceptualised the principles underpinning the Inquiry – promoting the dignity and autonomy of older people, and protection and safeguarding of older people.

## II WHAT IS ELDER ABUSE?

### A *Description*

Elder abuse usually refers to abuse by family, friends, carers and other people where there is a relationship or expectation of trust. While there is not a universally accepted definition, a widely used one is that of the World Health Organization (WHO), describing elder abuse as

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<sup>2</sup> Christian Porter, Attorney-General (Cth), ‘National Plan to Address Elder Abuse’ (Media Release, 20 February 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/National-Plan-to-address-elder-abuse.aspx>>.

<sup>3</sup> Ken Wyatt, Minister for Aged Care (Cth), ‘Powerful New Reforms to Ensure Safe, Quality Aged Care’ (Media Release, 18 April 2018) <<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2018-wyatto48.htm>>.

<sup>4</sup> Law Commission (UK), *Adult Social Care*, Report No 326 (2011) 4 [1.14].

a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.<sup>5</sup>

This description is used across a range of government and non-government bodies in Australia.<sup>6</sup> Elder abuse may take a number of forms, including physical, psychological, financial and sexual abuse, as well as neglect.<sup>7</sup>

The definition of elder abuse does not include all abuse of older persons, but is limited by the relationship between the abuser and the older person – that is, when they are in a relationship where there is an expectation of trust. This will include an expectation of trust as a result of an ‘affective relationship’, such as family members, friends, and informal carers, and those in a ‘functional position of trust’, such as paid carers and some professionals.<sup>8</sup>

Throughout the course of the Inquiry, it became clear that abuse and neglect in the context of the provision of aged care was a particular concern. In this area, what is termed ‘institutional’ or ‘system’ abuse was also an issue that required consideration by the ALRC. Institutional abuse has been described as occurring when the ‘routines, systems and regimes of an institution result in poor or inadequate standards of care and poor practice which affects the whole setting and denies, restricts or curtails the dignity, privacy, choice, independence or fulfilment of individuals’.<sup>9</sup> A number of the concerns raised in the Elder Abuse Inquiry about aged care could be characterised as about this form of abuse, particularly in relation to adequate levels of staffing. Recognising systems or institutional abuse has consequences for how to ascribe responsibility and to prevent further abuse: ‘Accountability for system abuse lies in the organisation and culture of care ... A multilevel approach is needed in which the implications of people’s behaviour are seen as set in organisational practices’.<sup>10</sup>

While commonly used, the terminology of ‘elder abuse’ may not be appropriate, particularly for some communities. For example, in the Aboriginal and Torres Strait Islander community, in addition to referring to the age of a person, ‘elder’ is also a title of respect.<sup>11</sup> Similarly, in culturally and linguistically diverse communities there may be difficulties in translating the term elder abuse. Ethnic Communities’ Council of Victoria has developed material for particular communities that refers instead to what can go wrong in families, and to respect and dignity in ageing.<sup>12</sup>

## B Difficulties of Definition

A number of complexities exist in describing elder abuse, particularly in relation to the concept of ‘age’.<sup>13</sup> Additionally, a range of conduct is captured by the WHO definition, from intentional mistreatment and neglect to unintentional conduct that causes harm or distress to an older

<sup>5</sup> World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (17 November 2002).

<sup>6</sup> See, eg, My Aged Care, *Elder Abuse Concerns* (22 June 2015) <[www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns](http://www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns)>; Elder Abuse Prevention Unit, *Elder Abuse: Definition* <[www.eapu.com.au/elder-abuse](http://www.eapu.com.au/elder-abuse)>.

<sup>7</sup> Jolanda Lindenberg et al, ‘Elder Abuse an International Perspective: Exploring the Context of Elder Abuse’ (2013) 25 *International Psychogeriatrics* 1213, 1213.

<sup>8</sup> Thomas Goergen and Marie Beaulieu, ‘Critical Concepts in Elder Abuse Research’ (2013) 25 *International Psychogeriatrics* 1217, 1224.

<sup>9</sup> Rochdale Borough Safeguarding Adults Board, *Institutional Abuse* <<https://www.rbsab.org/the-public/what-is-abuse/institutional-abuse.aspx>>.

<sup>10</sup> Yuliya Mysyuk et al, ‘Listening to the Voices of Abused Older People: Should We Classify System Abuse?’ (2015) 350 *BMJ* h2697.

<sup>11</sup> National Aboriginal and Torres Strait Islander Legal Services, Submission No 135 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, August 2016, 2.

<sup>12</sup> See, eg, Health Translations, *Abuse* <<http://healthtranslations.vic.gov.au/bhcv2/bhcht.nsf/PresentEnglishResource?Open&cx=&s=Abuse>>.

<sup>13</sup> However, it has been argued that ‘definitional conformity’ of elder abuse has developed: Lindenberg et al, above n 7, 1213.

person. It has been said that the term elder abuse ‘does not represent a single problem, but many different problems’.<sup>14</sup>

## 1 Age

There are some difficulties in designating old age as a distinguishing feature for a form of abuse. As the ALRC also noted in its 2013 Report into barriers to work for older Australians, the concepts of ‘old age’ and ‘ageing’ are not self-evident, but have different meanings according to their social and historical contexts.<sup>15</sup> Broader shifts, such as the normalisation of a ‘retirement age’ and subsequent disengagement from the labour market have contributed to understandings of old age, and of older persons as a definable social group – that is, to the assumption that older persons are in some way separate from those who are not yet old.<sup>16</sup> Withdrawal from the labour market also contributed to an assessment of older people as of declining capability and increased dependency,<sup>17</sup> with ‘particular characteristics of helplessness, vulnerability and frailty assigned to the older population’.<sup>18</sup>

With increasing diversity over the life course, distinguishing older people as a distinct group and experiencing a distinct form of abuse has some challenges. Elder abuse may also overlap with or share similarities with the mistreatment of other groups, such as people with disability.

However, some factors associated with ageing, and particularly with entering into very old age, mean that a person is more at risk of a specific kind of abuse although it may be that this elevated risk is the result of an interrelationship between ‘personal, interpersonal and systemic factors’.<sup>19</sup>

Some of these distinct risks have been summarised by Thomas Goergen and Marie Beaulieu: while the very old ‘generally have a reduced exposure to risks of becoming a victim of violent acts in public spaces and by strangers’, the increased prevalence of functional limitations, and the need for assistance with activities of daily living, may heighten the risk of abuse by those in a relationship of trust with an older person.<sup>20</sup>

There are advantages to retaining a focus on elder abuse as a distinctive social problem that requires targeted research, prevention and response strategies. However, overall, the ALRC generally avoided making recommendations for legal reforms that were targeted *solely* at ‘older’ people in this Inquiry. Instead, it recommended that a National Plan be developed to combat elder abuse. This broader policy document would provide a vehicle for national leadership and coordination of strategies, including legal reform, to prevent and respond to elder abuse.

## 2 Relationship with Family Violence

Elder abuse is often committed by a family member of the older person, notably by adult children but also the older person’s spouse or partner. The essence of elder abuse in the WHO

<sup>14</sup> Joan Harbison et al, ‘Understanding “Elder Abuse and Neglect”: A Critique of Assumptions Underpinning Responses to the Mistreatment and Neglect of Older People’ (2012) 24 *Journal of Elder Abuse & Neglect* 88, 89.

<sup>15</sup> Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013) 40.

<sup>16</sup> Martha Fredvang and Simon Biggs, ‘The Rights of Older Persons: Protection and Gaps under Human Rights Law’ (Social Policy Working Paper No 16, Brotherhood of St Laurence and University of Melbourne Centre for Public Policy, August 2012) 6.

<sup>17</sup> Harbison et al, above n 14, 90–1.

<sup>18</sup> *Ibid* 91.

<sup>19</sup> Simon Biggs and Ariela Lowenstein, *Generational Intelligence: A Critical Approach to Age Relations* (Routledge, 2013) 100.

<sup>20</sup> Goergen and Beaulieu, above n 8, 1222.

definition is the harm or distress caused by a person in a position of trust. The WHO definition is wider than the concept of 'family violence', in that the relationships of trust extend more widely than 'family'.

However, elder abuse is closely related to family violence and therefore abuse of an older person may often also be considered family violence.<sup>21</sup> The Victorian Royal Commission into Family Violence specifically examined violence against older people and noted that elder abuse and family violence are often used interchangeably in policy documents and statistics.<sup>22</sup>

'Elder abuse' is usually committed by a family member and available research suggests that women are more likely to experience elder abuse than men.<sup>23</sup> Some instances of elder abuse may be a continuation of family violence that began when the perpetrator and victim were not old. In other cases, while the abuse may occur within a family relationship, other factors such as attitudes toward older people, social isolation or a relationship of dependence may be relevant.<sup>24</sup>

An Australian Institute of Family Studies (AIFS) Report into elder abuse has noted that

[p]rogress towards understanding elder abuse and developing effective response and prevention measures, are recognised to be considerably less well developed than in other areas of interpersonal violence, including family violence and child abuse.<sup>25</sup>

Moreover, the nature and dynamics of abuse experienced by older people may be influenced by their being part of one or more particular communities. This may be the case, for example, for Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, and people with disability.<sup>26</sup> However, there has been limited research about the dynamics of abuse in particular communities.

A particular manifestation of elder abuse is financial abuse, which appears to be one of the most common forms of elder abuse. Social attitudes to intergenerational wealth transfer in families are important considerations in developing an understanding of elder financial abuse. As the AIFS Report noted:

[G]enerational attitudes and expectations in relation to asset transfers before or after death, and the broader question of attitudes and expectations in relation to mutual or non-mutual intergenerational support in terms of material resources and care, form an important part of the backdrop to the social and economic dynamics that may influence the conditions in which elder abuse occurs.<sup>27</sup>

Whether abuse of an older person is described as elder abuse or family violence can have an impact on services available to the older person to respond to the abusive behaviour. For instance, family violence services such as crisis accommodation that largely cater for women and children may not be suitable for older people who have experienced abuse.<sup>28</sup>

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<sup>21</sup> John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69 *Australian Social Work* 115, 117.

<sup>22</sup> Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 68.

<sup>23</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016) 5.

<sup>24</sup> *Ibid* ch 3.

<sup>25</sup> *Ibid* 4.

<sup>26</sup> *Ibid* 12–13.

<sup>27</sup> *Ibid* 19.

<sup>28</sup> Victoria, above n 22, 92.

### 3 *Definition and Measurement*

Consensus on a definition of elder abuse is important for developing an evidence base about it. A 2007 report on a study of prevalence of elder abuse in the UK noted that '[v]ariation in prevalence estimates is heavily influenced by differences in methodology', including differences in definition.<sup>29</sup>

Since the conclusion of the Inquiry, progress towards both an accepted definition and an estimate of prevalence in Australia has been made. AIFS is leading an Elder Abuse National Research project, to be completed in June 2018, to develop an Australian definition of elder abuse, to develop and test instruments to measure elder abuse against the Australian definition and to develop a data analysis plan and conduct secondary data analysis to answer key research questions on elder abuse.<sup>30</sup>

## III FRAMING LEGAL RESPONSES

### A *Federal and State Responsibilities*

Laws relating to elder abuse exist across Commonwealth, state and territory jurisdictions. The Commonwealth makes laws relating to financial institutions, social security, superannuation and aged care.<sup>31</sup> Laws relating to substitute decision-making, including guardianship, powers of attorney and most criminal laws, lie with the states and territories.

This poses some challenges for responding to elder abuse in a cohesive fashion, as

responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations.<sup>32</sup>

The ALRC was well placed to consider reforms in this fragmented legal landscape, given that its legislative functions include considering proposals for uniformity between state and territory laws, as well as proposals for complementary Commonwealth, state and territory laws.<sup>33</sup> In the ALRC's 2010 Family Violence Inquiry, the ALRC considered the complex interactions across the federal landscape, particularly between the *Family Law Act 1975* (Cth) and state and territory family violence and child protection laws.<sup>34</sup> In that context the ALRC identified the aspiration of 'seamlessness' as a key policy goal. In the Elder Abuse Report too, the ALRC made recommendations directed at both Commonwealth, state and territory laws and legal frameworks, in order to comprehensively address the range of legal mechanisms available to safeguard older people from abuse.

<sup>29</sup> Madeleine O'Keeffe et al, 'UK Study of Abuse and Neglect of Older People: Prevalence Survey Report' (Research Report, National Centre for Social Research and King's College London, June 2007) 11.

<sup>30</sup> Australian Institute of Family Studies, *Elder Abuse National Research Strengthening the Evidence Base—Stage One* <aifs.gov.au/projects/elder-abuse-national-research-strengthening-evidence-base-stage-one>.

<sup>31</sup> The Commonwealth's powers to make laws relating to aged care arise from its legislative power to make laws regulating corporations providing aged care, funding programs administered by states and territories, and its powers relating to age pensions, carer pensions and other welfare regimes: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 102. The Commonwealth's powers in relation to taxation, financial institutions, social security and superannuation arise from the banking, social welfare and powers respectively: *Australian Constitution* s 51(ii), (xiii), (xxiii), (xxiiiA). The Commonwealth does not have an enumerated power to legislate with regard to the welfare of adults generally.

<sup>32</sup> Kaspiew, Carson and Rhoades, above n 23, 1. See also Lacey, above n 31.

<sup>33</sup> *Australian Law Reform Commission Act 1996* (Cth) ss 21(1)(d)–(e).

<sup>34</sup> Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).



In the Elder Abuse Inquiry, the ALRC recommended that a National Plan to combat elder abuse be developed to establish a national policy framework, act as a vehicle for coordination, and to promote a long-term approach for the protection of older people from abuse.<sup>35</sup> The Australian Government has accepted this key recommendation, and signalled that it will develop a National Plan with the goals identified by the ALRC:

- promoting the autonomy and agency of older people;
- addressing ageism and promoting community understanding of elder abuse;
- achieving national consistency;
- safeguarding at-risk adults and improving responses; and
- building the evidence base.<sup>36</sup>

A draft is expected by the end of 2018.<sup>37</sup> The Age Discrimination Commissioner, the Hon Dr Kay Patterson AO, has also indicated that implementation of the recommendations from the Elder Abuse Report will be one of her advocacy priorities.<sup>38</sup>

### B      *Framing Principles for this Inquiry*

The ALRC used two key principles to frame the recommendations in the Elder Abuse Report: dignity and autonomy, and protection and safeguarding. Elder abuse clearly undermines dignity and autonomy. Concerning autonomy and intimate partner violence, Professor Marilyn Friedman has written that ‘abuse denies to the abused person ... the safety and security she needs to try to live her life as she thinks she ought to’ or ‘according to her values and commitments’.<sup>39</sup>

However, protection from abuse is sometimes seen as infringing on autonomy – that is, protection and autonomy are sometimes seen as opposing considerations that need to be balanced or traded off against each other when issues of whether and how to intervene to protect a person from abuse arise.

There is particular concern about overly interventionist or paternalist approach to protecting older people. In its 2014 Report, *Equality, Capacity and Disability in Commonwealth Laws*, the ALRC had cause to consider how to effect, for people with disability, the shift toward full recognition of their equal right to make decisions that affect their lives. This shift, from others making decisions based on a judgement about a person’s ‘best interests’ to recognising that a person’s will, preferences and rights should guide decisions that affect their lives, was operationalised through the National Decision-Making Principles.<sup>40</sup> This also involved conceiving of autonomy as not only involving a sphere of non-interference, but also in terms of considering what support is needed for a person to exercise their autonomy and decision-making ability.<sup>41</sup>

In a related sense, protecting older people from abuse can be seen to support and enable their ability to live autonomous and dignified lives. Jonathan Herring has expressed this as meaning that any intervention to protect a person should occur with the aim to ‘restore or support

<sup>35</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 9 [rec 3-1].

<sup>36</sup> Ibid [rec 3-3].

<sup>37</sup> Porter, above n 2.

<sup>38</sup> Kay Patterson, Age Discrimination Commissioner, ‘Rights of Older Australians: Ageing and Advocacy’ (Speech, 13 February 2018).

<sup>39</sup> Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) 142.

<sup>40</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 11 [rec 3-1].

<sup>41</sup> See Martin Stevens et al, ‘Social Workers’ Power of Entry in Adult Safeguarding Concerns: Debates over Autonomy, Privacy and Protection’ (2017) 19 *Journal of Adult Protection* 312, 318–19; Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 34–5.

autonomy'.<sup>42</sup> Where possible, in the Elder Abuse Inquiry, the ALRC sought to recommend changes to the law that both uphold autonomy and provide protection from harm. Where this was not possible, greater weight was generally given to the principle of autonomy. However, in limited cases, where there is serious abuse of vulnerable people, protection was given additional weight.

## 1 *Dignity and Autonomy*

Some recommendations were particularly targeted at empowering people to protect themselves from abuse and seeking to ensure that they are supported to make decisions that reflect their rights, will and preferences.

Reforms related to enduring documents – that is, enduring powers of attorney, enduring guardianship and advance care directives – focus on improving safeguards against misuse of an appointment by a substitute decision maker. Such reforms would promote people's ability and confidence in planning for a time in the future when they may require substantial decision-making support. The ALRC recommended reforms that would ensure that a person can determine the scope and extent of their enduring appointments and not be required to give broader or unlimited powers to be able to effect certain transactions. It also recommended that appointed decision makers be required to support and represent the will, preferences and rights of the principal.<sup>43</sup> In a similar vein, the ALRC also recommended safeguards in relation to wills and superannuation. It recommended reviewing the rules in relation to binding death benefit nominations in APRA-regulated superannuation funds<sup>44</sup> and planning for the possibility of cognitive impairment in the context of self-managed superannuation funds.<sup>45</sup> The ALRC also recommended that national best practice guidelines be developed for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to improve the understanding of legal practitioners of the dynamics of elder abuse, risk factors for undue influence, and safeguards against them in the making of wills and other advance planning documents.<sup>46</sup>

In relation to court and tribunal appointed decision makers, recommendations were directed towards maximising the possibilities for involving the person who may be the subject of a guardianship and administration order in the application process, and ensuring that guardians and financial administrators understand their obligations to promote the autonomy and wellbeing of a person who is subject to a guardianship and administration order.<sup>47</sup>

The ALRC also sought to promote autonomy by making avenues for redress easier and more accessible. It recommended that the jurisdiction of state and territory civil and administrative tribunals be expanded to allow it to deal with misuse of powers by enduring attorneys/guardians, as well as guardians and financial administrators appointed by a court or tribunal, and to enable them to order any remedy that the Supreme Court could order in relation to this.<sup>48</sup> It also recommended that civil and administrative tribunals be given jurisdiction to deal with family disputes involving residential property under an 'assets for care' arrangement.<sup>49</sup> The ALRC also made a recommendation designed to encourage formalisation of these agreements, and thus aid enforceability, and concluded that, for the purposes of calculating an entitlement to the Age Pension, the *Social Security Act 1991* (Cth) should be amended to require that a 'granny flat interest' be expressed in writing.<sup>50</sup>

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<sup>42</sup> Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 35.

<sup>43</sup> Australian Law Reform Commission, above n 35, 12 [rec 5-1].

<sup>44</sup> *Ibid* 13 [rec 7-1].

<sup>45</sup> *Ibid* [rec 7-2].

<sup>46</sup> *Ibid* 14 [rec 8-1].

<sup>47</sup> *Ibid* [rec 10-1], [rec 10-2].

<sup>48</sup> *Ibid* 12 [rec 5-2].

<sup>49</sup> *Ibid* 13 [rec 6-1].

<sup>50</sup> *Ibid* [rec 6-2].

## 2 *Protection and Safeguarding*

Two areas of the Inquiry particularly engaged with questions of protection and safeguarding – aged care and adult safeguarding.

The ALRC's recommendations in aged care focused on buttressing the move towards greater consumer control for older people in aged care with suitable regulatory oversight to ensure accountability and transparency in the provision of quality care, including protections and safeguards against abuse or neglect.

In relation to aged care, the ALRC needed to reflect on how the issues raised that could be classified as 'institutional' or 'system' abuse overlapped with systemic considerations about the quality of care. The line between an issue that goes to quality assurance and one that goes to elder abuse was at times difficult to draw – after all, gross quality failures arguably produce outcomes that are abusive or neglectful. But, overall, the ALRC did not see its role in the Inquiry as one of systematically reviewing the adequacy of quality standards and processes for auditing quality in aged care in our Inquiry. Instead, the ALRC concentrated on safeguards against abuse. Since the ALRC Inquiry, there has been considerable interest in inquiring into quality processes in aged care, including:

- a review of aged care quality regulatory processes;<sup>51</sup>
- a Senate Standing Committee on Community Affairs Inquiry into quality assessment and accreditation framework (to report in November 2018); and
- a Senate Standing Committee on Health, Aged Care and Sport Inquiry into the Quality of care in residential aged care facilities in Australia (ongoing at the time of writing).

These reviews are opportune, in that they have allowed the ALRC's recommendations to be situated within a broader examination of aged care quality processes, and provided added momentum for government action to implement reform. The ALRC's recommendations for a serious incident response scheme in aged care involved rethinking the aged care system's response to abuse and neglect. In doing so, the emphasis was shifted from requiring aged care providers to *report* the occurrence of an alleged or suspected assault, to requiring an *investigation and response* to incidents by providers, along with independent oversight of that investigation and response. The ALRC also made recommendations in relation to a range of other safeguarding strategies, including enhanced employment screening processes, regulating the use of restrictive practices in aged care, and national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.<sup>52</sup>

The ALRC's recommendations about adult safeguarding involved perhaps the finest negotiation of the relationship of autonomy and protection. The ALRC recommended that adult safeguarding agencies have a role in safeguarding and supporting 'at-risk' adults.<sup>53</sup>

Protecting these people from abuse will serve to support their autonomy and show respect for their dignity, because living in fear of abuse can prevent a person from making free choices about their lives and pursuing what they value.

Most state and territory public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability by their guardians, financial administrators or those with powers of attorney. However, there exists a cohort of vulnerable adults, many of whom are old, who do not fall within the purview of this

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<sup>51</sup> Kate Carnell and Ron Paterson, 'Review of National Aged Care Quality Regulatory Processes' (Report, Department of Health (Cth), 25 October 2017).

<sup>52</sup> See Australian Law Reform Commission, above n 35, ch 4.

<sup>53</sup> *Ibid* 15 [rec 14-1].

investigative function. The ALRC recommended that these other vulnerable adults should be better protected from abuse.

Rather than extending the jurisdiction of state and territory public advocates or guardians to all older adults, the ALRC made two decisions:

1. It recommended that adult safeguarding laws be introduced, without recommending that they be situated in a particular body. The ALRC did not suggest that the recommended adult safeguarding function should necessarily be given to public advocates, but rather that the states and territories decide which of their agencies might perform this role, or whether a new agency might need to be created.
2. It recommended that safeguarding laws apply not to older people, but to ‘at-risk adults’, defined as adults who: (a) need care and support; (b) are being abused or neglected, or are at risk of abuse or neglect; and (c) cannot protect themselves from the abuse.<sup>54</sup> The ALRC concluded that this ‘functional’ approach to vulnerability was preferable to providing safeguarding services to all people over a certain age. This allows recognition that most people over 65 are not particularly vulnerable and will not need safeguarding services, while some people under 65 will need these services.

Adult safeguarding is envisaged as an intervention to support autonomy, operating in the main with the person’s consent. Most often, safeguarding and support would involve working with the at-risk adult to arrange for health, medical, legal and other services. In some cases, it might also involve seeking court orders to prevent someone suspected of abuse from contacting the at-risk adult. Where necessary, the ALRC considered that adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect at-risk adults from abuse.

However, in particularly serious cases, the safety of an at-risk person may need to be secured, even against their wishes. The ALRC concluded that, although consent should always be sought, it should not be required in serious cases of physical abuse, sexual abuse or neglect.<sup>55</sup> This may be necessary to secure people’s long-term autonomy interests and their immediate dignity. The ALRC also recommended that consent should not be necessary where safeguarding agencies cannot contact the at-risk adult, despite extensive efforts to do so, or where an adult lacks the decision-making ability to give this consent.<sup>56</sup>

#### IV CONCLUSION

The Elder Abuse Inquiry is one of a series of inquiries the ALRC has completed that have required it to consider how the law can respond to complex social policy issues – these include inquiries into family violence, barriers to work for older people, decision-making for people with disability, and incarceration rates of Aboriginal and Torres Strait Islander people. Comprehensive responses to all of these issues require broader changes than simply legal reform, but, in this Inquiry, as in the others, the ALRC has produced a blueprint for reform that can support and shape broader social change.

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<sup>54</sup> Ibid 15 [rec 14-3].

<sup>55</sup> Ibid [rec 14-4].

<sup>56</sup> Ibid.

# THE PREVALENCE OF ELDER ABUSE AMONG ADULT GUARDIANSHIP CLIENTS

LOIS BEDSON,\* JOHN CHESTERMAN\*\* AND MICHAEL WOODS\*\*\*

*In this article, a picture of elder abuse among Victorian guardianship clients is presented using data from two time periods (2013-14 and 2016-17). The first data set is drawn from a case file review of clients of the Office of the Public Advocate undertaken by a researcher, and the second data set is from data entered into mandatory abuse fields by victims' guardians. The second data set finds elder abuse at higher rates overall, which is likely explained by the additional knowledge guardians would have about the persons that the researcher would not. Research found elder abuse prevalence rates among guardianship clients of 13 per cent in 2013-14 and 21 per cent in 2016-17. It also found that women experienced elder abuse at higher rates than men and that clients with dementia or intellectual disability were more likely to have experienced elder abuse than those with other disability types. This new research relates to people with cognitive impairment who are usually left out of national elder abuse prevalence studies, and provides evidence about the characteristics of elder abuse in this cohort that is otherwise absent. The high rates of elder abuse found in the research presented here attest to the significant, and perhaps over-utilised, role that adult guardianship plays in present-day elder abuse response strategies.*

## I INTRODUCTION

Elder abuse is now widely recognised as a social problem in Australia, and, unless effective preventative measures are put in place, one that is anticipated to grow with our aging population. With this in mind, the question of how to prevent and how to respond to situations of elder abuse has been seriously engaged at both state and national levels. For example, the Victorian Royal Commission into Family Violence in 2016 reported on the needs and experiences of older people.<sup>1</sup> Furthermore, in February 2016, the (now former) Attorney-General of Australia, Senator the Hon George Brandis QC, asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into protecting the rights of older Australians from abuse.<sup>2</sup> The ALRC released its final report in June 2017.<sup>3</sup>

Through this engagement, it has become widely accepted that there is a lack of information on the prevalence of elder abuse in Australia. The Australian Institute of Family Studies' (AIFS) report *Elder Abuse: Understanding Issues, Frameworks and Responses* 'establishe[d] that there is very limited evidence in Australia that would support an understanding of the prevalence of elder abuse'.<sup>4</sup> Recognising this lack of evidence as a serious challenge to the development of evidence-based policy and program responses, one of the ALRC's 43

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<sup>1</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 67–98.

<sup>2</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 18 [1.7] (*Elder Abuse Report*).

<sup>3</sup> *Ibid.*

<sup>4</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016) 5.

recommendations was that '[t]here should be a national prevalence study of elder abuse to build the evidence base.'<sup>5</sup>

Following the release of the ALRC report, the Australian Government committed to funding a national prevalence study. In late 2017, work on establishing the parameters of the study commenced, and Phase One of the research program is currently underway. It is designed to prepare the ground for the national prevalence study by developing a definition of elder abuse to apply in future research and instruments needed to assess prevalence.<sup>6</sup>

While a national prevalence study will provide a crucial baseline for those seeking to prevent and respond to elder abuse, it is anticipated that the results of this study (like the vast majority of national prevalence studies that came before it) will exclude the experiences of people with cognitive impairment. Most national prevalence studies look at elder abuse among community dwelling elders with the capacity to respond to telephone interviews,<sup>7</sup> missing the experiences of older people living in aged care or with significant dementia or other forms of cognitive impairment. It is likely that this research method dominates the field because it is cheaper to implement. To date, only one national elder abuse prevalence study has included older people with cognitive impairment.<sup>8</sup>

The proportion of older people who suffer from cognitive impairment – almost one in ten – combined with the positive correlation between cognitive impairment and risk of elder abuse suggests that almost all national prevalence studies undertaken to date underrepresent the rate of elder abuse in many countries.<sup>9</sup> As the Office of the Public Advocate (OPA) submitted in their report for the Australian Guardianship and Administration Council, only by being inclusive of the experiences of people with cognitive impairment will it be possible to measure the full extent of elder abuse in the Australian community.<sup>10</sup> The OPA shared this report with the Australian Institute of Family Studies to help inform their work in developing the parameters for the Australian national prevalence study. The study we present here, based on research into the experiences of elder abuse among the OPA's guardianship clients, seeks to share information about this 'hard to reach' cohort to help fill this research gap.

The high rates of elder abuse found in this Victorian cohort are attributable, at least in part, to the fact that guardianship is a protective jurisdiction. As such, concerns about abuse, neglect and exploitation are common reasons for a guardianship application to be made. These fulfil Victoria's legislative requirements that a 'need for a guardian' (in these cases the need for guardian decisions that provide protection from abuse) be demonstrated in concert with the other two key requirements: that the person has a 'disability' and 'is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances'.<sup>11</sup>

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<sup>5</sup> *Elder Abuse Report*, above n 2, 9.

<sup>6</sup> Briony Dow and Bianca Bijnath, 'Elder Abuse National Research: Definition' (Discussion Paper, Australian Institute of Family Studies, 2017) 1.

<sup>7</sup> See, eg, National Initiative for the Care of the Elderly, 'Into the Light: National Survey on the Mistreatment of Older Canadians 2015' (Research Report, Canadian Network for the Prevention of Elder Abuse, June 2016); Alice Mowlam, Rosalind Tennant, Josie Dixon and Claudine McCreadie, 'UK Study of Abuse and Neglect of Older People: Prevalence Study Report' (Research Report, National Centre for Social Research, August 2007).

<sup>8</sup> Isabel Iborra Marmolejo, 'Elder Abuse in the Family in Spain' (Research Report, Queen Sofia Centre for Studies on Violence, 2008).

<sup>9</sup> It is estimated that 8.8 per cent of Australians over 65 years old suffer from dementia (Australian Institute of Health and Welfare, *Australia's Health 2016* (2016) 107); Kaspiew, Carson and Rhoades, above n 4, 8.

<sup>10</sup> Lois Bedson, 'Are National Elder Abuse Prevalence Studies Inclusive of the Experiences of People with Cognitive Impairment? Findings and Recommendations for Future Research' (Research Report, Office of the Public Advocate, May 2017).

<sup>11</sup> *Guardianship and Administration Act 1986* (Vic) s 22(1).

However, a concern exists that the high rates of elder abuse in this cohort may be partially attributable to overuse of guardianship as a health and community service sector response to elder abuse. Two developments – law reform in the guardianship realm away from ‘best interests’ decision-making towards substituted judgement (which prioritises the will and preferences of the person under guardianship) and the proposed development of ‘at-risk adult’ protection agencies across Australia – would work together to address these concerns.<sup>12</sup>

## II LANGUAGE

In this paper, for brevity, the term ‘guardianship clients’ will be used to refer to people who have been made subject to a guardianship order by the Victorian Civil and Administrative Tribunal (or the relevant court or tribunal in other states and territories). The Public Advocate, Victoria’s guardian of last resort, was appointed as guardian to each of the ‘guardianship clients’ referred to in the research data presented below. The Public Advocate then delegated the appointments to guardians employed by the Office of the Public Advocate.

For shorthand, this paper will also use the term ‘elder abuse victim’ to refer to people identified by the researcher as experiencing elder abuse. This does not imply that the persons themselves identify with this term. It also uses the term ‘elder abuse’ to encompass both abusive actions and neglectful inaction, irrespective of the intentions of the perpetrator.

## III GUARDIANSHIP AND ELDER ABUSE

### A *The Present Relationship*

In Australia, the appointment of an administrator or adult guardian is a well-known, and commonly employed, response to elder abuse in situations where the victim has significant cognitive impairment. This involves ‘the removal of decision-making authority from the victim and the appointment of a substitute decision maker’<sup>13</sup> for financial or lifestyle decisions. These processes occur in line with state and territory legal frameworks that govern guardianship and administration.<sup>14</sup> Guardianship is a protective jurisdiction so that, when elder abuse is suspected, the appointment of a substitute decision maker is often intended to protect the person from further financial exploitation and physical, psychological or other violence.

As the research data presented below demonstrates, there is a strong relationship between experiences of elder abuse and guardianship. Australia’s intellectual and practical engagement with the United Nations *Convention on the Rights of Persons with Disabilities* (‘CRPD’) has raised questions about the place of substitute decision-making regimes, such as guardianship, in our legislation. These questions involve asking: ‘is guardianship overused?’ and ‘should it even be used at all, even in circumstances involving elder abuse?’

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<sup>12</sup> *Elder Abuse Report*, above n 2, 15–16.

<sup>13</sup> John Chesterman, ‘Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies’ (2016) 69 *Australian Social Work* 115, 117.

<sup>14</sup> See, eg, *Guardianship and Administration Act 1986* (Vic); *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 2000* (Qld); Subject to the laws and terminology in the different states and territories, ‘administration’ usually refers to substitute decision-making in relation to estate and financial matters and ‘guardianship’ covers lifestyle matters including accommodation, services and health-related decisions.

## B *Is Guardianship Overused?*

While responses that effectively prevent further harm and abuse are certainly required, Chesterman highlights the important concern that guardianship is being used as an almost ‘default’ response to elder abuse.<sup>15</sup> The most important of his concerns is that invoking the protections of guardianship impinges on the rights of an older person’s ability to make their own decisions and, potentially, their ability to drive the responses to abuse that they would most appreciate. Chesterman argues that Australia’s state and territory ‘response strategies could be improved by prioritising what service responses, if any, the person wants, even when the person has significant cognitive impairment’,<sup>16</sup> instead of deferring so readily to guardianship and administration as solutions. This thinking aligns with the *CRPD*’s aim to overcome systemic barriers to access to justice for people with disability,<sup>17</sup> and improving their equal recognition before the law by providing necessary supports for them to enact decisions based on their will and preferences.<sup>18</sup>

Solving the problems Chesterman identifies would require a two-pronged approach to guardianship law reform. Firstly, to bring laws into alignment with the *CRPD*. Secondly, to develop services to reduce the need for the health and community sector to rely on guardianship proceedings to respond to suspected elder abuse.

## C *Should Guardianship Even be Used at All?*

The place of guardianship in Australia’s future has been a much-debated topic since the release of the *CRPD*, with some suggesting art 12 necessitates the abolition of all substitute decision-making arrangements.<sup>19</sup> However, the ALRC has convincingly argued that this is not the case,<sup>20</sup> confirming the ongoing relevance of the ‘crucial [protective] role’ played by the guardian of last resort as a necessary human rights backstop, albeit in a more limited set of circumstances.<sup>21</sup>

The ALRC argued that bringing Australia’s decision-making frameworks into alignment with art 12, which has happened to varying extents in different jurisdictions, requires a focus on ‘the *limits* surrounding the appointment of another to act in a person’s stead and also upon the *standard* by which the person is to act.’<sup>22</sup> This includes consideration of the extent to which they promote the will and preferences of the person and enable them to be supported.

## D *The Current Context: Moving towards Compliance with the CRPD*

Australia ratified the *CRPD* in July 2008. The *CRPD* ‘has the potential to profoundly change how law conceptualises and responds to disability’<sup>23</sup> as it clearly shifts away from a medical model of disability towards a social model, seeking reasonable accommodations by state parties to overcome systemic barriers to equality. Indeed

<sup>15</sup> Chesterman, above n 13, 117–18.

<sup>16</sup> *Ibid* 118.

<sup>17</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 13.

<sup>18</sup> *Ibid* art 12.

<sup>19</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report No 124 (2014) 52 [2.71] (*‘Equality, Capacity and Disability Report’*).

<sup>20</sup> *Ibid* 52–6 [2.73]–[2.90].

<sup>21</sup> *Elder Abuse Report*, above n 2, 382 [14.32].

<sup>22</sup> *Equality, Capacity and Disability Report*, above n 19, 58–9 [2.101] (emphasis in original).

<sup>23</sup> Fleur Baupert, Linda Steele and Piers Gooding, ‘Introduction to Disability, Rights and Law Reform in Australia: Pushing Beyond Legal Futures’ (2017) 35 *Law in Context* 1, 2.



[t]he decade since the CRPD entered into force has witnessed a variety of law and policy reform activity ... in response to a growing awareness of barriers to equal justice and other legal issues confronting people with disability ... Since ratification of the CRPD ... a number of jurisdictions have completed ... reviews of their guardianship laws. [In the realm of guardianship,] [t]he resulting inquiries, proposals and measures have ... been intended to give effect to the CRPD's principles.<sup>24</sup>

Law reform bodies in Queensland, Victoria, the Australian Capital Territory, New South Wales and Tasmania reviewed their guardianship laws,<sup>25</sup> and produced recommendations (draft proposals in NSW and Tasmania) for change in 2010, 2012, 2016, November 2017 and December 2017 respectively.<sup>26</sup> All of the reviews recommended the removal of 'best interests' style principles from their laws in order to promote the person's human rights (including the importance of supporting and considering their will and preferences) and better align with the *CRPD*.<sup>27</sup>

Victoria is currently the closest of these jurisdictions to achieving this shift. The Guardianship and Administration Bill 2018 was introduced to the Victorian Parliament in March 2018.<sup>28</sup> The Bill does not contain any reference to 'best interests' style decision making. Rather, the primary object of the Bill 'is to protect and promote the human rights and dignity of persons with a disability by having regard to the *Convention on the Rights of Persons with Disabilities*, recognising the need to support persons with a disability to make, participate in and implement decisions that affect their lives'.<sup>29</sup> The Bill states that 'the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person'.<sup>30</sup>

By moving away from 'best interests' style considerations in the appointment of a guardian by the relevant court or tribunal and the practice of guardianship,<sup>31</sup> Chesterman's concerns about the potential for overuse of guardianship will be at least partly addressed – as guardianship appointment and practice will be less weighted towards what society might think of as a 'good outcome' for the person and more considerate of the person's own rights, will and preferences.

Another way in which Australia could provide better support to people with a disability, in the context of elder abuse, is by enacting the adult safeguarding legislation and funding adult safeguarding agencies as was proposed in the ALRC's elder abuse inquiry. The ALRC's report

<sup>24</sup> Ibid 2–4.

<sup>25</sup> *Guardianship and Administration Act 2000* (Qld); *Guardianship and Administration Act 1987* (Vic); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1995* (Tas).

<sup>26</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010); Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); ACT Law Reform Advisory Council, *Guardianship Report*, Final Report (2016); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Draft Proposals (2017); Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)*, Issues Paper No 25 (2017).

<sup>27</sup> For example, Queensland recommended that the "best interests" approach reflected in the current General Principle 7(5) be replaced with promotion of the 'adult's rights, interests and opportunities' to give the General Principles a strong human rights focus and reflect more closely the relevant articles of the CRPD (Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) xii); Victoria recommended that 'the phrase "best interests of the person" should be replaced with the "promotion of the personal and social wellbeing of the person"' as a guiding principle for substitute decision making' (Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 92); NSW recommended that 'new decision-making principles should require representatives to give effect to a person's will and preferences wherever possible rather than a person's "best interests"' (New South Wales Law Reform Commission, *Review of the Guardianship Act 1987*, Draft proposals (2017) 2).

<sup>28</sup> Guardianship and Administration Bill 2018 (Vic).

<sup>29</sup> Ibid s 7(1).

<sup>30</sup> Ibid s 8(1)(b).

<sup>31</sup> All reviews have also recommended that guardianship appointments must only be made where they are the least restrictive response possible to resolving the matter, for example, in Victoria's new Bill VCAT is directed to consider whether other less restrictive options such as mediation might be able to resolve the matter (Guardianship and Administration Bill 2018 (Vic) cl 31(b)).

identified that '[n]o government agency ... has the clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse.'<sup>32</sup> To address this gap, they recommended that '[a]dult safeguarding laws be enacted in each state and territory ... [which] give adult safeguarding agencies the role of safeguarding and supporting "at-risk adults".'<sup>33</sup> These laws would safeguard and support a larger cohort than those covered by state and territory guardianship legislation, by including people across the spectrum of decision-making abilities who find themselves at risk of abuse or neglect. In discussing who should hold these new responsibilities, the ALRC stated that '[e]xisting public advocates and public guardians have expertise in responding to abuse, and may be appropriate for this broader safeguarding function ... [h]owever, some states or territories may prefer to give this role to another existing body or to create a new statutory body.'<sup>34</sup>

Therefore, the future may see an expansion of public guardians' responsibilities in some states and territories, as well as continuing to offer protection and support to older people with limited decision-making ability that are experiencing or are at immediate risk of abuse, in alignment with the *CRPD*. The ALRC's proposed adult safeguarding agencies would give services an alternative response pathway to guardianship in suspected elder abuse cases involving people with cognitive impairment. These changes, alongside the type of service response improvements proposed by Chesterman (which will be supported by funding to statutory adult safeguarding agencies), would reduce the likelihood of guardianship being overused, or taking away more rights than it enhances.

The research presented below could valuably be repeated, following these changes, to assess the impact of these policies on the prevalence rates of elder abuse among guardianship clients. For example, how effective have the alternate service pathways been on reducing the use of guardianship as an elder abuse response strategy?

#### IV RESEARCH ON ELDER ABUSE PREVALENCE IN AUSTRALIA

##### A *General Community*

As discussed above, Australian research to date has provided very limited evidence about the prevalence and incidence of elder abuse. Two population-based studies looked at women's health outcomes and women's personal safety (with a focus on sexual assault and intimate partner violence), but were limited in the extent to which they aligned with definitions of elder abuse.<sup>35</sup> Another set of studies involved the analysis of data from calls to elder abuse helplines. These studies shed light on the set of circumstances when 'elder abuse is known or suspected and a person concerned has decided to seek advice.'<sup>36</sup> In two of these three studies, the reporter of the abuse was either the victim or an interested party. One study looked solely at case file data based on direct reports from victims of elder abuse.

While direct reports provide more reliable data than reports from interested parties (as they do not involve subjective judgements about another person's experience), studies that limit themselves to direct reports by victims provide a narrower view of the scope of elder abuse in Australia than they could otherwise. This is because they do not capture information about abuse experienced by people with significant cognitive impairment.

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<sup>32</sup> *Elder Abuse Report*, above n 2, 384 [14.40].

<sup>33</sup> *Ibid* 377.

<sup>34</sup> *Ibid* 25 [1.48].

<sup>35</sup> Kaspiew, Carson and Rhoades, above n 4, 6.

<sup>36</sup> *Ibid*.

In 2017, State Trustees Limited funded a market research company to undertake a small study involving telephone interviews with 820 people over 60 years old. The study collected information on whether or not the people had experienced financial elder abuse themselves (seven per cent of women and one per cent of men) and whether or not they knew of someone who had been mistreated.<sup>37</sup>

## B People with Cognitive Impairment

Without the benefit of results from a population-based prevalence study that includes the experiences of people with cognitive impairment,<sup>38</sup> one set of data that could provide insight into elder abuse among this cohort are the case files of people subject to adult guardianship or administration orders. Of course, people under guardianship or administration orders are a much narrower group than people with cognitive impairment (which includes an estimated 8.8 per cent of all Australians over 65 years old who suffer from dementia),<sup>39</sup> as not everyone with cognitive impairment requires a substitute decision-maker or meets the legal requirements for guardianship.<sup>40</sup> However, as mentioned above, this intervention is a relatively common systemic response to situations where elder abuse is suspected or known, and the person lacks decision-making abilities in the relevant area (for example, to make a decision about where and with whom they should live). As such, examination of this data is potentially fruitful.

State Trustees Limited funded Monash University to undertake the ‘Protecting Elders Assets Study’ from 2009–2011. This study included the 2010 report *Prevalence of Financial Elder Abuse in Victoria*,<sup>41</sup> and looked at de-identified case file data from sources which included the Office of the Public Advocate, Victoria’s guardian of last resort and State Trustees Limited, Victoria’s administrator of last resort. Referring to its analysis of data from the Office of the Public Advocate, the report found:

This data gives ... insight into the [demographic characteristics] ... that underlie the vulnerability to financial abuse for these clients. A majority of clients were women, the mean age was 80 years, and 12 per cent were in their nineties. Clients were most likely to be vulnerable to financial ‘exploitation’ because of a diagnosis of dementia, with three quarters of women and nearly 60 per cent of men having this diagnosis. Men were more likely than women to be vulnerable because of physical disability or acquired brain injury.<sup>42</sup>

Because this study concerned population-wide prevalence of financial abuse, it did not report on prevalence or incidence rates of elder abuse among people under administration or guardianship.

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<sup>37</sup> State Trustees Limited, ‘Financial Elder Abuse: A Survey of Victorians’ (Poster presented at 5<sup>th</sup> National Elder Abuse Conference, Sydney, 19–20 February 2018).

<sup>38</sup> See also Bedson, above n 10, for a discussion of the requirements of such a study.

<sup>39</sup> Australian Institute of Health and Welfare, *Australia's Health 2016* (2016) 108.

<sup>40</sup> The legal requirements are set out in the *Guardianship and Administration Act 1986* (Vic) s 22. To provide some context, an estimated 81,771 Victorians over 65 years old suffered from dementia in 2016 (8.8 per cent of 929,214 older Victorians), while only 349 Victorians over 65 with dementia were subject to a guardianship order in 2016–17. Hence, an estimated 0.4 per cent of Victorians with dementia were OPA guardianship clients in 2016 (Australian Bureau of Statistics, *3253.0 Population Estimates by Age and Sex, Regions of Victoria, 2016* (2017) Data cube sheet 6; Australian Institute of Health and Welfare, above n 39, 108).

<sup>41</sup> Jo Wainer, Peteris Darzins and Kei Owada, ‘Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study’ (Research Report, State Trustees, 10 May 2010).

<sup>42</sup> *Ibid* 18.

## V NEW RESEARCH ON ELDER ABUSE PREVALENCE AMONG VICTORIA'S PUBLIC GUARDIANSHIP CLIENTS

The research findings presented here draw from two separate data sets that both consider the question of elder abuse prevalence among guardianship clients of Victoria's Office of the Public Advocate. The first data set is drawn from the first study to consider the prevalence of elder abuse among guardianship clients.<sup>43</sup> This research examined Victorian guardianship case files for clients received by the OPA in the 2013-14 financial year, for evidence that the person had experienced elder abuse. The second data set, which was also derived from OPA guardianship matters over a one year period (2016-17), used a different data collection method to identify which matters involved elder abuse.

The original research project, which generated the first data set, was commenced by OPA in 2015. The central questions it sought to answer were:

- What was the incidence of elder abuse among our guardianship clients?
- What were their circumstances?
- How did OPA help protect them from the abuse?

In late 2015, in response to this initial project, mandatory fields were added to OPA's information management system to capture information about violence, abuse and neglect in all open cases.<sup>44</sup> Information inputted into those fields was used to create the second data set referred to in this paper. This provides a point of comparison to the first data set, as well as providing additional information about the prevalence of elder abuse among guardianship clients.

Alongside the organisational benefit to OPA of gaining a greater understanding of guardianship clients' experiences of elder abuse, the broader purpose of the research presented here is to:

- contribute quantitative evidence that sheds light on the prevalence of elder abuse among people under guardianship; and
- highlight the importance of capturing the experiences of people with cognitive impairment in future national elder abuse prevalence studies.

### A *Research Methods*

#### 1 *Definition of Elder Abuse*

For the purposes of this study, elder abuse was defined as 'a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'.<sup>45</sup> For this research, an 'older person' was defined as a person that was aged 65 or over at the time their matter was received by OPA.

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<sup>43</sup> Monash University used OPA data, along with other sources, to explore the characteristics of people experiencing financial elder abuse, but did not comment on the prevalence of elder abuse in this cohort. (Wainer, Darzins and Owada, above n 41, 13-18.)

<sup>44</sup> The mandatory fields, which collect information about the types of abuse the person has experienced, and whether or not the abuse was substantiated, must be completed before the file can be closed.

<sup>45</sup> World Health Organisation, *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide* (2008) <[http://www.who.int/ageing/publications/ELDER\\_DocAugusto8.pdf](http://www.who.int/ageing/publications/ELDER_DocAugusto8.pdf)>.

## 2 *First Data Set*

The first study considered all guardianship matters that were received by OPA in 2013-14, with the goal of identifying people that came under OPA guardianship, and had experienced elder abuse. The researchers identified 388 guardianship clients that were 65 years or older at the time their matter was received.<sup>46</sup> Key information about these 388 guardianship clients, such as demographics, information about their guardianship order, and a free text summary of the matter with relevant presenting issues for consideration (written by the guardian), was extracted from OPA's case management system. The free text summary was searched for references to elder abuse (any reference to violence, abuse or neglect or suspicions of same). This method returned 59 potential guardianship clients that may have experienced elder abuse. The full paper files and electronic records of the matters identified using this method were then closely reviewed by the researcher.

Evidence or suspicions of abuse were documented in the files in various ways. For example, guardians recording information provided in conversation by community service providers or accusations by family members, paperwork from guardianship application processes, and letters from clinicians or community service providers (often provided as evidence in guardianship hearings). By searching the files for references to different types of abuse (including neglect), the researcher determined that there were 51 people who had, on the balance of probability, experienced elder abuse.

Most of those excluded for the final stage were identified as people at the centre of a family conflict situation that involved multiple accusations of abuse levelled by different parties at each other. In these situations, and other situations where accusations of abuse made by family lacked independent support, the deciding factor in whether they were included in the sample was whether the appointed guardian believed the accusations to be plausible.

There was one clear exception to this pattern of abuse accusations that lacked corroboration. One of the 59 people identified in the initial filtering process was excluded from the sample on the grounds that, while they had experienced abuse,<sup>47</sup> the abuse had not occurred in a relationship of trust and did not satisfy the definition of 'elder abuse'.

For the 51 elder abuse victims identified of the 388 people in the sample, additional information was collected about the type or types of abuse experienced and the characteristics of the perpetrator. Basic quantitative analysis was also undertaken on the full range of variables available. The small sample size meant most relationships between variables lacked statistical significance, but nevertheless indicate elder abuse prevalence and the demographic profile of this cohort.

## 3 *Second Data Set*

The second data set comprises individuals who were subject to guardianship orders and who had at least one of these matters closed (including instances where an OPA guardian is reappointed under a new order) in the 2016-17 financial year. The study used closed, rather than open, cases to guarantee the mandatory abuse fields had been completed. This ensured that the most complete and accurate estimates of elder abuse were obtained. To be included in this data set, the individuals also needed to meet the age selection criterion, which was to

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<sup>46</sup> Some people were subject to multiple guardianship or temporary guardianship orders in the one year, and so the research consistently refers to people or 'guardianship clients', as opposed to new matters, so the prevalence rates of the population are not skewed by multiple entries relating to the one person.

<sup>47</sup> The person's human right to freedom of movement was violated by procedures put in place to manage wandering behaviours of other residents.

be 65 years or older on the day the matter was received. This resulted in a data set of 487 people.<sup>48</sup>

To identify which of those people had likely experienced violence, abuse or neglect, information from the new mandatory abuse fields was used. These fields are completed by the person's guardian, either during the course of the matter, or at the point of closing the file. The two fields collect information about the type or types of abuse identified and about whether the guardian believes the abuse identified has been substantiated.

The design of the fields reflects the difficulties of collecting information about violence and abuse being perpetrated against people with cognitive impairment, particularly with the additional challenge of elder abuse victims not wanting to disclose abuse perpetrated by their loved ones. Hence, the abuse and neglect fields are designed to capture violence, abuse and neglect that the person's guardian, either 'reasonably suspects' has occurred, or believes 'on balance of probability' has occurred.<sup>49</sup>

In this paper, abuse of guardianship clients that is 'reasonably suspected' will be referred to as 'abuse not substantiated' and the abuse for which there is strong evidence will be referred to 'abuse substantiated'. When the two abuse cohorts are combined in the findings they will be referred to as 'abuse victims'. While it is possible that a guardian's 'reasonable suspicion' might be incorrect, and individuals may have been incorrectly identified in this sample as 'abuse victims', it is contended that the 'reasonable suspicion of abuse' of a guardian, with access to the professional expertise of the person's health and community service workers, is an appropriate method of measuring abuse prevalence.

Demographic data and information entered into the mandatory abuse and neglect fields were extracted from OPA's case management system in accordance with the selection criteria described above. Note that the case management data fields do not clearly identify the perpetrators of the abuse. Hence, there is no straightforward way of ensuring these abuse instances occurred in 'a relationship where there is an expectation of trust' in accordance with the definition of 'elder abuse'. For the purposes of this paper, we rely on evidence from the first data set, in which 51 out of 52 older guardianship clients identified as experiencing abuse were determined to be experiencing 'elder abuse'. Therefore, it is reasonable to assert that most, if not all, of the 102 abuse victims identified in the second data set are also 'elder abuse' victims. This paper proceeds on the assumption that identifying this cohort as 'elder abuse victims' will not significantly skew the analysis that follows.

#### 4 *Abuse Time-Frame*

For the purposes of this study, no selection criteria were placed on the time-frame for the identified elder abuse. This is because of the difficulty in establishing exactly when and where the abuse occurred when it is not directly observed or involves victims with cognitive impairment. Hence, the elder abuse reported here includes victims that experienced abuse at some point in the past, as well as victims of ongoing abuse.

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<sup>48</sup> Individuals may have multiple orders across the period reviewed. The 487 people identified were involved in a total of 520 matters recorded in OPA's case management system.

<sup>49</sup> The level of evidence used to make this determination would not necessarily guarantee a conviction in court.

## B Findings and Discussion

### 1 Prevalence Rates

In 2013-14 (the first data set), 13 per cent of OPA's older guardianship clients had experienced elder abuse.<sup>50</sup> Looking at prevalence rates by gender shows that 17 per cent of women in this cohort had experienced elder abuse, compared with eight per cent of men.

Data from 2016-17 (the second data set) showed that elder abuse was substantiated for 13 per cent of guardianship clients. It also revealed that a further eight per cent of this cohort experienced elder abuse that was not substantiated. In total, the data suggested that elder abuse had impacted the lives of 21 per cent of guardianship clients (see Table 1 below).

Table 1. Prevalence of elder abuse among guardianship clients (2016-17)

|                   | Women<br>n=271 | Men<br>n=216 | Persons<br>n=487 |
|-------------------|----------------|--------------|------------------|
| Substantiated     | 14% (37)       | 11% (24)     | 13% (61)         |
| Not substantiated | 10% (28)       | 6% (13)      | 8% (41)          |
| Total identified  | 24% (65)       | 17% (37)     | 21% (102)        |

The recent data also suggested that gender played a role in how likely people were to have experienced violence, abuse or neglect. Women were more likely than men to have experienced elder abuse (24 per cent compared to 17 per cent).

### 2 Forms of Elder Abuse

Based loosely on the types of violence and abuse referred to in the *Family Violence Protection Act 2008* (Vic),<sup>51</sup> and tailored to OPA's client group, the categories used in this paper are: physical abuse, psychological or emotional abuse (including social isolation), financial abuse, sexual abuse, impairment related abuse, other violence and abuse, and neglect and acts of omission.<sup>52</sup>

#### (a) Individuals Experience Multiple Forms of Elder Abuse

In 2013-14, information gleaned from the case files suggested that 71 per cent of elder abuse victims had experienced more than one form of abuse. Again, this rate was higher for women (76 per cent). The second data set showed comparatively low rates of multiple forms of abuse recorded against victims (33 per cent). This discrepancy is likely attributable to the differences in the way the information was collected, and not representative of a real shift. In creating the first data set, the researcher combed the case files, searching for references to elder abuse, and documented all that came up. For the second data set, guardians completed two mandatory fields relating to abuse, and could not close the file without doing so. As a hurdle on the way to closing a matter, perhaps guardians were less likely to record every form of abuse that had

<sup>50</sup> That 13 per cent is 51 of 388 guardianship clients for whom OPA received guardianship orders in 2013-14.

<sup>51</sup> *Family Violence Protection Act 2008* (Vic) s 5.

<sup>52</sup> Some of the less commonly used categories here are: 'Impairment related abuse' includes deliberately restricting a person's access to their hearing aids, mobility aids or medication; 'other violence and abuse' includes everything that does not fit in to the other categories and may include legal or civil abuse and systemic abuse; and 'acts of omission' is defined as 'the failure to act upon a legal duty or responsibility' and includes doctors who fail to offer medical treatment because they base the decision not to offer treatment on judgements about the value of the person's life, due to their disability, rather than on the clinical value of the treatment (Office of the Public Advocate, 'Guide to Completing Violence, Abuse and Neglect Fields on Resolve' (Practice Guide, Office of the Public Advocate, September 2015) 3 [3.2.5]).

affected that person, especially if the abuse was not continuing or central to the reason that the guardianship order was required.

It is plausible that the overall elder abuse prevalence rates derived from the second data collection method are more accurate (given the guardian's in-depth knowledge of the person's circumstances) but provide less nuanced reporting on abuse types. Whether the results from the first or second data set are more representative of the population, or the truth lies somewhere in the middle, this data suggests that at least one third of elder abuse victims under guardianship have experienced multiple forms of abuse that would likely have involved multiple instances of abusive acts or neglectful inactions.

*(b) Prevalence of Different Forms of Abuse*

The two data collection periods and methods generated somewhat different prevalence rates across the different types of elder abuse (see Table 2 below). The fact that the second data set contained, on average, fewer forms of abuse per elder abuse victim would have influenced the proportions reported below, and this could partly explain the lower rates seen in the second period. However, it cannot explain the higher prevalence rates apparent in the areas of financial abuse, neglect and impairment related abuse in the second period.

*Table 2. Prevalence of each abuse type among older guardianship clients*

|                                   | 2013-14<br>(n=388) | 2016-17<br>(n=487) |
|-----------------------------------|--------------------|--------------------|
| Financial abuse                   | 7% (29)            | 10% (47)           |
| Psychological and emotional abuse | 6% (24)            | 5% (23)            |
| Physical abuse                    | 6% (24)            | 4% (18)            |
| Neglect and acts of omission      | 4% (15)            | 8% (39)            |
| Other abuse                       | 1% (5)             | 1% (3)             |
| Sexual abuse                      | 1% (2)             | 0% (1)             |
| Impairment related abuse          | 0% (1)             | 5% (22)            |

The elder abuse experiences of the OPA's guardianship clients with high rates of financial abuse is broadly aligned with much of the elder abuse literature, which recognises financial abuse as one of the most common forms of elder abuse in the general community.<sup>53</sup> The 2016-17 data shows that ten per cent of all older guardianship clients experienced, or were suspected to have experienced, financial abuse.<sup>54</sup>

Psychological and emotional abuse and physical abuse were reported at relatively high rates in both periods. Interestingly, the rates reported in this cohort were not quite as high as the Australian Longitudinal Study of Women's Health, which found that just under eight per cent of Australian women over 70 years old had experienced some form of abuse, with name calling and put downs the most common forms recorded.<sup>55</sup> This highlights the need to define when mistreatment passes into elder abuse. The longitudinal study asked three questions:

<sup>53</sup> Financial abuse and psychological abuse are the two abuse types most frequently reported to elder abuse helplines in Australia. No Australian prevalence rates exist, however the World Health Organisation's 2015 report on elder abuse showed financial abuse estimates of between one and nine per cent in high- and middle-income countries (the highest range of all common abuse types) (Kaspiew, Carson and Rhoades, above n 4, 5-7).

<sup>54</sup> The 2013-14 rate of financial abuse among guardianship clients was 7.5 per cent.

<sup>55</sup> Australian Longitudinal Study on Women's Health, *1921-26 cohort: Summary 1996-2013* (2014) <[https://www.alsw.org.au/images/content/pdf/Cohort\\_summaries/ALSWH\\_1921-2\\_2020cohort\\_summary.pdf](https://www.alsw.org.au/images/content/pdf/Cohort_summaries/ALSWH_1921-2_2020cohort_summary.pdf)>.



- Has anyone close to you tried to hurt you or harm you recently?
- Has anyone close to you called you names or put you down or made you feel bad recently?
- Are you afraid of anyone in your family?

OPA guardians would not necessarily have categorised all instances of name calling as elder abuse, especially if they did not occur on a regular basis. Hence, OPA data may have used a higher threshold when categorising an experience as abusive, compared to the Australian Longitudinal Study of Women's Health. It is also possible that guardianship clients were less able to report abuse than people without significant cognitive impairment.

OPA clients experienced neglect at higher rates than are reported in the general community,<sup>56</sup> with respective prevalence rates of four per cent in 2013-14 and eight per cent in 2016-17 (of all older guardianship clients). Given the protective jurisdiction of guardianship, and the higher than average dependency rates of the cohort, it is not surprising that abuse and neglect rates of guardianship clients would be higher than that of the general community.

Another unique feature of this cohort is their susceptibility to 'impairment related abuse'. This form of elder abuse is unique to people with some form of physical or cognitive impairment, for example, hearing loss, mobility challenges or memory loss. Older people under guardianship experienced 'impairment related abuse' at rates of almost one in 20 people (five per cent) in 2013-14 and one in five elder abuse victims in the 2016-17 cohort. This highlights the importance of further research into 'impairment related abuse' among older people with cognitive impairment, as well as the relationship between dependency and elder abuse.

### 3 Elder Abuse Victims' Experience of Abuse

Financial abuse was the most common form of elder abuse experienced by victims in both periods (57 per cent in 2013-14 and 46 per cent in 2016-17). Examples of financial abuse experienced by guardianship clients in the first data set included forging and misusing Power of Attorney documents, forging the person's signature to effect transfer of the person's home to the perpetrator, and perpetrators spending the older person's money on themselves.

Table 3. Proportion of elder abuse victims who experienced each form of elder abuse

|                                   | 2013-14<br>(n=51) | 2016-17<br>(n=102) |
|-----------------------------------|-------------------|--------------------|
| Financial abuse                   | 57% (29)          | 46% (47)           |
| Psychological and emotional abuse | 47% (24)          | 23% (23)           |
| Physical abuse                    | 47% (24)          | 18% (18)           |
| Neglect and acts of omission      | 29% (15)          | 38% (39)           |
| Other abuse                       | 10% (5)           | 3% (3)             |
| Sexual abuse                      | 4% (2)            | 1% (1)             |
| Impairment related abuse          | 2% (1)            | 22% (22)           |

<sup>56</sup> The WHO reported estimated prevalence rates for neglect constituting elder abuse of zero to six per cent across high- to middle-income countries (World Health Organisation, *World Report on Ageing and Health* (2015) <[http://apps.who.int/iris/bitstream/handle/10665/186463/9789240694811\\_eng.pdf;jsessionid=05905CB857F8B3092C50DD9A4FAC8E4?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/186463/9789240694811_eng.pdf;jsessionid=05905CB857F8B3092C50DD9A4FAC8E4?sequence=1)>). The longitudinal study of Australian women found that around 20 per cent had experienced neglect. However, the questions asked included 'Are you sad and lonely often?' and 'Do you feel that nobody wants you around?' which are not necessarily indicative of neglect of a person's daily care needs (World Health Organisation, *World Report on Ageing and Health* (2015) 47 <[http://apps.who.int/iris/bitstream/handle/10665/186463/9789240694811\\_eng.pdf;jsessionid=05905CB857F8B3092C50DD9A4FAC8E4?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/186463/9789240694811_eng.pdf;jsessionid=05905CB857F8B3092C50DD9A4FAC8E4?sequence=1)>).

In 2013-14, psychological and emotional abuse and physical abuse were tied as the second most common form of abuse (47 per cent each). Interestingly, in 2016-17 their incidence rates were much lower (23 per cent and 18 per cent respectively). This can partially, but not fully, be explained by the fact that guardians were less likely to identify multiple forms of abuse against one client than the researcher who created the first data set. Some evidence of this can be seen in the fact that in 2013-14, almost half of the cases that reported one of these forms of abuse also reported the other, while in 2016-17 this correlation was lower at around one quarter.

In 2013-14, neglect and acts of omission were the fourth most common category of elder abuse, at 29 per cent. However, in 2016-17, this was the second most common category of elder abuse, with 38 per cent of elder abuse victims suffering neglect. The second data set showed that 32 per cent of people who had experienced financial abuse had also experienced neglect. The first data set showed a less strong correlation, with only 17 per cent of people identified as victims of financial abuse also identified as suffering neglect. This higher rate of correlation between the categories is notable in that most correlations between categories were lower in the second period, but could be partially explained by the higher rate of neglect reporting in the second period.

Reports of impairment related abuse were more common in the second data set than in the first: one person out of 51 in the first period compared with 22 people out of 102 in the second period. This discrepancy is most likely attributable to the different data collection strategies, and suggests the need for further exploration of what sorts of abuse events guardians are categorising as 'impairment related'. This category, along with 'neglect and acts of omission', are both valuable areas for further inquiry in this cohort and in future elder abuse studies that include people with cognitive impairment. The categories 'other abuse' and 'sexual abuse' were reported at low rates in both periods. However, the 'other abuse' category was notably lower in the second period than the first. This discrepancy could also be explored further.

#### 4 Likelihood of Substantiation

To identify the full extent of the violence, abuse and neglect perpetrated against people with cognitive impairment, the OPA captured information about a guardian's suspicions of abuse as well as when they were absolutely confident that abuse had occurred – herein called 'substantiated' and 'not substantiated' elder abuse. This distinction is discussed above in the research methods used for the second data set. Table 4 displays the substantiation rates for different types of elder abuse. This demonstrates how difficult it can be to be sure that elder abuse has occurred or is occurring. Where the guardianship client is living at home, sometimes with a suspected abuse perpetrator, and either does not wish to or is unable to disclose the abuse, it can be very difficult for their guardian or community support services to know whether or not abuse has definitively occurred.

*Table 4. Proportion of persons for whom the identified elder abuse was substantiated, by abuse type (2016-17)*<sup>57</sup>

|   |     |
|---|-----|
| Impairment related abuse (n=22)         | 86% |
| Physical abuse (n=18)                   | 78% |
| Neglect and acts of omission (n=39)     | 62% |
| Psychological or emotional abuse (n=23) | 61% |
| Financial abuse or exploitation (n=47)  | 49% |
| TOTAL ABUSE AND NEGLECT (n=102)         | 60% |

<sup>57</sup> Forms of abuse that were experienced by small number of our sample were excluded from this table so as not to cause confusion. For example, one woman was identified as having suffered sexual abuse and that abuse was substantiated; this would give sexual abuse a substantiation rate of 100 per cent.

Overall the substantiation rate was 60 per cent. Impairment related abuse and physical abuse, which are probably the most visible forms of abuse (lack of hearing aids or wheelchair; bruising and more serious injuries), had the highest rates of substantiation (86 per cent and 78 per cent respectively). On the other hand, less than half of the people who were suspected of experiencing financial abuse had that abuse substantiated (49 per cent). This lower rate may stem from the difficulties inherent in proving financial abuse (particularly the less significant forms), or it could be a reflection of the fact that guardians do not make financial decisions and therefore have limited access to information about the person's financial situation, or both. Perhaps administrators, when they are appointed, would report higher rates of substantiation of financial elder abuse. This is a potential area for future collaborative research.

## 5 *Disability and Elder Abuse*

Both data sets showed that people with intellectual disability and people with dementia were more likely than people without these disabilities to be victims of elder abuse (see Table 5 below). The second data set (which reported a higher proportion of elder abuse victims overall) showed that 24 per cent of people with an intellectual disability and 23 per cent of people with dementia were victims of elder abuse.

*Table 5. Elder abuse prevalence rates by disability type*

|                         | 2013-14 | 2016-17 |
|-------------------------|---------|---------|
| Intellectual disability | 17%     | 24%     |
| Dementia                | 16%     | 23%     |
| Mental illness          | 12%     | 12%     |
| Acquired Brain Injury   | 11%     | 18%     |
| Physical disability     | 6%      | 16%     |
| All                     | 13%     | 21%     |

Both data sets also presented the same broad picture of the prevalence of elder abuse across the five main disability types recorded in OPA's case management system, with intellectual disability and dementia showing the highest risk and acquired brain injury, physical disability and mental illness showing lower risk profiles.

Mental illness, however, stands out as the only group for whom prevalence rates did not rise, despite the higher overall rate of identified victims in the second data set. The groups of guardianship clients with mental illness or intellectual disability also grew faster than those with other disability types. It is not clear why this growth occurred, but the data suggests that elder abuse was not the driver for the growth in the numbers of older guardianship clients with a mental illness.

## 6 *Age and Elder Abuse*

The relationship between the age of guardianship clients and elder abuse is not straightforward, and requires further exploration. While the overall abuse rates were lower in 2013-14 than 2016-17 in every age group (and for each gender), there were some patterns worth mentioning.

In both 2013-14 and 2016-17, the prevalence of elder abuse was higher for women than men, both overall and in each age group. In 2013-14, the prevalence rate for both men and women was lowest in the 85 years and over age group. However, in 2016-17, while men over 85 years old experienced less elder abuse than men in the younger age groups (65-74 years and 75-84

years), women in the oldest age group experienced a higher prevalence of elder abuse than any other cohort (27 per cent).

The apparent rise in abuse rates for women over 85 years old cancelled out the apparent fall in abuse rates for men in that cohort, returning a relatively flat overall profile of elder abuse prevalence by age (20 per cent for 65-74 year olds, 21 per cent for 75-84 year olds, 22 per cent for people over 85 years).

Table 6. Proportion of elder abuse victims by age group and gender

|       | 2013-14 |     |     | 2016-17 |     |     |
|-------|---------|-----|-----|---------|-----|-----|
|       | Women   | Men | All | Women   | Men | All |
| 65-74 | 16%     | 4%  | 9%  | 23%     | 18% | 20% |
| 75-84 | 16%     | 11% | 14% | 21%     | 20% | 21% |
| 85    | 13%     | 6%  | 11% | 27%     | 13% | 22% |
| Total | 17%     | 8%  | 13% | 24%     | 17% | 21% |

The interplay between age and gender is worth exploring further, to test the hypothesis that elder abuse prevalence rates in the older age groups (for example 85 years and over) vary with gender. The second data set suggests that older women may be more vulnerable to elder abuse than the other cohorts explored here. The first data set suggests the opposite, that older female guardianship clients may be less vulnerable to elder abuse than the younger cohorts. As discussed earlier, the second data set is believed to have more reliably identified elder abuse than the first data set, due to the closer relationship between the guardian that identified the abuse and the guardianship client. Further exploration of this issue would help decide whether older female guardianship clients are in fact more vulnerable to elder abuse.

It is very likely that a positive correlation exists between cognitive impairment and elder abuse<sup>58</sup> and between age and cognitive impairment.<sup>59</sup> However, further research is required to further elucidate these relationships.

## 7 Perpetrators of Elder Abuse

As elder abuse occurs in the context of relationships characterised by trust, it is unsurprising that there is significant overlap between family violence and elder abuse. The data from 2013-14 shows that in practice most, but not all, elder abuse of guardianship clients fits under the banner of family violence. This is because family violence against older people requires the perpetrator to be either a family member or in a family-like relationship with the victim, whereas elder abuse just requires that they be in a relationship normally characterised by trust, which includes family and family-like relationships as well as friends and others with whom the person has formed an intimate connection.

Of the victims of elder abuse identified in 2013-14, nine out of ten experienced family violence. Women were more likely to have experienced their abuse in a family violence context than men (95 per cent compared with 69 per cent). This large discrepancy suggests that gender may play an important role in determining people's experiences of elder abuse, and that this is an area for further research.

Table 7 below provides information on perpetrators of elder abuse. The three largest categories of perpetrator were all family members: children and their spouses, the spouse of the victim,

<sup>58</sup> World Health Organisation, *World Report on Aging and Health*, above n 56, 75

<sup>59</sup> Australian Institute of Health and Welfare, above n 39, 108.

and other relatives. The data analysis found 67 perpetrators of abuse across the 51 cases identified in 2013-14. Just under 30 per cent of elder abuse victims were being abused by multiple perpetrators.

Table 7. *Perpetrators of elder abuse (2013-14)*

|                             | Number of perpetrators identified (n=67) |
|-----------------------------|--|
| Children and their partners | 40                                       |
| Spouse                      | 12                                       |
| Other relative              | 6  |
| Friend/Neighbour            | 5  |
| Housemate                   | 3  |
| Paid carer                  | 1  |

The method of data collection used in 2016-17 did not allow analysis of perpetrator-victim relationships.

### C Limitations

These two methods of estimating elder abuse prevalence among guardianship clients have some limitations. The first method used to estimate prevalence was likely to have returned an underestimate of elder abuse rates, as the free-text case summaries used to identify potential elder abuse would not always have mentioned all the abuse the person had experienced.<sup>60</sup> Abuse suffered may be hidden from interested parties and service providers, it may have occurred in the past, or it may not be central to the issues that brought the matter to the guardianship jurisdiction. These would all be reasons that the person's case summary and files may not contain reference to their experience of elder abuse. Note that the first case file review study employed the World Health Organisation's widely accepted definition of elder abuse as 'a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.'<sup>61</sup> The case review method allowed the identification of the relationship between victim and perpetrator.

The prevalence rates of abuse and neglect gathered from the mandatory data fields would return a more accurate estimate than the file review method. This is because the appointed guardian would have gathered a good understanding of the person's situation by the time they closed the file.<sup>62</sup> The main limitation of this data set is that the case management system does not allow easy reference to the perpetrator or perpetrators of any abuse or neglect. Hence, it is possible that a few of the instances of abuse and neglect returned by this method may include abuse that occurred outside of a 'relationship of trust'. This abuse is not normally recognised as 'elder abuse'. For these reasons, the two sets of results generated by these different research methods are not precisely comparable. However, as discussed above in the research methods section, the analysis undertaken on the first data set strongly suggests that the number of cases among the second data set that did not involve 'elder abuse' and 'relationships of trust' would be very few.<sup>63</sup>

<sup>60</sup> Both overall rates of elder abuse and rates for individual types of abuse would be underestimated.

<sup>61</sup> World Health Organisation, *A Global Response to Elder Abuse Report*, above n 45, 1.

<sup>62</sup> Except for the rare matters where the person moved out of Victoria or died before the guardian became familiar with their matter.

<sup>63</sup> Out of 52 identified cases of abuse of older people (65 years and over), in only one did the abuse not occur in a 'relationship of trust.'

An overarching limitation, when considering the prevalence rates of elder abuse among people with cognitive impairment, is that people under guardianship represent a very small subset of this cohort, and, as such, prevalence rates of elder abuse among guardianship clients are not representative of this broader group.

## VI CONCLUSION

The Australian Government responded to the ALRC's recommendations coming out of the elder abuse inquiry by committing to lead the development of a National Plan to Combat Elder Abuse and funding a research program that includes a national elder abuse prevalence study. Given the dearth of population-level evidence about elder abuse, this research will set the stage for the development of much needed evidence-based policy and services in this area.

Only one national prevalence study, to date, has been inclusive of the experiences of people with cognitive impairment.<sup>64</sup> This is because conducting studies that include people with cognitive impairment are more expensive and more difficult. However, with just under one in ten Australians over 65 years old suffering from dementia, and strong evidence to suggest a positive correlation between cognitive impairment and elder abuse, it is imperative that future research includes this cohort. The research presented here contributes to the task of measuring the prevalence of elder abuse. In particular, it contributes to the difficult task of measuring elder abuse among people with cognitive impairment.<sup>65</sup> It found elder abuse prevalence rates among guardianship clients of 13 per cent in 2013-14 and 21 per cent in 2016-17. It also found that women experienced elder abuse at higher rates than men, and that the vast majority of the elder abuse identified was committed by relatives and also constituted family violence. Guardianship clients with dementia or intellectual disability were more likely to have experienced elder abuse than those with other disability types. Financial abuse was the most commonly identified form of elder abuse in both periods, with neglect, psychological abuse and physical abuse also identified at significant rates (from four to eight per cent) in both periods.

The comparatively high rate of 'impairment related abuse' identified by guardians in the 2016-17 period (five per cent) is of interest, as this is not a category seen in elder abuse research conducted with people living independently in the community. It suggests that older people with cognitive impairment and higher levels of dependency may be vulnerable to a wider range of forms of elder abuse than others. Further research into this cohort would be valuable, as would any research that further unpacks the relationships between elder abuse, cognitive impairment and age.

Given the questions raised about the overuse of guardianship as a health and community service sector response to elder abuse among people with cognitive impairment, it is unclear whether the differing rates of abuse by disability type point to particular recommendations for action (aside from the development of alternative service responses to guardianship for this cohort, for example, through funding for adult safeguarding agencies). However, it would be worthwhile for public guardians to be made aware of the potential for increased susceptibility to elder abuse among guardianship clients who have dementia or an intellectual disability. Public guardians may also like to implement violence and abuse screening tools that identify dementia and intellectual disability as risk factors.

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<sup>64</sup> Marmolejo, above n 8.

<sup>65</sup> Bedson, above n 10, 23-4.

Where possible, it would be interesting to replicate this research in different jurisdictions, ideally before and after the law reform and service initiatives discussed herein. Doing so would shed light on the success or otherwise of these reforms from a human rights perspective.

Finally, we see these findings as a driver for change towards research into elder abuse being consistently inclusive of the experiences of people with cognitive impairment and as contributing to building the knowledge base about this cohort.

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# IDENTIFYING INSTITUTIONAL ELDER ABUSE IN AUSTRALIA THROUGH CORONIAL AND OTHER DEATH REVIEW PROCESSES

BILL MITCHELL\*

*Coronial and other death review systems can help identify institutional elder abuse if they are aligned to intercept appropriate cases. While retrospective in nature, coronial and other death review systems help us understand how and why a person died. Poor understanding of the nature and characteristics of institutional elder abuse, limited epidemiological, prevalence and incidence data and missing or misaligned reporting systems have hampered our ability to understand and address institutional elder abuse in residential aged care services (RACS). It is important to identify why deaths in RACS are not investigated, particularly deaths that arise from institutional elder abuse. This analysis involves examining coronial and other death review processes, and in particular the 'triggers' that initiate those processes. The analysis involves considering what we already know about deaths in RACS. We also need to understand how our systems' response to deaths by institutional elder abuse is potentially impacted by other factors including constitutional confusion and entrenched ageism. This paper suggests law reform solutions and legal process alternatives to improve our understanding and our approach to institutional elder abuse.*

## I INTRODUCTION

Coronial and other death review processes can help identify institutional elder abuse if reporting systems are aligned to intercept appropriate cases. While retrospective in nature, coronial and other death review processes help society understand how and why a person died. Poor understanding of the nature and characteristics of institutional elder abuse, limited epidemiological and prevalence data and missing or misaligned reporting systems have hampered our ability to understand and address institutional elder abuse through public health policy and regulatory frameworks.

To understand the limitations of existing coronial and other death review processes, it is important to identify why deaths in RACS<sup>1</sup> are infrequently investigated, even if they result from institutional elder abuse. This article examines the 'triggers' that initiate coronial and other death review processes and how they might be improved to better identify deaths from institutional elder abuse. It also suggests law reform and legal process solutions to improve

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<sup>1</sup> For the purposes of this article, RACS are residential care as defined under s 41-3 of the *Aged Care Act 1997* (Cth):

41-3 Meaning of *residential care*

(1) *Residential care* is personal care or nursing care, or both personal care and nursing care, that:

- (a) is provided to a person in a residential facility in which the person is also provided with accommodation includes:
  - (i) appropriate staffing to meet the nursing and personal care needs of the person; and
  - (ii) meals and cleaning services; and
  - (iii) furnishings, furniture and equipment for the provision of that care and accommodation; and
- (b) meets any other requirements specified in the Subsidy Principles.

(2) However, residential care does not include any of the following:

- (a) care provided to a person in the person's private home;
- (b) care provided in a hospital or in a psychiatric facility;
- (c) care provided in a facility that primarily provides care to people who are not frail and aged;
- (d) care that is specified in the Subsidy Principles not to be residential care.

the identification of deaths from institutional elder abuse. Firstly, we need to understand the context of institutional elder abuse.

Institutional abuse is an accepted subset or type of elder abuse.<sup>2</sup> It has been recognised since Townsend's landmark study, *The Last Refuge*, was published in 1962.<sup>3</sup> The World Health Organisation recognises the institutional setting of elder abuse:<sup>4</sup>

Abusive acts in institutions include physically restraining patients, depriving them of dignity (for instance, by leaving them in soiled clothes) and choice over daily affairs; intentionally providing insufficient care (such as allowing them to develop pressure sores); over- and under-medicating and withholding medication from patients; and emotional neglect and abuse.<sup>5</sup>

Despite this recognition, there is no accepted, authoritative definition of institutional abuse of older persons.<sup>6</sup> Inherent difficulties in operationalising definitions, under-reporting and methodological problems in research studies have contributed to this.<sup>7</sup> Institutional abuse is often described as maltreatment or abuse of a person by or from a system of power.<sup>8</sup> Put simply, it is abuse by or within an institutional setting.<sup>9</sup> These two aspects – circumstance and setting – also reflect how coronial and other death review processes are triggered. Research across institutional abuse suggests the predominance of perpetrators and abusers are systemic actors such as employees.<sup>10</sup> This naturally depends on how we define the circumstances and setting of institutional elder abuse.

Perpetrators within an institutional setting are numerous and comprise biological and non-biological family members including co-residents such as spouses and visitors. In cases of staff on resident violence, workplace stressors are said to play an important role.<sup>11</sup> Similarly, in in-home care settings, carer stress has been linked to perpetration of elder abuse. The early view of caregiver abuse was that abuse was largely due to frustration caused by the stress and burden of caregiving, and ignorance of the rights and needs of the older person.<sup>12</sup> However, more recent research has found that the caregiver model does not explain the majority of cases of elder abuse.<sup>13</sup>

Older persons living in RACS are vulnerable to abuse,<sup>14</sup> and are more likely to have some degree of cognitive impairment and/or a disabling condition.<sup>15</sup> They are often frailer and more dependent on others for care and support and all approved care recipients reflect high level

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<sup>2</sup> Lynn McDonald et al, 'Institutional Abuse of Older Adults: What We Know, What We Need to Know' (2012) 24(2) *Journal of Elder Abuse & Neglect* 138, 139–40.

<sup>3</sup> Peter Townsend, *The Last Refuge* (Routledge & Paul, 1<sup>st</sup> ed, 1962).

<sup>4</sup> World Health Organisation, *Elder Abuse* (11 January 2018) <<http://www.who.int/en/news-room/fact-sheets/detail/elder-abuse>>.

<sup>5</sup> *Ibid.*

<sup>6</sup> Lynn McDonald, 'Elder Abuse and Neglect in Canada: the Glass is Still Half Full' (2011) 30(3) *Canadian Journal on Aging* 437.

<sup>7</sup> Donna Goodridge and D Wierucka, 'Vulnerable in a Safe Place: Institutional Elder Abuse' (1996) 9(3) *Canadian Journal of Nursing Administration* 82.

<sup>8</sup> Jane Powers, Andrea Mooney and Michael Nunno, 'Institutional Abuse: A Review of the Literature' (1990) 4(6) *Journal of Child and Youth Care* 81.

<sup>9</sup> *Ibid.*

<sup>10</sup> McDonald et al, above n 2.

<sup>11</sup> Donna Goodridge, Patricia Johnston and Maureen Thomson, 'Conflict and Aggression as Stressors in the Work Environment of Nursing Assistants: Implications for Institutional Elder Abuse' (1996) 8(1) *Journal of Elder Abuse & Neglect* 49.

<sup>12</sup> Lawrence Schiamberg and Daphna Gans, 'An Ecological Framework for Contextual Risk Factors in Elder Abuse by Adult Children' (1999) 11(1) *Journal of Elder Abuse & Neglect* 79.

<sup>13</sup> Melanie Joosten, Freda Vrantzidis and Briony Dow, 'Understanding Elder Abuse: A Scoping Study' (Research Report No 16, University of Melbourne and the National Ageing Research Institute, 2017) 16.

<sup>14</sup> McDonald et al, above n 2, 139.

<sup>15</sup> *Ibid.*

needs.<sup>16</sup> The impacts of elder abuse on older persons are grave; mortality rates for victims are three times higher.<sup>17</sup> Obviously, a higher index of suspicion for investigation into the preventable factors around the death of an older person in RACS is warranted.<sup>18</sup>

Ecological perspectives reveal institutional elder abuse occurs within a range of systems with a multiplicity of risk factors.<sup>19</sup> Within the contemporary, Australian context:

Some taxonomies of abuse also include institutional elder abuse as a form of elder abuse – described as occurring when the ‘routines, systems and regimes of an institution result in poor or inadequate standards of care and poor practice which affects the whole setting and denies, restricts or curtails the dignity, privacy, choice, independence or fulfilment of individuals.’<sup>20</sup>

Inquiries regularly reveal, but rarely name, the phenomenon that is institutional elder abuse. The New South Wales Parliamentary Inquiry into Elder Abuse recounted the shocking example of a man demeaned and treated roughly by RACS staff.<sup>21</sup> That same Inquiry dedicated minimal time to the issue because it considered ‘that abuse of older people in aged care is an area of Commonwealth Government responsibility and thus outside the scope of this inquiry.’<sup>22</sup>

## II DEFINITIONS AND CONTEXT

### A *Types and Subsets of Institutional Elder Abuse*

Institutional elder abuse includes all forms of elder abuse such as physical, psychological and financial abuse, as well as contextual examples of sexual abuse, resident on resident aggression and staff on resident violence. Australian studies on the sexual assault of older women in RACS have begun to uncover the extent of specific types of institutional abuse in Australia.<sup>23</sup> Therefore, while RACS encounter all forms of elder abuse, they also appear to have some types particular to their circumstances and setting.

Accepted subsets of institutional abuse include ‘overt abuse’, ‘program abuse’ and ‘systems abuse’.<sup>24</sup> RACS or their agents can be abusers in each of these subsets – that is, they are the circumstance. RACS are also the setting for various forms of violence and abuse, including abuse perpetrated by others such as family members, co-residents, visitors and staff. In some cases, RACS are both the circumstance and setting: where the RACS has an institutional awareness of, is complicit in, or is party to the abuse in some way. In overt abuse cases, the

<sup>16</sup> See s 21-2 of the *Aged Care Act 1997* (Cth):

21-2 Eligibility to receive *residential care*

A person is eligible to receive *residential care* if:

(a) the person has physical, medical, social or psychological needs that require the provision of care; and

(b) those needs can be met appropriately through residential care services; and

(c) the person meets the criteria (if any) specified in the Approval of Care Recipients Principles as the criteria that a person must meet in order to be eligible to be approved as a recipient of residential care.

<sup>17</sup> Etienne Krug et al (eds), *World Report on Violence and Health* (World Health Organisation, 2002) 133.

<sup>18</sup> Tatiana Hitchen et al, ‘Premature and Preventable Deaths in Frail, Older People: A New Perspective’ (2017) 37(8) *Ageing & Society* 1531, 1537.

<sup>19</sup> Lawrence Schiamberg et al, ‘Elder Abuse in Nursing Homes: An Ecological Perspective’ (2011) 23(2) *Journal of Elder Abuse & Neglect* 190, 191.

<sup>20</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 110.

<sup>21</sup> Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) XI.

<sup>22</sup> *Ibid* 70.

<sup>23</sup> Rosemary Mann et al, ‘Norma’s Project: A Research Study into the Sexual Assault of Older Women in Australia’ (Research Report No 98, Australian Research Centre in Sex, Health and Society, June 2014).

<sup>24</sup> Christine Barter, ‘Who’s to Blame: Conceptualising Institutional Abuse by Children’ (1997) 133(1) *Early Child Development and Care* 101.

abuse includes physical, sexual, psychological, emotional or verbal abuse by an institutional actor or agent such as a staff member or contractor. In cases of program abuse, the institution itself causes harm by its acts or omissions, such as operating below acceptable conditions or improper use of its power to modify the behaviour of a person. Complaints to the Aged Care Commission system often reflect a range of hybridised (overt and program) abuse issues. Breaches of the *Aged Care Act 1997* (Cth) and related instruments such as the *Charter of Care Recipients' Rights and Responsibilities – Residential Care* reveal overt and program abuses.<sup>25</sup>

Systems abuse involves an entire care system that is stretched beyond capacity and causes maltreatment through inadequate resources. Recent inquiries have raised concerns about system-wide abuse in the RACS sector.<sup>26</sup> Systems abuse is often reflected in cases reported by coroners where an element of the overall system fails older persons and leads to death. For example, in the *Inquest into the Death of Margery Frost*, the Coroner considered the adequacy of staffing levels in the context of an older woman's death.<sup>27</sup> Staff-resident ratios have program and system-wide relevance and are commonly raised as a matter of concern. Different types of institutional abuse do not occur in a vacuum and individual deaths can reveal idiosyncratic, programmatic and systemic failures.

## B An Example of Hybrid Institutional Abuse: Restrictive Practices

Using the definitions proposed earlier, many types of institutional elder abuse appear to be hybrids. One illustrative example is the use of restrictive practices (also called restrictive interventions) within and by RACS. Restrictive practices are 'the deliberate or unconscious use of coercive power to restrain or limit an individual's freedom of action or movement.'<sup>28</sup> The key legislation governing the activities of federally funded aged care services in Australia — the *Aged Care Act 1997* (Cth) — does not prohibit, legislate for, or regulate the use of restrictive practices to manage the challenging behaviours of some aged care residents.<sup>29</sup> The Public Advocate of Queensland recently reported that 'it is concerning that the inappropriate use of restraints in RACS in Australia has been a factor in the deaths of some people upon whom the restraints were applied...'.<sup>30</sup> The Administrative Appeals Tribunal equated the use of restrictive practices to breaches of the rights of residents under the *Aged Care Act 1997* (Cth). In *Saitta Pty Ltd v Secretary, Department of Health and Ageing*,<sup>31</sup> the Tribunal (per McDonald DP) was reviewing a RACS' accreditation over a legion of quality of care issues:

A resident was observed an hour after breakfast had concluded sitting in the dining room (not at the table) with a lap belt restraining her. It was Dr Lett's oral evidence that, as well as restraining the resident from undertaking normal activity, this is also a dangerous practice as the resident may try to wiggle out causing skin to tear or bruise or the resident to fall and injure him/herself. This is an example of an incident where even [if] it was a once off occurrence the fact of it happening is strongly indicative of serious non-compliance, as the restraint could easily be removed when the resident had finished her meal. The Tribunal is satisfied that there is non-compliance with Standard Pt 3 Item 3.5 (residents to be assisted to achieve maximum independence), Item 3.6 (right to dignity)

<sup>25</sup> *Aged Care Act 1997* (Cth) sch 1.

<sup>26</sup> House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia* (2018) Terms of Reference.

<sup>27</sup> *Inquest into the Death of Margery Frost* [2009] Queensland Coroners Court 1725 (31 May 2011).

<sup>28</sup> Claire Spivakovsky, 'Restrictive Interventions in Victoria's Disability Sector: Issues for Discussion and Reform' (Discussion Paper, Office of the Public Advocate, August 2012) 3.

<sup>29</sup> Office of the Public Advocate Queensland, 'Legal Frameworks for the Use of Restrictive Practices in Residential Aged Care: An Analysis of Australian and International Jurisdictions' (Discussion Paper, Office of the Public Advocate Queensland, June 2017) 15.

<sup>30</sup> *Ibid* ii.

<sup>31</sup> [2008] AATA 681.

and Standard Part Item 4.4 (management actively working to provide a safe and comfortable environment consistent with residents' needs).<sup>32</sup>

The decision reinforces that restrictive practices reflect overt abuse and program abuse. The Public Advocate of Queensland has argued that restrictive practices 'may also constitute a breach of law and human rights.'<sup>33</sup> The absence of regulatory frameworks for the use of restrictive practice and interventions in RACS is the subject of numerous recommendations for urgent reform.<sup>34</sup> It begs the question: are any restrictive practices legitimised, particularly for those who cannot consent to such practices? Are all restrictive practices abusive? This is a digression, albeit an important one, and we will return to the issue of restrictive practices as a potential trigger for coronial attention later in this article.

### C Defining 'Institution'

A key issue for institutional elder abuse is how 'institution' is defined. Recent Australian inquiries have taken a very broad approach to the term. The Royal Commission into Institutional Responses to Child Sexual Abuse defined 'Institution' as 'any organisation, including children's homes, religious organisations, missions and reserves, government agencies, schools, sports clubs, juvenile justice facilities and out-of-home care (foster, relative and kinship care).'<sup>35</sup> Such a broad-brush approach suggests that institutional elder abuse would incorporate an assortment of settings where older persons live or receive clinical or personal care. It seems uncontroversial that RACS would be included in even a narrow definition. Aged care in all its various manifestations has an institutional aspect and 'institution' would also include community-dwelling older persons receiving home-based aged care services. The focus of this article is deaths in RACS but the parallels between children and older persons in community-based care obviously warrant further consideration.

### D Defining 'Death'

That older persons die in RACS is not controversial. RACS are cruelly known as 'God's waiting rooms'. In 2015-16, 214,000 persons entered RACS.<sup>36</sup> Based on recent data, nearly 80 per cent of residents died after an average length of stay of 34.5 months, and length of stay correlated with mortality.<sup>37</sup> Accurate cause of death is essential for understanding how many older people have premature, preventable deaths, with implications for aged care services, healthcare expenditure, quality and safety, and human rights.<sup>38</sup> How we define deaths is therefore also fundamental to identifying instances of institutional elder abuse.

The Australian Bureau of Statistics (ABS) uses a range of descriptors under causes and types of death. Causes of death are drawn from the International Classification of Diseases (ICD-10) diagnostic criteria and contain thousands of codes. The three principal types of death are

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<sup>32</sup> Ibid [122].

<sup>33</sup> Office of the Public Advocate of Queensland, Submission to the Standing Committee on Health, Aged Care and Sport, *Inquiry into the Quality of Care in Residential Aged Care*, February 2018, 3.

<sup>34</sup> Australian Law Reform Commission, above n 20, [4.10]–[4.11].

<sup>35</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 1, 17–18.

<sup>36</sup> Australian Institute of Health and Welfare, *Aged Care* (15 January 2018) <<https://www.aihw.gov.au/reports-statistics/health-welfare-services/aged-care/overview>>.

<sup>37</sup> Hitchen et al, above n 18, 1533.

<sup>38</sup> Ibid, 1531.

natural, external and unknown.<sup>39</sup> The same definitions are used by coroners for reporting deaths.<sup>40</sup> As discussed later, coroners have the added role of deciding how the person died.

External cause deaths are those where the underlying cause of death is determined to be one of a group of 'causes external to the body (for example intentional self-harm, transport accidents, falls, poisoning etc.).'<sup>41</sup> They include intentional and unintentional deaths. These types of deaths are often reported to coroners.<sup>42</sup> They reflect issues across all subsets of institutional elder abuse. Suicide within RACS has received some attention but researchers are just beginning to explore this phenomenon and its possible prevention.<sup>43</sup>

Natural cause deaths are deaths 'due to diseases (for example diabetes, cancer, heart disease etc.) which are not external or unknown.'<sup>44</sup> Natural cause deaths offer insights into clinical and personal care, disease management and other issues within RACS that may reflect institutional elder abuse. If the deaths of frail, older persons are inaccurately classified as natural, and any contributing modifiable factors are not identified, avoidable mortality cannot be highlighted and addressed.<sup>45</sup> The term 'premature death' is also used at times.<sup>46</sup> Interestingly, older persons over 70 years are excluded from this death classification.<sup>47</sup> It might therefore be viewed as a somewhat discriminatory age proxy that equates the age of 70 years and older as being the right time to die. Unknown deaths are deaths where it is unable to be determined whether the cause was natural or external.<sup>48</sup>

Quite apart from causes of death, the 'Australian Cause of Death Statistics System' also reports on 'potentially avoidable deaths' as measured by 'potentially preventable deaths' and 'potentially treatable deaths'.<sup>49</sup> 'Potentially preventable deaths' are those amenable to screening and primary prevention, such as immunisation, and reflect the effectiveness of the current preventive activities of the health sector.<sup>50</sup> These deaths are of great interest for both program and system abuse identification. Deaths from potentially treatable conditions are those which are 'amenable to therapeutic interventions and reflect the safety and quality of the current treatment system...'.<sup>51</sup> These deaths potentially reflect overt and program abuse issues.

Each of these death classifications are present in the cohort of deaths within RACS. Each one also potentially aligns with definitions of institutional elder abuse. Hitchen et al make a useful suggestion about the classifications at play in RACS:

Three general aspects bear on whether and how a death should be investigated: Is it due to the progression of a medical condition (natural)? Is it expected given the person's overall condition and their disease (premature)? Is it only attributable to the medical condition(s) and the person's overall condition and not amenable to other factors (preventable)?<sup>52</sup>

<sup>39</sup> Australian Bureau of Statistics, *Causes of Death, Australia, 2016: Explanatory Notes* (27 September 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3303.0Explanatory%20Notes12016?OpenDocument>>.

<sup>40</sup> Ibid 33.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Briony Murphy et al, 'Suicide Among Nursing Home Residents in Australia: A National Population-Based Retrospective Analysis of Medico-Legal Death Investigation Information' (2018) 33(5) *International Journal of Geriatric Psychiatry* 786.

<sup>44</sup> Joseph Ibrahim et al, 'Premature Deaths of Nursing Home Residents: an Epidemiological Analysis' (2017) 2016(10) *Medical Journal of Australia* 442.

<sup>45</sup> Hitchen et al, above n 18, 1532.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid 1534.

<sup>48</sup> Australian Bureau of Statistics, above n 39.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Hitchen et al, above n 18, 1535.

As we see later in this article, this classification mirrors how coroners' laws have been framed in recent years. An additional complexity for post death investigation arises with the dignity of risk, in which patients' right to self-determination and autonomy directly overrode prevention strategies.<sup>53</sup> The 'preventable death' category might not be easily applied to these cases.<sup>54</sup> This advice is given with the caution that 'this determination requires vigilance and should not be accepted without question.'<sup>55</sup> Staff actions can look relatively harmless or even merciful at times, masking a neglectful or more sinister, even homicidal, reality. Another example is where 'a "preventable death" still occurs because staff are reckless or provide sub-optimal care and then use the older person's dignity of risk choice as "a shield" – to avoid their professional obligations and responsibilities.'<sup>56</sup>

Exploring the alignment of death classifications with what is known about the subsets of institutional elder abuse is clearly worthwhile. Hitchen et al have suggested an alternative classification approach.<sup>57</sup> They suggest that a

more nuanced classification of deaths in older people would permit improved assessment of the quality of care provided, including identification of health or life care practices that are unsafe or deleterious. Identified gaps can be addressed, and more generally, minimum standards set for such services.<sup>58</sup>

The alternative suggested is for 'treated', 'untreated' and 'untreatable' to replace 'premature' and 'preventable'.<sup>59</sup> This might exclude deaths from institutional elder abuse such as external cause deaths where quality of care issues were something other than medical care.

In the end, we are interested in cases where institutional elder abuse causes or contributes to death, from which we might learn how to prevent the abuse and ultimately prevent death. From an investigative sense, Mosqueda and Wiglesworth called this cohort 'suspicious elder deaths'.<sup>60</sup> Coroners and medical examiners in the United States have benefited from inquiries into deaths in RACS, allowing some level of differentiation between accidental deaths and fatal elder abuse.<sup>61</sup> This work mirrors Australian coroners' work on externally caused deaths in RACS. It is, however, only one area of distinction in a complex field. Deepening our understanding about how death classifications reveal and reflect typologies of institutional elder abuse is key.

### III SOME FUNDAMENTAL LIMITATIONS

Beyond definitional issues, a number of problems hamper our ability to identify institutional elder abuse deaths. These include limitations in coronial and other death review processes, prevalence data and the impacts of constitutional confusion and ageism.

#### A *Limitations of Coronial Systems*

State coroners are a recent development in Australia. The South Australian Government appointed the first State Coroner in 1975 and other states and territories followed suit over the

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 1536.

<sup>57</sup> Ibid 1537–8.

<sup>58</sup> Ibid 1538.

<sup>59</sup> Ibid 1537–8.

<sup>60</sup> Laura Mosqueda and Aileen Wiglesworth, 'Coroner Investigations of Suspicious Elder Deaths' (Research Report No 239923, National Criminal Justice Reference Service, October 2012).

<sup>61</sup> Ibid 10.

following decades. The role of Australian coroners is more circumscribed than the historical role of the mediaeval Coroner, whose diverse role included collecting chance revenue from sources such as deodands, shipwrecks, treasure troves, royal fish and forfeited property of felons and brigands.

The modern coroner's role is to take charge of a death investigation and make findings. They examine issues that arise from particular deaths.<sup>62</sup> Their role is described by Hermagoras' 'elements of circumstance': who, how, when, where and what.<sup>63</sup> Inquests are formal judicial hearings into the causes and circumstances of death, in which the parties involved present evidence, cross-examine witnesses and are often represented by lawyers.<sup>64</sup> All other death investigations are handled 'in chambers', where findings are reached on the basis of desk-based reviews of witness statements, police and medical examiner reports and other forensic evidence.<sup>65</sup> Inquests occur within 'a maelstrom of conflicting emotions'<sup>66</sup> and in a best-case scenario can 'facilitate understanding of the circumstances of death, forgiveness for error or fault and adoption of better and safer processes with the potential to avoid deaths occurring in comparable circumstances.'<sup>67</sup>

In Australia, nearly 20,000 deaths, or 12% of all deaths, are reported to coroners each year.<sup>68</sup> Certain deaths are subject to mandatory reporting, while others rely on the discretion of third parties to report. Some types of deaths must be the subject of an inquest, while others are at the discretion of the Coroner. Coroners' findings (whether for investigation or inquest) usually require the 'how' and 'what' of death. The 'how' equates to 'the manner of death or mechanism of death and the context in which it occurred.'<sup>69</sup> The 'what' 'focuses on the medical cause(s) of death, not the legal responsibility for it, or the circumstances in which it occurred.'<sup>70</sup>

The overall inquest rate of reported deaths has been estimated at approximately 1 in 20 reported deaths.<sup>71</sup> Coroners are disproportionately unlikely to hold inquests for deaths due to suicide and deaths among the elderly (65 years or older).<sup>72</sup> This is even though persons over 65 account for more than half of reported deaths.<sup>73</sup> Importantly for this article, the odds of discretionary (non-mandated) inquests declined with the age of the decedent.<sup>74</sup> This is particularly important given the lack of mandated reporting or inquests for deaths in RACS.

Australian epidemiological research on premature deaths amongst RACS residents highlighted that coronial processes fail to identify factors to prevent deaths:<sup>75</sup>

[P]remature and preventable deaths occur in nursing homes, and it follows that coroners have an important role in identifying factors that may prevent death and injury. However, formal coroners' inquests examined fewer than 3% of the external cause deaths, and in 98.4% of all cases coroners made no recommendations about injury prevention. There

<sup>62</sup> Hugh Selby, *The Aftermath of Death: Coronials, Law, Pathology, Counsellors, Safety, Media* (Federation Press, 1992) 6.

<sup>63</sup> W Vollgraff, W, 'Observations sur le sixieme discours d'Antiphon' (1948) 1(4) *Mnemosyne* 257; *Coroners Act 2003* (Qld) s 45.

<sup>64</sup> David Studdert et al, 'Duration of Death Investigations that Proceed to Inquest in Australia' (2016) 22(5) *Injury Prevention* 314, 315.

<sup>65</sup> *Ibid.*

<sup>66</sup> Ian Freckleton, 'Minimising the Counter-Therapeutic Effects of Coronial Investigations: In Search of Balance' (2016) 16(3) *QUT Law Review* 4, 22.

<sup>67</sup> *Ibid.*

<sup>68</sup> Studdert et al, above n 64, 314.

<sup>69</sup> Queensland Courts, *State Coroner's Guidelines Chapter 8: Findings* (2013) 5.

<sup>70</sup> *Ibid.*

<sup>71</sup> Simon Walter et al, 'Factors Predicting Coroners' Decisions to Hold Discretionary Inquests' (2012) 184(5) *Canadian Medical Association Journal* 521, 526; Studdert et al, above n 64.

<sup>72</sup> *Ibid.*

<sup>73</sup> Studdert et al, above n 64, 315.

<sup>74</sup> Walter et al, above n 71, 521.

<sup>75</sup> Ibrahim et al, above n 44, 442.



were substantial variations between jurisdictions in the number of cases for which recommendations were delivered (0-21%).<sup>76</sup>

This research presumed that all deaths directly or indirectly resulting from injury or non-natural causes must be reported to coroners.<sup>77</sup> The study considered 21,672 reported deaths (18,383 natural cause and 3,289 external cause). Only 95 of the 3,289 external cause deaths resulted in inquests.<sup>78</sup> Of those, about half (53) lead to recommendations that sought to identify preventative or remedial actions.<sup>79</sup> Therefore, only 1.6% of all reported external cause deaths led to recommendations.<sup>80</sup> Ibrahim noted, ‘disturbingly, there has been no reduction in the prevalence of these types of external cause deaths over the past 12 years.’<sup>81</sup>

The rate of inquest varied by Australian jurisdiction from 0-8% of reported external cause deaths, and the rate of recommendations varied from 0-21%.<sup>82</sup> Crucially, and in line with previous comments, this cohort only included cases from the National Coronial Information System (NCIS). This meant it was limited to deaths that had been reported to a coroner. Therefore, the study missed deaths that had not attracted coronial attention. Additionally, the cohort did not look at natural cause deaths, which in the absence of a mandated process have a substantially lower rate of report, investigation or inquest. The findings of this study, one might suggest, are the tip of the iceberg.

Notwithstanding the low rate, coroners’ inquests do consider issues of institutional elder abuse. In the findings of an *Inquest into the Death of Caterina Montalto*,<sup>83</sup> the Victorian Coroner considered a case where no report was made until a whistleblowing staff member made a disclosure.<sup>84</sup> The deceased’s death was ‘covered up’<sup>85</sup> and the inquest revealed serious accountability issues within the facility. High among them was the need for staff to understand and comply with the obligation for coronial reportability.<sup>86</sup> A Queensland example, the *Inquest into the Death of Albert Biffin*,<sup>87</sup> considered a range of issues including continuity of care and competence of staff. This inquest also highlighted the importance of clinical records, an issue canvassed more thoroughly later in this article. In the *Inquest into the Death of Ruth Ann Dicker*,<sup>88</sup> the Coroner looked at death by neck compression caused by a lap sash seatbelt on the deceased’s wheelchair. Ibrahim makes the point that choking accounted for 7.9% of all external cause deaths and is by definition preventable.<sup>89</sup>

Areas of attention for coroners looking into deaths in RACS have included a veritable grab-bag of issues, including: falls, choking, the use of restraints, fire safety, medication, end of life care, lifting and hoisting equipment, resident-on-resident aggression, personal hygiene (bathing, showering, toileting), emergency treatment, resuscitation, wound management (pressure sores, ulcers), disease management and control, (gastroenteritis, influenza), catheterization, aspiration, dental care (dentures, oral hygiene) and constipation.<sup>90</sup> Many of these issues involve aspects of institutional elder abuse at overt, program and system levels.

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<sup>76</sup> Ibid 445.

<sup>77</sup> Ibid 442.

<sup>78</sup> Ibid 445.

<sup>79</sup> Ibid 444.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid 446.

<sup>82</sup> Ibid.

<sup>83</sup> *Inquest into the Death of Caterina Montalto* [2013] Coroners Court of Victoria 2011/2017 (18 December 2013).

<sup>84</sup> Ibid 2–3.

<sup>85</sup> Ibid 19, 52.

<sup>86</sup> Ibid 20.

<sup>87</sup> *Inquest into the Death of Albert Eric Bruce Biffin* [2017] Coroners Court of Queensland 2013/751 (3 May 2017).

<sup>88</sup> *Inquest into the Death of Ruth Ann Dicker* [2013] Coroners Court of South Australia (14 August 2013).

<sup>89</sup> Ibrahim et al, above n 44, 445–6.

<sup>90</sup> *Residential Aged Care Communiqué* (1 February 2018) The Communiqués <<http://vifmcommuniques.org/residential-aged-care-communique/#home>>.

Prior to statutory jurisdictions, common law courts only intervened when there was an ‘insufficiency of inquiry’ into a cause of death.<sup>91</sup> Currently, courts only intervene where specific statutory criteria are made out to warrant orders such as a fresh coronial investigation or inquest. State and territory coronial laws are largely uniform and use relatively consistent terms and definitions. Births, Deaths and Marriages law in all Australian jurisdictions provide certification procedures within a prescribed period of death or its discovery. Where a death is reportable, a certificate is not issued and the death is reported to the coroner. The failure to report a death is an offence in all Australian jurisdictions.

How then is it that deaths in RACS are not reported? All Australian jurisdictions use statutory ‘triggers’ that require reporting of certain deaths to coroners. These deaths are known as ‘reportable deaths’.<sup>92</sup> This is different to the ICD death classifications.<sup>93</sup> The definition of deaths that must be reported to coroners varies slightly across the six states and two territories.<sup>94</sup>

Deaths are reportable to coroners by virtue of circumstance (examples include violent or unnatural, sudden, unknown cause, suspicious or unusual) or setting (examples include custody, care or recent health procedure). This aspect can be called ‘reportability’. A death in RACS is not a prescribed circumstance or setting in any Australian jurisdiction. The term ‘death in care’ is a common class of reportable death but each jurisdiction has a narrow or constrained definition that excludes RACS.<sup>95</sup>

Health care deaths are reportable in most jurisdictions but have limited application to a death in a RACS. The trend for medical-setting reportable deaths in eastern seaboard states’ coronial laws has centred on the criteria that the death was not a reasonably expected outcome.<sup>96</sup> This obviously aligns with Hitchen et al’s notion that death investigations might follow the question of whether death was expected. This has some utility within the RACS setting if reporting was honestly and dutifully undertaken. Cases like *Montalto* potentially render this sort of trigger ineffectual.<sup>97</sup> This Australia-wide constrained reportability means that deaths in RACS are not subject to the same level of accountability as other deaths in care.

Take Queensland’s scheme as an example — under the *Coroners Act 2003* (Qld) ‘reportable deaths’ include ‘deaths in care’.<sup>98</sup> The definition of ‘deaths in care’ does not include a death in RACS.<sup>99</sup> Guidelines specifically note this exclusion.<sup>100</sup> Accordingly, deaths in RACS only come to the attention of a coroner when they are reported by virtue of circumstance because the opportunity to report based on setting is completely absent. Excluding obvious, irrelevant triggers (the person is unknown or died in a police operation), the death would only come to the attention of a coroner if the death was violent or otherwise unnatural,<sup>101</sup> suspicious,<sup>102</sup>

<sup>91</sup> *R v Cardiff City Coroner, Ex Parte Thomas* [1970] 3 All ER 469.

<sup>92</sup> The Australian Bureau of Statistics also uses this term. See Australian Bureau of Statistics, *Causes of Death, Australia, 2013* (31 March 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3303.0Explanatory+Notes12013>>.

<sup>93</sup> ‘Old People’s Home’ and ‘Pensioner’s Home’ fall under ‘Residential Institution’ in ‘Place of Occurrence’ of death. See World Health Organisation, *International Statistical Classification of Diseases and Related Health Problems 10<sup>th</sup> Revision*, 2016, Chapter XX <<http://apps.who.int/classifications/icd10/browse/2016/en#/XX>>.

<sup>94</sup> Studdert et al, above n 64, 315.

<sup>95</sup> *Coroners Act 2017* (NT) s 18; *Coroners Act 1997* (ACT) s 3C; *Coroners Act 1993* (SA) s 3; *Coroners Act 1995* (Tas) s 3; *Coroners Act 2008* (Vic) ss 3, 4, 11, *Coroners Act 1996* (WA) ss 3, 17.

<sup>96</sup> Sarah Middleton and Michael Buist, ‘The Coronial Reporting of Medical-Setting Deaths: A Legal Analysis of the Variation in Australian Jurisdictions’ (2014) 37(3) *Melbourne University Law Review* 699, 713–14.

<sup>97</sup> *Inquest into the Death of Caterina Montalto* [2013] Coroners Court of Victoria 2011/2017 (18 December 2013).

<sup>98</sup> *Coroners Act 2003* (Qld) s 8.

<sup>99</sup> *Ibid* s 9.

<sup>100</sup> Queensland Courts, *State Coroner’s Guidelines Chapter 8: Findings* (2013) 21.

<sup>101</sup> *Coroners Act 2003* (Qld) s 8(3)(b).

<sup>102</sup> *Ibid* s 8(3)(c).

health care related,<sup>103</sup> or where a cause of death certificate was not issued.<sup>104</sup> In a RACS setting, a likely report is where the examining medical practitioner refuses to certify cause of death or the death was externally caused. However, this does not always occur, even in the face of evidence. Mosqueda and Wiglesworth use the example of advanced bedsores to highlight this point.<sup>105</sup> Or, as they note, it may be as simple as the authority with the obligation to report failing to examine the whole body.<sup>106</sup>

Age proxies are evident in some legislative schemes.<sup>107</sup> The *Coroners Act 2009* (NSW) s 38(2)(a) uses age 72 to further constrain reportability. The Act limits the need to report where a person aged 72 years or older dies an unnatural or violent death after sustaining an injury from an accident, being an accident that was attributable to the age of that person, that contributed substantially to the death of the person, and was not caused by an act or omission by any other person.<sup>108</sup> This must impact on the rate of report, and consequently on investigations and inquests in New South Wales RACS. Age proxies like this reinforce ageist views that deaths in RACS are outside the warrant of coronial oversight. These types of provisions are not examples of positive discrimination, rather, they reinforce the view that the older the decedent, the less need for a post-death investigation.

Operational policies recognise the consequences of limited reportability and provide specific procedures for making referrals to the Office of Aged Care Quality and Compliance or Office of the Aged Care Quality Commissioner.<sup>109</sup> Notwithstanding that referrals may be entirely within scope, this clearly represents a different approach to other deaths in care. The *Coroners Act 2003* (Qld) specifically includes deaths in care facilities under the *Disability Services Act 2006* (Qld), *Forensic Disability Act 2011* (Qld), *Mental Health Act 2016* (Qld), *Public Health Act 2005* (Qld), *Child Protection Act 1999* (Qld), and *Corrective Services Act 2006* (Qld). So then, what of other death review processes?

## B Limitations of Domestic Violence Death Reviews

Family violence death reviews do not effectively target elder abuse or institutional elder abuse. Some Australian jurisdictions use these specialised processes in cases of family or domestic violence or homicide. Operating within coronial processes, death reviews have a qualitative (individual case) and quantitative review function. The review 'looks into cases of domestic violence and uses these as a window, or a lens, into systems, services and communities, identifying opportunities for intervention, prevention or where the story may be changed.'<sup>110</sup>

Recent inquiries in Queensland,<sup>111</sup> New South Wales,<sup>112</sup> and Victoria regarded aspects of elder abuse as falling within the sphere of domestic and family violence.<sup>113</sup> There is an ongoing definitional debate about these issues that cannot be fully aired in this article. Suffice to say there are many areas of overlap between elder abuse and other forms of interpersonal violence.

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<sup>103</sup> Ibid s 8(3)(d).

<sup>104</sup> Ibid s 8(3)(e).

<sup>105</sup> Mosqueda and Wiglesworth, above n 60, 37.

<sup>106</sup> Ibid.

<sup>107</sup> *Coroners Act 2009* (NSW) s 38.

<sup>108</sup> See the interplay between sections 6(1) and 38 of the *Coroners Act 2009* (NSW).

<sup>109</sup> Queensland Courts, *State Coroner's Guidelines Chapter 8: Findings* (2013) 30.

<sup>110</sup> Coroner's Court NSW, *Domestic Violence Death Review Team Role and Function* (29 March 2018) <[http://www.coroners.justice.nsw.gov.au/Pages/Publications/dv\\_annual\\_reports.aspx](http://www.coroners.justice.nsw.gov.au/Pages/Publications/dv_annual_reports.aspx)>.

<sup>111</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015); Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the Adequacy of Financial Protections for Queensland's Seniors* (2015).

<sup>112</sup> Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) XI.

<sup>113</sup> Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) Paper No 132.

The United Nations has suggested that violence, abuse and neglect experienced by older women combined elements from elder abuse (or older adult mistreatment), abuse of vulnerable adults and intimate partner violence.<sup>114</sup> The Australian Institute of Family Studies noted that the 'intersecting fields of thinking and concern include those related to family violence, violence against women, and disability.'<sup>115</sup> Taking a step aside from this definitional quagmire, opportunities exist to use the alignment between aspects of elder abuse and family violence to review deaths from institutional elder abuse.

In Queensland, the Domestic and Family Violence Death Review and Advisory Board's *Procedural Guidelines* set out a case identification system using definitions from the *Domestic and Family Violence Protection Act 2012* (Qld) (DFVPA) and the *Coroners Act 2003* (Qld).<sup>116</sup> The *Procedural Guidelines* outline detailed 'case identification and selection' information and a process for death reviews.<sup>117</sup> The definition of 'domestic and family violence death' includes a relevant relationship between the deceased and a second person.<sup>118</sup>

The trigger for review relies on an expansive definition of 'domestic violence',<sup>119</sup> which includes 'emotional or psychological abuse'<sup>120</sup> and 'economic abuse',<sup>121</sup> both of which are commonly experienced forms of elder abuse, even if economic and financial abuse may overlap but should not be conflated. Estimates put 'emotional or psychological abuse' at 1-6% and economic or financial abuse at 1-9%, and they commonly coalesce in hybrid abuse.<sup>122</sup> Notwithstanding the breadth of the definition of domestic violence, which obviously encapsulates many aspects of elder abuse, the triggers for a death review have limited prospects of occurring with respect to institutional elder abuse as the provision now stands. There is of course the opportunity to consider any violence that led to a death occurring between an older person and another with whom they are in a 'family relationship'.<sup>123</sup>

However, one important trigger potentially exists for an 'informal care relationship'.<sup>124</sup> The definition of informal care relationship excludes parent/child and commercial care arrangements.<sup>125</sup> However, a death review might be triggered in a home care setting if there was an informal care relationship.<sup>126</sup> It may also apply to an informal care relationship within an institution, say between a visitor and older person. There are cases of older persons, especially women, who depend on others to provide informal care in exchange for receipt of carer payment or carer allowance from Centrelink. Where these relationships involve violence, abuse or neglect, they are in a twilight zone between in-home overt abuse and domestic violence. Section 20 of the DFVPA defines an informal care relationship as one that exists between two persons if one of them is or was dependent on the other person (the carer) for help in an activity of daily living. This definition actively excludes commercial arrangements but notes that the carer payment scenario is not a commercial arrangement. Therefore, if a person (including relatives outside the parent child relationship) receiving carer payment providing care commits acts of violence (as defined under the DFVPA), this may come within the scope of a death review referral. It is not clear if any research has ever been done to consider this situation in Queensland or elsewhere but it deserves careful scrutiny.

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<sup>114</sup> *Neglect, Abuse and Violence against Older Women* UN Doc ST/ESA/351 (2013) 3–56.

<sup>115</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016) 2.

<sup>116</sup> Domestic and Family Violence Death Review and Advisory Board, *Procedural Guidelines 2016-19*.

<sup>117</sup> *Ibid* 16–17.

<sup>118</sup> *Ibid* 14.

<sup>119</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

<sup>120</sup> *Ibid* s 11.

<sup>121</sup> *Ibid* s 12.

<sup>122</sup> Kaspiew, Carson and Rhoades, above n 115, 5.

<sup>123</sup> See definition of 'Relevant Relationship' at s 13(a) and 'Family Relationship and Relative' at s 19 of the *Domestic and Family Violence Protection Act 2012* (Qld).

<sup>124</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 20.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid*.

One term absent from the DFVPA is ‘neglect’. Definitions coalesce around ‘acts’ as opposed to ‘omissions’. This is an important distinction and point of divergence between elder abuse and family and domestic violence. Many serious cases of elder abuse, and also child abuse, involve omissions, such as neglect and the failure to provide necessities of life. Despite this, there seems to be no reason why an act of neglect should not be included in domestic and family violence definitions, and this might be worth consideration by state parliaments. It may be the view of legislators that those for whom the DFVPA is crafted are invulnerable to neglect.

In the United States, Elder Death Review Teams study and learn from suspicious elder deaths and facilitate communication amongst agencies to identify barriers and fill gaps.<sup>127</sup> How a death becomes the jurisdiction of a coroner has been subject of analysis in the United States with mixed results. Mosqueda and Wiglesworth found inconsistency across the essential areas: screening processes, data sets, trigger events and definitions.<sup>128</sup> Australia’s National Coronial Information System has been highlighted as innovative,<sup>129</sup> and a unique national repository.<sup>130</sup> However, as noted earlier, the NCIS’ utility is ultimately limited by reportability. So how much do we actually know about deaths in RACS?

### C *Prevalence and Incidence Studies*

Prevalence studies are essential to identify how many older adults are mistreated in institutions at a given point in time or during a given time frame.<sup>131</sup> Incidence studies provide information about how many persons are abused for the first time during a specified time period.<sup>132</sup> A significant limitation of most elder abuse studies is that they do not include older persons in RACS. Accordingly, prevalence studies into elder abuse rarely capture the true picture and extent of institutional elder abuse.<sup>133</sup> Therefore, most prevalence studies can only reflect a partial view of the nature and extent of elder abuse. Prevalence studies have principally focused on private households:

Studies of the prevalence of elder abuse have been conducted in several countries, including Canada, the UK, Portugal, Ireland, Spain, Israel and the USA ... [i]n each of the listed prevalence studies, the focus was on older people in private households who were deemed to have the cognitive capacity to participate in the study. Older people living in residential aged care facilities and those who lived in private dwellings but did not have sufficient cognitive capacity to discuss their circumstances and experiences in an interview were excluded from the estimation of the prevalence of elder abuse in these studies.<sup>134</sup>

This situation is concerning given that older persons in RACS and those living in private dwellings with cognitive impairment are at greater risk of abuse than any other population of older persons. The inclusion of these people would give us a very different picture of elder abuse, and national prevalence research should address this gap. If we know so little about the prevalence of institutional elder abuse, how much do we actually know about deaths in RACS?

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<sup>127</sup> Mosqueda and Wiglesworth, above n 60.

<sup>128</sup> Ibid 7.

<sup>129</sup> Ibid 10–11.

<sup>130</sup> Joseph Ibrahim, Lyndal Bugeja and David Ranson, ‘Using Existing Information from Medico-Legal Death Investigations to Improve Care of Older People in Residential Aged Care Services’ (2013) 21(2) *Journal of Law and Medicine* 255, 258.

<sup>131</sup> McDonald et al, above n 2.

<sup>132</sup> Ibid 150.

<sup>133</sup> Kaspiew, Carson and Rhoades, above n 115, 5.

<sup>134</sup> Lixia Qu et al, ‘Elder Abuse Prevalence Scoping Study: Final Report’ (Report, Australian Institute of Family Studies, 2017) 24.

D *Prevention of Death*

There already is a substantial evidence base on deaths from institutional elder abuse. It remains, however, partially hidden within other sources of data. Ibrahim and his colleagues provided a comprehensive analysis of preventable deaths in RACS with recommendations on a wide range of external-caused and preventable deaths including choking,<sup>135</sup> medication,<sup>136</sup> physical restraints,<sup>137</sup> respite,<sup>138</sup> resident-to-resident aggression,<sup>139</sup> suicide,<sup>140</sup> and unexplained absences.<sup>141</sup> Many of the circumstances analysed by Ibrahim and others fall within accepted definitions of institutional elder abuse and are flags for death investigation.

A common thread in the research is the need for improvement in the information reported to police or coroners.<sup>142</sup> Ibrahim recommended '[a]mending the relevant Coroners Act in each jurisdiction to make deaths occurring in respite or within seven days after discharge from respite care a reportable death.'<sup>143</sup> This is a good starting point for coronial reform but does not go far enough. The primary data source for the retrospective study was information generated for coroners' investigations of injury-related deaths that occurred in RACS, which must be reported to coroners in accordance with state and territory legislation.<sup>144</sup> The report was limited in the sense that 'other areas of neglect and abuse e.g. sexual assault and deprivation of freedom of movement, did not lead to deaths that were reported to the coroners. Therefore, we were not able to examine them.'<sup>145</sup> This conclusion is correct and exemplifies the problem of constrained reportability in two ways. Firstly, it assumes that all deaths that should be reported are. Secondly, it misses deaths that did not need to be reported under current reporting obligations. The combination of these two factors means we only ever see a portion of a more substantial cohort.

Ibrahim, Bugeia and Ranson also looked at the issue of using medico-legal death information to improve RACS care for older persons.<sup>146</sup> They suggested this rich source was underused<sup>147</sup> and blamed three myths for the lack of use of the data: firstly, that deaths in RACS are not preventable or at least inevitable; secondly, that public health gains are too small; and thirdly, that it is someone else's charter or responsibility.<sup>148</sup> The first is completely undermined by recent work on prevention. The second requires separate expert consideration. It is the third myth that is most interesting as it plays into the mythology of central Commonwealth responsibility. Ibrahim, Bugeia and Ranson suggested that 'not one entity was responsible for systemically aggregating and analyzing medico-legal death data.'<sup>149</sup> This article accepts that their point is true but suggests that the problem is far deeper. Is it the case that the states and territories have failed to take responsibility for ensuring coronial and other death review processes including RACS?

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<sup>135</sup> Joseph Ibrahim, *Recommendations for Prevention of Injury Related Deaths in Residential Aged Care Services* (Monash University, 2017) 14–16.

<sup>136</sup> *Ibid* 16–19.

<sup>137</sup> *Ibid* 19–21.

<sup>138</sup> *Ibid* 21–2.

<sup>139</sup> *Ibid* 22–3.

<sup>140</sup> *Ibid* 23–4.

<sup>141</sup> *Ibid* 24–6.

<sup>142</sup> *Ibid* 41, 55, 67, 87, 103–4.

<sup>143</sup> *Ibid* 171.

<sup>144</sup> *Ibid* 47.

<sup>145</sup> *Ibid* 36.

<sup>146</sup> Ibrahim, Bugeja and Ranson, above n 130.

<sup>147</sup> *Ibid* 255.

<sup>148</sup> *Ibid* 257.

<sup>149</sup> *Ibid* 258.

## E *The Chilling Effect of Constitutional Power*

Has the spectre of constitutional control had a chilling effect on coronial and other death review processes with respect to deaths in RACS? Has Commonwealth legislative superiority seen aged care excluded from important post death accountability? Who has the legislative power to deal with aged care? The short answer to these questions is that aged care is both a Commonwealth and a State responsibility.<sup>150</sup> States have broad legislative powers that often encompass aged care and work cooperatively to provide services to older persons.

Lacey noted that the mythology of Commonwealth constitutional control and capacity in aged care is 'based on an incomplete understanding of the Commonwealth's constitutional power.'<sup>151</sup> She contended that '[t]he reality – based on the Commonwealth's legislative powers as set out in s 51 of the *Constitution* – is that the Commonwealth has only a partial ability to effect a legal framework for preventing and responding to elder abuse.'<sup>152</sup> She calls it the 'myth of an all-encompassing Commonwealth legal and policy dominance in the ageing portfolio.'<sup>153</sup> So it seems that while the Commonwealth does not have complete constitutional control over aged care, the actions of the States in this area reflect otherwise, whether by agreement, ceding or surrender.

The external affairs power is mooted as a source for specific elder abuse frameworks.<sup>154</sup> It allows the establishment of underpinning frameworks, which could include those aimed at institutional elder abuse, as far as they implement existing standards found in various multilateral instruments.<sup>155</sup> It might be more useful to have a specific international instrument to rely upon. A Convention on the Rights of Older Persons has been mooted for some time and its feasibility and possible content is the subject of mandates within the Open-ended Working Group on Ageing.<sup>156</sup> Debates around rights that should be contained in a convention have included the right to freedom from abuse in institutional settings.<sup>157</sup>

## F *The Impact of Ageism*

It is easier for the community to consider most deaths of older people and especially those in an aged care setting inevitable, rather than actively seeking to identify preventable factors.<sup>158</sup>

<sup>150</sup> The Commonwealth's most obvious powers for aged care lie at s 51(xxiii) and s 51(xxiiiA) of the *Constitution*.

<sup>151</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99.

<sup>152</sup> *Ibid* 101.

<sup>153</sup> *Ibid* 103.

<sup>154</sup> Kaspiew, Carson and Rhoades, above n 115, 21–2.

<sup>155</sup> See *Convention on Elimination of all Forms of Discrimination Against Women*, signed 18 December 1979 (entered into force 3 September 1981); *International Covenant on Economic, Social and Cultural Rights*, signed 16 December 1966 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, signed 16 December 1966 (entered into force 23 March 1976); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 13 December 2006); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed 4 February 1985 (entered into force 26 June 1987).

<sup>156</sup> *Follow-up to the Second World Assembly on Ageing*, GA RES 65182, 65<sup>th</sup> sess (4 February 2011); *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, GA RES 67139, 67<sup>th</sup> sess (13 February 2013); *Measures to Enhance the Promotion and Protection of the Human Rights and Dignity of Older Persons*, GA RES 70164, 70<sup>th</sup> sess (22 February 2016).

<sup>157</sup> Robin Allen et al, 'Freedom from Violence, Abuse and Neglect in Older Age', Submission to the Open-ended Working Group on Aging, May 2017.

<sup>158</sup> Hitchen et al, above n 18, 1532.

If ageism is more prevalent than sexism and racism,<sup>159</sup> this question needs to be asked: Is ageism partly responsible for system failures such as the absence of coronial and other death processes for deaths in RACS, the lack of prevalence and incidence data, the failure to align existing processes where opportunities exist, and the failure to improve obvious systemic failings or gaps? The notion of a virtual age queue is relevant here, in that

societal allocation of practical and figurative resources tends to favour the middle-aged, as long as the line keeps moving, everyone generally gets his/her privileged turn. However, those at the back of the line are dependent on those at the front transitioning away in order to keep the line moving.<sup>160</sup>

Does a virtual age queue also remove any chance of accountability when older persons suffer institutional elder abuse leading to death? In the United States the elderly age of a decedent was a factor influencing investigators towards a decision in which the death was assumed to be natural.<sup>161</sup> If children are the only other group in society who are merely distinguished by their age,<sup>162</sup> why do they not suffer the same lack of accountabilities? The sorts of systems to report, respond and remediate abuse are far more comprehensive.

#### IV LAW REFORM AND LEGAL PROCESS SOLUTIONS

Discovering elder mistreatment post mortem is problematic in part because the resources are inadequate and the personnel inadequately trained for the purpose, but also, and perhaps primarily, because the science of differentiating abuse and neglect from natural causes is in its infancy. The prevalence of these occurrences is unknown and as long as they go undetected, it will remain so.<sup>163</sup>

Unless reforms are made, institutional elder abuse will remain beyond the reach of our understanding and beyond the reach of legal processes designed to prevent future deaths. We will continue to entrench ageist attitudes about the lives and deaths of older Australians. It also means we will continue to have systems of institutional care that lack accountability for the most vulnerable persons, in the most extreme cases.

However, as suggested by Ibrahim et al, 'aggregating and analysing data from coroners' findings provides information about the nature and burden of nursing home deaths and an evidence base for public health prevention strategies.'<sup>164</sup> It is clearly worth moving to improve our evidence base. How can we achieve this? A number of possible solutions exist:

1. Clarifying key definitions;
2. Reforms to aged care regulation;
3. Enabling other post-death investigative processes; and
4. Engaging in coronial law reform to fine-tune existing systems.

##### A Clarifying Key Definitions

Clarifying key definitions is necessary to move forward in this space. Key definitions include elder abuse, institutional elder abuse, death classifications, and coronial reportability. Work

<sup>159</sup> World Health Organization, *World Report on Ageing and Health* (2015) 11.

<sup>160</sup> Susan Fiske and Michael North, 'A Prescriptive Intergenerational-Tension Ageism Scale: Succession, Identity and Consumption' (2013) 25(3) *Psychological Assessment* 706.

<sup>161</sup> Mosqueda and Wiglesworth, above n 60, 3–4.

<sup>162</sup> Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 *Human Rights Law Review* 37.

<sup>163</sup> Mosqueda and Wiglesworth, above n 60, 10.

<sup>164</sup> Joseph Ibrahim et al, 'Nature and Extent of External-Cause Deaths of Nursing Home Residents in Victoria, Australia' (2015) 63(5) *Journal of American Geriatric Society* 954.



currently underway to develop Australian definitions of elder abuse must take into account the lived experience of older persons living in RACS. This is particularly important in any foundational definition building exercise. The inclusion of institutional elder abuse in elder abuse definitions would ensure that any National Plan on Elder Abuse is designed with the needs and personal safety of vulnerable older persons in mind. By 2050, 3.5 million older Australians will be using aged care services.<sup>165</sup> This alone is reason for the inclusion of RACS in key definitional work.

## B Aged Care Regulatory Reform

Alongside the National Plan on Elder Abuse, aged care regulatory reform has shown to be necessary given incidents of abuse at various RACS and other services such as Oakden in South Australia. The recent Legislative Review of the *Aged Care Act 1997* (Cth) noted that, ‘the Department of Health (the department) is currently working with the sector to develop a new set of quality standards and processes to apply across all of aged care, called the Single Aged Care Quality Framework.’<sup>166</sup> These standards should provide an evidence base for post-death investigation.

While the Oakden Aged Mental Health Care Service was not a RACS, the subsequent Oakden Report<sup>167</sup> and Carnell-Paterson Report<sup>168</sup> highlighted many areas of necessary aged care reform. The abuse at Oakden is likely symptomatic of other institutional settings for older persons. The Carnell-Paterson Report noted, as many others have over time, that restrictive practices can lead to deaths of older persons in institutional care and urgent reforms were needed for this issue.<sup>169</sup> It also highlighted reforms needed to serious incident reporting systems.<sup>170</sup> Issues raised as potentially coming within the reporting scheme include physical restraint, elder abuse, resident on resident aggression, suicide attempts or self-harm, choking, and unexplained absences.<sup>171</sup> Unfortunately, Carnell-Paterson did not consider the coronial system’s response to deaths in aged care.

The Oakden Report did highlight the importance of a clinical record:

Ultimately, the clinical record of a person is one of the most important reflections of what has happened during the provision of their Health Care. At its most fundamental, the clinical record is relied upon when [c]ourts and [c]oroners need to determine what has occurred. Clinical records need to meet standards and those that do not are a window into the system and those providing the care.<sup>172</sup>

The utility of RACS’ clinical records in a post-death investigation would be heightened if reforms are made to aged care regulation. Firstly, a system of regulation and accountability could be implemented for the use of restrictive practices, including the recording and reporting of the use of practices and interventions. Secondly, an effective serious incident reporting and response scheme could be developed.<sup>173</sup> A third area of reform could be the effective suitability screening of RACS workers.<sup>174</sup> Each reform addresses an absence of protective safeguards against institutional elder abuse. Each reform would put in place

<sup>165</sup> Productivity Commission, *Caring for Older Australians: Overview*, Report No 53 (2011) xxii.

<sup>166</sup> Commonwealth of Australia, Department of Health, *Legislative Review of Aged Care Act 2017* (2017), 19.

<sup>167</sup> Aaron Groves (Chief Psychiatrist (WA)), *The Oakden Report* (Department for Health and Ageing (SA), 2017).

<sup>168</sup> Kate Carnell and Ron Paterson, ‘Review of National Aged Care Quality Regulatory Processes’ (Report, Department of Health (Cth), 25 October 2017).

<sup>169</sup> *Ibid.* See also recommendation 7.

<sup>170</sup> *Ibid* recommendation 6.

<sup>171</sup> *Ibid* 111–14.

<sup>172</sup> Groves, above n 167, 77.

<sup>173</sup> Australian Law Reform Commission, above n 20, [4.1]–[4.6].

<sup>174</sup> *Ibid* [4.9].

obligations that would provide a yardstick against which an assessment can be made about the experience of the older persons prior to and leading up to death. They would each be reflected on the face of relevant RACS records, including clinical records, about whether institutional elder abuse might be a factor in an older person's death. This would be particularly so in cases of staff on resident violence, resident on resident aggression, and in cases of overt abuse and neglect. Imagine looking back over the clinical record of a recent decedent that revealed a range of these occurrences – for example, a history of restrictive practices or a number of serious incident reports or both. There exists excellent potential for alignment of reformed clinical records with triggers for deeper post death investigation.

### C Other Post-Death Investigations

There are other agencies that might have a greater involvement in post-death investigations connected to institutional elder abuse. These include public guardians, public advocates, the Aged Care Complaints Commission and the Australian Aged Care Quality Agency.

#### 1 Public Guardians and Public Advocates

There is an existing mandate for public guardians and public advocates to be involved in individual and systemic complaints of institutional elder abuse. In Queensland, proposed amendments to the *Public Guardian Act 2014* (Qld) would allow the Public Guardian to investigate a complaint or allegation after an adult's death. Section 19 provides the Public Guardian with broad powers to investigate 'a complaint or allegation that an adult is or has been neglected, exploited or abused.'<sup>175</sup> There is very limited judicial consideration of the extent or operation of this power. It appears to be limited to matters relating to 'adults with impaired capacity for a matter' and the Office of the Public Guardian's own policy reflects this, even though it has not been confirmed by judicial finding.<sup>176</sup> The Public Guardian is already empowered under the *Guardianship and Administration Act 2000* (Qld) to engage in systemic advocacy on behalf of adults with impaired decision-making capacity. The recent work of the Public Advocate has included the impact of restrictive practices on older persons in aged care.<sup>177</sup>

#### 2 Aged Care Complaints Commission and Australian Aged Care Quality Agency

The Aged Care system is currently in a state of flux and has been called a 'national concern'.<sup>178</sup> The Aged Care Complaints Commission (ACCC) system provides some opportunity to investigate deaths from institutional elder abuse. The Commissioner has stated that the Commission has 'a limited window on elder abuse.'<sup>179</sup> Like many statutory authorities, the ACCC's jurisdiction is prescribed to certain areas. The Commissioner has given examples of cases within jurisdiction:

- Inappropriate chemical or physical restraint;
- Inappropriate use of force;
- Seclusion or not involving the person receiving care in social and other activities of the service;
- Neglect and other gaps or omissions in care; or

<sup>175</sup> *Public Guardian Act 2014* (Qld) s 19.

<sup>176</sup> Office of the Public Guardian of Queensland, *Annual Report 2016-17*, 54.

<sup>177</sup> Office of the Public Advocate Queensland, above n 29.

<sup>178</sup> Community Affairs Committee, Parliament of Australia, *Effectiveness of the Aged Care Quality Assessment and Accreditation Framework for Protecting Residents from Abuse and Poor Practices, and Ensuring Proper Clinical and Medical Care Standards are Maintained and Practised Interim report* (2018) Ch 4.

<sup>179</sup> Aged Care Complaints Commissioner, Submission No 148 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, August 2016, 8.

- Not allowing a person receiving care to make their own decisions.<sup>180</sup>

These examples align closely with the WHO description of elder abuse within an institutional setting. The *Aged Care Complaints Principles 2014* (Cth) are silent on whether investigation can occur after the death of a RACS resident. However, a complaint may be made by a ‘person ... raising an issue or issues about an approved provider’s responsibilities under the Act or under the principles made under section 96-1 of the Act.’<sup>181</sup> This renders death irrelevant beyond the logistical and evidentiary limitations it imposes. The *Guidelines for the Aged Care Complaints Commissioner* describe complaints on behalf of deceased RACS residents through an example ‘... a complaint relating to a deceased person could be made more than a year later where the family has been grieving and has not yet felt ready to make a complaint.’<sup>182</sup> There is also a corresponding provision to allow refusal of a complaint where ‘the issue is subject to a coronial inquiry’.<sup>183</sup> The ACCC policy notes:

[I]f a complainant alleges that the failure to administer correct medication caused a death, the delegate may decide to take no further action in respect of that issue because determining the cause of death is a matter for the coroner.

If there are issues about care that are not directly related to the coronial inquiry, such as where someone has concerns about the continence management of a person receiving care immediately before they died, such issues can be resolved without interfering with a coronial inquiry.<sup>184</sup>

Once more we see other systemic actors reliant on the constraints of the coronial system. However, the policy is clear that the investigation of a complaint not subject to coronial or other death review processes is open to the ACCC. The question arises: Is investigation by the ACCC an appropriate substitute for coronial processes? The short answer is no, for a range of reasons, including that death investigations should be the purview of judicial officers, who hold the powers to conduct thorough investigations and report findings publicly. The ACCC has provided industry alerts on topics with clear alignment to institutional elder abuse such as oral health and dental hygiene, lap belts on wheelchairs, manual lifting, fire safety, bed poles, call bells and smoking.<sup>185</sup> These issues align with Ibrahim’s research and the findings of coroners, and they contribute to the existing evidence base of institutional elder abuse.<sup>186</sup>

The suite of Aged Care Principles includes *Quality of Care Principles 2014* (Cth), and *User Rights Principles 2014* (Cth). The *User Rights Principles* set out care recipients’ rights in residential care, which includes ‘to be treated with dignity and respect, and to live without exploitation, abuse or neglect.’<sup>187</sup> Other principles include rights to quality care appropriate to his or her needs,<sup>188</sup> to live without discrimination or victimisation,<sup>189</sup> and to live in a safe, secure and homelike environment.<sup>190</sup> These values should be a yardstick for post-death investigation. Given all of this, clarifying the ACCC’s jurisdiction in cases of institutional elder abuse pre- and post-death is a priority.

<sup>180</sup> Ibid 4.

<sup>181</sup> *Aged Care Complaints Principles 2014* (Cth) cl 6(1) citing the *Aged Care Act 1997* (Cth) s 96-1.

<sup>182</sup> See *Guidelines for the Aged Care Complaints Commissioner* (Australian Government, Version 2.0, 2017), 57 [5.29].

<sup>183</sup> *Aged Care Complaints Principles 2014* (Cth) cl 8(e).

<sup>184</sup> *Guidelines for the Aged Care Complaints Commissioner*, above n 182, 57.

<sup>185</sup> Aged Care Complaints Commissioner, *Archived Industry Information* (29 November 2017) <<https://www.agedcarecomplaints.gov.au/internet/accc/publishing.nsf/Content/archived-industry-information>>.

<sup>186</sup> Ibrahim et al, above n 44; Ibrahim, above n 135.

<sup>187</sup> *User Rights Care Principles 2014* (Cth) Schedule 1.

<sup>188</sup> Ibid 1(d).

<sup>189</sup> Ibid 1(b).

<sup>190</sup> Ibid 1(e).

The Australian Aged Care Quality Agency (AACQA) is responsible for accreditation and monitoring of RACS in Australia.<sup>191</sup> The ACCC can refer matters to the AACQA where ‘if, in the course of dealing with a complaint, the Complaints Commissioner identifies matters that could indicate an issue of a systemic nature (that may affect some or all people receiving care at a service).’<sup>192</sup> Many of the issues subject of investigation and finding by the AACQA would fall within the definition of institutional elder abuse. The serious risk statutory decisions are a clear example of this. While these matters can be the subject of AACQA’s consideration, they have no particular role to investigate individual deaths in RACS. Despite this, the nature of those cases also fits within possible triggers for post-death investigation of institutional elder abuse. Triggers could include notifications of consideration of serious risk and any accreditation decisions flowing from that process.

Recent parliamentary inquiries have considered how the ACCC and AAQCA provide accountability for quality of care in light of the failures at Oakden.<sup>193</sup> The Senate has recommended a new Single Aged Care Quality Framework which would combine the ACCC and other bodies.<sup>194</sup> Additionally, new Aged Care Quality Standards are being developed.<sup>195</sup> Draft standards include consumer dignity, autonomy and choice, personal care and clinical care, lifestyle services and supports, and service environment.<sup>196</sup> In any event, structural changes to the ACCC and AACQA systems should ensure those agencies or their successors are fine-tuned to detect and deal with complaints of institutional elder abuse at individual, program and systemic levels.

#### D *Coronial Law Reform*

When the *Coroners Act 2003* (Qld) was debated, it was said that it would include a focus on identifying emerging patterns.<sup>197</sup> Deaths in RACS are not a new or emerging pattern. Rather, deaths in RACS simply fail to be investigated because of the barriers noted in this article. This is not a criticism of coronial systems. Rather, it is a reflection of their functionality, and their inbuilt, systemic limitations. Coronial and death review laws should be amended to ensure proper inclusion of deaths in RACS as a reportable setting and circumstance. Using Queensland’s coronial laws as an example, reform could be achieved in several ways.

A new class of reportable death could be added to the *Coroners Act 2003* (Qld). This might be framed in a number of ways. It might be a new subset of reportable deaths, namely, ‘a death in residential aged care’ or ‘a residential aged care related death’,<sup>198</sup> a new subset of health care related deaths<sup>199</sup> or a new subset of deaths in care.<sup>200</sup> Each option needs careful consideration.

The finer detail about when such a death is reportable should include the circumstances detailed in this article. Settings would include RACS. Circumstances could include:

- Types of causes of death that align with possible institutional elder abuse such as potentially avoidable deaths, including those deaths that were potentially preventable or potentially treatable;

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<sup>191</sup> Ibid 1(g).

<sup>192</sup> Ibid 6.

<sup>193</sup> See Community Affairs Committee, above n 178; Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia* (2017).

<sup>194</sup> Community Affairs Committee, above n 178, 67.

<sup>195</sup> Parliament of Australia, *Single Quality Framework Draft Aged Care Quality Standards*, Consultation Paper 2017.

<sup>196</sup> Ibid.

<sup>197</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 1 April 2003, 1059 (M Lawlor).

<sup>198</sup> *Coroners Act 2003* (Qld) s 8(3).

<sup>199</sup> Ibid s 10AA.

<sup>200</sup> Ibid s 9(1).

- Where the decedent was involved in a critical, serious or reportable incident, including where the decedent had been involved in resident on resident violence or staff on resident violence;
- Where a report had been made to the RACS about the violence or abuse of a visitor;
- Where a Public Guardian or Public Advocate had been investigating quality of care at the RACS;
- Where the decedent had a restrictive practices history;
- Where staff suitability concerns had been raised or were relevant to the decedent; and
- Where a complaint had been made to, or an investigation initiated by, a relevant agency about breaches of aged care quality care standards or legislative principles.

Clear drafting would ensure that amendments were consistent with the Australian Constitution. The scope of model laws could be considered by the Australian Law Reform Commission or the Law, Crime and Australian Community Safety Council.

## E Overseas Models

Overseas models might assist in identifying best practice in reportability of deaths in aged care. Ontario uses a 'Geriatric and Long Term Care Review Committee' (GLTCRC) to assist and advise a coroner investigating deaths of older people in residential aged care.<sup>201</sup> It has a focus on all homicides involving residents of long term care or retirement homes. The GLTCRC also reviews cases where systemic issues may be present or where significant concerns have been identified by the family, investigating coroner or Regional Supervising Coroner.<sup>202</sup> Between 2004 and 2016, it reviewed 282 deaths and made 639 recommendations.<sup>203</sup> It appears similar in function to Queensland's Domestic Violence Death Reviews. Importantly, the GLTCRC work has a systemic and preventative focus:

Reviews and recommendations prepared by the GLTCRC are widely distributed to service providers, long term care providers and other relevant agencies and organizations throughout the province. Our role is to provide information to relevant organizations that will subsequently lead to improvements in processes, policies and initiatives, with the goal of preventing future deaths in similar circumstances.<sup>204</sup>

Referrals to the GLTCRC are made by the Office of the Chief Coroner in the event that expert or specialised knowledge is needed to further the coroner's investigation, and/or when there are significant concerns or issues identified by the family, investigating Coroner, Regional Supervising Coroner, or other relevant stakeholders.<sup>205</sup> The Committee has recently noted that 'although physical abuse and neglect causing death is not often seen in the cases reviewed by the GLTCRC, elder abuse in its many forms is often a peripheral or contributory issue.'<sup>206</sup>

Of course, the GLTCRC model has limitations, including that the GLTCRC is advisory in nature and it only reviews deaths that meet the criteria for mandatory referral, (ie homicides in long term care or retirement homes), or discretionary referral, (ie where systemic issues or implications may be present).<sup>207</sup> Certainly, it provides another model for improving our understanding of institutional elder abuse.

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<sup>201</sup> Geriatric and Long Term Care Review Committee, Office of the Chief Coroner of Ontario, *2017 Annual Report* (2017).

<sup>202</sup> *Ibid* iii.

<sup>203</sup> Geriatric and Long Term Care Review Committee, Office of the Chief Coroner of Ontario, *2016 Annual Report* (2016).

<sup>204</sup> *Ibid* i.

<sup>205</sup> *Ibid* 2.

<sup>206</sup> *Ibid* 13.

<sup>207</sup> *Ibid*.

## V CONCLUSIONS

Awareness of a problem but not knowing the extent or nature of it makes it difficult to create evidence-based policies that would provide a blueprint for resources and programs necessary to ameliorate the abuse.<sup>208</sup>

This article raises some of the systemic issues impacting on our ability to identify and understand deaths contributed to or caused by institutional elder abuse. It particularly addresses the problem of limited reportability within coronial and other death review processes and has sought to raise some practical solutions for consideration. Ibrahim summarised this urgent need by saying that ‘improving the quality of care for older people living in RACS in Australia requires a better understanding of how, why, where and when residents die.’<sup>209</sup> We must move beyond the underlying assumption that elder deaths are all natural deaths.<sup>210</sup>

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<sup>208</sup> McDonald et al, above n 2, 140.

<sup>209</sup> Ibrahim et al, above n 44, 11.

<sup>210</sup> Mosqueda and Wigglesworth, above n 60, 37.

# HOUSING AN AGEING AUSTRALIA: THE IDEAL OF SECURITY OF TENURE AND THE UNDERMINING EFFECT OF ELDER ABUSE

EILEEN WEBB\*<sup>1</sup>

*This article considers the degree of legal security of tenure and ontological security in various forms of accommodation utilised by older people. In so doing, the article examines how elder abuse can dilute legal and ontological security and makes suggestions as to how existing real property laws could be utilised and amended to safeguard housing security for older people.*

## I INTRODUCTION

One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss.<sup>2</sup>

It is undeniable that Australia will be faced with challenging economic and societal realities over the next 40 years.<sup>3</sup> Australia must respond to demographic changes, including an extension to the average working life and increased participation from Australian seniors.<sup>4</sup> Furthermore, various inquiries that have considered housing affordability in Australia highlight shortfalls in the provision of age-appropriate and affordable housing.<sup>5</sup> These major demographic and housing issues are closely connected, and are occurring against a background of stagnating economic conditions and an oversubscribed health system.

Security of tenure is a crucial factor in making people of all ages, including older people, feel confident in their housing circumstances. Security of tenure can be defined in a narrow legal sense based on the nature of an interest or the length of tenure in land or, more broadly, to encompass ontological security, the confidence that most human beings have in the continuity of their self-identity and in the constancy of their social and material environments. Ontological security is essential to general wellbeing and the link between secure housing and positive health outcomes is well established.<sup>6</sup>

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<sup>1</sup> Part 1 and 2 of this article utilise material incorporated in a research report of which I was a co-author. Content in this article from the report is content that I was solely responsible for as part of the co-authorship team. Aviva Freilich et al, 'Security of Tenure for the Ageing Population in Western Australia: Does Current Housing Legislation Support Seniors' Ongoing Housing Needs. Summary' (Report, Council on the Aging Western Australia – COTA WA, November 2014) <<http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf>> ('*Western Australia Security of Tenure for the Ageing Report*'). The research was funded by COTA WA and LotteriesWest. Elderly persons in urban and regional Western Australia living in a variety of housing tenures were interviewed for the report.

<sup>2</sup> Margaret Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 959.

<sup>3</sup> The Treasury (Cth), *2015 Intergenerational Report: Australia in 2055* (2015).

<sup>4</sup> James Massola, 'Inter-Generational Report: Joe Hockey Warns Difficult Days Lie Ahead', *The Sydney Morning Herald* (Sydney, 20 February 2015). See also Productivity Commission (Cth), 'An Ageing Australia: Preparing for the Future' (Research Paper, November 2013); Joint Center for Housing Studies of Harvard University, *Housing America's Older Adults—Meeting the Needs of an Ageing Population* (2014).

<sup>5</sup> Senate Economics References Committee, Parliament of Australia, *Out of Reach? The Australian Housing Affordability Challenge* (2015) 189–98.

<sup>6</sup> Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press in association with Basil Blackwell, 1984); Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press, 1991); *Western Australia Security of Tenure for the Ageing Report*, above n 1, 8.

The spectre of elder abuse, estimated to affect up to 14 per cent of older people,<sup>7</sup> can have a deleterious effect on a person's security of tenure. Elder abuse undermines not only the physical and emotional welfare of individuals but often has a financial impact. Indeed, in Australia, instances of elder financial abuse account for approximately 42 per cent of reported elder abuse cases.<sup>8</sup> Given that the pivotal asset for many older people is their home, the loss of that asset, or an unintended erosion of equity in the home, is likely to cause considerable stress. Even when older people are not homeowners, elder abuse can lead to the loss of a home. The misappropriation of an older person's personal assets, for example where a bank account is accessed without the older person's consent, can lead to the older person being unable to pay rent in the private rental market or fees in an aged care setting. And, the associated psychological impact is multiplied where the loss has been perpetrated by a close relative or acquaintance. Although elder abuse is prevalent and rising, it is interesting that there has been minimal consideration of the role real property laws have to play when encountering elder abuse, including in relation to security of tenure.

Of course, most legislation relevant to real property and residential accommodation is generic and, with the exception of retirement village and aged care legislation, does not make specific reference to older people. However, instances of elder abuse commonly involve some form of real property, such as the fraudulent sale or mortgage of an older person's home. The strict operation of property laws, for example the indefeasible title bestowed on an innocent third party despite the transfer being the subject of fraud, can have a deleterious effect on an older person's security of tenure. Furthermore, the result of such frauds or other property related losses – or simply individual circumstances – may result in an older person residing in more marginal types of accommodation such as a private rental, a residential park or a boarding house. All types of accommodation have differing degrees of legal and ontological security of tenure which in turn impact upon an older person's wellbeing and ability to age well.

This article is in five parts. Part II focuses on older people and examines why it is important to look at older people as a discrete group rather than within the generic population. It also considers the importance of security of tenure for older people's wellbeing. Part III will discuss the nature of security of tenure and its role and recognition by the law, including references to international human rights instruments. Part III also considers the impact elder abuse may have on older people's legal security of tenure and, in turn, their ontological security. Part IV examines the legal security of tenure and the ontological security available to older people in different forms of accommodation. The article concludes with suggestions to enhance existing laws, thus ensuring a greater degree of legal security of tenure and ontological security for the ageing population.

## II AN AGEING AUSTRALIA

### A *Older People and Accommodation*

The laws relating to housing and accommodation are many and they impact differently on individuals depending on a person's particular life circumstances. However, the effectiveness of, and any shortcomings in, the law pertaining to housing and accommodation arrangements are likely to present a greater level of stress and anxiety to seniors than other age groups.

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<sup>7</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016).

<sup>8</sup> 'Review into the Characteristics of Elder Abuse in Queensland'. This research project was conducted by Barbara Blundell, Joe Clare, Emily Moir, Eileen Webb and Mike Clare on behalf of the Department of Communities, Child Safety and Disability Services (Qld). It was completed in March 2018 but is yet to be tabled in the Queensland Parliament. For more information see <<https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/our-progress/enhancing-service-responses/tailoring-responses-meet-needs-vulnerable-queenslanders>>.



Seniors are at a stage in their lives when tenure is especially important. Seniors place a high value on their home environment as they are less likely to be in full-time employment and consequently more likely to spend greater time in their homes and in their immediate neighbourhoods than at any other period in their lives. This stage in a senior's life can be impacted by a variety of issues associated with ageing which may affect accommodation choices. For example, there may not be the variety of accommodation options available to seniors as to younger persons due to physical limitations and the rising cost of accommodation. Illness and age-related health concerns are likely to become more prevalent and there may be changes in the family dynamic due to the necessity for carers, transition to widowhood, and/or the need to reside with or closer to relatives.<sup>9</sup> From a financial perspective, if something goes wrong it is unlikely that seniors will be able to rebuild and recoup losses. Given that the base retirement age is 55 (although most people will be unable to qualify for the pension until 67) and that life expectancy has increased to around 80 years, it is foreseeable that many older people will pass through several forms of accommodation between retirement and end of life.<sup>10</sup> Therefore, while a particular kind of housing may meet a person's needs at one point in time, such needs can change dramatically with the ageing process.<sup>11</sup> Perry, Andersen and Kaplan note that the experience of aging may necessitate transitions in living environments, either through adaptations to current residences or through relocations to more supportive environments.<sup>12</sup> Although such issues may be experienced by other age groups and demographics as well, it is suggested that seniors are particularly vulnerable to their occurrence and may face distinct barriers in accessing assistance.

### B *Why is Security of Tenure Important to Older People?*

Whatever the mode of accommodation, security of tenure is a priority for almost all older people. Apart from the obvious desirability of stable accommodation, there are also discernible health, social and economic benefits to safeguarding security of tenure as the population ages. Transitions in later life are complex and 'challenge older adults to make projections of a future self and to anticipate their emotional, medical and financial needs'.<sup>13</sup> Older people who are secure in the knowledge that they can stay in their accommodation for an extended period – or permanently – exhibit demonstrably better physical and psychological health than those in less stable accommodation.<sup>14</sup> The impact of a change of residence, particularly a sudden or involuntary one, heightens the risk of physical and psychological health implications in both

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<sup>9</sup> Wiseman discusses 'decision-to-move factors' encountered as people age, beginning with a 'triggering event' that motivates seniors to reconsider their residential circumstances: Robert F Wiseman, 'Why Older People Move' (1980) 2 *Research on Aging* 141. See also David J Ekerdt, Mark Luborsky and Catherine Lysack, 'Safe Passage of Goods and Self During Residential Relocation in Later Life' (2012) 32 *Ageing and Society* 833.

<sup>10</sup> Indeed a female who was born in 2012 will on average live for an estimated 94.4 years while a male born in 2012 will live on average 91.6 years: Productivity Commission (Cth), above n 4, 50.

<sup>11</sup> Three types of relocation over the course of retirement have been described being motivated by lifestyle, adaption to increased needs and finally the need for institutional care: Eugene Litwak and Charles F Longino Jr, 'Migration Patterns among the Elderly: A Developmental Perspective' (1987) 27 *Gerontologist* 266; Tam E Perry, Troy C Andersen and Daniel B Kaplan, 'Relocation Remembered: Perspectives on Seniors Transitions in the Living Environment' (2014) 54 *Gerontologist* 75.

<sup>12</sup> Perry, Andersen and Kaplan, above n 11, 76.

<sup>13</sup> Ibid 78.

<sup>14</sup> Although studies have concluded that older people in their own homes have the highest levels of ontological security, those in longer term rental or permanent public housing experience similar levels. Such levels decline the more precarious the accommodation arrangements: see generally Rosemary Hiscock et al, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18 *Housing, Theory and Society* 50.

the short and longer term.<sup>15</sup> Furthermore, relocation that takes place without regard to the personal preferences of older people gives rise to feelings of powerlessness.<sup>16</sup>

Insecure accommodation may also impact upon older people's social milieu through a reluctance to engage in their local communities or,<sup>17</sup> in the event of having to relocate, the loss of existing support and friendship networks.<sup>18</sup> The prospect of possibly having to move weighs heavily on older people, especially where there are limited options for accommodation elsewhere.<sup>19</sup>

Finally, there are significant economic costs which may result from the heightened risk of illness and the consequences of actual or potential dislocation. Much attention has been paid to the rising cost of funding the healthcare of older people yet the nexus between secure accommodation and better health outcomes for older people is, for the most part, overlooked.<sup>20</sup> Where an older person must relocate, voluntarily or involuntarily, support formerly provided by friends or family within a community is likely to cease and must be provided in some other way. Similarly, if an older person must move from a private arrangement to public housing, more cost falls to the public purse.<sup>21</sup>

Despite the obvious benefits of secure accommodation for older people, there has not been a comprehensive response to the focus on security of tenure for older people. Unfortunately, issues affecting seniors are often a low priority for resource allocation and policy innovation because of older people's relative lack of economic and political power.<sup>22</sup> Furthermore, gradual shifts in the nature of society, even with profound consequences, rarely elicit the same scrutiny as immediate policy issues.<sup>23</sup>

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<sup>15</sup> Involuntary relocation has been identified as a factor in increased morbidity. The relocation process has also been linked to the emergence of physiologic and psychosocial disorders such as *Relocation Stress Syndrome*: Abir K Bekhet, Jaclene A Zauszniewski and Wagdy E Nakhla, 'Reasons for Relocation to Retirement Communities: A Qualitative Study' (2009) 31 *Western Journal of Nursing Research* 462.

<sup>16</sup> Indeed, Rutman and Freedman conclude that maintaining a sense of control over the relocation decision-making process is critical to positive post-relocation adaptation: Deborah L Rutman and Jonathan L Freedman, 'Anticipating Relocation: Coping Strategies and the Meaning of Home for Older People' (1988) 7 *Canadian Journal on Aging* 17. See also Abir K Bekhet, Jaclene A Zauszniewski and May L Wykle, 'Milieu Change and Relocation Adjustment in Elders' (2008) 30 *Western Journal of Nursing Research* 113; Frank Oswald et al, 'Relationships between Housing and Healthy Aging in Very Old Age' (2007) 47 *Gerontologist* 96.

<sup>17</sup> For example, in the *Western Australia Security of Tenure for the Ageing Report*, above n 1, 9 n 11, some interviewees from residential parks reported that many older residents do not complain even if conditions in a residential park are poor or essential maintenance is neglected. Some stated the older residents were not prepared to engage with residents' groups or be seen to engage with other residents for fear of being branded a troublemaker.

<sup>18</sup> Philippa Howden-Chapman, Louise Signal and Julian Crane, 'Housing and Health in Older People: Ageing in Place' (1999) 13 *Social Policy Journal of New Zealand* 14.

<sup>19</sup> This was a common thread in many of the interviews in the *Western Australia Security of Tenure for the Ageing Report*, above n 1, particularly in relation to residents in residential parks on rolling periodic leases (see ch 8) and older people in the private rental market (see ch 5). Studies have, unsurprisingly, recorded heightened quality of life for older people formerly residing in private rentals who have been able to access age appropriate public housing with community supports: Ena Ahern, *Older Australians Experience Living in Insecure Tenancies* (Housing for the Aged Action Group, 2003).

<sup>20</sup> The World Health Organisation has stated that affordable and appropriate housing protects people from hazards and promotes good health and wellbeing: World Health Organisation, *Health Principles for Housing* (1989). Similarly, see M Powell Lawton and Jacob Cohen, 'The Generality of Housing Impact on the Well-Being of Older People' (1974) 29 *Journal of Gerontology* 194; Howden-Chapman, Signal and Crane, above n 18.

<sup>21</sup> In the *Western Australia Security of Tenure for the Ageing Report*, above n 1, 9 n 15, a significant number of private tenants and residents of residential parks made the comment that if, in the first case, the rent increased too much, or, in the second case, if the resident was forced to vacate the park, their only option was public housing.

<sup>22</sup> Howden-Chapman, Signal and Crane, above n 18.

<sup>23</sup> Productivity Commission (Cth), above n 4.

## III THE NATURE OF SECURITY OF TENURE

A *What Does Security of Tenure Mean to Lawyers and Non-Lawyers?*

In its simplest form, security of tenure is a legal concept that refers to a person's right to occupy premises for a given time. While it is essential to ground our discussions in the correct legal terminology, we must be mindful that the expression has taken on a broader – more colloquial – interpretation that encapsulates issues of adequate housing and quality of life.<sup>24</sup> Both options are problematic: too narrow a focus on a bare legal notion may exclude consideration of pertinent related issues and yet too broad an interpretation will dilute the precision of the ensuing legal discussion.

Tenure can be defined as the conditions under which land or buildings are held or occupied.<sup>25</sup> It is the right of a person to hold property, a person's entitlement to occupy land, the nature of that right and the term and manner of the occupation. For example, a person's tenure pursuant to a lease gives that person the right to occupy the land for the term of the lease under the terms and conditions stipulated in the lease or as implied by statute. The security of a person's tenure in any given case is gauged according to the extent of an individual's right to occupy the land. Legal security of tenure means that, in the eyes of the law, a grantee has a right to remain in occupation of land that the law will enforce.

It is obvious, therefore, that tenure, and thus security of tenure, is not a one size fits all concept. There is a vast array of different tenure arrangements. Determining security of that tenure focuses on a continuum from people who are very secure in their tenure through ownership or long term leases, through to people with little or no security of tenure. In any given case, the degree of security of tenure will depend on the nature of the occupation and the legal rules that will determine the security and the term of the tenure. So, a person who owns their own home will, prima facie, have the most secure tenure. A home owner can occupy the premises for as long as they desire and use the property as they like, subject, of course, to overriding government requirements or any arrangements made with others to occupy the premises, for example a lease. In comparison, under a private residential lease for one year under residential tenancies legislation, the tenant will have the right to exclusive possession of the premises for the term of one year. This right may be impacted upon by the terms of the residential tenancy agreement and/or the provisions of the legislation. Therefore, if the tenant is in breach of his or her obligations under the lease, the lease – and the tenant's tenure – may be terminated. In a boarding or lodging situation, any notion of security of tenure is illusory; the occupant can be evicted from the premises at will.

B *Extending the Legal Notion of Security of Tenure – The Right to Adequate Housing and Ontological Security*

The legal understanding of security of tenure may be quite different to the use of the term in common parlance. Rather than an arrangement between the grantor of the interest and the grantee, the natural conclusion is that it is an interest in the land obtained by the grantee – a relationship between the tenant and the land. There is often a view that the tenant has rights in and over the land for an undefined period. Although in some cases, for example a leasehold

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<sup>24</sup> While the legal classification serves a valid purpose, the reality is that the concept of security of tenure is generally understood to mean more than the right to occupy 'four walls with a roof'. See *A Home is More than Four Walls and a Roof* (Directed by Mark Andrew Job, St James Drop-In Centre, 2010) <<https://youtu.be/T9Fyb-oJp1w>>, a short subject documentary produced for St. James Drop-In Centre in Montréal, Québec, Canada.

<sup>25</sup> Angus Stevenson and Maurice White (eds), *Concise Oxford English Dictionary* (Oxford University Press, 12<sup>th</sup> ed, 2011).

interest, the tenant does obtain an interest in the land, the interest is inferior to that of ownership and is regulated by the agreement between the parties.<sup>26</sup> Also, security of tenure is often regarded as synonymous with quality of life issues, a matter explored below in relation to the concept of adequate housing. This is not correct in a legal sense. Legal security of tenure has no correlation with quality of life issues, except to the extent that people take comfort in knowing that one's occupation is secure and long-lasting. Indeed, there may be an inconsistency between the two, for example, where a person in public housing has secure tenure but, in some cases, the stress of neighbourhood dysfunction results in a below average quality of life.<sup>27</sup>

If the extent of an individual's security of tenure is limited by and to the characteristics of the form of the tenure, it does not take us very far. An unencumbered home owner will, for the most part, have considerable security of tenure, whereas a boarder in a lodging house has virtually none. This makes a legal analysis of security of tenure relatively straightforward because reference to the relevant statutes, and in some cases the common law, will reveal its nature and extent. However, to most people, security of tenure is not just occupation for a time span. Commentary clarifying art 11(1) of the *International Covenant on Civil and Political Rights (ICCPR)* describes legal security of tenure as one of seven components in the right to adequate housing.<sup>28</sup> The other six factors are affordability,<sup>29</sup> habitability,<sup>30</sup> availability of services, materials, facilities and infrastructure,<sup>31</sup> accessibility, location,<sup>32</sup> and cultural adequacy.<sup>33</sup> As such, security of tenure is but one of several factors that combine to produce adequate housing. Although security of tenure is a – and in many cases *the* – pivotal element in the mosaic that represents adequate housing, it is not the be-all and end-all. Indeed, after a cursory examination of the common law and real property legislation, the existence of or degree of security of, tenure is easily ascertainable. What is a more difficult prospect is examining whether, despite legal security, the housing is adequate to the person's needs – adequate meaning by reference to these other factors.

Traditionally, the common law in relation to the occupation of a dwelling is constrained. It rarely differentiates between real property (a physical structure upon land with a capital value) and a home (described by Fox-O'Mahoney as a social, psychological, cultural and emotional phenomenon).<sup>34</sup> Despite recognition in other academic disciplines, it is fair to say that real property law has been slow, even reluctant, to weigh up the importance of a secure and stable living environment for an occupant in a contest with commercial or economic considerations. With the exception of an unencumbered owner of land, an occupant's tenure was viewed traditionally in terms of length and nature – how long an occupant would be indulged by an owner before the law permitted the occupant to be moved on.

<sup>26</sup> Or as imposed by statute.

<sup>27</sup> For example, in the interviews for the *Western Australia Security of Tenure for the Ageing Report*, above n 1, 14 n 26, several senior public housing tenants were quite distressed by the activities and behaviour of some of their neighbours but were told by Housing Authority representatives that it would be several years before they could be transferred to other accommodation.

<sup>28</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 11(1) ('*ICCPR*').

<sup>29</sup> Personal or household financial costs associated with housing should not threaten or compromise the attainment and satisfaction of other basic needs. For example, food, education, access to health care.

<sup>30</sup> Adequate housing should provide for elements such as adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.

<sup>31</sup> Housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, etc.

<sup>32</sup> Adequate housing must allow access to employment options, health-care services, schools, child-care centres and other social facilities and should not be built on polluted sites nor in immediate proximity to pollution sources.

<sup>33</sup> Adequate housing should respect and take into account the expression of cultural identity and ways of life.

<sup>34</sup> Lorna Fox, 'The Idea of Home in Law' (2005) 2 *Home Cultures* 25; see generally Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2006).

But is the focus on security of tenure artificial in relation to the overall wellbeing of older people and the circumstances in which they age? Does security of tenure equate to adequate housing or quality of life? Security of tenure may be a factor that contributes to quality of life – indeed, in some cases the lack of security of tenure is a cause of considerable angst – yet its mere existence does not guarantee a secure lifestyle in the sense of being comfortable in one’s surroundings. When considering security of tenure, it seems appropriate to examine security in the narrow legal but also in a broader sense. This requires looking beyond the time based legal notion, to encompass other issues. Security means a secure condition or feeling,<sup>35</sup> with secure being defined as untroubled by danger or fear, safe, reliable and stable.<sup>36</sup> Therefore a wider view of security of tenure extends beyond the legal notion (which, of course, remains extremely important) and encompasses factors such as those outlined above in relation to adequate housing. Affordable, convenient and secure housing is critical in the lives of seniors, and security in one’s home environment is linked directly to physical and mental wellbeing as people age.<sup>37</sup>

This discussion links well with housing literature, in particular with Giddens’ theory of ontological security – the confidence that most human beings have in the continuity of their self-identity and in the constancy of their social and material environments.<sup>38</sup> Basic to a feeling of ontological security is a sense of the reliability of persons and things.<sup>39</sup> Several commentators have explored the relationship between stable housing and ontological security and, in turn, the link between ontological security and health and social outcomes.<sup>40</sup> Indeed, the World Health Organisation emphasises the quality and environment of housing and its impact on the health of occupants. Affordable and appropriate housing protects people from hazards and promotes good health and wellbeing.<sup>41</sup>

Ontological security is of particular importance to older private homeowners<sup>42</sup> and renters<sup>43</sup> and is undermined by factors influencing insecurity of tenure including housing cost and complex tenancy procedures.<sup>44</sup> While security of tenure does not equate to ontological security, the two concepts overlap and, in reality, the existence of legal security of tenure will, in a predominance of cases, foster the feelings of safety and perceived control essential for a high degree of ontological security. Therefore, it is plain to see that older people who

<sup>35</sup> Stevenson and White, above n 25.

<sup>36</sup> Elizabeth Jewell (ed), *The Pocket Oxford Dictionary and Thesaurus* (Oxford University Press, 2<sup>nd</sup> American ed, 2006) 754.

<sup>37</sup> Hiscock et al, above n 14.

<sup>38</sup> Giddens, *The Constitution of Society: Outline of the Theory of Structuration*, above n 6; Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age*, above n 6.

<sup>39</sup> Dupuis and Thorns note that home can provide a locale in which people can work at attaining a sense of ontological security in a world that at times is experienced as threatening and uncontrollable: Ann Dupuis and David C Thorns, ‘Home, Home Ownership and the Search for Ontological Security’ (1998) 46 *The Sociological Review* 24.

<sup>40</sup> There is an abundance of literature that considers the relationship between ontological security and home. In addition to the sources referred to above, other noteworthy discussions include: Susan Bright and Nicholas Hopkins, ‘Home, Meaning and Identity: Learning from the English Model of Shared Ownership’ (2011) 28 *Housing, Theory and Society* 377; Kathleen Mee, ‘I Ain’t Been to Heaven Yet? Living Here, this is Heaven to Me’: Public Housing and the Making of Home in Inner Newcastle’ (2007) 24 *Housing, Theory and Society* 207; Beverley A Searle, Susan J Smith and Nicole Cook, ‘From Housing Wealth to Well-Being?’ (2009) 31 *Sociology of Health & Illness* 112; Kate E Mason et al, ‘Housing Affordability and Mental Health: Does the Relationship Differ for Renters and Home Purchasers?’ (2013) 94 *Social Science and Medicine* 91.

<sup>41</sup> World Health Organisation, ‘International Workshop on Housing and Climate Change: Developing Guidance for Health Protection in the Built Environment – Mitigation and Adaptation Responses’ (Meeting Report, 2010) <<http://www.who.int/hia/housing/en/>>.

<sup>42</sup> Ann Dupuis and David C Thorns, ‘Meanings of Home for Older Home Owners’ (1996) 11 *Housing Studies* 485.

<sup>43</sup> Whether ‘secure housing’ means ‘home ownership’ and whether ownership is a pre-requisite for ontological security remains a matter of debate: Ade Kearns et al, ‘Beyond Four Walls – The Psycho-Social Benefits of Home: Evidence from West Central Scotland’ (2000) 15 *Housing Studies* 387. Cf Hiscock et al, above n 14.

<sup>44</sup> Hiscock et al, above n 14.

experience elder abuse will, naturally, experience a dilution of ontological security that will be magnified further by conduct that undermines the legal security of tenure in their housing circumstances.

### C *The Impact of Elder Abuse*

Differing conceptualisations of elder abuse can be seen in various disciplines and there is no one accepted definition of elder abuse.<sup>45</sup> However, a commonly utilised definition is: ‘any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.’<sup>46</sup> Broader scope is often utilised in relation to elder financial abuse with the World Health Organisation describing such abuse as ‘the illegal or improper exploitation or use of funds or other resources of the older person’.<sup>47</sup> This definition incorporates abuses committed by persons outside a relationship of trust so as to include the actions of strangers and institutions.

Experiencing abuse, whether instigated by persons close to or removed from an older person, is likely to have profound psychological and physical impacts upon an older person’s health as well as dilute his/her income and assets in retirement. An older person is unlikely to have the time or the physical, psychological and financial resolve to recover or recoup losses.<sup>48</sup> If the abuse undermines the older person’s ability to retain or find accommodation it is likely there will be a catastrophic impact on the older person’s health and wellbeing.

In a time of decreasing housing affordability and income stagnation, the ‘nest eggs’ believed to be held by older people may become attractive to family, associates or even strangers. ‘Inheritance Impatience’ is a term often used to describe the actions of adult children or grandchildren who do not want to wait until an older person passes away to receive money or property from the older person’s estate.<sup>49</sup> And, some people seek to access these funds through a variety of means such as abusing enduring powers of attorney or dealing with an older person’s property without their knowledge or consent. In an abundance of cases, the conduct is directed at land, particularly the family home, or has consequences that impact upon the older person’s accommodation choices, for example through loss of savings.<sup>50</sup>

Real property laws impact upon accommodation choices. The right to dwell in a property, the term of the residency, the conditions upon which a person can stay in or vacate the dwelling are addressed in various statutes and, in some cases, by the common law. Given that real property laws will determine a person’s legal security of tenure – and the nature of that tenure will also impact upon ontological security – a logical step is to consider the laws regulating different types of accommodation and assess how elder abuse may impact upon those notions.

<sup>45</sup> Kaspiew, Carson and Rhoades, above n 7, 47–57.

<sup>46</sup> Aged Rights Advocacy Service, ‘Accessing the Aged Rights Advocacy Service to Prevent Elder Abuse’ (Report, November 2013) 5 referring to Australian Network for the Prevention of Elder Abuse (ANPEA) working definition 1999. See also Kaspiew, Carson and Rhoades, above n 7, 47–57.

<sup>47</sup> Shelly L Jackson and Thomas L Hafemeister, ‘Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society’s Response’ (Final Report to National Institute of Justice, United States Department of Justice, August 2010 <<https://www.ncjrs.gov/pdffiles1/nij/grants/233613.pdf>>.

<sup>48</sup> Frances Gibson and Francine Rochford, ‘Emerging Consumer Credit Issues for Older Australians’ (2008) 12 *University of Western Sydney Law Review* 73; Duncan Boldy et al, ‘Addressing Elder Abuse: Western Australian Case Study’ (2005) 24 *Australasian Journal on Ageing* 3, 3.

<sup>49</sup> Kirsty Needham, ‘Inheritance Impatience Causing Families to Rob Granny for School Fees, Renovations’, *The Sydney Morning Herald* (online), 21 November 2015 <<https://www.smh.com.au/national/nsw/inheritance-impatience-causing-families-to-rob-granny-for-school-fees-renovations-20151121-gl4im7.html>>.

<sup>50</sup> Ibid. See also Nick Goiran, ‘Sense of Entitlement Leads to Elder Abuse’, *The West Australian* (Perth), 20 September 2017.

## IV ACCOMMODATION TYPES AND THE DIFFERING DEGREES OF SECURITY OF TENURE

A *Home Ownership*

Apparently X (interviewee's brother) gave the signed transfer to the lawyer and the property was transferred from Mum to him (X). The lawyer didn't ask to see Mum; X said she wasn't feeling well and that she just wanted him to drop off the documents. Mum didn't know what she had signed. He (X) sold the house. Mum won't do anything because she doesn't want him to go to jail. I would.<sup>51</sup>

A high proportion of older people enter retirement owning their own home.<sup>52</sup> Although the home is often the only major asset held, the increase in real estate values over the past few decades means that many of these homes are very valuable indeed. Ironically, the older home owner's security of tenure can be undermined by the operation of the existing legal framework. Of particular concern are instances of elder financial abuse involving an older person's real property, a risk that is likely to increase as the population ages. The Torrens system, and its focus on the indefeasibility of title, leaves a defrauded (former) registered proprietor unable to reclaim an unfettered interest in his or her property when it has been registered in the name of an innocent third party.<sup>53</sup> This is the case even where the older person has been defrauded of that property. Although it is hoped that provisions such as s 56C of the *Real Property Act 1900* (NSW) and eConveyancing will make such frauds harder to perpetuate, fraud may occur through forgery of the older person's signature on the mortgage or transfer instrument, identity fraud or impersonation of the older person, or by the older person being persuaded to sign mortgage or transfer documents while under a misapprehension about the nature of the documents or their effect.<sup>54</sup> In such cases, the fraudulent party may transfer the property into his or her name, sell the property to a third party, or mortgage the property as security for a loan. Such transactions may result from the misuse of an enduring power of attorney.<sup>55</sup> If the property had been transferred into the name of the fraudulent party (or to someone who was directly involved in the fraud), the fraud exception to indefeasibility of title would see the property transferred back to the older person.<sup>56</sup>

The matter becomes more complicated if a third party is involved. While there is a fraud exception to indefeasibility of title, it must, of course, be brought home to the present registered proprietor or his or her agent. If the property is transferred to a third party that is not involved in the fraud and the transfer is registered, the title of the third party will be indefeasible. The only option for an older person is to seek compensation from the relevant assurance fund. In some jurisdictions, recourse to the fund is not direct and may require that the older person first proceed against the fraudulent abuser.<sup>57</sup> In many cases, especially when a family member is involved, the older person may not have the financial, emotional or physical capacity to do so.

Where the property is encumbered by a fraudulent mortgage, the mortgage will be enforceable against the registered proprietor if the mortgagee was not implicated in the fraud.<sup>58</sup> If the debt is not repaid, the mortgagee could sell the property to recoup the debt. The older person will

<sup>51</sup> Interview HE 4 in *Western Australia Security of Tenure for the Ageing Report*, above n 1, 31.

<sup>52</sup> Gavin Wood and Rachel Ong, 'Can the Private Rental Sector Provide a Secure, Affordable Housing Solution?', *The Conversation* (online), 19 October 2016 <<http://theconversation.com/can-the-private-rental-sector-provide-a-secure-affordable-housing-solution-63880>>.

<sup>53</sup> Teresa Somes and Eileen Webb, 'What Role for Real Property Law in Combatting Elder Abuse Through Assets for Care Arrangements?' (2017) 22 *Canterbury Law Review* 120, 123.

<sup>54</sup> Ibid. See also Teresa Somes and Eileen Webb, 'Close to Home: Legal Dilemmas Surrounding Family Care and Accommodation Arrangements' (2015) 33(2) *Law in Context* 24.

<sup>55</sup> Discussed below in Part V.

<sup>56</sup> Presuming they choose to do so.

<sup>57</sup> See generally *Western Australia Security of Tenure for the Ageing Report*, above n 1, 33.

<sup>58</sup> *Frazer v Walker* (1967) 1 AC 569.

be left with either no property at all or a property encumbered by a registered mortgage. The only recourse may be to the relevant assurance fund. Such a result has a significant impact on legal security of tenure and, with the concomitant psychological impact, undermines ontological security and wellbeing. Furthermore, if the perpetrator is an adult child or person for whom the older person has affection, the likelihood of pursuing the perpetrator is small. Although there has been a fraud, older people are unlikely to seek recourse or report the matter to police in most cases.<sup>59</sup>

### 1 *Mortgages or Guarantees for the Benefit of Other Family Members*

The conduct does not necessarily need to be fraudulent. The natural love and affection between family members means that older people may be persuaded to assist family members by using their home as security for a guarantee or a loan. Such lending is often the result of an agreement with a family member, for example an adult child, to help that person financially by entering into an arrangement where the older person mortgages his or her property and the family member agrees to pay the mortgage. These loans are secured against the older person's home, which is a huge risk if the loan defaults and the older person cannot service the debt. The failure of (usually) the family member to pay the mortgage or the guarantee can result in the loss of an older person's home. Unfortunately, many older people enter into such transactions without being fully aware of the nature of the transaction and the consequences of the arrangement going awry. Some such agreements may also come about through undue influence or unconscionable conduct. Again, so long as the lender is not a party to the relevant conduct, the older person will be bound by the mortgage or guarantee over the property.<sup>60</sup>

### 2 *Reverse Mortgages*

Reverse mortgages and other home equity withdrawal mechanisms can be advantageous in permitting older people to access equity in their homes to improve quality of life in retirement. The downside is that although there may be low or no repayments, interest is, of course, accruing. In some cases, seniors have found themselves in a negative equity situation as such. Although recent legislative amendments have addressed this issue, the products still have some disadvantages and seniors need to be well advised as to the risks involved before entering into such arrangements, particularly for the benefit of relatives.<sup>61</sup>

### 3 *Family Agreements (Assets for Care Arrangements)*

Family agreements, sometimes referred to more specifically as assets for care arrangements, occur when an older person makes a financial contribution to a family member, relative or friend in exchange for accommodation for life. This can be in the form of a granny flat, a home extension or simply moving into a home with family. The common denominator is that the older person makes a contribution to (usually) an adult child, often through selling the family home. The key criterion is that there has been a monetary advantage provided to the adult child in return for agreeing that the older person will be cared for. If the arrangement is successful, it can be a source of a considerable amount of ontological security. However, legal security of tenure is precarious.

The reality is, these arrangements are unregulated and there is little to no legal security of tenure in them. The transactions are usually entered into without a written contract and without consideration of contingencies such as the breakdown of the agreement, the need for the adult child to sell the property (for financial reasons or as the result of a divorce) or the

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<sup>59</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 102.

<sup>60</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474.

<sup>61</sup> See generally *Western Australia Security of Tenure for the Ageing Report*, above n 1, 203–11.



older person's health deteriorating to an extent that residential aged care is necessary. And, even if the terms of the agreement are written down, often the very contingency not considered in the document is the one that arises.<sup>62</sup> Entering into these arrangements may also have significant Centrelink ramifications. For example, the contribution to the adult child is likely to exceed the deprived assets (gifting) provisions in the legislation, thus diluting the older person's right to social security payments.<sup>63</sup>

If the relationship breaks down, the older person is in a difficult financial position. In most cases, the older person has not been recorded on the title to the land. Therefore, the older person has given a considerable amount of money to the adult child and the value of the adult child's property has been enhanced by the fruits of that financial contribution (through a home extension, the construction of a granny flat or a cash injection into the household). In most cases the older person's assets, usually a home, have been sold. If the older person has not been recorded on the title as a registered proprietor, it is difficult for the older person to be reimbursed. Gifts to even adult children are subject to the doctrine of advancement,<sup>64</sup> and the older person will need to call upon equitable notions such as a constructive trust or estoppel to establish an interest in the land.<sup>65</sup> Such a process is lengthy and expensive as matters can only be brought in Supreme Courts and in some jurisdictions, District Courts.

## B *Private Rental*

I was renting this place from an old lady for 12 years. The rent had been the same for a while (\$210) but she knew I looked after the place. She died suddenly just before Christmas. Her son came around and said that the unit had been left to his daughters. He said I would have to leave because he wanted to renovate the unit and lease it out at \$450 a week. I looked around but there was nothing I could afford. I didn't want to move out of the area because I had choir, my doctor, shops and the rest. I went to see my member of parliament and the woman in his office told me to just stay put for as long as I could. I didn't want to do that because if they threw me out I would never be able to rent anywhere again. Finally I spoke to the son and told him I didn't have anywhere to go. He said he would put off the renovation and I could stay on for six months. The rent rose by \$150. I am happy to be staying for a while but I don't know what's going to happen when the six months is up.<sup>66</sup>

Traditionally, as households enter retirement, older people have been very likely to own their homes outright. However, there is a growing minority for whom this is not the case. 'Critical life events' such as divorce, inequalities in relation to employment, wages and superannuation (particularly for women) and shifts in affordable housing supply, have resulted in individuals and households either falling out of home ownership and being unable to regain entry, or being unable to ever achieve home ownership at all. In some cases, the loss of the home through fraud or a transaction to assist a relative can lead to the loss of real property and the need to find accommodation in the private rental market.

Ontological security is minimal because with rising costs and low availability older people in rental situations become concerned that if they have to leave the property they are residing in, they may not find another – at least not in a familiar area. Even under a fixed term residential tenancy, security of tenure is for only a short period of time. Upon expiry of the fixed term many older people continue on periodic tenancies that can be terminated without grounds on very short notice. Although cheaper accommodation might be found further out to the fringes

<sup>62</sup> *Mainieri v Cirillo* (2014) 47 VR 127.

<sup>63</sup> *Social Security Act 1991* (Cth) s 9(4); Somes and Webb, above n 53.

<sup>64</sup> *Calverley v Green* (1984) 155 CLR 242; cf *Vadisanis & Vadisanis* (2014) 53 Fam LR 345.

<sup>65</sup> Somes and Webb, above n 53; Somes and Webb, 'Close to Home: Legal Dilemmas Surrounding Family Care and Accommodation Arrangements', above n 54.

<sup>66</sup> Interview PR 3 in *Western Australia Security of Tenure for the Ageing Report*, above n 1, 51.

of the city, older renters tend to be apprehensive about difficulties entailed in travelling greater distances, access to infrastructure and in establishing new networks.<sup>67</sup>

Legal security of tenure is limited too. Each state and territory has enacted residential tenancies legislation.<sup>68</sup> Despite the intention behind the legislation – to balance the legal positions of landlords and tenants – the reality is that renters are, for the most part, in a precarious position in relation to legal security of tenure. Although there are no time restraints upon residential leases, most such leases are for a fixed term of six or twelve months. After the expiry of a fixed term, many leases simply revert to periodic status, meaning that the lease can be terminated after the expiry of a limited notice period, usually without grounds.

Evidence suggests that renting can be difficult for older people due to a lack of willingness on the part of landlords to install age-friendly fittings, such as shower rails.<sup>69</sup> If older persons obtained permission to install such aids themselves, the fittings must be removed without damage to the property at the end of the lease. Furthermore, as people age, it becomes more important to ensure that the landlord actually carries out repairs. The refusal of many landlords to allow tenants to keep a pet also impacts upon an older person's enjoyment of the property. Perhaps unsurprisingly, the lack of legal security of tenure – and a dearth of ontological security – in the private market, has been cited as one of the key reasons for seniors moving into public housing.

### C *Community Housing and Public Rental*

There was something in my roof. I complained about it but nobody came to look. I was terrified; I knew someone was up there. This went on and on and I was beside myself. I wanted to leave but DOH said there was nothing available. I think they thought I was mad. Finally I got someone to have a look up there. It turned out some fellows from another unit could climb up through the man-hole, into the roof and crawl along to my unit. They thought it was a joke to scare me. They got warned but they are still around. I still want to leave.<sup>70</sup>

Community housing is part of a broader social housing system that also includes public housing. However, community housing differs from public housing in that it is generally owned or managed by a non-government, not-for-profit organisation. Many shires and local government authorities also offer community housing. Public housing is much more secure from a legal security of tenure perspective. As a result, ontological security is usually better than in private rental situations, although some residents do express concerns regarding safety and neighbourhood atmosphere. Such tenants may want to move but are prevented by waiting lists from doing so.

Public housing is managed by state government housing authorities, and residential tenancies legislation extends, at least in part, to public housing tenants. The legislation differs from state to state but it is worth noting here that in Western Australia there is a controversial three strikes policy that can result in eviction of older tenants. This can have harmful repercussions in circumstances where younger family members cause trouble and the older person is evicted. Under s 75A of the *Residential Tenancies Act 1987* (WA), the Housing Authority may apply to

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<sup>67</sup> Catherine Bridge et al, 'Age-Specific Housing and Care for Low to Moderate Income Older People' (Final Research Report No 174, Australian Housing and Urban Research Institute, September 2011) 119. (2011).

<sup>68</sup> *Residential Tenancies Act 1997* (ACT); *Residential Tenancies Act 2010* (NSW); *Residential Tenancies Act 1999* (NT); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); *Residential Tenancies Act 1995* (SA); *Residential Tenancies Act 1997* (Tas); *Residential Tenancies Act 1997* (Vic); *Residential Tenancies Act 1987* (WA).

<sup>69</sup> Victorian Council of Social Service, Submission to Consumer Affairs Victoria, *Review of the Residential Tenancies Act 1997*, August 2016.

<sup>70</sup> Interview SH 2 in *Western Australia Security of Tenure for the Ageing Report*, above n 1, 61.

the court to terminate a tenancy on the basis that the tenant has caused or permitted the premises to be used for illegal purposes, caused or permitted a nuisance to occur on the premises, or interfered or permitted an interference to neighbours. A tenant is also responsible for the behaviour of others on the premises with the tenant's permission. In a report entitled 'A Better Way', the WA Equal Opportunity Commissioner noted that strikes had been issued to seniors after unruly behaviour of guests outside of their control (including when a tenant was in hospital).<sup>71</sup> The Commissioner argued that as public housing was used by people who could not access the private market, eviction should not be a punitive measure.<sup>72</sup>

#### D Retirement Villages

Although clearly the [Retirement Villages] Act seeks to strike a balance between the rights and obligations of owners and residents, the balance falls heavily in favour of the protection of the interests of the residents of retirement villages, particularly in the long term certainty and security of their accommodation.<sup>73</sup>

The legislative framework regulating retirement villages is complex. All Australian jurisdictions have domestic retirement village laws.<sup>74</sup> In addition, the titles to the land and the contracts themselves are extremely complex and difficult to understand.<sup>75</sup>

So far as legal security of tenure is concerned, a recent report in Western Australia identified that there are three key events that may directly impact on a resident's legal right or practical option to remain in a retirement village, and may result in a resident being forced to leave the village.<sup>76</sup> These include circumstances in which, firstly, a retirement village 'fails' as a result of operator insolvency or an operator chooses to terminate a retirement village scheme. Secondly, a residence contract is terminated by an administering body. Or, thirdly, living conditions in a village become untenable for a resident because of mismanagement and/or clashes with management.

The reality is that there is a high degree of legal security of tenure in a retirement village. However, ontological security may not be so robust in many cases. Because of clashes with residents or management, or a desire to simply move away, residents may attempt to leave retirement residences. However, they may find that they cannot afford to leave because of the fees that they are required to pay upon departure or difficulty selling the unit for a price that would enable the older person to purchase another home elsewhere. This has recently been the subject of considerable media scrutiny due to the unfair nature of retirement village

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<sup>71</sup> Equal Opportunity Commission (WA), 'A Better Way: A Report into the Department of Housing's Disruptive Behaviour Strategy and More Effective Methods for Dealing with Tenants' (Report, Government of Western Australia, June 2013) 59.

<sup>72</sup> *Ibid* 2.

<sup>73</sup> *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219, [175] (Pritchard J).

<sup>74</sup> *Retirement Villages Act 2012* (ACT); *Retirement Villages Act 1999* (NSW); *Retirement Villages Act 1995* (NT); *Retirement Villages Act 1999* (Qld); *Retirement Villages Act 2016* (SA); *Retirement Villages Act 2004* (Tas); *Retirement Villages Act 1986* (Vic); *Retirement Villages Act 1992* (WA).

<sup>75</sup> Richard McCullagh, 'Care in Australian Retirement Villages' (2014) 8 *Elder Law Review* 4; *Western Australia Security of Tenure for the Ageing Report*, above n 1, 71–87.

<sup>76</sup> See generally *Western Australia Security of Tenure for the Ageing Report*, above n 1, 72.

contracts,<sup>77</sup> the imposition of deferred management fees,<sup>78</sup> and unconscionable conduct on the part of retirement village administrators and owners.<sup>79</sup> At the time of writing, the Australian Competition and Consumer Commission (ACCC) and the Western Australian Division of Consumer Protection are also investigating issues associated with retirement village contracts.<sup>80</sup>

## E Residential Parks

Some of the residents thought they would die in here – to find out now many of them in their 70s and 80s that they are to move with nothing in their pockets, nothing that will buy them anything else.<sup>81</sup>

Sometimes referred to as, *inter alia*, relocatable, manufactured or mobile home parks, residential parks provide sites upon which (ostensibly) moveable dwellings are placed. Of late, lifestyle villages, where the dwellings resemble strata title or villa accommodation but are governed by the same legislation as other residential parks, have emerged.<sup>82</sup> Residents of lifestyle villages obtain longer leases and enjoy a considerable degree of legal security of tenure through long leases. Levels of ontological security seem to differ depending on the relationships within the park and with management and services available.<sup>83</sup> The reality is that, in more traditional environments, legal security of tenure, and often ontological security, is lacking. This is particularly the case in circumstances involving more vulnerable, low-income older people who need to reside in parks more akin to caravan parks rather than the more expensive and secure, lifestyle villages.

Although the relevant legislation differs from jurisdiction to jurisdiction, legal security of tenure is minimal because most villages have limited availability of fixed term agreements. The term of the agreements are rarely over five years and are most commonly around 12 months. After the expiry of the fixed term it is usual for the leases to simply revert to periodic tenancies. Periodic leases in such instances can be terminated on short notice and without grounds. This lack of security of tenure impacts considerably upon ontological security. Many residents feel insecure and are reluctant to complain about issues of concern or seek repairs.<sup>84</sup>

A concern regarding this form of accommodation is the fate of residents when the land on which the park is situated is sold, often for development. If a resident has to move, dismantling and transporting a park home is expensive. Furthermore, there is a lack of alternative locations

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<sup>77</sup> Alison Choy Flannigan, 'What Retirement Village Operators Need to Know about Australian Consumer Law and NSW Reforms' on *Mondaq* (18 September 2017) <<http://www.mondaq.com/404.asp?404;http://www.mondaq.com:80/australia/x/629408/Consumer+Trading+Unfair+Trading/What+retirement+village+operators+need+to+know+about+Australian+consumer+law+NSW+reforms&login=true>>; Consumer Protection – Department of Mines, Industry Regulation and Safety (WA), 'Special Investigation Unit to Review Retirement Village Contracts' (Media Release, 20 July 2017) <<https://www.commerce.wa.gov.au/announcements/special-investigation-unit-review-retirement-village-contracts>>.

<sup>78</sup> Adele Ferguson, 'ACCC to Investigate AVEO Over Contract Terms and Conduct', *Australian Financial Review* (online) 3 July 2017 <<http://www.afr.com/business/health/aged-care/accc-to-investigate-aveo-over-contract-terms-and-conduct-20170702-gx2wze>>.

<sup>79</sup> *Ibid.*

<sup>80</sup> Jenne Brammer, 'Retirement Villages to Come Under the Microscope', *The West Australian* (online), 21 July 2017 <<https://thewest.com.au/news/wa/retirement-fees-investigation-ng-b88542803z>>.

<sup>81</sup> Michelle Rafferty, "'Devastated' Kirra Beach Caravan Park Retirees Vow to Fight Eviction", *ABC News* (online), 15 March 2018 <<http://www.abc.net.au/news/2018-03-15/devastated-kirra-beach-caravan-park-retirees-vow-fight-eviction/9550252?pfmredir=sm>>.

<sup>82</sup> Lifestyle villages have become increasingly popular and have become a more specialised form of tenancy arrangement; indeed, separate legislation for lifestyle villages is a consideration of the statutory review of the relevant legislation: *Residential Parks (Long-Stay Tenants) Act 2006* (WA).

<sup>83</sup> *Western Australia Security of Tenure for the Ageing Report*, above n 1, 89–103.

<sup>84</sup> *Ibid.*

to place park homes, especially in urban areas. This is likely to mean that a new park will be a considerable distance from the resident's former surrounding thus undermining networks built up over time. The vulnerable position of residents in the event of the park owner's insolvency is another area of concern.

## F *Aged Care*

Mr X is a care recipient in a residential aged care facility. He smokes, swears and is generally unpleasant and rude to the staff and other care recipients. He also rides around on a gopher and drives the gopher at staff members at the facility if he doesn't get his way. He has been told that he can leave the aged care facility but he doesn't want to. He is still at the facility and he and the staff have come to an accommodation.<sup>85</sup>

The *Aged Care Act 1997* (Cth) provides for the Commonwealth to give financial support through payment of subsidies for the provision of aged care and through the payment of grants for other matters connected with the provision of aged care. Security of tenure in Australian aged care facilities is a topical issue from a legal, economic and societal perspective. Recently, regulation of aged care facilities has seen the introduction of a considerable number of new regulatory measures, including the integration of high care and low care facilities and 'Community Common Care Standards'. Other legislative changes include variation in the use of accommodation bonds and the mix of high care and low care places. In the future it seems likely that the use of the family home to fund aged care will become a controversial issue.<sup>86</sup>

In most cases, legal security of tenure is relatively secure. However, it can be undermined, for example, in the following circumstances:

- Where the residential care service is closing.
- Where the residential care facility no longer provides accommodation and care suitable for the care recipient. The approved provider may ask a care recipient to leave if the residential care facility no longer provides accommodation and care suitable for the care recipient, having regard to the care recipient's long term assessed needs, and has not agreed to provide care of the kind that the care recipient presently needs.<sup>87</sup>
- Where the operator of the residential care facility asks the care recipient to leave for the reasons set out in s 6(2) of the *User Rights Principles 2014*. A care recipient may also be asked to leave for certain specified reasons.<sup>88</sup>
- Where a care recipient is transferred to a new bed or room within a residential care facility.

Elder financial abuse has been an issue in relation to aged care facilities as often the first indication of abuse is where an older person's fees are not paid because a relative is accessing funds from the older person.

Ontological security is dependent on the conditions within a particular facility. Factors that can impact upon ontological security in aged care facilities are the availability of trained staff in appropriate staff-resident ratios, the conduct of other residents, the quality of food and the amenity of the surroundings.

<sup>85</sup> Ibid 110, Interview AC 10.

<sup>86</sup> Ibid 26.

<sup>87</sup> *User Rights Principles 2014* (Cth) s 6(2)(b) ('*User Rights Principles 2014*').

<sup>88</sup> *Western Australia Security of Tenure for the Ageing Report*, above n 1, 107.

## G *Boarders and Lodgers*

For decades private rooming houses have been at the core of boarding and lodging accommodation in Australia, particularly in inner urban areas. Western Australia is no exception. From their origins as short to long term residences for working single men, the demographic has changed considerably over the years and they now provide refuge for many marginalised people on low incomes and other forms of disadvantage including mental illness and substance abuse.<sup>89</sup>

Boarders and lodgers throughout Australia have little legal security of tenure or ontological security.<sup>90</sup> Despite this, boarding and lodging accommodation is flexible and, for the most part, more affordable than renting in the public or private tenancy market. It is less expensive to enter into such arrangements as there are lower entry costs and fewer ongoing expenses.<sup>91</sup> Some jurisdictions have introduced legislation affecting rooming houses but elsewhere, for example Western Australia, there is no legislation that directly regulates the relationship between owners and boarders and lodgers. There is little to no legal security of tenure and similarly ontological security is lacking.

## V WHERE TO NOW?

At the outset, this article noted the importance of legal security of tenure in underpinning ontological security and wellbeing in older age. As the population ages, it is essential that older people can obtain, and retain, age-appropriate and affordable accommodation. Apart from the benefit to the individuals concerned, the economy and society benefits too.

In an era of declining housing affordability and a significant reduction in Commonwealth and state government contribution to affordable housing, including the supply of public housing stock, the scourge of elder abuse has become problematic. Much elder abuse, particularly physiological and financial elder abuse, involves the real property or other assets of an older person. Experiencing elder abuse is likely to undermine an older person both physically and emotionally. Victims of elder abuse express feelings of embarrassment, disappointment, betrayal and fear. These effects are compounded by the fact that the abuse is perpetrated by someone in a relationship of trust. And, often the abuse results in a significant financial loss, in some cases involving the loss of a home.

It is rare for a perpetrator to be pursued or money and/or property recouped. Although the conduct may fit within the definition of particular crimes, for example fraud or stealing, law enforcement authorities seem to regard elder abuse as a family or domestic matter. It seems that only cases of considerable physical or financial abuse are pursued.<sup>92</sup> Also, contemplating the criminal, and even the civil, justice system may be intimidating for an older person. Not only are proceedings complex, lengthy and expensive, in most cases older people do not want to pursue the perpetrator because, despite what that person has done, they are in a close relationship and the older person wants to retain the relationship.

So, how can the existing real property framework be tweaked to provide a measure of protection to enhance older people's legal, and therefore in most cases, ontological security? Furthermore, given that elder abuse is undermining this, what safeguards can be put in place?

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<sup>89</sup> Ibid 137.

<sup>90</sup> Val Colic-Peisker, Rachel Ong and Gavin Wood, 'Asset Poverty, Precarious Housing and Ontological Security in Older Age: An Australian Case Study' (2014) 15 *International Journal of Housing Policy* 167, 167.

<sup>91</sup> For example, utility connections are not required.

<sup>92</sup> Eileen Webb, 'The Mistreatment of Older People: Is it Time to Legislate Against Abuse?', *The Conversation* (online), 7 June 2013 <<https://theconversation.com/the-mistreatment-of-older-people-is-it-time-to-legislate-against-abuse-14922>>.

The article concludes with some suggestions to enhance security of tenure in the forms of accommodation discussed in Part IV.

## A *Home Ownership*

The Torrens system is prefaced upon the view that the certainty of the register is paramount. As a result, so long as an exception to indefeasibility is not applicable to the circumstances, the registered proprietor, whether a transferee or a mortgagee, has good title. Although compensation may be available for the older person through an assurance fund, the impact upon legal and ontological security of tenure of being faced with the loss of a home is enormous.

### 1 *Education*

Education is a starting point. It is essential that older people are aware of the risk of elder financial abuse and of measures available to protect their real property.<sup>93</sup> Many older people do not realise they may be vulnerable to abuse, especially where family is involved. Furthermore, education campaigns cannot reach all older people at risk. The reality is that a determined fraudster – or an unscrupulous relative – is likely to be able to perpetuate a fraud even with the availability of education programs. Therefore, it is necessary to consider alternative strategies.

### 2 *Sales*

Where an interest in land is transferred to an innocent third party through fraud, little can be done to assist the older person. As mentioned, recourse to the assurance fund may be available. However, in such circumstances, compensation is unlikely to assist an older person who would need to find alternative accommodation – in all likelihood not in a familiar area.

Consideration should be given to an alert on dealings with a person's property. This need not be applicable to just older people – it may be a useful safeguard generally. If there is a need to make contact with the registered proprietor prior to a transfer – or the registration of a mortgage – potential fraudulent registration could be discovered before the transaction proceeds too far. It is suggested that an automated system of notification could trigger contact with a registered proprietor and evade the end result of loss of a property.<sup>94</sup>

### 3 *The Conduct of, and Consultation with, Lenders*

The Banking Royal Commission has revealed a litany of procedural breaches with regard to lending.<sup>95</sup> When a consumer applies for credit, the *National Consumer Credit Protection Act 2009* (Cth) obliges a credit provider to make reasonable inquiries about the consumer's financial situation and their requirements and objectives.<sup>96</sup> In so doing, the credit provider must take reasonable steps to verify the consumer's financial situation. This means that payments must be able to be made without substantial hardship to the consumer.

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<sup>93</sup> For examples of such programs see materials produced by COTA WA and Advocare.

<sup>94</sup> It is acknowledged that this would not be foolproof.

<sup>95</sup> Eileen Webb, 'The Financial Services Royal Commission Highlights the Vulnerability of Many Older Australians', *The Conversation* (online), 15 March 2018 <<https://theconversation.com/the-financial-services-royal-commission-highlights-the-vulnerability-of-many-older-australians-93359>>.

<sup>96</sup> Australian Securities and Investments Commission, 'Credit Licensing: Responsible Lending Conduct' (Regulatory Guide No 209, November 2014) 4, 11, 40 <<http://download.asic.gov.au/media/2243019/rg209-published-5-november-2014.pdf>> ('*ASIC Credit Licensing Regulatory Guide*').

Unfortunately, it is thought that often these steps are not adequately followed by lenders.<sup>97</sup> Also, from the older person's perspective, it is not always that the older person is vulnerable per se, but that they are 'situationally vulnerable' because of concern for the well-being of a child, or the desire to maintain relationships. The reality is that it is often difficult for the older person to refuse to enter into such transactions. Even if the steps within the legislation are followed, the legislation does not define 'substantial hardship'. There is a presumption that if a consumer must sell their principal residence to pay back a loan, this demonstrates substantial hardship.<sup>98</sup> In many cases of older people obtaining loans or entering into mortgages, this is the case. However, banks still continue to lend in these types of transactions.<sup>99</sup>

In instances of fraud, banks and financial institutions are, to a considerable degree, protected against fraudulent transactions. As noted above, a mortgage will only be set aside where the fraud is brought home to the bank. Australian case authority suggests that this will only occur in extreme circumstances of complicity.<sup>100</sup> Reckless practices within banks have not been regarded as sufficient to enable the fraud to be 'brought home' to the lender.<sup>101</sup> However, the major cases in this area pre-date the responsible lending regime. It is suggested that, in future, courts may pay more heed to the role banks play in 'enabling' fraud to occur through non-compliance with responsible lending conduct. Consideration could be given to an application of deferred rather than immediate indefeasibility in instances of reckless conduct by mortgagees.<sup>102</sup> If this were the case, as has been the position in New Zealand for quite some time,<sup>103</sup> banks may be encouraged to tighten up procedures and abolish reckless practices.

#### 4 Awareness of Elder Financial Abuse among Bank Staff

The Australian Bankers Association has taken steps to enhance training of staff in relation to elder financial abuse.<sup>104</sup> While such programs are to be welcomed, it is suggested that persons involved in providing loans should receive additional training regarding the problematic nature of lending involving older people, especially where the loan is being entered into for the benefit of another person. In such cases there needs to be a rigid assessment of the application in accordance with responsible lending provisions. It is imperative that mortgage brokers also receive such training.

#### 5 Abuse of Enduring Powers of Attorney

Many instances of elder abuse occur through the misuse of an enduring power of attorney (EPA).<sup>105</sup> An EPA is a legal agreement that enables a person to appoint another person or

<sup>97</sup> Consumer Action Law Centre, Submission to *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 3 April 2018, [2.5] <<https://financialservices.royalcommission.gov.au/public-hearings/Documents/Round-1-written-submissions/Consumer-Action-Law-Centre.pdf>>.

<sup>98</sup> ASIC *Credit Licensing Regulatory Guide*, above n 96.

<sup>99</sup> Webb, above n 95.

<sup>100</sup> *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483.

<sup>101</sup> *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210. See also *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202.

<sup>102</sup> Pamela O'Connor, 'Immediate Indefeasibility for Mortgagees: A Moral Hazard?' (2009) 21 *Bond Law Review* 133.

<sup>103</sup> *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557.

<sup>104</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 295–303 ('ALRC Elder Abuse Final Report'); Eileen Webb and Teresa Somes, 'How Can We Prevent Financial Abuse of the Elderly?', *The Conversation* (online), 3 October 2017 <<https://theconversation.com/how-can-we-prevent-financial-abuse-of-the-elderly-84991>>.

<sup>105</sup> See generally Melanie Joosten, Briony Dow and Jenny Blakey, 'Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria' (Summary Report, National Ageing Research Institute and Seniors Rights Victoria, June 2015) 5; Kaspiew, Carson and Rhoades, above n 7, 11; Jo Wainer, Peteris Darzins and Kei Owada, 'Prevalence of Financial Elder Abuse in Victoria: Protecting



persons to make financial and/or property decisions on their behalf. When used correctly an EPA is a prudent safeguard. The attorney has authority to make financial decisions on another person's behalf because that person is unable to do so due to illness or loss of capacity. Unfortunately, when misused, EPAs can lead to considerable financial and/or property losses. Pitfalls associated with EPAs include issues of accountability, transparency and vulnerability to abuse. As Wuth argues, the lack of scrutiny of EPAs enhances the likelihood for financial abuse.<sup>106</sup> This statement is borne out by findings that nominate powers of attorney as one of the main sources of financial abuse

Many fraudulent activities regarding property are the result of a misuse of a power of attorney. The Australian Law Reform Commission (ALRC) *ALRC Elder Abuse Final Report* notes that such documents

may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney.<sup>107</sup>

Given the concerns regarding enduring powers of attorney, it is suggested that relevant legislation should include penalties for misuse of an EPA. The ALRC has recommended that tribunals should have jurisdiction to award compensation when duties under an enduring document have been breached.<sup>108</sup> However, so far as security of tenure is concerned, such measures may be too little, too late. It is likely that if the misuse involves dealings with the older person's land, the same issues discussed above in relation to fraudulent transfer or mortgage of the older person's land will arise.

## B *Family Agreements (Assets for Care)*

Such agreements were given considerable attention by the ALRC. Indeed, the ALRC recommended that tribunals be given jurisdiction over such disputes within families. In the ALRC's view, access to a tribunal provides a low cost and less formal forum for dispute resolution – in addition to the existing avenues of seeking legal and equitable remedies through the courts.<sup>109</sup> The ALRC noted further that social security laws and Centrelink processes relating to eligibility for the Age Pension may be resulting in family agreements that are disadvantageous to the older person if the agreement fails. To this end, the *Social Security Act 1991* (Cth) should be amended to require that assets for care agreements be expressed in writing in order for the older person to continue to be entitled to the Age Pension.<sup>110</sup>

While the recommendations of the ALRC are sound, more needs to be done in this area. It is important to revisit the doctrine of advancement in relation to gifts of money or property to adult children. Furthermore, measures such as a caveat to protect such interests and legislation to provide some form of regulation of these arrangements would be welcome.<sup>111</sup>

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Elders' Assets Study' (Research Report, Faculty of Medicine, Nursing and Health Sciences, Monash University, 2010).

<sup>106</sup> Natalia Wuth, 'Enduring Powers of Attorney: With Limited Remedies – It's Time to Face the Facts!' (2013) 7 *Elder Law Review* 1, 3.

<sup>107</sup> *ALRC Elder Abuse Final Report*, above n 104, 159–60 [5.2].

<sup>108</sup> *Ibid* 160 [5.3].

<sup>109</sup> *Ibid* 204 [6.4].

<sup>110</sup> *Ibid* [6.5].

<sup>111</sup> There is debate as to whether the older person would have a caveatable interest in the property.

### C *Private and Public Rental*

Residential tenancy legislation does not consider the age of tenants. However, given that home ownership is decreasing and that more and more Australians are becoming life-long renters, more people will be entering retirement in the rental market. Enhanced security of tenure can be obtained through longer leases and provision for age-friendly features and ‘home comforts’, for example a pet, to be permissible.

Although it is unlikely to be popular with the real estate industry, consideration should be given to tightening the existing residential tenancy acts to safeguard older, and in some cases, all tenants. In comparison, in Europe and in some US jurisdictions, there is a much higher percentage of the population who rent throughout their lives. Residential rental terms are, for the most part, lengthy. There are strict limitations upon termination and, in some cases, additional protections for older tenants. And, unlike Australia where 76 per cent of private rentals are owned by smaller investors,<sup>112</sup> in Western Europe there are large landholding institutions that treat their housing assets as long term secure investments that provide a steady return. This provides for greater legal security of tenure and, as a consequence, ontological security. For example, in France the minimum term of a lease in most cases is three years where the landlord is an individual and six years where the landlord is a corporation. Unless there is a valid notice to vacate, leases are renewed by operation of law for the same period and on the same conditions.<sup>113</sup> There are caps on rent for lengthy time periods, safeguards against excessive rents, and landlords must show just cause to terminate a lease. Interestingly, older renters again receive additional protections.<sup>114</sup> The exception to this provision is where the landlord is aged over 60 years or where his or her annual income is less than one and one half times the amount of the minimum salary.<sup>115</sup>

The recent inquiry into residential tenancy legislation in Victoria has recommended several initiatives such as longer periods of tenure, limitations upon termination and the ability to keep a pet in rental accommodation.<sup>116</sup> Despite the significant degree of security of tenure available to public and community housing tenants, issues regarding neighbourhood amenity, waiting lists, and repairs need to be addressed.

### D *Retirement Villages*

Although legal security of tenure is high in relation to retirement villages, the ontological security of many residents is undermined through conditions in the villages. Some residents complain that the terms of the contracts, and the general atmosphere in some villages, contribute to dissatisfaction and a decline in ontological security.

<sup>112</sup> Julie Power, ‘With More People Renting than 30 Years Ago, Change is Needed to Protect Tenants’ Rights’, *The Sydney Morning Herald* (online), 13 October 2013 <<https://www.smh.com.au/national/with-more-people-renting-than-30-years-ago-change-is-needed-to-protect-tenants-rights-20131012-2vf3x.html>>.

<sup>113</sup> *Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986* [Law No 89-462 of 6 July 1989 Tending to Improve the Rental Relations and Modifying Law no 86-1290 of 23 December 1986] (France) art 10 [Google Translate]. See the discussion in Adrian J Bradbrook, ‘Residential Tenancies Law – Lessons from France’ (1997) 5 *Australian Property Law Journal* 107.

<sup>114</sup> Bradbrook, above n 113.

<sup>115</sup> *Ibid.*

<sup>116</sup> Residential Tenancies Act 1997 Review, ‘Rights and Responsibilities of Landlords and Tenants’ (Issue Paper, Consumer Affairs Victoria, 23 March 2016) <[https://engage.vic.gov.au/download\\_file/2040/634](https://engage.vic.gov.au/download_file/2040/634)>. The Victorian Government has announced an initial set of reforms focused particularly on giving tenants a sense of security and support: Residential Tenancies Act 1997 Review, ‘Options Discussion Paper’ (Discussion Paper, Consumer Affairs Victoria, 2017) <[https://engage.vic.gov.au/download\\_file/1650/634](https://engage.vic.gov.au/download_file/1650/634)>; Residential Tenancies Act 1997 Review, ‘Summary of Responses to the Issues Paper, Security of Tenure’ (Summary, Consumer Affairs Victoria, April 2016) <[https://engage.vic.gov.au/application/files/1114/8816/5813/FSH\\_Activity\\_Summary\\_-\\_Security\\_of\\_Tenure\\_3.pdf](https://engage.vic.gov.au/application/files/1114/8816/5813/FSH_Activity_Summary_-_Security_of_Tenure_3.pdf)>.

It is an interesting period in relation to retirement villages. Most state governments have amended the relevant legislation considerably to recalibrate the bargaining positions of operators and residents. It is anticipated that the present consideration of retirement village contracts, in particular identification of unfair contract terms and unconscionable conduct by operators, will lead to improvements that will enhance the experience of residents of retirement villages.

### E *Residential Parks*

It is important to draw a distinction between residential parks and lifestyle villages. Although, for the most part, these forms of accommodation are regulated under the same legislation, the reality is that the two situations are very different. Lifestyle village residents enjoy considerable security of tenure through long leases, the only possible issue being the consequences if the operators become insolvent. In comparison there are considerable difficulties with tenants in park accommodation more akin to a tourist park. Although there have been some attempts by various state governments to support such tenants, the reality remains that the residents are merely leasing the land from the operator and, if the operator wants to sell the land, the resident must leave. Furthermore, as most tenants are on short leases, termination periods can be relatively short, especially where it is difficult to find another place to reconstruct the home.

Park home accommodation is marketed as an affordable retirement option. It is of concern that older people buy into villages and then may be forced to leave in a short time. Legislation must do more to balance the rights of the operator with those of the residents. Like the discussion about private rental, there needs to be longer, secure terms. There should also be provision for sufficient compensation for residents to move in the event of a park closure.

### F *Aged Care*

Again, security of tenure here is almost guaranteed, except in very limited circumstances. However, it is essential that to ensure ontological security, aged care facilities adopt appropriate safeguards and strategies to ensure the safety and amenity of residents, including appropriate staff-resident ratios.

### G *Boarders and Lodgers*

Older people residing in boarding houses enjoy little legal security of tenure and often lack ontological security. Indeed, ShelterSA has noted that the sector 'lacks sufficient or consistent regulation and is ill-suited to the diverse and often severely compromised health and personal circumstances of vulnerable residents.'<sup>117</sup> Research in this area notes the lack of security of tenure, poor housing conditions and issues affecting safety and privacy. Even in states where there is legislation extending to rooming houses, much more could be done to assist older boarders. Examples are the provision of rights akin to tenants under the residential tenancies acts, training and certification for operators, and more links to support services.

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<sup>117</sup> ShelterSA, 'The End of the Road – Rooming Housing in South Australia', (Research Study, March 2017) 8 <<http://www.sheltersa.asn.au/wp-content/uploads/170315-Shelter-SA-The-End-of-the-Road-Final.pdf>>.

## VI CONCLUDING COMMENTS

If Australian seniors are to be living longer, healthy lives and retiring later, it is in the national interest to foster an environment supportive of these aspirations. Research in a variety of disciplines, including gerontology, social work, medicine and, of course, housing, underscores the symbiotic relationship between stable and secure accommodation on a continuing basis and positive health, social and economic outcomes. Such literature emphasises the importance placed by older people on secure, long-term tenure and the insecurities that may arise – thus undermining quality of physical and emotional health – where their occupation is uncertain or threatened.

Australian seniors are far from a homogenous group and live in a variety of dwellings: homes on green title blocks, units and villas, ‘granny flats’, residential parks, retirement villages, aged care facilities, and boarding houses. No matter what the form of dwelling however, many older people can experience vulnerability in relation to their accommodation – including that brought about, directly or indirectly, through instances of elder abuse.

There is a symbiotic relationship between stable and secure accommodation on a continuing basis and positive health, social and economic outcomes. To obtain these benefits, it is essential to safeguard older people’s legal security of tenure and maximise ontological security. Real property laws and practice – and an eye to the growing incidence of elder abuse in relation to property and assets – can contribute to this goal with a relatively small amount of recalibration.

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# THE NEXUS BETWEEN ELDER ABUSE, SUICIDE, AND ASSISTED DYING: THE IMPORTANCE OF RELATIONAL AUTONOMY AND UNDUE INFLUENCE

ANNE P F WAND\*, CARMELLE PEISAH\*\*, BRIAN DRAPER\*\*\* AND HENRY BRODATY\*\*\*\*

*The term elder abuse encompasses a wide range of acts or lack of action (neglect) which cause harm or distress to an older person and occur within trusted relationships. Harm may occur when older people are unduly influenced to make decisions, including to end their lives. With the legalisation of assisted dying in Victoria, there is an urgent need to consider the relevant aspects of decision-making in this setting. Assessment of the social and relational context of older individuals is essential in evaluating whether decisions for assisted dying are autonomous or potentially an extreme form of elder abuse, or anywhere in between.*

## I INTRODUCTION

With the introduction of the *Voluntary Assisted Dying Act 2017* (Vic)<sup>1</sup> ('the Act') in Victoria, and active bills and parliamentary inquiries into assisted dying in New Zealand, New South Wales, the Australian Capital Territory and Western Australia, there is an urgent need to discuss the potential implications of such legislation for elder abuse. Notably, s 5(1)(i) of that Act specifically acknowledges 'there is a need to protect individuals who may be subject to abuse'.<sup>2</sup> Implicit to such 'protection', and arguably the safe and effective functioning of any assisted dying legislation, is the recognition and mitigation of risks of such abuse.

Older people, the age group with the highest rate of suicide internationally,<sup>3</sup> may be particularly vulnerable to abuse under this legislation<sup>4</sup> given their interpersonal contexts, especially the frequently dependent nature of their relationships and comparatively greater health burden, combined with other psychosocial factors such as perceived burdensomeness influencing decision making.

According to the World Health Organisation, elder abuse can be defined as

a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an *expectation of trust* which causes harm or distress to an older person.<sup>5</sup>

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<sup>1</sup> *Voluntary Assisted Dying Act 2017* (Vic). Notably when using the term 'assisted dying' we use the definition from the Act, namely 'the administration of a voluntary assisted dying substance and includes steps reasonably related to such administration'. Euthanasia is not a legal term and does not have a universally accepted definition, so is not otherwise used in this paper unless specifically used by the reference source.

<sup>2</sup> *Voluntary Assisted Dying Act 2017* (Vic) Pt 1 s 5(1)(i).

<sup>3</sup> Ajit Shah, Ravi Bhat, Sofia Zarate-Escuredo, Diego DeLeo and Annette Erlangsen, 'Suicide Rates in Five-Year Age-Bands after the Age of 60 Years: The International Landscape' (2016) 20 *Aging and Mental Health* 131, 138.

<sup>4</sup> *Voluntary Assisted Dying Act 2017* (Vic).

<sup>5</sup> World Health Organization, *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide* (2008), 1 <[http://www.who.int/ageing/publications/ELDER\\_DocAugusto8.pdf](http://www.who.int/ageing/publications/ELDER_DocAugusto8.pdf)>.

Elder abuse can take various forms such as physical, psychological or emotional, sexual and financial abuse.<sup>6</sup> It can also be the result of *intentional or unintentional neglect*. This definition clearly includes harm and distress incurred within the context of a relationship where there is exploitation of trust and vulnerability, a key factor distinguishing abuse of older adults and that of younger adults.<sup>7</sup> One means of incurring harm is to adversely influence decision making, otherwise conceptualised as undue influence,<sup>8</sup> a prominent target of Articles 12 and 16 of the Convention on the Rights of Persons with Disability.<sup>9</sup> Hitherto used in the context of will-making and the execution of contractual documents,<sup>10</sup> but also in reference to treatment consent (see *Re T*),<sup>11</sup> undue influence has relevance to both suicide and assisted dying.

Decisions to suicide or to request assisted dying are never undertaken in a vacuum. Relational autonomy<sup>12</sup> suggests that autonomy emerges within and because of relationships,<sup>13</sup> and the corollary of this is that decision-making occurs within and because of relationships. There is evidence of the impact of relationships on the decision to die by suicide,<sup>14</sup> but little attention has been given to the impact of relationships on requests for assisted dying. Clarification of these issues is of utmost importance with the passage of the *Voluntary Assisted Dying Act 2017* (Vic).<sup>15</sup>

The aim of this paper is to explore the ways in which relationships can cause harm mediated by suicide or requests for assisted dying, which by definition constitute elder abuse. We firstly discuss how interpersonal (relationship) factors relate to abuse and suicide. Secondly we explore concepts of undue influence and relational autonomy in the context of suicide and assisted dying in older people; and thirdly, criminal prosecutions. Finally, the implications for policy and guidelines in regards to requests for assisted dying are discussed.

## II UNDERSTANDING RELATIONSHIPS, ABUSE AND SUICIDE

People rarely exist in isolation, but function within various interacting social and family systems, which are inextricably linked with mental health. Most older adults with functional and/or cognitive impairment are in dependent relationships with family members and carers, rendering them vulnerable to abuse. Carers may feel stressed and burdened by their caregiving role and the shift in family roles,<sup>16</sup> with anger and conflict culminating in abuse<sup>17</sup> of a myriad of psychological, physical, neglect and financial varieties.<sup>18</sup>

<sup>6</sup> Ibid.

<sup>7</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016) 8.

<sup>8</sup> Carmelle Peisah et al, 'The Wills of Older people: Risk Factors for Undue Influence' (2009) 21(1) *International Psychogeriatrics* 7, 15.

<sup>9</sup> *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, A/RES/61/106 (entered into force on 3 May 2008).

<sup>10</sup> Peisah et al, above n 8, 7.

<sup>11</sup> *Re T (An Adult): Refusal of Medical Treatment* [1992] All ER 649.

<sup>12</sup> Carolyn Ells, Matthew R Hunt and Jane Chambers-Evans, 'Relational Autonomy as an Essential Component of Patient-Centered Care' (2011) 4(2) *International Journal of Feminist Approaches to Bioethics* 79, 101.

<sup>13</sup> Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1(7) *Yale Journal of Law and Feminism* 7, 36.

<sup>14</sup> Gustavo Turecki and David A Brent, 'Suicide and Suicidal Behaviour' (2016) 387 *The Lancet* 1227, 1239. This review paper describes the social, including relationship factors associated with suicide, such as living alone, interpersonal stressors, loss and bereavement.

<sup>15</sup> *Voluntary Assisted Dying Act 2017* (Vic).

<sup>16</sup> Carmelle Peisah, 'Practical Application of Family and Systems Theory in Old Age Psychiatry: Three Case Reports' (2006) 18(2) *International Psychogeriatrics* 345, 353.

<sup>17</sup> Susan Kurrle, Paul Sadler and Ian Cameron, 'Patterns of Elder Abuse' (1992) 157(10) *Medical Journal of Australia* 673, 676.

<sup>18</sup> Ibid. Kurrle and colleagues describe the frequency of various forms of elder abuse in a sample of community dwelling older people.

In a more indirect way, family relationships have an impact on suicide in older people. The interpersonal theory of suicide<sup>19</sup> recognises the role of relationships in the decisions to end one's life. According to this theory, three factors of thwarted belongingness, perceived burdensomeness and capability for suicide must be present for the decision to suicide. There is empirical evidence to support this hypothesis in older people. Van Orden and colleagues found that greater perceived burdensomeness and painful and provocative experiences were associated with suicide case status.<sup>20</sup> The sense of being a burden to loved ones and/or society has also been identified in quantitative studies of risk factors for suicide,<sup>21</sup> as well as in qualitative work on why older people have self-harmed.<sup>22</sup> This includes our own empirical work that demonstrated the combined effects of feeling like a burden to others, and often compounded by the very helplessness of family and professional caregivers alike.<sup>23</sup> As such, carer stress may amplify the older person's internalised perceptions of burdensomeness.<sup>24</sup> When a carer's burden culminates in an older person's suicide in order to relieve the carer of that distress, it clearly does not constitute abuse. However, it shows the relational pathways of decision making in suicide, which at their extreme can constitute abuse, as will be discussed.

In depressed older adults, the psychiatric and physical health of their carers, and reported difficulties caring, increase the risk of suicidal behaviours in older adults.<sup>25</sup> How this is mediated is unclear, although it has been postulated that the older person may become demoralised by viewing their own depression as burdensome to the family carer and their relationship with them.<sup>26</sup> This demoralisation may lead them to conclude that their family member would be better off without them. On the other hand, it may be that when the family caregiver is not coping they are unable to provide social support to their depressed older relative, increasing the risk of a suicide attempt.<sup>27</sup> It is likely that both possibilities contribute to suicide risk, but passively so. In our own qualitative work on late-life self-harm we have empirically confirmed that the relational context is important, with perceptions of family and caregiver rejection acting as both a trigger for, and consequence of, self-harm.<sup>28</sup> The older person's self-harm may reflect a defensive response of projective identification (when a person projects, onto another, unacceptable feelings or impulses that the recipient adopts as their own), whereby the older person acts out their burdened caregiver's unexpressed wish for their death.<sup>29</sup>

Another mechanism for family relationships culminating in suicide or influencing the decision of an older person to end their life is the untenable situation. In some cases, older people are

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<sup>19</sup> Thomas E Joiner, *Why People Die by Suicide* (Harvard University Press, Cambridge, Massachusetts, 2005).

<sup>20</sup> Kim Van Orden et al, 'A Case Controlled Examination of the Interpersonal Theory of Suicide in the Second Half of Life' (2016) 20(3) *Archives of Suicide Research* 323, 335.

<sup>21</sup> Jerome Motto and Alan Bostrum, 'Empirical Indicators of Near-Term Suicide Risk' (1990) 11(1) *Crisis* 52, 59.

<sup>22</sup> Van Orden et al, above n 20, 324; Anne Wand et al, 'Understanding Self-Harm in Older People: A Systematic Review of Qualitative Studies' (2018) 22(3) *Ageing and Mental Health* 289, 298; Joiner, above n 19.

<sup>23</sup> Anne Wand et al, 'Why Do the Very Old Self-Harm? A Qualitative Study' (2018) *American Journal of Geriatric Psychiatry* <<https://doi.org/10.1016/j.jagp.2018.03.005>>.

<sup>24</sup> Kimberley Van Orden et al, 'The Interpersonal Theory of Suicide' (2010) 117(2) *Psychological Review* 575, 600.

<sup>25</sup> Gregory A Hinrichsen and Nancy A Hernandez, 'Factors Associated with Recovery from and Relapse into Major Depressive Disorder in the Elderly' (1993) 150(12) *American Journal of Psychiatry* 1820, 1825; Richard A Zweig and Gregory A Hinrichsen, 'Factors Associated with Suicide Attempts by Depressed Older Adults: A Prospective Study' (1993) 150(11) *American Journal of Psychiatry* 1687, 1692.

<sup>26</sup> Zweig and Hinrichsen, above n 25, 1692.

<sup>27</sup> Ibid.

<sup>28</sup> Wand et al, above n 23.

<sup>29</sup> Projective identification is a defence mechanism or interpersonal communication whereby subtle interpersonal pressure from the carer is placed upon another [older] person to take on the feelings/thoughts of an aspect of the carer – in this context the wish their elder relative was dead. The older person who is the target of that projection then begins to think, feel and behave in the way the carer projected, ie 'I want to die'.

'bullied' into suicide. Family conflict, elder abuse, and complex interpersonal dynamics may lead to untenable situations, whereby suicide is perceived by the older person to be their only option. The following situation illustrates this outcome.

Mrs B was an 86 year old widow with dementia who had recently moved to a nursing home after a prolonged medical admission following a fall. She was referred to an aged care psychiatry service for assessment due to continued refusal to eat and take medications. She was largely mute upon review, but her daughter, a geriatrician and nursing home staff provided a history of massive weight loss (20kg in four months), low mood, reduced talkativeness, and poor engagement with staff. Her daughter had been her primary co-resident carer for the preceding two years. Mrs B's son had learned his sister, and not he, was appointed their mother's representative under Power of Attorney (POA). This was perceived as an unforgivable slight against his expected role as the male of the family in their cultural context. He was also angry his mother had chosen to live with his sister and not move to a nursing home, concerned this would diminish his inheritance. He became increasingly hostile, accusatory and abusive towards his mother for choosing his sister for the POA role. This involved him shouting at her, abruptly stopping and starting the car when driving with her, throwing her rosary beads, accusing his sister of taking advantage of her, and verbally threatening his mother. Her daughter explained: 'Sometimes she'd rush at me [after outings with her son] and just sob and I was powerless to do anything.' The abusive behaviours occurred when Mrs B was alone with her son on weekly scheduled outings. Mrs B's daughter offered her mother an excuse of being 'unwell' to protect against having to experience the weekly visits, but she declined saying 'he's my son and I love him'.

When Mrs B was admitted to hospital after a fall she developed a delirium (an acute confusional state) during which time she voiced paranoid ideas about her son electrocuting her and coming to 'throw me in the Nile'. She was increasingly withdrawn and started to refuse food, most fluids and medication. Her son's abusive behaviours continued in hospital and escalated to the point where he had to be escorted from the building by security staff. Mrs B refused to look at or speak to her son. Subsequently, he was allowed to visit his mother for short periods, and was reportedly quiet and non-confrontational towards her, with no further accusations made about her finances. Mrs B's delirium resolved, but her cognitive and functional impairment had progressed to the point where she needed nursing home care. Upon discharge to a nursing home her oral intake improved, but it was noted she would not eat after her son visited.

Mrs B's indirect self-harm (refusal to eat and take medications) emerged in the context of an untenable situation – elder abuse from her son whom she simultaneously loved and feared. Although she would withdraw during his visits and was visibly distressed afterwards, she was unable to voice this and would not agree to suggested measures to stop him visiting. This response derived from her role as a mother, and also culturally, as he was the eldest child and a man, and as such his position was the head of the family. The indirect self-harm inadvertently served to solve this problem as her son's accusations and overt hostility stopped when she stopped speaking, eating, and taking medications. Mrs B's daughter and others were aware of the abuse, but felt unable to protect her, understanding the complexity of the interpersonal dynamics of the situation for Mrs B. As her daughter summarised, 'She would put up with anything and just wanted to see him because she loves him. He's her son.' Her daughter, the nursing home staff, geriatrician and GP all felt torn between respecting Mrs B's apparent wish to maintain contact with her son and wanting to protect her from her son's abuse. Notably there was no requirement for the abuse to be reported or clear guidelines for how they should respond. Moreover, the reluctance of the older person to cease contact with or prosecute the perpetrator is a common phenomenon for several reasons.<sup>30</sup>

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<sup>30</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 209.



Other situations perceived as untenable which have been implicated in the suicide deaths of older adults analysed by psychological autopsy include loss of self-esteem following migration to a different culture, guilt, shame, rejection by spouse, financial disaster and inability to stop drinking alcohol.<sup>31</sup>

### III UNDUE INFLUENCE AND RELATIONAL AUTONOMY IN RELATION TO ELDER ABUSE, ASSISTED DYING, AND SUICIDE

#### A *Undue Influence*

The legal construct of undue influence is usually applied to testamentary undue influence,<sup>32</sup> but it has much broader application. O'Neill and Peisah argue that the concept should be extended to consideration of how relationships may influence decision making, particularly in people with cognitive impairment, who may be influenced by others to make a range of legal decisions in the other person's favour.<sup>33</sup> Undue influence is also relevant to discussions about euthanasia and suicide, particularly when the decision making of individuals is recognised as bound to their relationship context. Peisah and colleagues described several risk factors or 'red flags' for undue influence in will-making, which remain relevant to other areas of decision making.<sup>34</sup> The red flags relate to the social environment, the social circumstances, and vulnerability of the person (testator):<sup>35</sup>

(i) The social environment includes consideration of the relationship with the 'influencer', such as a relationship between an older cognitively impaired person and a family member, helpful neighbour or friend, carer, distant relative, a 'suitor'/de facto partner or spouse (often younger and not cognitively impaired), and professionals (doctors, lawyers, clergy etc).

(ii) The social circumstances that may indicate risk include the presence of family conflict, loss of favour of previously trusted relatives or friends, psychological and/or physical dependency on a carer, and isolation and sequestration.

(iii) The personal factors that render a person vulnerable to undue influence include: physical illness, disability and/or sensory impairment; substance misuse; mental illness (eg depression, schizophrenia, paranoid ideas) and cognitive disorders (delirium, dementia, intellectual disability); psychological factors including mourning and grief, personality disorders; and impaired neuropsychological functions required for decision making capacity (eg problems with judgement and reasoning, apathy/passivity).

#### B *Relational Autonomy*

Many older people are burdened by these risk factors outlined in the previous section. An understanding of how these factors affect decision-making can be drawn from the concept of relational autonomy, which proposes that the autonomy of individuals is founded upon their social connections and context.<sup>36</sup> Our identity is shaped by social environments and our interactions with other people. Nedelsky suggested that autonomy emerges within and

<sup>31</sup> John Snowdon and Pierre Baume, 'A Study of Suicides of Older People in Sydney' (2002) 17(3) *International Journal of Geriatric Psychiatry* 261, 269.

<sup>32</sup> Peisah et al, above n 8, 6.

<sup>33</sup> Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Australasian Legal Information Institute (AustLII) Communities, 2<sup>nd</sup> ed, 2017).

<sup>34</sup> Peisah et al, above n 8, 10.

<sup>35</sup> *Ibid.*

<sup>36</sup> Ells, Hunt and Chambers-Evans, above n 12, 86.

because of relationships.<sup>37</sup> According to this concept, self-identity and decision making capacity are dynamic and change with the individual's network of relationships, and their cultural and social context.<sup>38</sup> For example, in Maori people (and some other indigenous peoples), decisions about an individual may be made as part of a family group in a cultural context: *taha whanau* (family health).<sup>39</sup> In relation to decision making specifically, a relational autonomy approach promotes understanding and incorporating a person's interpersonal context when assisting them to make choices in line with their sense of self and values.<sup>40</sup>

A related concept in evaluating whether a decision is made autonomously is authenticity. Conditions for authenticity stipulate that the persons' decisions, beliefs, values and commitments are identified as their own, coherent with their sense of self and identity.<sup>41</sup> Thus, even though most tests of decision making capacity focus upon procedural aspects (ie understanding, retaining and weighing up relevant information and then communicating a decision) and emphasise capacity being decision-specific, the context of the person should also be considered to ensure the decision is autonomous.<sup>42</sup> This context includes authenticity, consistency and social dimensions – that decisions are made in line with the persons' values, commitments and beliefs and in continuing interactions with others.<sup>43</sup> As we are social beings, we are accountable for these decisions and must be able to explain the reasons for making decisions and take responsibility for them and their consequences. Understanding undue influence and relational autonomy may be the key to understanding why some older people decide (or not) to attempt suicide or, in the future, request assisted dying.

Long term abuse and family violence also affect autonomy and decision-making through the insidious undermining of self-esteem and identity. When a person has a mental disability, including vulnerability in terms of sense of self and identity, more time must be spent understanding their values and decisions and exploring aspects of authenticity, accountability and social context necessary for autonomy.<sup>44</sup> One example is the following case of Mrs H, as discussed by Mackenzie:

Mrs H is a woman with an aggressive bone cancer who has had a leg amputation as part of treatment. Her husband has just left her due to her disability, disfigurement and the anticipated burden she would pose on him. She is a woman who has a poor sense of self, with a practical identity determined by norms of traditional femininity, such that her husband's leaving her results in her feeling worthless and with no reason to live.<sup>45</sup>

This self-concept informs her decision to decline further treatment and to tell the treating team that she wants to die.<sup>46</sup> It is not difficult to see how her position could extend to a request for assisted dying. The difficulty in assessing the autonomy of decision making here is that her sense of self or identity and the values she endorses seem to stem from an oppressive social relationship.<sup>47</sup> Mackenzie suggests that Mrs H's autonomy in the decision to stop treatment, and potentially to go on to request assisted dying, is therefore compromised. This is because her capacity to reflect has been impacted by distorting influences, and the appropriate response for the medical team would be to try and shift Mrs H's perception of her situation,

<sup>37</sup> Nedelsky, above n 13, 36.

<sup>38</sup> Ells, Hunt and Chambers-Evans, above n 12, 86.

<sup>39</sup> Tane Ora Alliance, *Taha Whanau – Family Health* <<https://www.maorimenshealth.co.nz/te-whare-tapa-wha-health-whare/taha-whanau-family-health/>>.

<sup>40</sup> Ells, above n 12, 87.

<sup>41</sup> Catriona Mackenzie and Wendy Rogers, 'Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act' (2013) 9(1) *International Journal of Law in Context* 37, 52.

<sup>42</sup> *Ibid* 44.

<sup>43</sup> *Ibid* 45.

<sup>44</sup> *Ibid* 50.

<sup>45</sup> Catriona Mackenzie, 'Relational Autonomy, Normative Authority and Perfection' (2008) 39(4) *Journal of Social Philosophy* 512, 533.

<sup>46</sup> *Ibid* 526.

<sup>47</sup> *Ibid* 518.

for example, by helping her explore whether she could see her life as having value within a broader social network (other than just her husband) and identifying sources of self-esteem around which she could reconstruct her identity.<sup>48</sup> Thus patient autonomy can be supported by attention to the relational context.<sup>49</sup>

The issue of autonomy and requests for assisted dying are complex. On the one hand, if ever there was a decision that had to be autonomous it should be the request to end one's life. On the other hand, we have previously encouraged discussion and family consultation about such decisions.<sup>50</sup> In reaching an informed decision to end one's life, we have suggested that the person requesting assisted dying should demonstrate that they have considered the potential adverse impact of their death on their loved ones.<sup>51</sup> Distorted perceptions of relationships and how their death might affect family and friends are relevant here. Discussion with family also allows an opportunity to explore these perceptions, and potentially resolve issues underlying the decision to request assisted dying. Rabins has also pointed out that whether there is a 'good reason' to die by suicide, family and friends are often permanently and seriously damaged by such a death of their loved one.<sup>52</sup> Whether this is also the case in assisted dying remains to be seen, although some families have reported feeling pressured to accept a relative's wish for assisted dying when repeatedly threatened with the alternative prospect of their suicide.<sup>53</sup>

The reality is that notwithstanding burdened carers and a failing sense of self, a decision for assisted dying is never made in a vacuum, nor should it be. Principles of relational autonomy may be used to protect older people from this most serious potential form of abuse. Constraints on the competence condition for autonomy may come from influences which distort capacity for reflection and self-awareness. Cognitive impairment in older people is an obvious cause of such. Traditionally, this has been interpreted narrowly, in terms of impairments in the practical operation of capacity, through compromised functions such as understanding and appreciating information, weighing up the pros and cons of various options and applying these to one's situation and values, and then arriving at a decision.<sup>54</sup> However, cognitive impairment may also impede accurate appraisals of relationships and consequently guide decisions through mechanisms such as changes in personality or family alliances, persecutory ideas, and apathy/passivity.<sup>55</sup> Christman gives other examples of distorting influences such as overpowering emotions, depression or other mental illness, being subject to physical, emotional or verbal abuse, being under the influence of substances which distort perception, or being deprived of educational and social opportunities to develop skills in reasoning, criticism and reflection.<sup>56</sup> Lack of self-esteem or self-confidence, often the end result of longstanding abuse, impair one's capacity to understand his or herself and to respond in a flexible way to life changes. Autonomy is compromised by lack of self-esteem because it is hard to make a decision if one does not think his or her life and activities are worthwhile.<sup>57</sup> Given the array of potential factors described by Christman which may distort self-awareness in younger adults, the additional challenges faced by older adults are particularly sobering. These challenges include impaired cognition causing passivity, impaired reasoning and

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<sup>48</sup> Ibid 526.

<sup>49</sup> Ells, Hunt and Chambers-Evans, above n 12, 95.

<sup>50</sup> Cameron Stewart, Carmelle Peisah and Brian Draper, 'A Test for Mental Capacity to Request Assisted Suicide' (2010) 37(1) *Journal of Medical Ethics* 34, 39.

<sup>51</sup> Ibid 38.

<sup>52</sup> Peter V Rabins, 'Can Suicide be a Rational and Ethical Act in Persons with Early or Pre-Dementia?' (2007) 7 *American Journal of Bioethics* 47, 49.

<sup>53</sup> Claudia Gamondi, Murielle Pott, Sheila Payne, 'Families' Experiences with Patients Who Died after Assisted Suicide: A Retrospective Interview Study in Southern Switzerland' (2013) 24(6) *Annals of Oncology* 1639, 1644.

<sup>54</sup> *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

<sup>55</sup> O'Neill and Peisah, above n 33; Carmelle Peisah et al, 'Family Conflict in Dementia: Prodigal Sons and Black Sheep' (2006) 21(5) *International Journal of Geriatric Psychiatry* 485, 492.

<sup>56</sup> John Christman, 'Relational Autonomy, Liberal Individualism and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143, 164.

<sup>57</sup> Mackenzie, above n 45, 525.

reflection, and the disintegration of a sense of self, which is conferred not only by impaired cognition but also by disintegration of the body.

### C Elder Abuse and Undue Influence

These concepts of undue influence and relational autonomy are highly pertinent to elder abuse in general, as well as to decisions for assisted dying and suicide in older people. Firstly, we deal with elder abuse. Older age often comes with more ill health, which impacts on a person's view of themselves, their needs within relationships, and how they respond to maltreatment in these relationships.<sup>58</sup> Dementia, for example, is more prevalent with increasing age and has been associated with greater risk of elder abuse compared to people without dementia. The risk of elder abuse increases incrementally with the degree of cognitive impairment.<sup>59</sup> Several reasons have been proposed for this increased risk of elder abuse in dementia, including greater ill health, frailty and dependency on family/carers for support, and less ability to defend oneself from physical and verbal abuse.<sup>60</sup> Neglect may occur due to the dependency upon others for activities of daily living and personal self-care (eg continence management). People from culturally and linguistically diverse communities may be at heightened risk of abuse due to language difficulties if their primary language is not English due to dependency on family members for support with instrumental activities of daily living (eg paying bills, seeking health care) and social contact, and potential conflict from different expectations of care between generations.<sup>61</sup>

Abuse in older people may also be long standing, such as 'domestic violence grown old'.<sup>62</sup> For some families and couples, conflict and abuse may be well entrenched patterns of relating which simply persist into old age (thus called domestic violence grown old), rather than arising for the first time in late life. Cognitive or functional changes and ill health in older age may shift the balance of needs in a relationship, for example, with a long-term victim of abuse struggling to provide care for the perpetrator.<sup>63</sup> Additionally, perpetrators of domestic violence may not make good carers, as a poor premorbid relationship may lead to elder abuse.<sup>64</sup> Furthermore, long-term domestic violence is associated with depression and anxiety and the undermining of confidence and self-esteem, capability for independence, opportunities for success and personal development and resilience. Additionally, it may promote isolation.<sup>65</sup> Many of these consequences are also risk factors for undue influence. As discussed above, individuals make decisions in the context of their social environment, personal factors (physical, psychological and cognitive) and significant relationships. Decisions are also guided by how people conceptualise themselves, which may be distorted by abusive interpersonal relationships and social structures, thus impairing autonomy.<sup>66</sup> Therefore, as in the circumstance of making wills, these factors may interact to render an older person vulnerable to undue influence and abuse within their significant relationships.

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<sup>58</sup> Lucy Knight and Marianne Hester, 'Domestic Violence and Mental Health in Older Adults' (2016) 28(5) *International Review of Psychiatry* 464, 474.

<sup>59</sup> Xinqi Dong et al, 'Decline in Cognitive Function and Elder Mistreatment: Findings from the Chicago Health and Aging Project' (2014) 22 *American Journal of Geriatric Psychiatry* 598, 605.

<sup>60</sup> Knight and Hester, above n 58, 466.

<sup>61</sup> Dale Bagshaw, Sarah Wendt and Lana Zannettino, 'Preventing the Abuse of Older People by their Family Members' (Stakeholder Paper 7, Domestic Violence Clearing House, 2009) 16  
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.843.2682&rep=rep1&type=pdf>>.

<sup>62</sup> Chanaka Wijeratne and Sharon Reutens, 'When an Elder is the Abuser' (2016) 205(6) *Medical Journal of Australia* 246, 247.

<sup>63</sup> Knight and Hester, above n 58, 466.

<sup>64</sup> Claudia Cooper, 'Abuse of People with Dementia by Family Carers: Representative Cross Sectional Survey' (2009) 338 *British Medical Journal*, 583, 586.

<sup>65</sup> Knight and Hester, above n 58, 469.

<sup>66</sup> Mackenzie, above n 45, 526.

### D *Assisted Dying and Undue Influence*

Assisted dying is potentially a fertile ground for undue influence, and this has been recognised in the recent Victorian legislation.<sup>67</sup> Eligibility for assisted dying under the *Voluntary Assisted Dying Act 2017* (Vic) requires a person: to have lived in Victoria for a minimum of one year; to be over the age of 18; to have decision making capacity in relation to voluntary assisted dying; to have a condition which is incurable, advanced, progressive and will cause death; to have six months to live (or 12 months if suffering from particular neurodegenerative conditions such as motor neurone disease which they are expected to die from with 12 months); and experience suffering which cannot be relieved in a manner perceived as tolerable to the individual.<sup>68</sup> Apart from the formal three-step request process, which mandates two independent medical assessments and a written declaration from the person requesting assisted dying, the legislation includes safeguards to protect vulnerable people from coercion and abuse. Requests will be subject to review by a dedicated board.<sup>69</sup> Notably, the Act also requires that the two doctors involved in assessing the person are satisfied that they are ‘acting voluntarily and without coercion’.<sup>70</sup> It is also clearly stipulated that a person whose primary reason for requesting assisted dying is a mental illness (as defined under the *Mental Health Act 2014* (Vic)) or a disability (as defined by the *Disability Act 2006* (Vic)) alone is ineligible.<sup>71</sup>

Thus, in addition to assessing decision making capacity in relation to assisted dying, clinicians must assess or screen for undue influence. In a proposed legal test for competence to request assisted suicide, we previously emphasised both components of the assessment task. Specifically in relation to undue influence, we suggested that the decision must be made by the person him or herself and not one he/she feels compelled to make, or coerced by others involved in their care into making, in order to relieve them of burden.<sup>72</sup> The possibility of making a voluntary and informed decision despite the likely presence of dependent relationships with carers was noted.<sup>73</sup> The person’s strength of will and the degree of pressure upon them to request assisted suicide should also be considered when assessing for undue influence. The same assessment could be usefully applied to the determination of their capacity to request assisted dying.

Terminal illness is of itself a risk factor for undue influence, and it is conceivable that people suffering from the associated physical and psychological symptoms would be more vulnerable to pressure, whether express or implied, from significant others. The definition of a terminal illness is in itself complex. There is a clear difference, for example, between someone with a condition that confers a very short life expectancy and someone with a diagnosis of early Alzheimer’s dementia. Whilst a person with early dementia has a statistically shorter life expectancy than someone without dementia of the same age, there is uncertainty about when or how they will die many years before their death. Knowledge of having, or even fear of developing, dementia may confer anxiety about the imagined experience of functional and cognitive decline, which is not often realised.<sup>74</sup> Notably, the *Voluntary Assisted Dying Act* specifies that, for a person to be eligible for access to voluntary assisted dying, they must have a disease that is expected to cause death within weeks or months, not exceeding six months,<sup>75</sup> which is perhaps a protective measure for those contemplating assisted dying in early dementia.

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<sup>67</sup> *Voluntary Assisted Dying Act 2017* (Vic).

<sup>68</sup> *Ibid* s 9.

<sup>69</sup> *Ibid* pt 9.

<sup>70</sup> *Ibid* ss 20(1)(c), 29(1)(c).

<sup>71</sup> *Ibid* ss 9(2)–(3).

<sup>72</sup> Stewart, Peisah and Draper, above n 50, 38.

<sup>73</sup> *Ibid*.

<sup>74</sup> Brian Draper et al, ‘Early Dementia Diagnosis and the Risk of Suicide and Euthanasia’ (2010) 6 *Alzheimer’s and Dementia* 75, 82.

<sup>75</sup> *Voluntary Assisted Dying Act 2017* (Vic) ss 9(1)(d), (3).

Depression is not uncommonly comorbid with terminal illness and may influence decision making capacity. It may compound perceptions of hopelessness, isolation and burdensomeness,<sup>76</sup> especially when accompanied by a poor prognosis. For example, depression in patients with cancer with a poor prognosis of less than three months life expectancy was found to be associated with requests for euthanasia.<sup>77</sup> Further, the wish for euthanasia may be state-dependent, as preferences for euthanasia in depressed older people mostly resolved upon treatment for depression.<sup>78</sup> Depression can be screened for in the terminally ill, and there is evidence that treatment is effective and can improve quality of life.<sup>79</sup> It is worth noting, however, that the presence of depression does not automatically preclude decision making capacity, a point which has been raised elsewhere.<sup>80</sup>

### E Suicide and Undue Influence

Older people, especially those reliant on carers, may feel obliged to end their lives by suicide to reduce care giver burden, for similar reasons to those proposed to potentially underlie euthanasia requests. We have previously described two cases of older people who requested euthanasia, but as it was not legal in their jurisdiction, they attempted suicide instead. In one case, an 88-year-old woman who was the primary carer for her frail older husband took an overdose with suicidal intent in the context of acute chronic pain. She had previously expressed a wish to die by euthanasia should she ever lose her independence. The acute pain was a trigger to her suicide attempt as she could no longer perform her caregiving role for her husband and feared both placement in residential aged care facility and becoming a burden on her family. In the other case an 89-year-old man with cognitive impairment and alcohol misuse who lived alone made multiple attempts to end his life. He stated he would have opted for euthanasia were it legal, and concluded that the only solution was to take matters into his own hands. With some awareness of his declining cognition, death for him meant avoiding becoming a burden on his family, nursing home placement and dependency. Avoiding placement also meant that his children would receive the full amount of his estate.<sup>81</sup>

In both of these cases, although there was no apparent external undue influence, it was the interpersonal or relational factors that underpinned their requests for euthanasia and ultimately, as it was unavailable, their decisions to attempt suicide.

## IV ASSISTED DYING AND CRIMINAL PROSECUTIONS

Manslaughter and homicide are extreme manifestations of elder abuse. However, the line between assisting a person to die if they ask for help to end their life and abuse or criminal behaviour is not always clear. According to Australian law,<sup>82</sup> aiding and abetting a suicide is a crime. We have previously discussed *R v Justins*,<sup>83</sup> an Australian case of involuntary euthanasia due to incapacity.<sup>84</sup> Two women, Justins and Jennings, were found guilty of the manslaughter of Graeme Wylie, a man with severe dementia and depression who had

<sup>76</sup> Van Orden et al, above n 24, 600.

<sup>77</sup> Marije L van der Lee et al, 'Euthanasia and Depression: A Prospective Cohort Study among Terminally Ill Cancer Patients' (2005) 23 *Journal of Clinical Oncology* 6607, 6612.

<sup>78</sup> Stuart Hooper et al, 'Preferences for Voluntary Euthanasia during Major Depression and Following Improvement in an Elderly Population' (1997) 16(1) *Australasian Journal on Ageing* 3, 7.

<sup>79</sup> Lauren Rayner et al, 'Antidepressants for the Treatment of Depression in Palliative Care: Systematic Review and Meta-Analysis' (2011) 25(1) *Palliative Medicine* 36, 51.

<sup>80</sup> Stewart, Peisah and Draper, above n 50, 37.

<sup>81</sup> Anne Wand et al, 'Rational Suicide, Euthanasia, and the Very Old: Two Case Reports' [2016] *Case Reports in Psychiatry* 1, 2-3.

<sup>82</sup> *Crimes Act 1900* (NSW) s 31C.

<sup>83</sup> *R v Justins* [2008] NSWSC 1194 (12 December 2008).

<sup>84</sup> Stewart, Peisah and Draper, above n 50, 37.

requested euthanasia but lacked capacity to suicide. Justins was Wylie's long term de facto partner and Jennings was a friend of the couple and a member of the voluntary euthanasia organisation Exit International. Wylie had made suicide attempts and expressed to friends and family a wish to end his life rather than succumb to the inevitable stages of decline in dementia.<sup>85</sup> He did not prepare an advance directive outlining his wishes at the end of life in the event that he had lost capacity or give any indication as to who should make health care decisions for him. An application to visit the Dignitas clinic<sup>86</sup> for euthanasia was written by Jennings on behalf of Wylie in 2005. Dignitas rejected his application due to concerns about his capacity to consent to assisted suicide. Following this rejection, Wylie unsuccessfully attempted suicide again, whilst Justins – who was aware of the attempt – was out of the house at his request. Jennings then visited Mexico in order to procure Nembutal (pentobarbitone), after reading about the effectiveness of the drug for euthanasia, and gave it to Justins upon her return. In the same month Justins took Wylie to his solicitor to change his will which substantially increased her proportion of his estate. The couple had a medical certificate stating Wylie was competent to make his own decisions. Justins testified that she left the open bottle of Nembutal on the table in front of Wylie, which he then poured into a glass. She left the house. Wylie then drank from the glass. Justins returned and found him deceased. An autopsy revealed the Nembutal in his system and confirmed the presence of Alzheimer's disease. The prosecution rejected the women's offer to plead guilty to assisting suicide and a jury subsequently found both women guilty of manslaughter. Jennings killed herself before sentencing and Justins was sentenced to periodic detention. The verdict rested on two key issues: Wylie's capacity to decide to end his life by taking the Nembutal, and whether a reasonable person in Justins' position would have known he had the capacity or explored whether he had the capacity to end his life.<sup>87</sup>

Justins subsequently successfully appealed her conviction in 2010 in the Court of Criminal Appeal (CCA),<sup>88</sup> with a key element in the determination being that a decision to commit suicide need not necessarily be informed in order to be competent.<sup>89</sup> Specifically, Johnson J (with Simpson J agreeing) held that:

[4] The concept of 'an informed decision' is not apt to an assessment of the capacity of a person to decide to commit suicide. Nor is it useful to speak of a rational decision for which a good reason may be ascribed or identified.

[5] A person possessing capacity may decide to commit suicide on a basis that is ill-informed or not supported by reason, but it may be the reasoned choice of the person, which the law accepts will render the act of suicide the act of the person and not another person who provides the means of death.<sup>90</sup>

It is important to note that the CCA found that, in suggesting a sequential set of capabilities the deceased must have in order to have capacity, the trial judge fell into error because these transformed factual propositions into legal requirements.<sup>91</sup> Notwithstanding these findings, which disconnected clinical criteria for capacity from the determination of whether the act of suicide was the act of the person or the other providing the means of death, the case highlighted the relational context of assisted suicide, notably the question of aiding and

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<sup>85</sup> Thomas Faunce, 'Medical Law Reporter: *Justins v The Queen*: Assisted Suicide, Juries and the Decision to Prosecute' (2011) 18(4) *Journal of Law and Medicine* 706, 715.

<sup>86</sup> Dignitas is an association founded in Switzerland in 1988 with the objective of ensuring a life and death with dignity for its members. They offer services to people internationally, including the possibility of assisted suicide for people making a reasoned request in the context of medical proof and cases of terminal illness, pain or disability.

<sup>87</sup> Stewart, Peisah and Draper, above n 50, 37.

<sup>88</sup> *Justins v R* (2010) 79 NSWLR 544.

<sup>89</sup> Faunce, above n 85, 706.

<sup>90</sup> *Justins v R* (2010) 79 NSWLR 544 [4]–[5].

<sup>91</sup> *Ibid* [2].

abetting a suicide or manslaughter,<sup>92</sup> an important distinction in the discourse about assisted dying.<sup>93</sup>

It is unclear what constitutes aiding and abetting in suicide in Australia as there have been no tested cases and, unlike the UK,<sup>94</sup> there are no guidelines for prosecution. The six public interest factors against prosecution that comprise the Policy for Prosecutors in Respect of Cases Encouraging or Assisting Suicide ('the Policy') for prosecuting assisted suicide cases in England emphasise the following: the importance of the victim reaching a determined, voluntary, settled and clear informed decision to end their life; the accused being motivated by compassion; the accused trying to dissuade the victim from ending their life; the minor and reluctant encouragement or assistance to the victim; and the reporting of the suicide to police and assisting in the investigation of the circumstances of the suicide.<sup>95</sup> The emphasis is on the motivation of the accused who assisted the suicide, not the victim. The Policy also suggests that it is not in the public interest to prosecute someone who has reluctantly and compassionately assisted in the suicide of a competent and determined adult.<sup>96</sup>

Assisting suicide will include conduct where the defendant supplies an instrument or drug that a person then uses to kill herself or himself. It can also consist of advice on methods which help the suicidal person in his or her task. If the assistant takes a more active role and actually kills the person (for example, by injecting the patient with drugs), the charge of murder or attempted murder may apply. This was the question in Kate Gilderdale's case.<sup>97</sup> Gilderdale's daughter Lynn had myalgic encephalomyelitis that resulted in a form of chronic fatigue syndrome. She had consistently asked for help to end her life, had attempted suicide and made an advance directive indicating she refused life-sustaining treatment. After Lynn tried and failed to end her life by morphine overdose, Gilderdale administered morphine and injected air into her daughter's veins. She pleaded guilty to assisting a suicide but was found not guilty of attempted murder. The jury expressed much sympathy for Gilderdale's case, deeming her role in the suicide to be compassionate. She was sentenced to 12 months' conditional discharge.<sup>98</sup>

The motivation of the person assisting the suicide is an important determinant for prosecution. In contrast to the Gilderdale case, that in the case of *McShane* is a clear case of (elder) abuse.<sup>99</sup> Mrs McShane was in serious financial difficulty and was convicted under the *Suicide Act 1961* for trying to persuade her mother to kill herself.<sup>100</sup> McShane was video recorded instructing her mother to take an overdose and cautioning her mother, before she took the overdose, not to tell anyone of her (McShane's) role in assisting the suicide in case she would lose her inheritance claim. Her mother did not want to end her life and did not make an attempt. *McShane* illustrates malevolent motivation leading to coercion and pressure on a potential victim, in direct contrast to someone who makes an informed and voluntary decision to end their life,<sup>101</sup> having asked for the assistance of another.

<sup>92</sup> *R v Justins* [2008] NSWSC 1194 (12 December 2008).

<sup>93</sup> Faunce, above n 85, 710.

<sup>94</sup> Director of Public Prosecutions, *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (October 2014) Crown Prosecution Service <[http://www.cps.gov.uk/publications/prosecution/assisted\\_suicide\\_policy.html](http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html)>.

<sup>95</sup> Ibid.

<sup>96</sup> Alexandra Mullock, 'Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?' (2010) 18 *Medical Law Review* 442, 470.

<sup>97</sup> 'Mother Cleared of ME Daughter's Attempted Murder', *BBC News* (online), 25 January 2010 <[http://news.bbc.co.uk/2/hi/uk\\_news/england/sussex/8479211.stm](http://news.bbc.co.uk/2/hi/uk_news/england/sussex/8479211.stm)>.

<sup>98</sup> Afua Hirsch, 'Kay Gilderdale Case: A Clear Verdict on the Law's Confusion on Assisted Suicide', *The Guardian UK* (online), 26 Jan 2010 <<https://www.theguardian.com/uk/2010/jan/25/kay-gilderdale-case-expert-view>>.

<sup>99</sup> (1977) 66 Cr App Rep 97; R Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge-Cavendish, 2007) 60.

<sup>100</sup> *Suicide Act 1961* (UK).

<sup>101</sup> *McShane* (1977) 66 Cr App Rep 97 [43(3)].



## V IMPLICATIONS FOR POLICY AND GUIDELINES FOR ASSISTED DYING

We have previously recommended an approach to assessing mental capacity to request assisted suicide.<sup>102</sup> The proposed criteria for assessment include evaluating the following: the person's understanding of their conditions and prognosis; their perceptions of quality of life; their ability to give informed consent (including comprehending and retaining relevant information on the potential risks and likely result of taking a drug for assisted suicide, and feasible alternatives); their reasons for requesting physician assisted suicide; and their process of reasoning (weighing up the information and arriving at a decision).<sup>103</sup> Consistency in decision-making should be present over time and in line with past expressed wishes and the person must be able to communicate their wish. Focus was also given to the patient's mental status, mood (and possible mood disorders), general and interpersonal functioning, the presence of internal or external coercion; and

[t]he decision must be free from undue influence. While patients will still be able to make competent decisions when they are highly dependent on others for care, their decisions must truly be ones that they have made, rather than decisions which they have been forced to make or feel they should make to relieve others of burden. Undue influence must be assessed by having regard to both the patient's strength of will and level of pressure being placed on the patient by others to commit suicide.<sup>104</sup>

In addition, we have highlighted how concepts of relational autonomy are relevant to the assessment of requests for assisted dying. Whilst such a decision must be autonomous, the person must be considered in the context of their relationships, with the accompanying complexity. Where possible, people requesting assisted dying should be encouraged to discuss this decision with their friends and family, not only for support or to ensure they understand the broader effects of this decision on others, but to safeguard against abuse.

Noting the reference in the Act to the need to protect individuals who may be subject to abuse,<sup>105</sup> we propose that a robust set of guidelines be developed to support this and indeed all of the other principles of capacity assessment for the purposes of that Act. Such guidelines need to be promulgated amongst all health practitioners involved in assessments for the purposes of the legislation in line with the principles of training embodied within it.<sup>106</sup> It is the responsibility of all health practitioners involved in assessments for the purposes of the Act to understand the importance of determining capacity and undue influence and the potential for abuse in this context. It is important for the implementation of this legislation that health practitioners understand the legislation and their responsibilities under the legislation. Active policy regarding such specific education is essential given what is already known about the gaps amongst medical practitioners in understanding capacity in general<sup>107</sup> and other key provisions pertaining to end of life, such as withholding and withdrawing life-sustaining medical treatment.<sup>108</sup>

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) published a Position Statement on Physician Assisted Suicide.<sup>109</sup> It was recognised that the practice was illegal at the time of publication and the emphasis was on the ethical issues inherent in physician-assisted suicide, particularly in relation to psychiatrists. Several key points were

<sup>102</sup> Stewart, Peisah and Draper, above n 50, 38.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> *Voluntary Assisted Dying Act 2017* (Vic) ss 5(1)(i), 12.

<sup>106</sup> Ibid ss 4(b), 17, 18.

<sup>107</sup> Greg Young, Alison Douglass and Lorraine Davison, 'What Do Doctors Know about Assessing Decision-Making Capacity?' (2018) 131 *New Zealand Medical Journal* 58, 71.

<sup>108</sup> Ben White et al, 'Doctors' Knowledge of the Law on Withholding and Withdrawing Life-Sustaining Medical Treatment' (2014) 201(4) *Medical Journal of Australia* 1, 4.

<sup>109</sup> Royal Australian and New Zealand College of Psychiatrists, *Physician Assisted Suicide, Position Statement No 67* (2016) 1, 4.

raised: the rights of people with mental illness and that psychiatric illness should never be the justification for physician-assisted suicide; the rights of older people, especially those with dementia; misconceptions about older people and factors underpinning high suicide rates in older people; and the right of doctors to determine whether or not they will be involved in physician-assisted suicide.<sup>110</sup> The RANZCP concluded that the main role of doctors in end of life care is to promote good quality, comprehensive, accessible patient-centric care; that psychiatric assessment and treatment should be provided for people requesting physician-assisted suicide; and that psychiatrists should add their expertise to the debate. Noting the reference to psychiatric expertise in the Victorian legislation,<sup>111</sup> we would add the requirement that psychiatrists be trained in capacity and undue influence assessment.

## VI CONCLUSION

With assisted dying now legal in one state of Australia, there is an urgent need to consider how capacity to request assisted dying should be assessed, including the potential for undue influence and abuse. We are social beings and, as such, decision-making capacity, including for assisted dying, must be considered within a relational autonomy framework. Older people are at particular risk of undue influence in decision-making, and we know that relational factors drive decisions to self-harm and suicide in older people. Relationships would therefore be expected to influence requests for assisted dying.

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<sup>110</sup> Ibid 2.

<sup>111</sup> *Voluntary Assisted Dying Act 2017* (Vic) s 18(1).

# ADDRESSING ELDER ABUSE: PERSPECTIVES FROM THE COMMUNITY LEGAL SECTOR IN THE ACT

JOHN BOERSIG\* AND DOMINIC ILLIDGE\*\*

*The report of the Australian Law Reform Commission (ALRC) into elder abuse highlighted the urgent need to formulate an appropriate legal response to the complex nature of elder abuse. Legal aid commissions across Australia will ultimately play a large role in this response, in no small part due to the extensive assistance already provided to vulnerable members of the community. This paper will explore how legal aid services in Australia can respond to the recommendations of the ALRC. This will be done with particular reference to some measures already taken by Legal Aid ACT to address elder abuse in the Australian Capital Territory (ACT). This includes examining the need for a socio-legal model of service delivery which is reflective of a rights-based dialogue that accounts for the views of an elderly person about their legal problem. Ensuring that an effective legal service model is established, particularly one which recognises elder abuse as a violation of an elderly person's rights, is imperative if elder abuse is to be appropriately addressed.*

## I INTRODUCTION

Elder abuse, because it can be physical, financial, emotional or psychological, is a highly complex social and inter-personal issue. These factors can also combine to isolate an elderly person suffering abuse, making it difficult for them to seek legal advice. In consequence, formulating an appropriate legal response to elder abuse will require careful consideration of the impact that multiple issues – including familial relationships, disabilities or cultural backgrounds – may have on an elderly person's risk of abuse. The Australian Law Reform Commission's report *Elder Abuse—A National Legal Response* ('ALRC Report') has highlighted the urgent need for legal assistance.<sup>1</sup> The *ALRC Report* exposed the wide variety of areas posing legal issues in relation to elder abuse, such as wills, enduring powers of attorney and guardianship and the problems posed by the 'hidden' nature of elder abuse in the community.

Legal aid commissions throughout Australia already provide extensive advice and representation to vulnerable people, and this places them in a prime position to extend legal assistance to victims of elder abuse. This paper will explore the contribution that can be made through legal aid services to addressing elder abuse in the context of the *ALRC Report* and illustrate some innovative legal assistance strategies that can be implemented. The paper will utilise the experience of elder abuse in the ACT and the recent approaches taken by Legal Aid ACT to improve legal services for victims of elder abuse. In this context the paper will argue that we need to move towards a more rights-based dialogue, taking into account the views expressed by an elderly person, when examining how the risk factors of elder abuse must be woven into an appropriate legal assistance strategy.

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<sup>1</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017).

## II UNDERSTANDING THE FACTORS THAT INFLUENCE ELDER ABUSE IN THE COMMUNITY

It is useful to set out the current situation regarding elder abuse in the ACT to understand the difficulties that may be present in responding to elder abuse. As of the 2016 Census, there were 49,969 people over the age of 65 living in the ACT,<sup>2</sup> with 6,158 of these being persons over the age of 85.<sup>3</sup> The ACT, like the rest of the country, is an ageing jurisdiction, with the percentage of elderly people in the territory having increased from 8.6% in 2001 to 12.6% in 2016, the second largest increase in the nation behind Tasmania over that time.<sup>4</sup>

Despite the rapidly ageing population in the ACT, little is known about the incidence of elder abuse in the jurisdiction. A 2015 Council of the Ageing ACT report noted the true incidence of elder abuse in the Territory was ‘unknown’, primarily due to the difficulty collecting information and the vulnerability of victims of elder abuse.<sup>5</sup> However, one ‘concrete’ figure has been recorded by the Australian National University (ANU) in 2011. While conducting a survey in relation to the status of Canberra as an ‘age-friendly city’, the ANU found 6.1% of elderly people in the ACT had experienced a form of elder abuse, whether financial, psychological, physical or otherwise.<sup>6</sup> This figure is in line with the 2015 estimate by the World Health Organisation (WHO) noting 2.2% to 14% of elderly people in middle to high income nations have experienced some form of elder abuse.<sup>7</sup> Still, these figures are likely a conservative estimate given the difficulty in collecting information regarding elder abuse. The difficulty has often been attributed to the fact an elderly person may not recognise certain behaviour as abuse, or they may be reluctant to report a close friend or family member for fear of reprisal, destroying the relationship or losing the care they require, thereby deflating the numbers reported.<sup>8</sup>

As more people are required to access healthcare services or rely on their children or family members for everyday care, they are also placed at a greater risk of suffering from elder abuse. This is not to say that every arrangement made, whether it is to place an elderly person into an aged care facility or to execute an ‘assets for care’ agreement,<sup>9</sup> will result in elder abuse. However, such arrangements increase the dependence of the elderly person on their caregiver, elevating the risk of abuse.<sup>10</sup> Arguably elder abuse will become more prevalent in the ACT, and indeed the country in general, as the population ages and more people become dependent on others for financial or health care.

<sup>2</sup> Australian Bureau of Statistics, *2016 Census Quick Stats: Australian Capital Territory* (23 October 2017) <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/8?opendocument](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/8?opendocument)>.

<sup>3</sup> *Ibid.*

<sup>4</sup> Australian Bureau of Statistics, *2001 Census Quick Stats: Australian Capital Territory* (9 March 2006) <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/036](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036)>; Australian Bureau of Statistics, *2016 Census Quick Stats: Australian Capital Territory* (23 October 2017) Australian Bureau of Statistics <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/8?opendocument](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/8?opendocument)>.

<sup>5</sup> Eva Cotterell et al, ‘Elder Abuse in the ACT: A Literature Review’ (Report, Council on the Ageing, June 2015) 7.

<sup>6</sup> Centre for Mental Health Research, ‘A Baseline Survey of Canberra as an Age-Friendly City’ (Report, Australian National University, 2011) 51 (*ANU Report*).

<sup>7</sup> World Health Organisation, ‘World Report on Ageing and Health’ (Report, World Health Organisation, 2015) 74 <[http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811_eng.pdf?ua=1)>.

<sup>8</sup> Cotterall, above n 5, 10; Suzana Leonardi, ‘Elder Abuse? What’s That When It’s at Home: Experiences of Elder Abuse in the ACT’ (Draft Report, Council of the Ageing ACT, 2015), 11 <<http://www.cotaact.org.au/wp-content/2015/10/Elder-Abuse-Experiences-draft.pdf>>.

<sup>9</sup> An assets for care arrangement generally involves an elderly person either selling their home to provide funds for a family member in exchange for care or transferring their interest in their property to a family member in exchange for care.

<sup>10</sup> Louise Kyle, ‘Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse’ (Guide, Seniors Rights Victoria, 2012) <<https://assetsforcare.seniorsrights.org.au/assetsforcare/wp-content/uploads/2014/10/Assets-for-Care.pdf>>.

## A *Current Service Challenges in Addressing Elder Abuse in the ACT*

Canberra, as an ‘age-friendly city’,<sup>11</sup> should be at the forefront of putting in place mechanisms to ensure elder abuse is appropriately managed. However, while there have certainly been positive responses such as the ACT Elder Abuse Prevention Program Policy,<sup>12</sup> services remain disjointed and in need of greater exposure to the wider public. For instance, the Older Persons’ Abuse Prevention Referral and Information Line which was initially established in 2004, received only 125 calls in 2016-17 from people seeking information or advice about elder abuse.<sup>13</sup> At Legal Aid ACT there are proxy indicators for identifying elder abuse matters, such as statistics indicating the age of clients assisted and the presence of family violence. In 2016, 17,560 services to clients over the age of 65 were provided.<sup>14</sup>

These numbers, assuming the estimates of abuse in the ACT are correct, indicate that there is a much larger and hidden unmet need in the ACT for senior legal services addressing elder abuse. Additionally, Legal Aid ACT along with the other community legal services in the ACT are only able to provide preliminary advice on complex matters (such as wills or contractual arrangements involving equitable interests). This is problematic, as misfeasance in these areas of law can sometimes be an indication of elder abuse, particularly financial abuse, further illustrating the difficulty of meeting the legal needs of an ageing ACT population.<sup>15</sup>

These statistics are further compounded by the fact that social isolation may be a predictor of abuse.<sup>16</sup> This must be a primary consideration in recalibrating service delivery, particularly in a jurisdiction such as the ACT where a high average income coupled with policies that have spread public housing across the Territory, known as a ‘salt and pepper’ approach,<sup>17</sup> have had the effect of making those who are disadvantaged even more difficult to see within the community, as there are few obviously ‘poor’ suburbs or areas in the Territory.<sup>18</sup> The hidden nature of abuse informs the need for the consideration of a rights-based solution to elder abuse.

## B *Defining People Who are at Risk of Elder Abuse*

The statistics outlined above do not tell the full story of elder abuse in the ACT, or indeed the pervasiveness of elder abuse within the wider community, meaning a better evidence base

<sup>11</sup> World Health Organisation, *Canberra, Age-Friendly*

World <<https://extranet.who.int/agefriendlyworld/network/canberra/>>.

<sup>12</sup> ACT Government, ‘ACT Elder Abuse Prevention Program Policy’ (Policy, ACT Government, June 2012) <[http://www.communityservices.act.gov.au/data/assets/pdf\\_file/0004/317605/Elder\\_Abuse\\_Prevention\\_Program\\_Policy\\_2012\\_FINAL\\_2.pdf](http://www.communityservices.act.gov.au/data/assets/pdf_file/0004/317605/Elder_Abuse_Prevention_Program_Policy_2012_FINAL_2.pdf)>.

<sup>13</sup> Community Services Directorate, ‘Community Services Directorate – Annual Report 2016-17’ (Annual Report, ACT Government, 2017) 57.

<sup>14</sup> Internal Legal Aid ACT figures, so far in 2017-18 (as of 10 May 2018) 282 services to clients over 65 have been provided.

<sup>15</sup> Ashurst Australia, ‘Older People Law Brief’ (Report, Ashurst Australia, 14 January 2016). This report was prepared by Ashurst Australia for Legal Aid ACT.

<sup>16</sup> Ron Acierno, ‘Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study’ (2010) 100(2) *American Journal of Public Health* 292, 292.

<sup>17</sup> ACT Government, *Frequently Asked Questions: Answers to Your Questions about Public Housing Renewal in the ACT* (4 January 2018) Public Housing Renewal Taskforce <<https://www.planning.act.gov.au/topics/public-housing-renewal/frequently-asked-questions>>.

<sup>18</sup> Robert Tanton, Riyana Miranti and Yogi Vidyattama, ‘Hidden disadvantage in the ACT: Report for ACT Anti-Poverty Week’ (Report, National Centre for Social and Economic Modelling – University of Canberra, October 2017), 13-14 <<http://www.natsem.canberra.edu.au/storage/2017-hidden-disadvantage-in-the-act-anti-poverty-week-report.pdf>>; Kirsten Lawson, ‘ACTCOSS calls for budget concessions to help increasing numbers of poor in Canberra’ *The Canberra Times* (online), 6 June 2017 <<http://www.canberratimes.com.au/act-news/actcoss-calls-for-budget-concessions-to-help-increasing-numbers-of-poor-in-canberra-20170605-gwko98.html>>.

must be developed. The starting point must be doing away with the assumption that one is at risk of elder abuse simply by virtue of being over 65 and no longer working. It is suggested here that these assumptions are wrongly made because people over 65 are a statistical 'benchmark' recorded by the Australian Bureau of Statistics.<sup>19</sup> As submitted by Legal Aid ACT to the *ALRC Report*, assessing an elderly person's capacity independently of their age may be a far more effective metric by which to measure the of risk elder abuse than simply age itself.<sup>20</sup> Making the assumption a person over 65 is unable to enter an arrangement without it being tainted by abuse is highly paternalistic. This does nothing more than foster the very same assumptions that allow elder abuse to occur – namely, an assumption that an elderly person is incapable of managing their own affairs.<sup>21</sup> It ultimately represents a simplistic notion of vulnerability that assumes because a person possesses a particular characteristic, in this case age, they are therefore at risk of abuse or neglect.<sup>22</sup>

By the same token, it cannot be assumed that a person under 65 has the capacity to enter into agreements without an appropriate assessment ensuring that they understand the effect of those agreements.<sup>23</sup> Taking a more nuanced approach than simply checking a person's age to how we assess whether a person is at risk of abuse is ultimately necessary to ensure legal services are appropriately targeted to address elder abuse. This necessarily requires a rights-based approach, in an endeavour to ensure an open and active dialogue with the older person to get a full understanding of the circumstances in which they find themselves.<sup>24</sup> This is critical whether they are a 90 year old man living with a loving and caring family or a 59 year old cognitively impaired woman living alone with limited family interaction.<sup>25</sup>

## 1 Cultural and Social Issues in Defining Who is at Risk

The difficulty in defining who may be at risk of elder abuse is made even more problematic when considered from a non-Anglo-Saxon background, particularly the Aboriginal and Torres Strait Islander community. The statistics are compelling in this regard: an Indigenous woman is likely to live 9.5 years less than a non-Indigenous woman while an Indigenous man will likely live 10.6 years less than a non-Indigenous man.<sup>26</sup> While this gap has slowly been closing over the years,<sup>27</sup> it is nonetheless substantial. Additionally, Aboriginal and Torres Strait Islander people are more likely to become grandparents at a younger age than those from a non-Indigenous background.<sup>28</sup> With these factors in mind, how we define an elderly person in the Indigenous community for the purpose of elder abuse cannot be undertaken in the same manner as with the wider community. In fact, even the term 'elder' has a special connotation

<sup>19</sup> Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83 (2016), 22.

<sup>20</sup> Legal Aid ACT, Submission No 58 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, August 2016, 5.

<sup>21</sup> Joan Harbison, 'Understanding "Elder Abuse and Neglect": A Critique of Assumptions Underpinning Responses to the Mistreatment and Neglect of Older People' (2012) 24(2) *Journal of Elder Abuse & Neglect* 88, 95.

<sup>22</sup> Laura Pritchard-Jones, 'The Good, the Bad, and the "Vulnerable Older Adult"' (2016) 38(1) *Journal of Social Welfare and Family Law* 51, 56; James O'Brien and Desmond O'Neill, 'Prevention of Elder Abuse' (2011) 377 *The Lancet* 2005, 2006.

<sup>23</sup> Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267, 274.

<sup>24</sup> Australian Human Rights Commission, *A Human Rights Approach for Ageing and Health - A Human Rights Approach and the Aged Care Reforms*, Australian Human Rights Commission <<https://www.humanrights.gov.au/human-rights-approach-ageing-and-health-human-rights-approach-and-aged-care-reforms>>.

<sup>25</sup> Pritchard-Jones, above n 22, 56.

<sup>26</sup> Australian Bureau of Statistics, *Life Tables for Aboriginal and Torres Strait Islander Australians 2010-2012* (Catalogue number 3302.0.55.003, 15 November 2013), 6 <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/BD51C922BFB7C6C1CA257C230011C97F/\\$File/3302055003\\_2010-2012.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/BD51C922BFB7C6C1CA257C230011C97F/$File/3302055003_2010-2012.pdf)>.

<sup>27</sup> *Ibid.*

<sup>28</sup> Mick Gooda, 'Introduction' (Paper presented at the AAG Elder Abuse and Neglect Conference, Alice Springs, 5 September 2012).

in the Aboriginal and Torres Strait Islander community, being associated with authority and knowledge.<sup>29</sup> This also underlines why notions of elder rights, rather than simply elder abuse, provide a better paradigm for identifying need and best practice modes of service delivery.

Disabilities can also have a large impact on the risk of elder abuse for an individual. Cognitive impairment in particular has been shown to increase the risk a person faces of being subject to elder abuse.<sup>30</sup> Cognitive function can in fact be impacted by an older person's environment, with those who are in a socially secure situation less likely to experience cognitive impairment.<sup>31</sup> Losing cognitive function can impact a person's capacity to effectively manage their finances, opening up an elderly person to financial abuse, as an abuser will often be in a position to access and take control of that person's assets.<sup>32</sup> Even more problematic, impairment of capacity can be a consequence of elder abuse,<sup>33</sup> with those who suffer abuse more likely to be hospitalised, even when accounting for other factors such as socioeconomic status.<sup>34</sup> This can have the effect of possibly aggravating any condition an elderly person may have, further increasing their risk of experiencing abuse. Abuse could also have the impact of impairing the cognitive function of someone not considered an elder, yet opening them up to further abuse commonly categorised as elder abuse, particularly asset mismanagement. This again muddies the waters surrounding who is at risk of elder abuse beyond simply looking at their age, further illustrating the need for a nuanced approach to how legal services are delivered to those at risk of elder abuse.

The limited information regarding elder abuse in the ACT is reflective of the underreporting of elder abuse that has been a constant feature of the literature in this area.<sup>35</sup> This, combined with socio-economic and cultural context couching who is at risk of elder abuse, is why legal services must take into account the actual circumstances of an individual. In particular, noting that a person's cultural background, socio-economic status or cognitive ability may have a far bigger impact on their risk of elder abuse than simply age itself.

Given the hidden nature of elder abuse, and socio-economic disadvantage generally, in the ACT, it is a challenge to assess and provide an appropriately individualised legal service response to elder abuse. This issue is further compounded by the constant battles with funding the legal sector faces, limiting capacity to provide early intervention services, often an efficient and cost-effective means of legal problem solving.<sup>36</sup> Despite these issues, what is certain is that the need for legal services addressing elder abuse in the ACT clearly exists and is not being met.

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<sup>29</sup> Ibid.

<sup>30</sup> Xinqi Dong, 'Association of Cognitive Function and Risk for Elder Abuse in a Community-Dwelling Population' (2011) 32(3) *Dementia and Geriatric Cognitive Disorders* 209, 210.

<sup>31</sup> Susan Charles and Laura Carstensen, 'Social and Emotional Aging' (2010) 61 *Annual Review of Psychology* 383.

<sup>32</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, February 2016) 12.

<sup>33</sup> Ibid 11–12.

<sup>34</sup> Xinqi Dong and Melissa Simon, 'Elder Abuse as a Risk Factor for Hospitalization in Older Persons' (2013) 173(10) *JAMA Internal Medicine* 911.

<sup>35</sup> Robert Kohn and Wendy Verhoek-Oftedahl, 'Caregiving and Elder Abuse' (2011) 94(2) *Medicine and Health, Rhode Island* 47; Amy Carney, 'Indicators of Abuse in the Elderly ICU Patient' (2015) 38(3) *Critical Care Nursing Quarterly* 293; Jason Burnett, W Andrew Achenbaum and Kathleen Pace Murphy, 'Prevention and Early Identification of Elder Abuse' (2014) 30(4) *Clinics in Geriatric Medicine* 743.

<sup>36</sup> Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Report, Law and Justice Foundation of New South Wales, August 2012) 15.

### III HOW WE MUST RESPOND TO THE RECOMMENDATIONS MADE BY THE AUSTRALIAN LAW REFORM COMMISSION REPORT

The *ALRC Report* detailing a national legal response to elder abuse is a policy milestone and will form a substantial platform for the future. It is imperative that the recommendations and findings from the Report are not left as mere academic curiosities without any action taken towards their implementation. With that in mind, consideration is now given to some of the key points raised by the *ALRC Report*, particularly those which will impact on how both legal service delivery and law reform can complement each other to address elder abuse. Of particular significance is the recognition that the acknowledgment of elder abuse must mature into a discussion about elder rights ensuring that informed and appropriate decisions can be made, and how that may be balanced with a number of the protective recommendations made.

#### A *The Role of Legal Aid Commissions in Helping Develop a National Plan*

The headline recommendation to come out of the ALRC report was that of a National Plan to combat elder abuse.<sup>37</sup> The ALRC even noted that the National Plan, as the ‘capstone recommendation’, would provide an opportunity to develop any future policy planning on the back of programs and work already undertaken in multiple jurisdictions.<sup>38</sup> As life expectancy continues to rise and fertility rates continue to fall across the country, with those trends not confined to particular jurisdictions, there is little doubt that a coordinated and national response to elder abuse is required.<sup>39</sup> To be effective, such a plan would require consideration of how it operates at a national, state and territory level. Additionally, consideration would need to be given to the role that both legal aid commissions and community legal service providers would play in liaising with both government and non-legal community institutions.

Already, legal aid commissions and community legal centres operate under a National Partnership Agreement (NPA),<sup>40</sup> which regulates funding and performance indicators along with indicating priority clients (such as those who are over 65).<sup>41</sup> While not specifically related to elder abuse, the NPA places legal aid commissions and community legal centres in a position to be easily integrated into any national plan that is implemented. However, it is important the role of legal aid services is not limited only to providing legal advice and representation. Rather, legal aid services are able to play a large role in preventing elder abuse from occurring through community legal education.

#### 1 *Using Community Legal Education to Prevent Elder Abuse*

Under the NPA, community legal services are tasked with providing community legal education (CLE).<sup>42</sup> CLE is a critical tool in intervening early before legal issues become serious,

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<sup>37</sup> A draft of the National Plan is expected in late 2018: see Christian Porter, Attorney-General (Cth) ‘National Plan to Address Elder Abuse’ (Media Release, 20 February 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/National-Plan-to-address-elder-abuse.aspx>>.

<sup>38</sup> *ALRC Report*, above n 1, 59.

<sup>39</sup> Australian Bureau of Statistics, *Feature Article: Population by Age and Sex, Australia, States and Territories* (15 December 2016), 3101.0 – Australian Demographic Statistics, Jun 2016 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/3101.0Feature%20Article1Jun%202016>>.

<sup>40</sup> Council of Australian Governments, ‘National Partnership Agreement on Legal Assistance Services’ (Australian Government, 28 June 2017) <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/NationalPartnershipAgreementOnLegalServices.pdf>>.

<sup>41</sup> *Ibid* 5.

<sup>42</sup> *Ibid* 6, 12.



or before they even arise at all.<sup>43</sup> This is done through informing people about their rights and empowering them to solve legal issues as they arise.<sup>44</sup> Therefore, it is critical that any national plan implemented considers how CLE can play a role in addressing elder abuse, not only in educating those at risk but informing the wider community of the warning signs and potential consequences. Utilising the resources of community legal services that are already in place should certainly be a major consideration in implementing a nationwide CLE program. Involving both legal aid commissions and community legal centres would allow for consistency in the message that is produced. Furthermore, the nature of CLE as an outreach service provides a means of reaching out to the 'hidden' victims of elder abuse empowering them, or sympathetic friends and family, to speak up and seek legal advice or redress.

To illustrate the need for a national community education plan, there was an emphasis in the *ALRC Report* on education regarding wills, especially homemade, do-it yourself dispositions.<sup>45</sup> This is primarily due to concerns that many individuals may not have the ability to engage a lawyer to help them draft a comprehensive will. However, due to the increasing need for drafting wills, because of both an ageing population and the complexity of some testamentary wishes, many private firms are rejecting performing pro bono work on wills at an increasing rate.<sup>46</sup> As the population ages further, it is likely more people will be unable to afford appropriate services to help draft wills. Already, legal aid commissions provide limited advice in regards to wills, meaning it is not even the case that people fall into the 'justice gap'. Rather, they simply will be unable to get a will drafted if they cannot afford to engage a private lawyer.<sup>47</sup> For these people, they may have no choice but to draft a will using a publicly available and generic kit. While drafting your own will is a reasonable choice which people should be able to make,<sup>48</sup> using a kit also brings with it a further risk of undue influence from a person who may have been caring for an elderly person, even if the elderly person is assessed to have testamentary capacity.<sup>49</sup>

Providing CLE to older people about wills is critical, especially to ensure that they understand the importance of testamentary capacity and the risks involved in drafting your own will. This education can not only involve information provided on websites, but also outreach taking place at health care facilities, retirement villages or seniors centres mitigating some of the barriers older people may experience in accessing legal services.<sup>50</sup> For instance, outreach services are a critical aspect of Legal Aid ACT's operations, and play a large role in further fostering connections with the community. It is important this connection is used to inform elderly people about the complexities and issues that must be addressed when drafting a will, including the need for testamentary capacity.<sup>51</sup> Making sure that people are aware of the risks involved in drafting a will before it comes time to put pen to paper is critical in upholding the principle of autonomy underlying the *ALRC Report*, as legal education will help provide the person with the requisite knowledge to make an informed choice that reflects their wishes.

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<sup>43</sup> National Association of Community Legal Centres, Submission No 91 to Productivity Commission, *Inquiry into Australia's System of Civil Dispute Resolution*, November 2013, 30.

<sup>44</sup> *Ibid.*

<sup>45</sup> *ALRC Report*, above n 1, 290.

<sup>46</sup> Productivity Commission, *Access to Justice Arrangements*, Report No 72 (2014), 820. Wills/probate/estates was indicated by 25% of firms as one of the top 5 areas they reject doing pro bono work. This also may be indicative of the number of request received, however is reflective of the larger number of people who will not be able to get assistance in these areas.

<sup>47</sup> For instance, Legal Aid ACT provides education regarding wills, however will often not provide advice and does not assist a person in drafting a will.

<sup>48</sup> Victorian Law Reform Commission, *Succession Laws*, (Report, Victorian Law Reform Commission, August 2013), 12 <[http://lawreform.vic.gov.au/sites/default/files/Succession\\_Laws\\_final\\_report.pdf](http://lawreform.vic.gov.au/sites/default/files/Succession_Laws_final_report.pdf)>.

<sup>49</sup> *Ibid.*, 15. The common law tests for testamentary capacity are well established: see *Banks v Goodfellow* (1870) 5 QB 549, 565.

<sup>50</sup> Elizabeth Samra, Elder Abuse Report (Report, Legal Aid ACT, June 2017) 15. This report was prepared for Legal Aid ACT by Elizabeth Samra following community consultation with stakeholders in the ACT.

<sup>51</sup> As noted by Kunc J in *Ryan v Dalton* [2017] NSWSC 1007, [106] an assessment of testamentary capacity will always be a fact sensitive process, making it difficult to provide a specified procedure.

## B *The Potential for Abuse through Enduring Powers of Attorney*

Executing an enduring power of attorney (EPOA) is a common step taken by many elderly people to ensure decisions can be made regarding their finances or medical treatment in the event that they lose decision making capacity. However, the power received by a person who is appointed by an EPOA necessarily imposes a risk that power can be abused.<sup>52</sup> As raised by the *ALRC Report*, while each jurisdiction allows a mechanism for appointing an attorney, there are differences in the obligations and reporting mechanisms across the states and territories.<sup>53</sup> Furthermore, many principals and attorneys enter these agreements without regard to the legal ramifications involved or the obligations imposed upon the attorney.<sup>54</sup> Accordingly, when the elderly person loses decision-making capacity, they will be placed in a position where they will be unable to identify any breaches of the power of attorney and lack the ability to seek help.<sup>55</sup>

The potential for abuse occurring under an EPOA is, for the most part, self-evident because the person for whom decisions are being made will not be in a position to challenge those decisions. As the elderly person will not have capacity whilst an EPOA is in effect, often there may not be a chance for any decisions made under an EPOA to be challenged or examined until after the elderly person dies and the effects of the decisions can be identified.<sup>56</sup> Furthermore, a person appointed under an EPOA may potentially also be the executor of an elderly person's estate, making it difficult for the elderly person's wishes to be enforced even by a third party.<sup>57</sup>

### 1 *Appropriate Protections of Principals and Restriction of Attorneys*

An EPOA is intended to provide appropriate protections for the principal, that is, the person who may be subject to the abuse. In the ACT, there is no requirement for the parties to seek legal advice nor for there to be a witness present with either legal expertise or the ability to assess capacity when the agreement is executed. Currently, a witness to the execution of an EPOA need only sign a certificate noting the principal executed the EPOA voluntarily and they appeared to understand the nature and effect of the power of attorney.<sup>58</sup> There would be benefits to having more restrictive processes in safeguarding the interests of older people when they execute an EPOA. However, this need not necessarily be done through demanding witnesses have an ability to assess capacity, rather the parties to an EPOA agreement (particularly the principal) should be required to seek legal advice before entering into the agreement.<sup>59</sup> This would allow for an assessment of a person's decision-making capacity without the need for a specialised witness to be present when the EPOA is executed, and would help ensure a principal understands the gravity of executing an EPOA when they lose their decision-making capacity.

<sup>52</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010), 320.

<sup>53</sup> *ALRC Report*, above n 1, 163.

<sup>54</sup> Legal Aid ACT, above n 20, 58; see also *Ryan v Ryan* [2017] VSC 490, [130] the Attorney in this case did not appear to understand the position of trust she was placed in, despite drafting loan agreements with legal assistance and providing her principals with care. See also *Downie v Langham* [2017] NSWSC 113.

<sup>55</sup> Legal Aid ACT, above n 20, 58.

<sup>56</sup> See *Re McFadyen* [2015] ACTSC 219, involving a cognitively impaired woman who had executed a new will leaving her attorney the residue of her estate. Following her death, the trustee of the second will made an application to the ACT Supreme Court to seek a revocation of the second will as the principal did not have the testamentary capacity to make a valid will.

<sup>57</sup> This risk was outlined in *Alcazar-Stevens v Stevens* [2017] ACTCA 12, [47], and was used as an argument by the court for rejecting an interpretation of s 50 of the *Powers of Attorney Act 2006* (ACT) put forward that only would have allowed the executor of an estate to make an application under that section for the principal, or the estate, to receive compensation for a loss caused by a failure of the Attorney to comply with the Act.

<sup>58</sup> *Powers of Attorney Act 2006* (ACT) s 22.

<sup>59</sup> Legal Aid ACT, above n 20, 58.

Currently, in the ACT, there are no restrictions on who can be appointed as an attorney. Creating restrictions was addressed in the *ALRC Report* through making a list of ineligible persons, including if the person:

- (a) is an undischarged bankrupt;
- (b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);
- (c) has been convicted of an offence involving fraud or dishonesty; or
- (d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.<sup>60</sup>

Both (a) and (c) are identical to criteria found in the *Guardianship and Management of Property Act 1991* (ACT) preventing a person from being appointed a guardian or manager.<sup>61</sup> Meanwhile, paragraph (b) reflects the fiduciary nature of the director-company relationship, with those individuals who have made dishonest or seriously reckless decisions regarding a company disqualified from being appointed as a director.<sup>62</sup> Considering an attorney is burdened with similar fiduciary duties to a director, due to the vulnerability of the principal,<sup>63</sup> this represents an appropriate safeguard. The final criterion (d) preventing care workers from being appointed with an EPOA is clearly made in response to some of the issues highlighted surrounding elder abuse in aged care facilities.<sup>64</sup>

These criteria represent sensible restrictions and, at least in the ACT, are consistent with criteria preventing people from being appointed guardians. As recognised by the ALRC,<sup>65</sup> and indeed submitted by Legal Aid ACT, an exception should exist to criteria (d) for family members who provide care for an elderly person.<sup>66</sup> Despite the fact that often elder abuse will be perpetrated by a close family member,<sup>67</sup> it is important to remember that in many cases an elderly person will want to have their affairs dealt with by a person they trust and who often will understand their wishes. Restrictions on appointments are certainly necessary but it is important they do not undermine the purpose of the appointment, ensuring the principal's wishes, and consequently their rights, are respected.

## 2 *Managing Principal and Attorney Conflicts of Interest*

In some cases, even if the appointed attorney is acting in good faith, their interests and the interests of an older principal may come into conflict.<sup>68</sup> In other cases, the attorney may attempt to make a decision against the principal's wishes before the principal loses their capacity.<sup>69</sup> This risk is certainly intensified where the attorney is a family member who is controlling assets from which they may stand to benefit if the principal were no longer the owner.<sup>70</sup> The potential for conflicts of interest when a family member is appointed as an

<sup>60</sup> *ALRC Report*, above n 1, 174.

<sup>61</sup> *Guardian and Management of Property Act 1991* (ACT) s 10(2).

<sup>62</sup> *Corporations Act 2001* (Cth) s 206B.

<sup>63</sup> Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies – It's Time to Face the Facts!' (2013) 7 *Elder Law Review* 1, 6–7.

<sup>64</sup> *ALRC Report*, above n 1, 101; Kate Kersey et al, 'Professional Discipline of the New Zealand Nursing Residential Care Workforce: A Mixed Methods Analysis of HPDT Decisions 2004–2014' (2017) 24 *Journal of Law and Medicine* 803.

<sup>65</sup> *ALRC Report*, above n 1, 174.

<sup>66</sup> Legal Aid ACT, Submission No 223 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, February 2017, 9.

<sup>67</sup> Sarah Ellison et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (Law and Justice Foundation of NSW, 2004) 269.

<sup>68</sup> Tsharna Stewart, 'Enduring Powers of Attorney: An Effective Advanced Planning Tool or an Avenue for Financial Abuse' (2012) 32 *Queensland Lawyer* 201, 204.

<sup>69</sup> *Ibid.*

<sup>70</sup> *ALRC Report*, above n 1, 172.

attorney can go unnoticed, even by a solicitor who uncritically accepts the instructions of an attorney without considering the wishes of the principal, as was shown in *Reilly v Reilly*.<sup>71</sup>

The *ALRC Report* indicated legislation specifically targeted at conflict transactions should be enacted to protect the assets of an elderly person who has executed an EPOA.<sup>72</sup> This would be in addition to the already present legislative provisions dealing with conflict transactions generally.<sup>73</sup> Specific legislation enacted would require legal education, and indeed legal advice, before any agreement to enter into an EPOA arrangement is made. Legal advice to both principals and attorneys, would help both parties recognise a conflict transaction when it occurs (either generally or in reference to any enacted legislation), preventing the need for an independent party to identify a conflict and authorise that particular transaction.<sup>74</sup> Empowering elderly people with the information required to execute an EPOA ensures that they are heavily involved in the decision, reflecting the importance of a rights-based dialogue in this area. Legal advice could also be coupled with mandatory registration of those who have been appointed with powers of attorney,<sup>75</sup> providing more accountability for decisions made under an EPOA and an additional safeguard for any appointment.<sup>76</sup> These measures, while not necessarily completely preventing situations such as those in *Reilly v Reilly* from occurring, would increase the scrutiny given to EPOA arrangements where a family member is appointed as an Attorney.

### C *The Potential for Financial Abuse in Family Agreements*

With financial abuse being particularly associated with elder abuse,<sup>77</sup> it is no surprise informal family agreements can play a large part in enabling abuse to occur. As elder abuse often is a complex interaction between social factors such as familial relationships, environmental factors such as low levels of social support and physical factors such as decreased mobility or disease and disorders, it is easy to see how informal ‘assets for care’ agreements lead to abuse as elderly people become more dependent on others for care.<sup>78</sup>

For the most part, an elderly person will look to a family member for support, possibly one who is currently living with them, even if that family member is not entirely capable of undertaking such a role.<sup>79</sup> Hoping to keep assets within the family, or because they believe payment of some kind is required, an elderly person may transfer the interest they have in their own property to the caregiver as consideration for the care they will receive moving forward.<sup>80</sup> This agreement does not necessarily lead to elder abuse, but certainly increases the risk of it occurring.<sup>81</sup>

<sup>71</sup> [2017] NSWSC 1419, [380]–[381].

<sup>72</sup> *Ibid.*

<sup>73</sup> In the ACT this is found in s 42 of the *Powers of Attorney Act 2006 (ACT)*.

<sup>74</sup> Legal Aid ACT, above n 66, 8.

<sup>75</sup> As announced by the Treasurer Scott Morrison, as part of the 2018-19 Budget the Federal Government will be working with the States and Territories to develop a national online register of Enduring Powers of Attorneys (see Commonwealth, *Budget Measures 2018-19*, Budget Paper No 2 (8 May 2018) 77).

<sup>76</sup> Stewart, above n 68, 206.

<sup>77</sup> World Health Organisation, ‘World Report on Ageing and Health’ (Report, World Health Organisation, 2015) 74 <[http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811_eng.pdf?ua=1)>.

<sup>78</sup> Andrew Day et al, ‘An Assessment of Interventions that Target Risk Factors for Elder Abuse’ (2017) 25(5) *Health and Social Care in the Community* 1532, 1533.

<sup>79</sup> Shelly Jackson, ‘Theory-Based Models Enhancing the Understanding of Four Types of Elder Maltreatment’ (2016) 22(3) *International Review of Victimology*, 289, 304.

<sup>80</sup> Kyle, above n 10, 9.

<sup>81</sup> Legal Aid ACT, above n 20, 17.

## D *The Difficulty in Enforcing Rights under an Assets for Care Arrangement*

These arrangements necessarily bring with them a heightened risk of a transaction being tainted by undue influence or unconscionability, which may then provide a legal avenue for the elderly person to challenge the transaction. However, a transaction made where property is transferred from a parent to a child is not one where the law presumes that undue influence exists, rather factors showing an antecedent relationship must be examined.<sup>82</sup> It is likely that in those cases where an elderly person has a cognitive impairment, unconscionability or undue influence will be a highly relevant factor.<sup>83</sup> In these circumstances any argument over whether such a transaction was unduly influenced will often not be put forward until after the death of the elderly person and the estate has been executed.<sup>84</sup>

In cases where cognitive impairment is not present, identifying undue influence or unconscionability may prove more difficult as on its face the agreement made was mutually beneficial at the time.<sup>85</sup> This may mean, as noted by the ALRC, proprietary or equitable estoppel provides a more appropriate remedy.<sup>86</sup> Nonetheless, this course of action would still require conduct on behalf of the family member that would make it unconscionable to not honour the agreement the elderly person has relied upon.<sup>87</sup> While this conduct can be assessed on inferences and conduct alone,<sup>88</sup> the absence of any formal documentation in these agreements would likely negatively impact on the evidentiary burden the elderly person would ultimately bear. For a court, examining family arrangements many years after the fact with a view to determining a legal or equitable interest is ultimately not an easy task, even when there is a level of agreement as to the wishes of the elderly person.<sup>89</sup>

In any event, if such an agreement is made, it is often done quite informally and without the benefit of legal advice as to how it may affect an elderly person's rights or income support.<sup>90</sup> If the relationship breaks down, which will occur if elder abuse arises, the older person may be in a situation where they have no legal interest in their property and are unwilling to pursue a remedy due to the costs involved or the further damage it would do to family relationships.<sup>91</sup> The provision of independent legal advice is a critical factor in rebutting the presumption that a transaction was unduly influenced.<sup>92</sup> Clearly it is important that legal advice is given early to ensure that the consequences are appropriately understood. This could help prevent cases being brought by family members following the death of an elderly person and provide appropriate protection for elderly people making these transactions.

A further complication, as outlined in the *ALRC Report*, in preventing these agreements is because the arrangements may result in a 'granny flat interest' which is exempt from the 'gifting rules' affecting the older person's asset assessment for the purposes of social welfare

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<sup>82</sup> *Christodoulou v Christodoulou* [2009] VSC 583, [70].

<sup>83</sup> See *Re Mahoney* [2015] VSC 600, [186].

<sup>84</sup> See *Hartley v Woods* [2017] NSWSC 1420, *Thorn v Boyd* [2014] NSWSC 1159 and *Re Mahoney* [2015] VSC 600.

<sup>85</sup> *ALRC Report*, above n 1, 211; see also *Pinter v Pinter* [2016] QSC 314, [126], while this matter was brought by a son after his parents had died to protect his own interests following an assets for care type arrangement, this case reflects that the existence of undue influence will likely be examined at the time the transaction was made.

<sup>86</sup> *ALRC Report*, above n 1, 213.

<sup>87</sup> The principles regarding estoppel were outlined in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9.

<sup>88</sup> *Rixon v Horseshoe Pastoral Co Pty Ltd* [2017] NSWSC 1293, [58].

<sup>89</sup> As illustrated by *Hurst-Meyers v Public Trustee and Guardian (ACT)* [2018] ACTSC 61, these determinations can be time consuming especially when the elderly person is otherwise incapacitated, in this case suffering from dementia.

<sup>90</sup> Legal Aid ACT, above n 20, 28.

<sup>91</sup> Samra, above n 50, 11

<sup>92</sup> *Christodoulou v Christodoulou* [2009] VSC 583, [76].

payments.<sup>93</sup> Therefore, any changes that formalise these agreements may encourage older people to undertake them. Noting the gifting exemption that currently exists, this could potentially place a larger number of people at risk of abuse. It is therefore critical that elderly people considering these arrangements are informed about the consequences and their rights, as it can be difficult to enforce a legal or equitable interest after an agreement breaks down. Financial arrangements are therefore an area where CLE can be vital, informing elderly people of the risks involved in 'assets for care' arrangements and perhaps even providing limited assistance.

### E *Providing an Appropriate Forum for Resolving Disputes in Elder Abuse Matters*

An important procedural element in elder abuse matters is providing an appropriate forum to resolve disputes. While in some situations a crime will have been committed and it will be appropriate to involve the police, for the most part the issues that will be faced by the elderly are unlikely to attract the immediate interest of police – disputes involving wills, estates and powers of attorney, all of which have been discussed to some extent above.<sup>94</sup> These are areas of law in which great care needs to be taken when seeking specialist advice from solicitors. The nature of these disputes often means a matter will require a hearing in the Supreme Court,<sup>95</sup> depending on the monetary value disputed.<sup>96</sup> The cost and time that it would take for an elderly person to pursue such a matter is often more than enough to discourage them from engaging a lawyer to help them enforce their rights. Additionally, in the ACT, if any loss has been suffered due to the improper exercise of an EPOA, an application must be made to the Supreme Court to receive compensation, whether made by the elderly person or another interested party.<sup>97</sup> This places a near-insurmountable barrier on an elderly person who may have been left without any assets due to elder abuse.

However, this barrier could be removed, as the ALRC and multiple stakeholders suggest, through extending the jurisdiction of state and territory tribunals in relation to family agreements and EPOA disputes.<sup>98</sup> This would make the process much easier, since the ACT Civil and Administrative Tribunal (ACAT) already has the power to revoke or suspend an EPOA.<sup>99</sup> Extending the jurisdiction of ACAT and other tribunals to allow for compensation orders or determination in family agreement disputes would remove the significant cost barrier associated with taking court action along with simplifying the process, something which is key considering the vulnerability of many of those suffering from elder abuse and the complexity of the current legal framework. A simplified system of resolving these disputes would help empower elderly people to enforce their rights in cases of abuse.

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<sup>93</sup> ALRC Report, above n 1, 224; *Social Security Act 1991* (Cth) ss 12A(2), 12C(3), 1118.

<sup>94</sup> Coumarelos et al, above n 36, 17.

<sup>95</sup> This complexity is perfectly illustrated by the case of *Smith v Smith* [2017] NSWSC 408. This case concerned the abuse of an EPOA by the widow (who herself was an elderly person) of the deceased (who had been suffering from dementia in the last few years of his life). In this case, the validity of the will was not challenged, rather the widow was accused of falling short in her fiduciary duties to the principal under the EPOA. This case required a complex examination of equitable principles regarding not only fiduciary duties, but also receipt of trust money by other beneficiaries to the will.

<sup>96</sup> For instance, in the ACT see *Magistrates Court Act 1930* (ACT) s 257.

<sup>97</sup> *Powers of Attorney Act 2006* (ACT) s 50; while an application by family members following the death of the elderly person, this was demonstrated in *Alcazar-Stevens v Stevens* [2017] ACTCA 12 involving a beneficiary of a will seeking an extension of time from the ACT Supreme Court to apply for a s 50(1) order under s 50(5) of the *Powers of Attorney Act 2006* (ACT).

<sup>98</sup> ALRC Report, above n 1, 178, 218.

<sup>99</sup> *Guardianship and Management of Property Act 1991* (ACT) s 62(2).

## F *The Risks of Instituting Adult Safeguarding Legislation – Balancing Autonomy and Protection*

This paper has argued against a reductionist approach to elder abuse and vulnerability. In that regard, it is important that special attention is given to Chapter 14 of the *ALRC Report* discussing at-risk adults and safeguards that could be put in place to protect them.<sup>100</sup> The fallacy of assuming that only those over 65 need protection, while those under 65 do not, was recognised by the ALRC, who noted a ‘functional’ approach to vulnerability was preferred.<sup>101</sup> How we safeguard those at risk of elder abuse is an important factor in the law’s response to the issue, particularly noting that implementing safeguarding laws without nuance or consideration of the particular individual has the potential to do more harm than good.<sup>102</sup> It is important that, in line with the ALRC’s focus on respecting the autonomy and agency of the elderly,<sup>103</sup> we ensure that we do not take away the ability of elderly people to make informed decisions about their treatment and care.<sup>104</sup>

### 1 *Placing the Focus on the Rights of the Older Person*

Ensuring a person consents to any safeguard measure is critical if the guiding principle of respecting the autonomy of older people is to be upheld.<sup>105</sup> After all, the common law makes the presumption a person has the capacity to consent, with the burden of proof being placed on the party seeking to show incapacity.<sup>106</sup> This principle must be kept in mind when adult safeguarding legislation is drafted. However, with that being said, the ALRC Report notes the problem of respecting a person’s autonomy to the point of not acting within their best interests.<sup>107</sup> It is important that whatever policy change is put in place, it strikes a balance between respecting autonomy and removing an at-risk elderly person from a situation where they are experiencing elder abuse. Importantly it must be recognised, as submissions to the ALRC noted, that abuse can have an impact on a person’s autonomy, meaning even if they may objectively be assessed as having decision-making capacity in regards to refusing a safeguard measure, they may not be expressing their actual wishes.<sup>108</sup>

Hence, if on the one hand there is a principle espousing autonomy and on the other hand protection, how do we respond to the ALRC’s proposed principles relating to adult safeguarding legislation in cases where an older person’s decision-making capacity is compromised?<sup>109</sup> After all, any assessment of capacity is already a protectionist measure where an external party makes a decision as to whether someone has the autonomy to make decisions for themselves.<sup>110</sup> As noted by the ALRC, a balance between protection and respect for an older person’s rights is required.<sup>111</sup> Additionally, the Report goes on to note an older person’s ‘will, preferences and rights’ must be respected and that they have the ‘right to refuse support’, further highlighting the importance of autonomy.<sup>112</sup> Furthermore, there is a risk that in instituting adult protection legislation, the principles guiding child protection legislation are used to inform the drafting of legislation directed at protecting older people. While these

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<sup>100</sup> *ALRC Report*, above 1, 375.

<sup>101</sup> *Ibid* 376.

<sup>102</sup> Harbison, above n 21, 95.

<sup>103</sup> *ALRC Report*, above n 1, 69.

<sup>104</sup> Billy Boland, Jemima Burnage and Hasan Chowhan, ‘Safeguarding Adults at Risk of Harm’ (2013) 346 *BMJ* 30, 32–3.

<sup>105</sup> *ALRC Report*, above n 1, 20.

<sup>106</sup> *Re T (An Adult: Consent to Medical Treatment)* [1992] 4 All ER 649.

<sup>107</sup> *ALRC Report*, above n 1, 395–6.

<sup>108</sup> *Ibid* 396.

<sup>109</sup> *Ibid* 393.

<sup>110</sup> Kelly Purser and Tuly Rosenfeld, ‘Assessing Testamentary and Decision-Making Capacity: Approaches and Models’ (2015) 23(1) *Journal of Law and Medicine* 121, 123.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid*.

principles, in the ACT, do account for the wishes of a child in determining their best interests, their wishes are but one factor of 12 to be considered.<sup>113</sup> This approach could potentially clash with a number of human rights as found in the *Human Rights Act 2004* (ACT), most notably the right to equal recognition before the law.<sup>114</sup> As noted in a report by the Secretary-General of the United Nations to the General Assembly, the analogue to s 12(3) of the ACT *Human Rights Act* (being Article 26 of the International Covenant on Civil and Political Rights) extends to discrimination in any field regulated by public authorities.<sup>115</sup> Conceivably, this could include protection agencies established for elderly people. In this regard, formulating adult protection legislation without appropriate consideration of the autonomy of the older person would potentially be a discriminatory action impacting upon an elderly person's recognition before the law.

Consequently, the best approach must be to balance the potential risks associated with an over-paternalistic approach, and using a person's decision to not receive protection as a means to pursue the principle of autonomy at the expense of their wellbeing.<sup>116</sup> As with assessments of decision making capacity under the *Mental Health Act 2015* (ACT), the starting point must be that an older person understands the decision that they are making, meaning that decision must be respected.<sup>117</sup> There is room in a rights-based approach to undertake some protectionist measures, especially in regards to cognitively impaired older people, but those measures should not be considered without accounting for the views of the older person.

## 2 *Improving Coordination between Organisations in Responding to Elder Abuse*

The ALRC report made a number of recommendations about increased coordination and cooperation between health, medical and legal services, seeking consent from the at-risk adult before commencing action or investigation, and instituting statutory protections from civil liability for those who may report suspected abuse to the authorities.<sup>118</sup> Having a coordinated response is critical, as the current safeguard system is quite disjointed with multiple services and agencies involved in protecting the elderly.<sup>119</sup> A potential factor is the discombobulated responsibilities regarding elder abuse, with the Commonwealth having appropriated power over aged-care facilities, but none over adult protection legislation.<sup>120</sup> It is deeply problematic if people are unaware of what service may be required, or may be reluctant to report abuse for fear of reprisal or straining family relationships if they report elder abuse to the police.<sup>121</sup> For instance, in the presentation of a vulnerable older client a lawyer should recognise if there are capacity issues coupled with a risk of elder abuse. The lawyer may then contact the Public Trustee and Guardian along with other services such as the ACT Disability, Aged and Carer Advocacy Service or community support organisations. The obvious problem with this approach is that the pathway for assistance is ill defined and ultimately reliant on the lawyer's personal knowledge and contacts.

Additionally, while there are multiple legislative definitions of decision-making capacity,<sup>122</sup> it is possible different organisations may assess a person's capacity in different ways – whether

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<sup>113</sup> *Children and Young People Act 2008* (ACT) s 349(1).

<sup>114</sup> *Human Rights Act 2004* (ACT) s 12(3).

<sup>115</sup> Secretary-General, *Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General*, 66<sup>th</sup> sess, UN Doc 66/173 (22 July 2011) 8–9 [28].

<sup>116</sup> Suzy Braye, David Orr and Michael Preston-Shoot, 'Autonomy and Protection in Self-Neglect Work: The Ethical Complexity of Decision-Making' (2017) 11(4) *Ethics and Social Welfare* 320, 326.

<sup>117</sup> *Mental Health Act 2015* (ACT) s 7.

<sup>118</sup> *ALRC Report*, above n 1, 25.

<sup>119</sup> *Ibid* 378–9.

<sup>120</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 101–2.

<sup>121</sup> *Legal Aid ACT*, above n 66, 4.

<sup>122</sup> *Powers of Attorney Act 2006* (ACT) s 9; *Mental Health Act 2015* (ACT) s 7.



from a legal or medical perspective.<sup>123</sup> Furthermore, a service provider, whether they are legal or medical in nature, may only have a short period of time in which to identify abuse and, even if that abuse is identified, often there will not be a chance for that service provider to follow up with the report.<sup>124</sup> Arguably, it is clearly in the best interests of victims of elder abuse for there to be a reporting agency or process that can streamline and coordinate an investigation into an older person's capacity or well-being. This also points towards establishing publicly available and inexpensive legal aid services.

The Age Discrimination Commissioner, Dr Kay Patterson, has recently commented that we should all have an aversion to reports, inquiries or plans that never get implemented.<sup>125</sup> Given the vulnerability of elderly people subject to abuse, the *ALRC Report* rightly points out that it is the duty of all governments, community organisations and those with the power to reform the law to ensure these findings are properly considered and implemented. What has been outlined above represents a broad view of how these findings may be received and implemented. It also suggests that the debate needs to take more cognisance of how the rights of elderly people are impacted by abuse, and that we need to shift the discussion toward a rights-based dialogue. In short, the response to the *ALRC Report* must re-envisage legal services around notions of the civil rights of the older person. Practice must also be informed by the recognition that elder abuse is an infringement of a person's rights and affects them in a variety of ways.

#### IV DEVELOPING A SOCIO-LEGAL MODEL OF SERVICE DELIVERY

Currently, our mode of legal service delivery could be improved to better meet the legal needs and wishes of the elderly, particularly those who are most at risk of suffering elder abuse. This was illustrated by the 2012 Legal Australia-Wide Survey, which indicated those over 65 were less likely to seek help for their legal problems and less likely to receive a favourable resolution than other cohorts in the population.<sup>126</sup> Many elderly people may not understand their rights or are not aware of the availability of legal services to address their problems.<sup>127</sup> Additionally, elderly people from a culturally or linguistically diverse (CALD) background are even less likely than the general elderly population to seek out advice to redress legal issues.<sup>128</sup> This is not unsurprising as cultural attitudes regarding the elderly (or indeed reporting abuse inflicted by family members) can differ wildly between cultures.<sup>129</sup> Furthermore, using the internet or phone services can be a difficult task that prevents those elderly people with a cognitive impairment from seeking advice.<sup>130</sup>

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<sup>123</sup> See Jennifer Moye, Daniel Marson and Barry Edelstein, 'Assessment of Capacity in an Aging Society' (2013) 68(3) *American Psychologist* 158.

<sup>124</sup> Tony Rosen, 'Emergency Medical Services Perspectives on Identifying and Reporting Victims of Elder Abuse, Neglect and Self-Neglect' (2017) 53(4) *Journal of Emergency Medicine* 573, 579.

<sup>125</sup> Kay Patterson, 'Violence, Neglect and Abuse' (Speech delivered at the 2017 UN Open-ended Working Group on Ageing, New York) <<https://www.humanrights.gov.au/news/speeches/violence-neglect-and-abuse-un-oewga-new-york>>.

<sup>126</sup> Coumarelos et al, above n 36, 361. Issues arise using the over 65 metric as an indicator are noted in the paper above.

<sup>127</sup> Christine Coumarelos, Zhigang Wei and Albert Zhou, 'Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas' (Report, Law and Justice Foundation of New South Wales, March 2006), 167.

<sup>128</sup> Susannah Sage-Jacobson, 'Access to Justice for Older People in Australia' (2015) 33 *Law in Context* 142, 150.

<sup>129</sup> E-Shien Chang, Xin Qi Dong, 'Understanding Elder Abuse in the Chinese Community: The Role of Cultural, Social and Community Factors' in the National Academy of Sciences, *Elder Abuse and Its Preventions* (National Academies Press, 2014), ChII.1.

<sup>130</sup> People with Disability Australia, Submission No 104 to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Inquiry into Elder Abuse in New South Wales*, 12 February 2016, 22.

The interwoven and complex nature of all social factors and the legal problems arising from elder abuse necessitates a holistic approach that would take into account the various barriers preventing elderly people from achieving just outcomes. A holistic approach in this area can best be delivered through a socio-legal method of service delivery. This is a method of delivery requiring cooperation across multiple disciplines including legal, law enforcement, health and social organisations and the client themselves.<sup>131</sup> The coordination between a team made up of professionals from a wide variety of disciplines has proven to be an effective means of addressing elder abuse.<sup>132</sup> While this represents a ‘gold standard’ approach, with a fully coordinated team working to address the issues of one elderly client, it often will not be feasible in practice.<sup>133</sup> Often a member of one profession, whether a lawyer, doctor or social worker, will take on a form of ‘accidental case management’, using their own connections with other organisations and agencies to respond to the issues raised by an elderly client.<sup>134</sup> Even with this ad-hoc approach, referrals to different agencies are critical in addressing the complex environmental and social factors associated with elder abuse.<sup>135</sup> In other words, a legal service cannot simply focus on the legal problem at hand in relation to a matter raising the possibility of elder abuse.

It is worth noting from a legal services perspective, if an elderly client presents with a legal issue, it is quite likely abuse has already occurred, or indeed is continuing to occur.<sup>136</sup> This often means that prevention will not often be the primary goal of a legal services provider.<sup>137</sup> In other words, our job in the legal services industry is often to focus on harm-reduction, looking to mitigate the harm a client has already suffered and the risk of further harm in the future.<sup>138</sup> This is obviously further complicated by the ‘hidden’ nature of elder abuse, with there being a large risk that an elderly client may not present at all, especially when coupled with the hidden nature of disadvantage in the ACT. However, this can be mitigated through the provision of outreach services.

### A *The Importance of Outreach Services in a Socio-Legal Model*

It is critical for a socio-legal model of service delivery that outreach services are provided at locations where vulnerable elderly people are likely to be found. This not only has the effect of informing the elderly about the services available, but also helps to break down some of the barriers the elderly may face in accessing services, notably inability to go out to legal services.<sup>139</sup> This also helps to establish relationships with community organisations, further expanding the ability of a legal service to make referrals, enhancing their ability to deliver services consistent with a socio-legal model.<sup>140</sup> Not only can education be provided through

<sup>131</sup> World Health Organisation, ‘Active Ageing: A Policy Framework’ (Report, World Health Organisation, April 2002), 29.

<sup>132</sup> See Adria Navarro et al, ‘Do We Really Need Another Meeting? Lessons from the Los Angeles County Elder Abuse Forensic Center’ (2010) 50(5) *The Gerontologist* 702.

<sup>133</sup> Mark Lachs and Karl Pillemer, ‘Elder Abuse’ (2015) 373 *New England Journal of Medicine* 1947, 1954.

<sup>134</sup> Ibid.

<sup>135</sup> Arlene Groh and Rick Linden, ‘Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse Project’ (2011) 23(2) *Journal of Elder Abuse & Neglect* 127, 144.

<sup>136</sup> See Coumarelos, above n 36, 107 which details a number of reasons why a person delays taking legal action, such as having bigger problems, fear of damaging the relationship they have with the other party, the cost and the stress involved. These are factors which could prevent an older person from taking legal action until it becomes absolutely necessary.

<sup>137</sup> Xin Qi Dong, ‘Elder Abuse: Systemic Review and Implications for Practice’ (2015) 63 *Journal of the American Geriatrics Society* 1214, 1234.

<sup>138</sup> David Burnes, ‘Community Elder Mistreatment Intervention with Capable Older Adults: Toward a Conceptual Practice Model’ (2017) 57(3) *The Gerontologist* 409, 412.

<sup>139</sup> People with Disability Australia, above n 130, 7.

<sup>140</sup> Ashurst Australia, above n 15, 26.

outreach, but a lawyer can also be present to provide limited legal advice or to facilitate a further session if needed.<sup>141</sup>

Once a client does engage a legal service provider, it is important that services are in place or easily accessible, so as to address the social and environmental problems accompanying the legal issue at hand. One way of doing this is through embedding a social worker in the legal service, helping the client to understand the advice given and placing the lawyer in a better position to understand the multitude of issues that have led the client to seek legal advice.<sup>142</sup> This is not a unique concept, or indeed a modern one, with research going back over 35 years indicating the benefits of having social workers and lawyers operate in tandem.<sup>143</sup> A vulnerable older person may have experienced forms of social exclusion or marginalisation in the past, making them reluctant to access a legal service.<sup>144</sup> A social worker can help bridge this gap, connecting the client with the lawyer and ensuring the client's problems are understood. The social worker would also be able to follow-up with the client, ensuring that they understood any advice given and to make sure that they are 'doing okay'.

The ultimate goal of a socio-legal model of service delivery is to break down the barriers faced by older people in accessing justice. Once those barriers have been broken down, it then becomes possible to provide them with a service that addresses more than just the legal problem at hand. Outreach and education are vital factors in achieving the first goal while a multi-disciplinary approach that coordinates legal, health and social services is critical to achieving the second. Use of this approach has evolved out of discussion of elder abuse in relation to human rights, a recognition of elder abuse as a violation of many of the rights an elderly person is entitled to enjoy.<sup>145</sup> In fact, a socio-legal approach rather neatly relates to discussion of respecting a person's equality before the law.<sup>146</sup> In this sense, a socio-legal model is a critical aspect of a rights-based approach, treating the elderly person as more than simply a legal problem and involving them in the resolution of their issues.

## V HOW LEGAL AID SERVICES ARE RESPONDING TO THE CHALLENGES OF ELDER ABUSE

The responses to the *ALRC Report*, such as those outlined above, and a socio-legal model of service delivery, detail how the 'big picture' response to elder abuse may take shape. Legislative reform and national coordination regarding CLE are initiatives that will take time to develop and implement, even when considering the already present infrastructure provided by legal aid commissions and community legal centres. For instance, in Victoria and Queensland, seniors' rights services have been established with a mind to protecting and respecting the rights and dignity of older people in providing legal services.<sup>147</sup> These services provide a model for legal assistance that can be replicated across the country either by legal aid commissions or independent providers, particularly with a focus on rights-based delivery. In that regard, over the last 12 months Legal Aid ACT has been investigating how best to provide services to the elderly community in the ACT ensuring their rights are acknowledged and respected.

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<sup>141</sup> Ibid 24.

<sup>142</sup> Ibid 23.

<sup>143</sup> See Heather Craige, 'The Practice of Social Work in Legal Services Programs' (1982) 9(2) *Journal of Sociology & Social Welfare* 307.

<sup>144</sup> Elizabeth Peel, Helen Taylor and Rosie Harding, 'Sociolegal and Practice Implications of Caring for LGBT People with Dementia' (2016) 28(10) *Nursing Older People* 26.

<sup>145</sup> Sage-Jacobson, above n 128, 156–7.

<sup>146</sup> Ibid 157.

<sup>147</sup> See Senior Rights Victoria, *Your Rights – Elder Abuse*, Senior Rights Victoria <<https://seniorsrights.org.au/your-rights/>>.

For legal aid service providers such as Legal Aid ACT, it is critical that the particular problems surrounding service delivery to those suffering elder abuse are clearly identified. This is further highlighted by the demographics of the ACT, particularly in relation to the hidden nature of disadvantage in the ACT.<sup>148</sup> This ultimately places more emphasis on the outreach and social service referral aspects of legal service delivery. These services not only help to 'shine a light' on hidden victims, but also serve to empower an elderly person to assert any rights that have been violated due to the occurrence of elder abuse.

### A *Instituting Health Justice Partnerships and Outreach Services*

One way in which we can reach the most vulnerable in our community is through instituting health justice partnerships. These types of partnerships were originally seen in the United States, where the aim was to provide a better means to address the social factors surrounding illness, especially in regards to vulnerable patients.<sup>149</sup> It is critical for these partnerships to be successful that there is input from all parties involved, including the clients themselves, with a particular focus on barriers to justice that they face.<sup>150</sup> These partnerships ultimately allow for a greater awareness of legal issues for health practitioners and indeed awareness of medical issues for lawyers.<sup>151</sup> Having lawyers present at the hospital helps to alleviate some of the issues that may prevent people from accessing a lawyer, whether it is the stress associated with seeking legal assistance or limited mobility.<sup>152</sup> Health justice partnerships also allow for warm referrals, as information can be taken back to a lawyer or community worker, providing them with a 'head start' before the client comes to see them.<sup>153</sup>

In the context of elder abuse,<sup>154</sup> health justice partnerships facilitate medical staff to take action once it is recognised that a vulnerable elderly person may be at risk of abuse while they are in the hospital. The medical staff can then refer the matter to a lawyer or representative from a legal service present at the hospital, who can then provide information back to the legal service allowing a lawyer to be briefed and get in touch with the client. This cooperation allows for early intervention by legal services, preventing issues from arising and moving the focus from harm minimisation to harm prevention. Furthermore, these are individuals who would likely be considering an assets for care arrangement, providing an opportunity to provide them with advice on the potential consequences.

Currently, for example, Legal Aid ACT runs outreach sessions at the Canberra Hospital, providing a way for patients, families or visitors to ask for legal information or limited advice, or even to be booked for a further interview at a later time. The program was initiated in August 2017, and recorded 135 client interactions as of December 2017. Of these 135 interactions, 54 were referred to make a further appointment with Legal Aid or to an external organisation. Additionally, the largest age group of individuals seen were those over 56 years of age. While this may be reflective of the higher likelihood of hospitalisation of elderly people, especially those with chronic diseases,<sup>155</sup> it also illustrates why hospitals and other health care facilities

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<sup>148</sup> See Tanton, Miranti and Vidyattama, above n 18.

<sup>149</sup> Fiona Hum and Jennifer Faulkner, 'Medical-Legal Partnerships: A New Beginning to Help Australian Children in Need' (2009) 17 *Journal of Law and Medicine* 105, 105–6.

<sup>150</sup> Susan Ball, Cindy Wong and Liz Curran, 'Health-Justice Partnership Development Report 2016' (Report, Victorian Legal Services Board and Commissioner, July 2016) 3.

<sup>151</sup> Edward Paul et al, 'Medical-Legal Partnerships: Addressing Competency Needs Through Lawyers' (2009) 1(2) *Journal of Graduate Medical Education* 304, 305.

<sup>152</sup> Liz Bishop, Hana Shahkhan and Bebe Loff, 'A Hospital-Based Patient Legal Clinic' (2016) 23 *Journal of Law and Medicine* 678, 682–3; Elizabeth Tyler, 'Medical-Legal Partnership in Primary Care: Moving Upstream in the Clinic' [2017] *American Journal of Lifestyle Medicine* (forthcoming).

<sup>153</sup> Bishop, Shahkhan and Loff, above n 152, 679.

<sup>154</sup> *Ibid* 680.

<sup>155</sup> Population Health Division – ACT Health, 'Health and Wellbeing of Older Persons in the Australian Capital Territory' (Health Report No 63, ACT Government, May 2016) 31–2

in the ACT are appropriate places for establishing a legal presence to combat elder abuse. This partnership is in its infancy but, as time goes on, a closer relationship is being built, allowing for greater cooperation in the provision of a socio-legal service. Importantly, this partnership allows legal advice and assistance to be provided at the early stages of a matter when a client presents to a hospital rather than the legal service itself.<sup>156</sup> While not explicitly part of any plan to combat elder abuse, outreach at the Canberra Hospital serves to connect elderly clients with legal services at a stage when it is possible to prevent legal issues, such as those involving EPOAs, before they arise.

Additionally, Legal Aid ACT has partnered with Libraries ACT to not only place lawyers and staff at Libraries across the ACT, but also to package Legal Aid ACT information so it can be provided to clients of the Home Library Service (who have 300 house-bound people to whom they deliver library services).<sup>157</sup> While only a small step, those who are serviced by the Home Library Service will often be vulnerable individuals with limited mobility and often a small support network.<sup>158</sup> This approach can help bring 'hidden' victims out of the dark and connect them with Legal Aid ACT. Furthermore, noting the difficulties in simply using age as a risk factor for elder abuse, this service will help to connect Legal Aid ACT with a greater number of people who may be at risk of elder abuse rather than simply servicing those over 65.

### B *Providing Social Liaison Support to Vulnerable Clients*

As part of the socio-legal model of service delivery, it is optimal that a social worker is present and embedded within a legal service to provide non-legal support. Currently Legal Aid ACT provides social support workers for Aboriginal and Torres Strait Islander clients, clients from a culturally and linguistically diverse background and clients who are suffering from family violence. These liaison officers are an invaluable resource to Legal Aid ACT, helping to connect clients not only with in-house lawyers but also with other community organisations. These officers often work with some of the most vulnerable clients who come to Legal Aid ACT, and indeed clients who could be at a greater risk of elder abuse than the general population.<sup>159</sup> Ensuring these liaison officers are available to elderly clients is critical in providing a holistic service which is sensitive to attitudes that may cause or allow the perpetration of elder abuse. This is especially important in the context of Aboriginal and Torres Strait Islander clients, where there are unique issues regarding elder abuse, because an Indigenous liaison officer can break down some of the barriers faced by older people in the Aboriginal and Torres Strait Islander community from accessing legal services.

### C *Expanding Legal Aid Services in the Future*

Early resolution of disputes through a structured mediation process is the most obvious area to next reform. Legal aid commissions have shown to address elder abuse an approach that draws from family dispute resolution (FDR) services, especially if the signs of elder abuse are picked up early, provides a non-confrontational means of resolving the dispute.<sup>160</sup> Legal Aid ACT, as is the case with all legal aid commissions, has a large amount of experience in running FDR conferences, and this experience can certainly be applied in the elder abuse sphere. The

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<<https://health.act.gov.au/sites/default/files/Health%20and%20Wellbeing%20of%20Older%20Persons%20in%20the%20ACT%20Report.pdf>>.

<sup>156</sup> Dong, above n 137, 1234.

<sup>157</sup> This includes a bookmark containing a checklist with various factors which may indicate elder abuse such as lack of control over one's money, medication or safety.

<sup>158</sup> ACT Government, *Home Library Service* (4 January 2018) ACT Government Libraries <[https://www.library.act.gov.au/library\\_services/home-library-service](https://www.library.act.gov.au/library_services/home-library-service)>.

<sup>159</sup> Legal Aid ACT, above n 20, 14.

<sup>160</sup> *Ibid* 21.

use of FDR-like conferencing in elder abuse matters would likely be best placed as an early intervention service.<sup>161</sup> This situation might arise where there is a dispute over assets or care arrangements before any tangible harm has occurred. Early intervention would also serve to remove one of the major barriers to justice faced by elderly people – the fear of breaking down family relationships.<sup>162</sup> The complex nature of these family relationships often requires a ‘delicate’ approach that cannot be provided in the courtroom. Moreover, mediation and dispute resolution can be tailored to meet the needs of all parties attending.<sup>163</sup> Arguably, it is also important that the conference is not used as a method of assessing capacity, as that could be used to unduly influence not only the mediation session but the relationship between the elderly person and the other party moving forward.<sup>164</sup> In this sense, FDR-like conferencing would best serve older adults who have decision-making capacity, which would fit in with its purpose as an early intervention service.<sup>165</sup> This would allow for an elderly person’s views to be reflected in any decision or solution reached, which is vital in ensuring their rights are appropriately protected.

Finally, it is important to acknowledge that the formal processes of obtaining legal assistance can be a specific barrier for elderly people. Older people can often be in a situation where they are asset-rich, as they may own an unencumbered property, yet income-poor, preventing them from accessing the services of a private lawyer.<sup>166</sup> This is problematic, as in cases of elder abuse, while the older person may own the property, they may not have control over it, thus preventing them from using that asset to fund private representation.<sup>167</sup> Possible options include relaxing the means tests employed by legal aid commissions, and providing more flexibility in how they are applied to older people who may own property but who are suspected of being affected by elder abuse.<sup>168</sup> With Legal Aid ACT approving 28 grants of 73 applications received from those over 65 in 2016-17,<sup>169</sup> and the majority of these applications being rejected on the means test,<sup>170</sup> this option should be given serious consideration, including possible amendments to legal aid commission legislation across the country.

## VI CONCLUSION

Legal aid commissions will be at the forefront of Australia’s response to elder abuse. Vulnerable and disadvantaged people form the core clientele of legal aid. The *ALRC Report* shows that the justice system and its attendant institutions are not yet well designed to meet the legal needs of the elderly community, and their recommendations for a coherent national response to elder abuse is timely. The innovative work performed by legal aid commissions, as has been illustrated in this paper by the approach taken in the ACT, shows that solutions can be found to enhance the accessibility of legal assistance to victims of elder abuse. In particular, whether through outreach services or clear lines of referral from social services to legal services providers, early identification of people at risk of abuse is crucial to a successful provision of legal assistance to the elderly in our community. Legal aid services must find ways to cross the gap that can be created by age and isolation, so that the often hidden nature of elder abuse is exposed.

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<sup>161</sup> Ian Fletcher, ‘Can Specialised Family Mediation Prevent Elder Abuse in Australia’ (Paper presented at the Australian Mediation Conference, Sydney, 2012) 2.

<sup>162</sup> Samra, above n 50, 11.

<sup>163</sup> Gemma Smyth, ‘Mediation in Cases of Elder Abuse and Mistreatment: The Case of University of Windsor Mediation Services’ (2011) 30 *Windsor Review of Legal and Social Issues* 121, 129–30.

<sup>164</sup> Lise Barry, ‘Elder Mediation’ (2013) 24 *Australasian Dispute Resolution Journal* 251, 254–5.

<sup>165</sup> Fletcher, above n 161, 2.

<sup>166</sup> Productivity Commission, above n 46, 1020.

<sup>167</sup> Samra, above n 50, 20.

<sup>168</sup> *Ibid* 22.

<sup>169</sup> From internal numbers of Legal Aid ACT.

<sup>170</sup> Samra, above n 50, 20.

Clearly, legal aid commissions are well placed to develop better platforms for delivering services to victims of elder abuse. They already have extensive experience providing community legal education and specialist service to vulnerable and disadvantaged people – including Aboriginal and Torres Strait Islanders and people from culturally and linguistically diverse communities. However, the ability to improve specialised service to elderly people, or indeed to relax means tests, is related to the capacity of legal aid commissions to provide that service. This is not simply a question of redirecting resources, but is fundamentally a challenge to government to make the necessary investment in legal aid. Capacity is necessarily tied to funding, and the battles legal aid commissions and community legal centres have had with insufficient funding are well documented.<sup>171</sup> Additional funding would allow specialised service to better redress the disadvantaged who are faced by the often hidden nature of elder abuse. With the national spotlight on elder abuse becoming ever brighter, it is hoped Federal and State and Territory governments will quickly respond to the burgeoning needs of the most vulnerable and disadvantaged ageing population and, most significantly, resituate strategies around a new notion of elder rights.

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<sup>171</sup> See Productivity Commission, above n 46.





## A CRITICAL COMMENTARY ON THE 2017 ALRC ELDER ABUSE REPORT: LOOKING FOR AN ETHICAL BASELINE FOR LAWYERS

MARGARET CASTLES\*

*In Australia, the ethical rules for lawyers faced with clients exhibiting signs of mental incapacity or otherwise vulnerable and at risk of abuse are neither consistent nor clear. Lawyers cannot freely act to protect vulnerable clients without risking an unethical breach of client confidence, a position that sits in stark contrast to commonly understood moral norms in the community. The 2017 Australian Law Reform Commission Elder Abuse Report seeks a community response to elder abuse. In so doing it opens discussion for a reconceptualisation of some of the underlying assumptions upon which legal ethical rules in Australia are based. Further, it provides the opportunity to form a more solid philosophical basis for lawyers to develop an understanding of the competing interests between human rights and the protection of the vulnerable at the heart of this complex area.*

In May 2017, the Australian Law Reform Commission ('ALRC') published its report *Elder Abuse—A National Legal Response*.<sup>1</sup> The report addresses the legal and social issues raised by the increasing number of older people in Australia,<sup>2</sup> and the potential for older people to be the subject of abuse for multiple reasons and from different sources.<sup>3</sup> The complexities of the subject matter and the diverse circumstances in which elder abuse can occur, are illustrated by the range of contexts discussed in the report. Elder abuse can arise in the provision of financial, medical, care related, physical, housing, legal, family, administrative, social and community services. It can be 'casual' abuse that arises from misconceptions about the needs and potential of older people. It can arise within families or within service provision. It can be entrenched by legal, systemic, administrative, social and community standards. Elder abuse requires a whole community response, and the report considers the issues relating to elder abuse from a range of social perspectives and institutions.<sup>4</sup>

Lawyers come into regular contact with clients who fall into the ambit of the ALRC report. Lawyers are rightly concerned about mental capacity in the case of elderly clients, which can be coupled with concerns about undue pressure and influence from family and others. These concerns may or may not arise alongside concerns about physical, mental, or financial safety and wellbeing. In their professional capacity, lawyers are not acting as part of the broader community and must work within the specific boundaries of legal ethical guidelines.<sup>5</sup> This constrains the actions that they are at liberty to take in relation to their clients. To date, the various legal ethical rules that guide lawyers in this complex area have been inconsistent and often opaque. Lawyers also operate in a legally structured framework; their role *vis-à-vis* clients is to manage legal problems or legal outcomes. It is not their role to be concerned with broader social, community, financial or other matters.<sup>6</sup>

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<sup>1</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 17.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid* 18.

<sup>4</sup> *Ibid* 21.

<sup>5</sup> Margaret Castles, 'Mind the Gaps: Ethical Representation of Clients with Questionable Mental Capacity' (2015) 18(1) *Legal Ethics* 24, 31–2.

<sup>6</sup> This is an accurate reflection of lawyers in their traditional advisory role. It does not reflect ideas like 'ethics of care' lawyering in which a lawyer would indeed consider the broader social and community implications of a client's situation. Lawyers do undoubtedly think beyond basic legal advice and indeed

After grappling with the practical challenges of elder abuse, the ALRC recommended reforms that have philosophical, ethical and practical implications for legal practitioners. The purpose of this article is to critically analyse these proposals and evaluate their impact on lawyers aiming to achieve access to justice for clients with capacity issues. I will do this in three stages and much of this discussion will refer to an earlier article that compared approaches on client capacity between jurisdictions within Australia and internationally.<sup>7</sup> In Part One, I will briefly revisit and summarise the current ethical position of lawyers in relation to managing clients with capacity issues. I will review more recent ethical guidelines that have been developed in Australia, and give particular consideration to the extent to which current guidelines and ethical regimes conceptualise ideas of autonomy, dignity and protection. In Part Two, I will consider the nature and impact of the reforms proposed by the ALRC on the current position for lawyers. In Part Three, I will pose a question: If the reforms are implemented, what will be the implications for lawyers in philosophical and practical terms?

## I THE CURRENT ETHICAL POSITION

Older people do not occupy a special or distinct legal position. The rule of law, and principles of legal ethics apply across the community. Older people may exhibit a cluster of characteristics that expose them to abuse and vulnerability,<sup>8</sup> and the same can be said for people with mental incapacity. However this does not mean that they should be treated 'differently', individually or as a class, which would itself constitute a breach of human rights.<sup>9</sup> This is explicitly identified in the ALRC report, which frames elder abuse as a human rights issue grounded in the idea that dignity and autonomy are the inalienable rights of every human.<sup>10</sup> However, the report also points out that whilst older people can be exposed to a cluster of risks, their rights are not well defined.<sup>11</sup>

The general human rights approach of equal treatment can be eclipsed by community perceptions of the elderly as a specific vulnerable class,<sup>12</sup> perhaps not unlike children. This in turn can result in benign paternalism or best-interests decision making,<sup>13</sup> which consequently informs law, policy and practice around older people.<sup>14</sup> Ideas of independence, self-fulfilment and dignity can be overlooked when focusing on immediate needs such as physical care, access to resources, health care, and accommodation.<sup>15</sup> As older or otherwise vulnerable people may experience multiple challenges, it is easy to assume that merely being older somehow defines personhood.<sup>16</sup> This gives rise to the concern that underlies the ALRC report: the general belief that the human right to autonomy and self-determination must be necessarily balanced against the physical, care related, and social 'best interests' of the person.<sup>17</sup> This idea of protection often slides into paternalistic intervention which fails to recognise that the subject

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consider the impact of legal advice on the client's broader interests. However, we are still some way from accepting an ethics of care model as the norm in legal practice. See Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 49.

<sup>7</sup> Castles, above n 5.

<sup>8</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 113; Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer International Publishing, 2017) 12.

<sup>9</sup> Purser, above n 8, 6.

<sup>10</sup> Australian Law Reform Commission, above n 1, 48.

<sup>11</sup> *Ibid* 49.

<sup>12</sup> Purser, above n 8, 13.

<sup>13</sup> The Law Council of Australia, in its submission to the ALRC, provides four examples of decisions made against the expressed preferences of older people in the belief that they were in their best interests. See Law Council of Australia, Submission No 61 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, 17 August 2016, 9–10.

<sup>14</sup> Castles, above n 5, 37.

<sup>15</sup> Australian Law Reform Commission, above n 1, 76–7.

<sup>16</sup> The ALRC notes that pervasive, benign ageism assumes incompetence in the elderly and that this in turn has a strong normative influence in society. See *ibid*.

<sup>17</sup> *Ibid* 69.

of the decision should be involved in decision making, and that their needs go beyond day to day physical requirements. Benign or ignorant paternalism, motivated by the perceived best interests of the elder person, is pervasive and can result in cultural blindness to the foundational rights of older people. This perception permeates society, and lawyers are no exception.<sup>18</sup>

Legal ethical principles address two key questions that arise for lawyers encountering client capacity and client abuse:

1. What should a lawyer do if their client's capacity to give instructions to the lawyer is in doubt? and;
2. When can and should a lawyer breach their duty of confidence to a client in order to divulge lack of capacity or report abuse in order to protect the client's best interests?

The first challenge rests partly on the concept of agency – the principle that the lawyer as agent can only give effect to the client's informed instructions. It also rests on the concept of dignity – that lawyers must act on the client's expressed will, not supplant it with some other idea of what is best for the client.<sup>19</sup> The second challenge arises out of the strict provisions surrounding lawyer-client confidentiality. Absolute primacy is given to confidentiality between lawyer and client. This rests on the presumption of exclusivity between lawyer and client, and on the client's entitlement to privacy and confidence. It can only be prised open in specific and very narrowly defined circumstances.<sup>20</sup>

The peak professional body in Australia, the Law Council, has issued Australian Solicitors' Conduct Rules ('ASCR'), which most states and territories in Australia have adopted with only minor variation. These rules specify that lawyers must act in the client's best interests;<sup>21</sup> that lawyers must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices;<sup>22</sup> and that a lawyer must follow a client's lawful, proper, and competent instructions.<sup>23</sup> The rules go on to state that a lawyer must not disclose any information confidential to the client that is acquired during the engagement with the client unless the client consents,<sup>24</sup> and the solicitor does so for the sole purpose of avoiding the probable commission of a serious criminal offence<sup>25</sup> or for the purpose of avoiding imminent serious physical harm to the client or another person.<sup>26</sup> Explicit application of these principles means that a lawyer cannot take any action on behalf of a client who does not give instructions that are prima facie competent, and that if the lawyer believes the client is incompetent, they are barred by prohibition from breaching the confidence of the client by telling anyone else about it. This might mean that the lawyer believes the client is incompetent and at risk but is not able to divulge that information to anyone in order to protect the client. It also means that if the client is competent, the lawyer is bound to follow their instructions, however much the lawyer believes they are not in the client's best personal, social, financial, or other interests.<sup>27</sup>

Mindful of these internal tensions of principle, law societies in all states in Australia have looked for a way to guide lawyers through this very complex situation. Progress has been slow.

<sup>18</sup> The Law Council of Australia's commentary on the Solicitors' Conduct Rules specifically identify 'old age' as a possible indicator of lack of competency, along with mental illness, undue influence and fraud. See Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (at August 2013) r 8.1.

<sup>19</sup> For example, by allowing their own view of what is best conflict with the client's stated view.

<sup>20</sup> Law Council of Australia, above n 18, r 9.

<sup>21</sup> *Ibid* r 4.1.1.

<sup>22</sup> *Ibid* r 7.1.

<sup>23</sup> *Ibid* r 8.1.

<sup>24</sup> *Ibid* r 9.2.1.

<sup>25</sup> *Ibid* r 9.2.4.

<sup>26</sup> *Ibid* r 9.2.5.

<sup>27</sup> Whilst lawyers may only act on client instructions, they can of course counsel clients about the implications of, or on, other people or interests.

Writing on this topic three years ago, only two states in Australia, South Australia ('SA') and New South Wales ('NSW'), had specific ethical guidelines for working with clients with incapacity issues.<sup>28</sup> Guidelines introduced in SA in 2012 proposed a strong human dignity approach,<sup>29</sup> limiting the role of lawyers to support and advise, but recommending against any paternalistic intervention in the case of questionable capacity.<sup>30</sup> They proposed that a lawyer could never breach client confidence without express instructions, even to achieve protective measures for a client losing capacity, and that a lack of instructions would inevitably result in the lawyer being disabled from acting further for the client. This also meant that the lawyer was not permitted to reveal the need for protection. Guidelines introduced in NSW in 2003 took a more paternalistic approach.<sup>31</sup> Prompted by the practical reality that there would be cases where a lawyer cannot obtain instructions and has legitimate concerns about the client's welfare, the 2003 NSW guidelines envisaged lawyers breaching confidence in order to seek some form of intervention for a client exhibiting incapacity, and also allowed lawyers to personally initiate this process.<sup>32</sup> The guidelines updated in 2016 place greater emphasis on the balance of confidentiality and protection but continue to reflect the common law position that intervention is an option if there is no reasonable alternative.<sup>33</sup> Both sets of guidelines are grounded in ethical principles, but result in diametrically opposed outcomes. The SA guidelines took a clear view on the absolute nature of client autonomy and the prohibition on lawyers breaching confidence, even in perceived best interest, while the NSW guidelines looked to the need to protect vulnerable clients against disadvantage, even if there was some risk to lawyer-client confidentiality. This position is illustrated in the case *R v P*,<sup>34</sup> where the client lacked any community support, the lawyer was familiar with the client's circumstances and there was no reasonable alternative available to the lawyer to seek protection for the client. The intersection of rules and reality reflects the dilemma for lawyers trying to do the best for the clients they are dealing with.<sup>35</sup> Neither set of guidelines approach the matter lightly. Both acknowledge that capacity can be decision specific and they contain detailed and informative guidance on determining capacity, maximising the client's capacity to be involved in decision making.

More recently, Victoria and Western Australia ('WA') introduced detailed guidelines,<sup>36</sup> and the Law Society of Queensland has endorsed guidelines prepared independently.<sup>37</sup> These guidelines also reflect divergent approaches. The Victorian guidelines appear to adopt a position similar to the SA guidelines, particularly by acknowledging that if a client cannot give instructions due to incapacity, the lawyer may have to cease acting for them.<sup>38</sup> However, the guidelines then veer towards the NSW approach suggesting that only as a very last resort should lawyers make an application for guardianship or protection of the client.<sup>39</sup> The WA guidelines are limited to detailed practical advice without explicit discussion of human rights principles.<sup>40</sup> The Queensland guidelines are significantly more conservative, suggesting

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<sup>28</sup> Castles, above n 5, 29–30.

<sup>29</sup> Law Society of South Australia, *Client Capacity Committee: Statement of Principles with Guidelines* (2012).

<sup>30</sup> Castles, above n 5, 30.

<sup>31</sup> Law Society of New South Wales, *When A Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2016).

<sup>32</sup> Castles, above n 5, 29.

<sup>33</sup> Law Society of New South Wales, above n 31, 12; *R v P* [2001] NSWCA 473, cited in Law Society of New South Wales, above n 31.

<sup>34</sup> *Ibid.*

<sup>35</sup> Purser, above n 8, 3.

<sup>36</sup> Law Institute of Victoria, *Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity is in Doubt* (at October 2016); Law Society of Western Australia, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (at 2016).

<sup>37</sup> Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (May 2015).

<sup>38</sup> This advice relates specifically to situations where the lawyer believes a medical assessment is needed to determine capacity but the client refuses. See Law Institute of Victoria, above n 41, 5.

<sup>39</sup> *Ibid.* 6.

<sup>40</sup> Law Society of Western Australia, above n 36.

extreme caution before involving third parties without client consent.<sup>41</sup> The different state guidelines, to varying degrees, all advocate for respectful, patient, careful and, if necessary, repeated engagement with the client in order to maximise their capacity to make choices. With the exception of SA and Queensland, this often involves suggesting medical assessment, inviting the client to include relatives in future dealings with the lawyer, or involving other supportive agencies or resources.

The SA and Queensland guidelines take a consistently robust approach to breach of confidence. Both demand informed client consent before any breach of confidence, and in the absence of consent, state that the lawyer should cease to act for the client.<sup>42</sup> This is particularly problematic given the interlinking ethical responsibilities of legal advisors, who are tasked with the triple goals of zealously pursuing client interests (as stated by the client not presumed by the lawyer),<sup>43</sup> ensuring that the clients are fully advised in order to provide meaningful instructions,<sup>44</sup> and respecting confidence.<sup>45</sup> Guidelines that recommend advising an elderly client to seek medical assurance of their capacity to avoid things ‘going wrong’ in the future uniformly fail to require the client to be advised that one possible outcome of this assessment is a finding that they are not legally capable, with consequential removal of their autonomy. Lawyers in any other context would be ethically obliged to alert clients to possible negative outcomes of proposed action.<sup>46</sup> Elder clients should be afforded the same care. The disparity between approaches well illustrates the dilemma addressed by the ALRC in its report. Conversely, the conclusion that the lawyer must cease acting if consent is not forthcoming, rather than seeking to protect the client, can expose vulnerable clients without community or other support (as in the case of *R v P*) to significant risk. Respecting the ethical concept of absolute confidentiality might be at the expense of wellbeing, safety, protection, and quality of life. The ALRC report acknowledges this dichotomy, noting that different views of human rights and the practical impact of low level abuse on key human rights will influence where the balance falls in this situation.<sup>47</sup>

It is notable that all of these guidelines fail to reiterate the position stated by the Law Council of Australia’s ASCR, which explicitly limit when a lawyer can breach client confidence to circumstances where the client is at risk of imminent serious physical harm,<sup>48</sup> or to prevent the probable commission of a serious criminal offence.<sup>49</sup> At present, psychological or financial harm are expressly excluded. There is no provision for breaching confidence if the solicitor has reason to doubt the client’s capacity and believes they need protection other than from serious physical harm.<sup>50</sup> The much lower benchmarks set by Australian law societies (other than in SA and Queensland) demonstrate the weighing of best interests over autonomy that is not consistent with the national statement of ethics on client confidence.

Whilst all of the guidelines propose measures for maximising client participation in decision making, none go to the lengths that have been introduced in the UK which take a different philosophical approach. Underlying the UK position is the maximisation of client capacity to make choices within the lawyer-client relationship by insisting on an evidence-based assessment of likely client preferences in the event that paternalistic decision making is

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<sup>41</sup> Queensland Law Society, above n 47, 32.

<sup>42</sup> Ibid 43–6.

<sup>43</sup> Law Council of Australia, *Australian Solicitors’ Conduct Rules* (24 August 2015) rr 4.1.1, 4.1.3.

<sup>44</sup> Ibid rr 7.2, 8.1.

<sup>45</sup> Ibid r 9.1.

<sup>46</sup> Margaret Castles, ‘Barriers to Unbundled Legal Services in Australia: Canvassing Reforms to Better Manage Self-Represented Litigants in Courts and in Practice’ (2016) 25(4) *Journal of Judicial Administration* 237, 249.

<sup>47</sup> Australian Law Reform Commission, above n 1, 397 [14.102].

<sup>48</sup> Law Council of Australia, above n 43, rr 4.1.1, 9.

<sup>49</sup> Ibid r 9.2.4.

<sup>50</sup> In its call for submissions for the purpose of reviewing the current rules, the Law Council notes concern about the limits to rule 9 and seeks submissions on expanding the definitions. See Law Council of Australia, *Review of the Australian Solicitors’ Conduct Rules* (1 February 2018) 44–5.

inevitable. This is the UK approach across professions and services.<sup>51</sup> By contrast, in Australia, capacity is still primarily seen as an all or nothing proposition. This approach can be seen in the recent call for submissions on the revision of the Australian Model Rules of Professional Conduct by the Law Council of Australia.<sup>52</sup> Discussing the current position on the ethical management of clients with questionable capacity, the document suggests that ‘a client incapable of managing his or her own affairs is likely, generally, to be incapable of giving instructions ...’.<sup>53</sup> This simplistic assumption reinforces the binary approach of incapacity as all or nothing. It gives little attention to empowering and supporting decision making for clients who have nuanced needs and capacities.

The various positions in Australia at this time all rest on the same broad ethical values of confidentiality, client autonomy and residual protection from harm but emphasise different balances between these interests. We still lack a clear statement of principle around balancing autonomy and protective best interests. Very real personal, social and legal dilemmas arise when a person is not legally competent, but not legally protected. Lawyers, acting as lawyers, may not be able to ignore the plight of a client suffering abuse, nor leave a vulnerable and incapable client unprotected. Lawyers have a duty of confidentiality and loyalty, but when that duty conflicts with concerns that a client is at risk, the issues are complex and not helpfully solved by a rigid statement of principle.

## II ALRC REFORMS

The 2017 ALRC report and recommendations bring new depth to this discussion. The ALRC report spotlights the dilemma lawyers can face when the threatened wellbeing or safety of a client conflicts with the lawyer’s duty to respect the client’s autonomy. As a member of the community, the lawyer may feel a moral imperative to take steps to protect a client at risk of abuse. However, legal ethical rules do not reflect the community’s moral position. They restrain the lawyer from acting as their instincts might suggest. ASCR rule 9 specifies the only circumstances when a lawyer can breach the confidence of a client: to prevent the probably commission of a serious criminal offence,<sup>54</sup> or to prevent imminent serious physical harm to the client.<sup>55</sup> These exceptions will apply in extreme circumstances, and to that extent align with the ALRC benchmark that only serious abuse triggers intervention. But they set a high benchmark that will not catch instances of minor financial, psychological, and freedom of choice abuse that older adults are also commonly exposed to. This underlines blurred lines around the meaning of human dignity. The very capacity to exercise autonomy and agency may itself be facilitated by the provision of more basic needs such as care, housing, finances, health and safety. A high threshold may overlook the value of supporting quality of life at a less extreme level in order to facilitate a dignified and autonomous life.<sup>56</sup>

The ALRC report is framed in terms of elder abuse. This can take many forms: physical, emotional, psychological, legal, financial and social.<sup>57</sup> Issues of mental capacity that inhibit the ability to make decisions can coincide with, and may be catalysts for, abuse. Mental capacity is not axiomatically related to concerns of abuse, although it may raise concerns about the client’s capacity to care for themselves and determine their best interests. Moreover, mental frailty, lack of confidence, dependency and vulnerability may affect a person’s willingness and capacity to make decisions freely. Abuse is not necessarily linked to mental capacity, but elder people are vulnerable to both.

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<sup>51</sup> Castles, above n 5, 43.

<sup>52</sup> Law Council of Australia, above n 50.

<sup>53</sup> Ibid 36, quoting *AEW v BW* [2016] NSWSC 905, 915 [22], [25] (Lindsay J).

<sup>54</sup> Law Council of Australia, above n 43, r 9.2.4.

<sup>55</sup> Ibid r 9.2.5.

<sup>56</sup> Australian Law Reform Commission, above n 1, 51–2 [2.91]–[2.93].

<sup>57</sup> The ALRC Report provides a comprehensive list of risk factors. See Australian Law Reform Commission, above n 1, 18, 20–1.

The ALRC report focuses on older people. However, founded as it is on human rights principles, the report is explicit that its premises apply to any adult experiencing abuse. It necessarily draws on extensive discussion of mental capacity in relation to older people.<sup>58</sup> However, the ALRC report specifically recognises that its recommendations are equally applicable to any adult person. The ALRC report adopts the World Health Organisation definition of elder abuse as ‘a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.’<sup>59</sup> It notes that a confluence of factors including dependency, poor health, mental disorders including depression, low income or social economic status, cognitive impairment and social isolation are typical risk factors for abuse of any person, but are prevalent in the case of the older population.<sup>60</sup>

Recognising the lack of consistency or coverage of the protections for older people, the ALRC proposes the development of comprehensive and cogent adult safeguarding arrangements to provide accessible, consistent and nuanced protection. In the context of elder abuse, these protective measures apply equally to any adult. However, the report also makes a clear statement of principle that whilst protection of adults against abuse is imperative, autonomy is a priority and outweighs protection.<sup>61</sup> This is an important statement of principle. It challenges the implicit tendency of ethical guidelines and community attitudes to put protection first. It proposes that the consent of at risk adults prior to considering any safeguarding arrangements is absolutely imperative, except in serious cases of physical abuse, sexual abuse or neglect. Only in these extreme circumstances is intervention without consent appropriate.<sup>62</sup> Even then, autonomy is still a critical factor, with protection given extra weight only in cases of serious abuse.<sup>63</sup>

The report makes a second innovative recommendation. It suggests moving away from the concept of ‘presumed capacity’ to a model of supported decision making. Every set of guidelines in Australia starts with the traditional common law proposition that clients should be presumed to have capacity unless there is some legitimate reason to think otherwise.<sup>64</sup> This places an onus on lawyers (and others) to make at least a preliminary assessment of client capacity.<sup>65</sup> The necessity for lawyers to draw upon the expertise of medical professionals to determine capacity opens the door for loss of the client’s legal capacity. Evaluations of legal capacity are not nuanced, yet it is by now well accepted that people may have different levels of capacity that have different impacts. For example, an elderly client with some capacity issues may be well able to make a decision that they want to divide their estate equally to all offspring (or even that they do not), but may not understand the consequences of a complex financial investment arrangement. Many elderly people with diminishing capacity will have no doubt that they ‘don’t want to go into a home’, although they may lack the capacity to organise and implement other arrangements to maximise their independence for as long as possible. Under existing law and ethical guidelines, once legal capacity is found to be lacking, discussions about maximising engagement with the decision making process are no longer mandated. It is true that the older person’s support network can explore the options, but legally the older person’s rights to be heard and to make these decisions are taken over by another representative, even though there may be a range of decisions that they can make autonomously.

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<sup>58</sup> This is because of the purely demographic incidence of diminished mental capacity that goes with ageing.

<sup>59</sup> Australian Law Reform Commission, above n 1, 19.

<sup>60</sup> Ibid 20.

<sup>61</sup> Ibid 376 [14.6].

<sup>62</sup> The definition of a person needing safeguarding such that consent might not be needed is that the person needs care and support, is being abused, or is at risk of abuse or neglect, and cannot protect themselves.

<sup>63</sup> Australian Law Reform Commission, above n 1, 52.

<sup>64</sup> Ibid 56.

<sup>65</sup> Castles, above n 5, 32.

Whilst legal guardians are expected to act reasonably in the best interests of the person,<sup>66</sup> they are not required in Australia to specifically seek out the older person's views. This contrasts with the situation in the UK where there are explicit guidelines for determining the preferred wishes of the older person.<sup>67</sup> In supporting an approach that looks at practical means to maximise the expression of will and exercise of autonomy, rather than defaulting to a black and white 'competent or not' approach, the ALRC moves closer to the UK philosophy. For example, in the context of enduring documents, the ALRC adopts the 'Commonwealth Decision Making Principles' which recommend incorporating the supports necessary to enable any person to make an informed decision, rather than seeing capacity as an 'all or nothing' condition. The principles were developed in the 2014 ALRC report *Equality, Capacity and Disability in Commonwealth Laws*.<sup>68</sup> They require that a person be given access to as much support as they need to make decisions, that their will and preferences must direct decisions that affect their lives, and that there must be appropriate safeguards in relation to any interventions for persons who require decision making support.<sup>69</sup> The 'Commonwealth Decision Making Principles' explicitly reject the 'best interests' approach, preferring a process of determining or discovering a person's preference, or likely preference.<sup>70</sup> This ideally enables the person to continue to be involved in shared decision making, rather than substituted decision makers being appointed. Any representative of a person is not only required to understand the shifting nature of capacity,<sup>71</sup> but to also represent the person's will, preferences and rights.<sup>72</sup>

The ALRC's approach is not new. It is already reflected, albeit to different degrees, in capacity guidelines in Australia where lawyers are encouraged to take the time to seek out the resources needed to determine the client's will and intent. However, making this a key recommendation is important in reframing the approach to elder decision making and providing lawyers (and others) with more options when supporting clients with capacity issues. It is a particularly useful initiative in the context of the narrow legal ethical principles which bind lawyers and place them in a morally untenable position. Lawyers are bound to follow only the instructions of 'their client' and if 'their client' is represented by a litigation guardian, they must follow the instructions of that guardian. Lawyers need only be satisfied that the guardian is acting 'in the best interests' of the client, as determined by the guardian. They do not have a supervening role to interrogate the basis of instructions given by the guardian. By specifically including the 'will, preferences and rights'<sup>73</sup> of the person in that decision making process, the ALRC report provides lawyers with the scope to expand their role to ensure that the client's views are given a voice. This is particularly important in cases where an elder person is represented by a guardian in decisions affecting their legal autonomy.

The report also deals specifically with the role of legal practitioners both in relation to elder abuse and in relation to mental capacity. Firstly, there are some fairly obvious observations about the need for training and education. Some lawyers are much more likely to encounter issues of capacity and warnings of elder abuse than others. Some will already have sophisticated strategies for dealing with these challenges, but many will not.<sup>74</sup> Mandatory education and training is important to ensure solicitors who are engaged in activities such as drafting enduring powers of attorney and wills, have the skills and expertise to enhance autonomy and recognise abuse.<sup>75</sup> However, it is questionable whether one or two hours of CPD

<sup>66</sup> 'Best interests' is the typical description of a guardian's role. A lawyer may in fact refuse to act on the instructions of a guardian if they are not satisfied that they have the best interests of the person in mind.

<sup>67</sup> Castles, above n 5, 24, 43.

<sup>68</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

<sup>69</sup> *Ibid* 63.

<sup>70</sup> Australian Law Reform Commission, above n 1, 55.

<sup>71</sup> *Ibid* 200 [5.186].

<sup>72</sup> *Ibid* 202 [5.192].

<sup>73</sup> *Ibid* 164 [5.14], 166 [5.23].

<sup>74</sup> *Ibid* 288.

<sup>75</sup> *Ibid* 282, 287.



training will equip a lawyer with anything more than a rudimentary grasp of the complexities and demands that arise in this area. The depth and breadth of skills required by lawyers to meaningfully engage with older clients, both in terms of understanding the impact of diverse conditions and developing effective communication strategies, are complex.<sup>76</sup> Lawyers who work on ‘family agreements’, in which older people might sign over property in return for promises of support, should also be alert to family, health and cognitive influences. However, there is simply no guidance at all as to how far lawyers should inquire into the proposals, insist on enforceable agreements,<sup>77</sup> or intervene, or refuse to act, where potentially adverse outcomes seem likely.

Secondly, the report explores models for introducing protective ‘adult safeguarding’ measures. Under present ethical rules, and case law, lawyers are in a difficult position. They are bound to adhere to principles of client confidentiality. They are not permitted to divulge information obtained as part of the client relationship (including suspicion of incapacity or abuse) without competent client instructions. However, if they do nothing for want of instructions, clients may suffer adverse consequences. The Victorian case *Goddard Elliott v Fritsch* raised this issue in the context of a solicitor accepting a settlement that the client lacked the mental capacity to instruct on.<sup>78</sup> It was not clear in that case whether the solicitor knew that the client’s mental state had deteriorated during the retainer, although it was explicitly stated that the solicitor’s duty to the client extended to being aware of that possibility.<sup>79</sup> The court drew an important distinction between strongly advising a competent client to accept a settlement in their best interests, and accepting a settlement for a client who is not competent in the belief that it is in their best interests.<sup>80</sup>

Most state ethical guidelines envisage lawyers breaching confidence by alerting relatives or carers, or themselves initiating protective action.<sup>81</sup> When such actions are challenged, the courts appear to recognise the inevitability of such steps in some cases and look to the reasonableness and sensitivity of the lawyer’s actions.<sup>82</sup> There have been several cases across jurisdictions that deal with this dilemma. For example, the NSW case of *R v P* considered a situation where a lawyer sought the appointment of a guardian for his client against the client’s specific wishes.<sup>83</sup> The court concluded that in the circumstances of this case the lawyers’ actions, whilst in conflict with the client’s expressed instructions, did not warrant criticism because he had taken into account the client’s antipathy to some family members in deciding what action to take. The court indicated that it would consider what steps the lawyer had taken to provide support for the client, and would require the lawyer to consider reasonable alternatives to the ultimate decision to seek a guardian to take over the client’s affairs. Justice Bell in *Goddard Elliott v Fritsch* also noted that a solicitor might then be expected to assist the court in any inquiry into the client’s capacity, which might itself prompt a conflict between the duty of confidence to the client and the duty to assist the court.<sup>84</sup>

In terms of clear guidance for the legal profession, there is not a great deal of joy to be had from the ALRC report. The report canvasses existing legislative and ethical limits on medical

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<sup>76</sup> Nola Ries, Briony Johnston and Shaun McCarthy, ‘Legal Education and the Aging Population: Building Student Knowledge and Skills Through Learning in Collaboration with Community Organisations’ (2016) 37(2) *Adelaide Law Review* 495, 500.

<sup>77</sup> Australian Law Reform Commission, above n 1, 205 [6.9], 207 [6.16].

<sup>78</sup> [2012] VSC 87.

<sup>79</sup> *Ibid* 149 [559].

<sup>80</sup> The outcome of this case decision turned on whether there was immunity from punishment for a decision made by a lawyer in the process of conducting a case in court. This would prevent the client from recovering damages for the loss suffered due to the acceptance of the settlement without competent instructions, a position that Justice Bell found most concerning. See *ibid* [561]; Lise Barry, ‘*Goddard Elliott v Fritsch* [2012] VSC 87’ (2012) 10 *Macquarie Law Journal* 131.

<sup>81</sup> Castles, above n 5, 30.

<sup>82</sup> *Ibid* 34–5.

<sup>83</sup> *R v P* [2001] NSWCA 473.

<sup>84</sup> *Goddard Elliott v Fritsch* [2012] VSC 87, 145 [549].

practitioners breaching privacy to report abuse in some detail.<sup>85</sup> It points out that various Commonwealth legislative initiatives in the health care sector permit breach of privacy in the case of reporting serious abuse,<sup>86</sup> and that the Australian Privacy Principles permit disclosure where necessary for ensuring appropriate care or treatment, or for compassionate reasons.<sup>87</sup> Health professionals may also apply to various state tribunals if they believe a person is being abused by a guardian.<sup>88</sup> This is of no great assistance to lawyers who operate under a separate ethical code and in a different professional context. However, at the very least, this guidance to doctors and others provides a principled basis for framing discussion. The ALRC flags a range of circumstances when a breach of confidence might occur: in cases of serious abuse, when it is necessary to ensure appropriate care, and for compassionate reasons. These are all easily applicable to the decisions a lawyer might face with an older client, but are not currently discussed in any legal ethical guidelines. In a clear acknowledgment that the present ethical rules are fraught with uncertainty, the report acknowledges that lawyers' ethical rules might need to be changed to accommodate such protection.<sup>89</sup>

The perceived trade-off between autonomy and protection is acute when considering the range of circumstances where a breach of confidence might arise. The ALRC points out that there are many reasons why people, including older people, do not want to report abuse.<sup>90</sup> Older people may choose to reject support or intervention and will often be fiercely protective of their right to choose. They do not want to be treated like children or sheltered from all risk.<sup>91</sup> One submission to the ALRC describes this as the 'dignity of risk', the right to make decisions that may have adverse outcomes.<sup>92</sup> Older people can be reluctant to disclose or admit to diminishing capacity.<sup>93</sup> Breaching confidence in the 'best interests' of the person is a grave intrusion into their autonomy. It is for this reason that the ALRC proposes that supplanting autonomy for the perceived best interests is only permissible in cases of serious abuse.

The ALRC proposes the creation of 'Adult Safeguarding Agencies' for vulnerable adults who need care and support, who are being abused or neglected, or who are at risk of abuse or neglect and cannot protect themselves from the abuse.<sup>94</sup> The report envisages that adult safeguarding agencies will provide a first point of contact and will then investigate cases. However, the consent of the at-risk adults should always be obtained before invoking the support of the safeguarding agency.<sup>95</sup> The only circumstance when consent is not required is in cases of serious abuse, sexual abuse, or neglect.<sup>96</sup> Multidisciplinary in approach, it is implicit that there will be some objective measure in the approach of adult safeguarding procedures, although just how that is to be achieved is not stated. Mindful of the ethical constraints that exist around breaching client confidence, the ALRC recommends that any person who reports abuse to an adult safeguarding agency in good faith should not, as a consequence, be found to have departed from standards of professional conduct.<sup>97</sup> Whilst this is not a reflection of professional ethical rules, it does to an extent coincide with court decisions in which the

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<sup>85</sup> Ibid 342 [11.32].

<sup>86</sup> Where there is a threat to life, health or safety. *My Health Records Act 2012* (Cth); Australian Law Reform Commission, above n 1, 341 [11.28].

<sup>87</sup> Australian Law Reform Commission, above n 1, 341 [11.30].

<sup>88</sup> Ibid 341–2 [11.31].

<sup>89</sup> Ibid 414 [14.182].

<sup>90</sup> Ibid 393–4.

<sup>91</sup> Ibid 21.

<sup>92</sup> Women's Electoral Lobby, Submission No 261 to Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse*, February 2017.

<sup>93</sup> Castles, above n 5, 29.

<sup>94</sup> Australian Law Reform Commission, above n 1, 376.

<sup>95</sup> Ibid [14.6].

<sup>96</sup> Ibid [14.7].

<sup>97</sup> The report makes clear that in the case of trained professionals making such reports, the concept of reasonable suspicion goes hand in hand with the idea of good faith.

genuine intentions of lawyers in selecting and pursuing protection for the client are considered relevant.<sup>98</sup>

### III IMPACT ON LAWYERS

Governed as they are by ‘one size fits all’ ethical principles, there is often little guidance for lawyers working at the edges of ‘normal’ presumptions about client capacity. Lawyers have traditionally been left to make the best decisions they can. The different approaches of principle taken in Australian states indicate uncertainty around balancing ideas of autonomy, confidentiality, and protection. This creates a grey area. Consideration of best interests, prioritising physical care needs, and the presumption that relatives will ‘do the right thing’ can swamp concepts of autonomy and the right to choose. Strict adherence to client confidence (as is the case in SA and Queensland) limits intervention to the narrow circumstances outlined in ASCR rule 9. Yet it is abundantly clear that the predominance of elder abuse occurs in the financial area. Limiting the capacity of lawyers to consider initiating protective evaluation to cases of serious imminent physical harm creates definitional challenges. The span of human rights interests below ‘serious imminent physical harm’ is extensive and is where many human rights incursions will occur. Mental wellbeing, access to family and resources, and financial exploitation are all abuse but do not appear to fall within the very high benchmark set by the legal ethical rules. The relaxation of this requirement that flows from the NSW guidelines and cases such as *R v P*,<sup>99</sup> where the last resort intervention is countenanced, fails to recognise the potential negative impact of not acting earlier to avert problems. Given the pervasive and often hidden instances of elder abuse that fall along the scale of seriousness,<sup>100</sup> there may be times when a lawyer is best placed to identify concerns but, without explicit consent from the client, is not permitted to take any action. This idea is consistent with the fiduciary role of the lawyer who has a limited and legally focused role to play with clients, but it is not consistent with a more holistic community based approach to elder abuse. The ALRC report provides valuable baseline principles for lawyers working in this grey area. It makes autonomy of the person the overriding starting point. Only serious abuse warrants the overriding of autonomy. It recommends a decision making model that strengthens and supports available decision making capacity, rather than a binary competent or not competent model. It also supports the creation of independent protective agencies that in turn provide multidisciplinary options for supporting and protecting clients who may be at risk.

The ALRC proposes that the wishes of the person must be respected and their confidentiality maintained in all but cases of serious abuse.<sup>101</sup> There are no helpful definitions to determine what makes abuse serious. It is not clear whether it means risk to life or permanent health problems; whether it means embarrassment and upset, or ongoing psychological impact; whether it means not having access to television, phone and new clothes – or only serious life-threatening neglect. The ALRC gives examples such as cruel and degrading treatment and being locked in a room which suggest that only abuse or neglect at the upper end of the scale meets the definition. There is no real discussion of ‘scale’.<sup>102</sup> The report also refers to the right to privacy, bodily and psychological integrity, personal development, and relationships but in the context of abuse compromising those rights.<sup>103</sup> Where abuse is serious, the ALRC recommends the creation of safeguarding agencies that would appropriate resources to support the person. The ALRC encourages anyone to report abuse to a safeguarding agency.<sup>104</sup> This might include members of the public, but also includes doctors, health workers or lawyers

<sup>98</sup> *R v P* [2001] NSWCA 473.

<sup>99</sup> [2001] NSWCA 473.

<sup>100</sup> Lacey, above n 8, 113.

<sup>101</sup> Abuse is limited to serious physical abuse, sexual abuse or neglect.

<sup>102</sup> See, eg, Australian Law Reform Commission, above n 1, 397 [14.104]–[14. 105] where minor financial pilfering by a relative is defined as not being serious.

<sup>103</sup> *Ibid* 377.

<sup>104</sup> *Ibid* 376 [14.10].

with specific obligations of confidentiality to the person. Recognising that reporting and thus breaching confidence does contravene ethical guidelines, the ALRC notes that there may need to be alterations to professional conduct rules. It also recommends that there be a good faith exemption from breach of duty under professional conduct or other rules.<sup>105</sup> This generic proposal highlights the disparity between legal ethical rules and a broader liberty to report concerns to an agency to investigate the need for protection. Adult safeguarding agencies have been in place in the UK for some time, and are governed by the provisions of the *Care Act 2014* (UK).<sup>106</sup> A fundamental principle of the framework is the inclusion of the voice of the at risk adult and the leveraging of whatever supports might facilitate that engagement.

Since its inception, this legislation has drawn mixed reviews. Some stakeholders saw it as a necessary step forward, bringing adult protection into line with child and domestic violence protective regimes. Some thought it did not go far enough, and others that the legislation intruded unnecessarily into the private lives of adults.<sup>107</sup> There was concern that limiting the definition of abuse to human rights violations was too broad and failed to acknowledge both the impact of specific acts and the possibility of self-neglect as a basis for the need for protection. This concern aligned with the definitional problems outlined above. The status of autonomy and self-direction as a foundational human right could create a hierarchy of importance that may have the practical effect of excluding multiple minor instances of abuse (such as financial, psychological, relational, social or health care related abuse) from both public recognition and practical protection. The idea of a threshold for triggering concern and intervention continues to inform policy and law reform in Australia,<sup>108</sup> but in so doing invites a pinpoint rather than a more nuanced approach.

The legal profession continues to approach these questions from a slightly different perspective. In its recent call for submissions for the review of the current ASCR,<sup>109</sup> published several months after the ALRC report, the Law Council of Australia asked whether the risk of financial exploitation should justify a breach of confidence, and whether guidelines concerning the seeking of a financial management order for a client would be useful. Financial exploitation is one of the most common forms of elder abuse.<sup>110</sup> It may be a precursor to more serious abuse in that it takes away means of support, making the person dependent on the exploiter and thus exposed to further abuse, or it could leave them destitute and at risk of serious neglect. However, it does not seem to fall into the definition of serious abuse proposed by the ALRC. The Ethics Committee of the Law Council has expressed concern about creating a further exception to breaching confidence in the ASCR to encompass financial abuse because 'financial exploitation' lacks specificity.<sup>111</sup> The Law Council proposes the creation of unambiguous criteria to assist solicitors having to make such decisions.<sup>112</sup> The idea of a serious risk benchmark as advocated by the ALRC is not discussed, although perhaps implicitly it is already reflected in the existing wording of the ASCR.<sup>113</sup> However, as already noted, most state guidelines already move some way from this benchmark and the Law Council of Australia also seems open to moving away from such a strict approach. Even so, the opacity of the concept of serious risk, coupled with the discrete and limited role of the lawyer, raises challenges. A

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<sup>105</sup> Ibid 44.

<sup>106</sup> *Care Act 2014* (UK) c 23.

<sup>107</sup> For example, by legislating for power of entry or protection orders in the case of self-neglect. See Bridget Penhale et al, 'The Care Act 2014: A New Legal Framework for Safeguarding Adults in Civil Society' (2017) 19(4) *Journal of Adult Protection* 169.

<sup>108</sup> Purser, above n 8, 80.

<sup>109</sup> Law Council of Australia, above n 50.

<sup>110</sup> Three chapters of the report are devoted to different instances of financial abuse. See Australian Law Reform Commission, above n 1, 19.

<sup>111</sup> This in itself is an interesting point. The same paper suggests, at pages seven and eight, that ethical rules should not be overly prescriptive in favour of a broader reflection of underlying ethical principles. Yet, on this point, the Law Council seems concerned that definitional limits might require more detail. See Law Council of Australia, above n 50, 44.

<sup>112</sup> Ibid 45.

<sup>113</sup> Law Council of Australia, above n 18, rr 7.1, 8.1, 9.2.1.

lawyer may well be doubtful that the serious imminent harm test is met if they are aware that a client is being given little personal choice or freedom in a family care arrangement, or is miserable and isolated in a care facility, or is dissipating scant assets to family or other sources, or has far more bruises and cuts than are consistent with an occasional fall. Self-neglect poses another set of complex challenges.

Interestingly, the Law Council argues against further exception to confidentiality (as currently listed in the ASCR at rule 9), for cases where a lawyer forms a reasonable belief that the client cannot give instructions, on the basis that a rule to this effect is inadequate to guide solicitors through the complexities of such a decision.<sup>114</sup> The ALRC report does not really assist lawyers with this difficult area of decision making. Nor, realistically, can it. Ultimately, this remains the role of the Law Council of Australia and the various state law societies. However, the ALRC report has brought into sharp focus some of the dilemmas that are not clearly covered by existing ethical rules and proposes some important baselines for further discussion. This again reflects two different approaches to the core issue. It is not always incapacity to instruct that is the problem. Client unwillingness to take any action, fuelled by pride, fear, helplessness, lack of confidence or autonomy, may be the basis of concern for a lawyer. Lack of capacity is one side of the coin, the other is much less easily defined and managed.

Firstly, there is a dilemma that is posed by the range of circumstances in which a breach of confidence, with or without active seeking out of protective measures, is warranted. The ALRC stands firm that there should be no disclosure except in the case of serious abuse, whereas at least some states in Australia, and arguably also the Law Council, accept a more permeable barrier. Guarded support for the latter position can be found in the case law which implicitly recognises the pragmatic choices faced by lawyers and the negative social and personal implications if some protective action is not taken.<sup>115</sup> It is clear that the legal profession has, at least on a case by case basis, moved some way from the serious physical harm benchmark. Will the ALRC report, with its emphasis on autonomy and dignity, exert pressure on the legal profession to revisit that predominant approach?

Secondly, there is valuable contribution from the ALRC report in its challenge to the traditional idea of assumed capacity and the binary all-or-nothing approach to capacity.<sup>116</sup> In its robust shift towards supported decision making and the creation of legal processes and standards around this concept, the ALRC challenges the traditional approach at a cultural and legal level. This will potentially permeate practice across disciplines in this area, including in the area of law. Dispelling the best interests all-or-nothing culture that has informed the legal profession, and society, will force re-examination of these issues.

Thirdly, there is an important recommendation for lawyers in the creation of Adult Safeguarding Agencies. Lawyers are currently left to decide for themselves what to do. The example of *R v P*,<sup>117</sup> in which the court closely examined the choices that would have minimum impact on the client, demonstrates how difficult this can be. The provision of a consistent structure for supporting people at risk with no other effective supports will provide more certainty and confidence for lawyers wondering where to take their concerns. It does not address the issue of divulging confidence, but it provides a more certain and reliable resource for lawyers.

Fourthly, another valuable suggestion is in the creation of a 'good faith' exemption against disciplinary action where a person reveals confidential information. As stated by the ALRC,

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<sup>114</sup> Law Council of Australia, above n 50, 40.

<sup>115</sup> Castles, above n 5.

<sup>116</sup> Originally devised in the *Equality, Capacity and Disability in Commonwealth Laws* report, the 2017 ALRC report builds on that work in developing a consistent framework. See Australian Law Reform Commission, above n 68.

<sup>117</sup> Australian Law Reform Commission, above n 1, 20.

the exemption is probably far too simplistic to offer any protection. However, it is in principle consistent with the case law that recognises the dilemma for lawyers and the compelling reasons that can exist to take protective measures. This offers a valuable starting point for the development of clearer protocols.

#### IV CONCLUSION

Australia appears to be at a crossroads on client capacity and intervention. The philosophy of paternalism is by now eschewed by all law societies and by the courts. This is in line with the philosophy underlining the ALRC report. It is also well accepted that capacity is decision specific and nuanced, and that all ethical guidelines in Australia contain informative guidance on how to identify and manage potential lack of capacity, and in most cases, how to maximise participation in decision making. Reform in Australia comes a little later than in the UK and the USA, where specialised legislation for elder abuse and protection that focuses on engagement in decision making rather than more legalistic approaches have been in place for some time.<sup>118</sup>

There are definitional, philosophical, and practical challenges. The idea of a hierarchy of human rights guiding the discussion about protection potentially diminishes focus on the day to day instances of abuse. These instances, while not posing a critical risk, are part of more subtle but nonetheless pervasive abuse that might cumulatively undermine the higher right to quality of life. The ALRC proposes a high ‘serious abuse’ benchmark for intervention, whereas some existing guidelines and case law suggest a lower standard. Financial abuse is the most common area of elder abuse and exploitation,<sup>119</sup> but it is not clearly dealt with by either the ALRC or existing guidelines. Neglect, although not as often reported as other forms of abuse, is also not clearly defined.<sup>120</sup> Definitions and scale remain a challenge in this discussion. This potentially limits the options of lawyers faced with the complex moral and ethical dilemmas of a client who they believe is in need of protection in order to enhance their safety, life needs, and dignity.

The ALRC recommends a wholesale departure from the simplistic binary approach to capacity by proposing an approach that maximises capacity, so that capacity can be nurtured for decision making. This reflects the focus on supporting engagement adopted in the UK. However, in so doing, it also emphasises a strict human rights approach that in turn influences community perceptions – and a recognition that being older does not warrant less autonomy but requires at times more assistance to exercise that autonomy. Innovative ideas to address the complexities of this debate abound. Effective education and training, both at the community level and within the legal community, is one. The issues around competence, client empowerment, facilitating and supporting engagement, and understanding the impact of disease and the effects of ageing, are critically important if lawyers are to be able to deal respectfully and flexibly with diverse client needs. Sensitive, informed and skilful counselling of clients throughout the engagement would go a considerable way to open doors for discussion and problem solving for clients at risk of abuse. Better integration of services is also an option. Whilst there are some examples of interdisciplinary services for elder clients that recognise the co-dependence of health, law, wellbeing, and autonomy,<sup>121</sup> these are for the most part limited to a few community based initiatives. There is no pattern or tradition of doctors

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<sup>118</sup> Lorna Montgomery et al, ‘Implications of Divergences in Adult Protection Legislation’ (2016) 18(3) *Journal of Adult Protection* 149.

<sup>119</sup> Australian Law Reform Commission, above n 1, 358 [2.51].

<sup>120</sup> *Ibid* 360 [2.57].

<sup>121</sup> Nola Ries and Elise Mansfield, ‘Elder Abuse: The Role of General Practitioners in Community-Based Screening and Multidisciplinary Action’ (2018) 47(4) *Australian Journal of Medical Practitioners* 235, 236.

and lawyers working together in this area, yet this fundamental step is crucial to a more effective approach.<sup>122</sup>

The broader community response recommended by the ALRC necessitates examination of approaches to legal practice, the traditional nature of which isolates lawyers from engaging in communal responses due to limiting ethical principles. Traditional adversarial and transactional approaches to legal practice in Australia might well give way to developing philosophies. Some challenge the idea of objective decision making in favour of mediated or therapeutic approaches. Involving mediators in facilitating the input of elder people into decisions about their interests,<sup>123</sup> or the greater focus on therapeutic jurisprudence as a model for engaging with clients at risk,<sup>124</sup> propose different bases for decision making. Focusing on engaged participation and holistic collaborative outcomes, these ideas explicitly involve the lawyer in a greater circle of supporters. The legislative approach adopted in the UK is also an option, but not without critics. It also poses risks in implementation, particularly in relation to the tendency towards losing focus on individual context by linking abuse to legal threshold definitions.<sup>125</sup>

The Law Council of Australia's call for submissions on amendment of the ASCR is an opportunity for the legal profession to deeply consider these issues and come forward with considered proposals that acknowledge the difficult position that lawyers can find themselves in when torn between ethical rules and broader moral imperatives. The ALRC has greatly assisted that discussion by its focus on human rights and the meaning of autonomy and dignity. The recommendation of a supported decision making model that emphasises the interests of the client, whether or not they are able to express them at the time, and framing the discussion in terms of seriousness of abuse when balancing the option of intervention provide solid next steps. At present there are different benchmarks that apply when questions about the severity of abuse, the nature of abuse, and the appropriate course of action arise. There needs to be principled reconciliation of these differences before a more confident position on the role of lawyers in this very difficult area can be achieved.

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<sup>122</sup> Kelly Purser and Tuly Rosenfeld, 'Evaluation of Legal Capacity by Doctors and Lawyers: The Need for Collaborative Assessment' (2014) 201(8) *Medical Journal of Australia* 483.

<sup>123</sup> Lise Barry, 'Elder Mediation: What's in a Name?' (2015) 32(4) *Conflict Resolution Quarterly* 435.

<sup>124</sup> Purser above n 8, 55.

<sup>125</sup> Montgomery et al, above n 118.





# WHO IS VULNERABLE? THE SENTENCING OF ELDER ABUSE OFFENCES AND THE CASE OF *KATSIS V THE QUEEN*

HARRIET GRESHAM\*

## I INTRODUCTION

When sentencing an offender, courts in New South Wales are to take into account a range of aggravating factors that are ‘relevant and known to the court’.<sup>1</sup> One of these considerations is the vulnerability of the victim of the offence.<sup>2</sup> Over the past 20 years, NSW legislative and judicial decision-making has indicated that the courts may be moving towards an increased recognition of victim vulnerability. Despite this, recognising the vulnerability of victims in cases of elder abuse has, until the case of *Katsis v The Queen*,<sup>3</sup> appeared to extend only to the ‘very old’.<sup>4</sup> The decision of the NSW Court of Criminal Appeal in *Katsis v The Queen*<sup>5</sup> appears to represent a shift in judicial thinking well aligned with the findings of the Australian Law Reform Commission (ALRC) in their 2017 Report on Elder Abuse.<sup>6</sup> Both the Court and the ALRC appear to recognise that the vulnerability that allows for the abuse of older people is often made up of a number of different factors working together, rather than the age of the victim alone.<sup>7</sup> However, the applicability of this decision may be limited by the forms of elder abuse to which it will be relevant and its potential to be overruled by the High Court.

## II FACTS

The accused, Alexis Katsis, was found guilty in 2015, some 37 years after the offence, of the rape and murder of 66 year old Doris Fenbow.<sup>8</sup> Ms Fenbow’s body was found in her apartment on 3 September 1988 after smoke was seen coming from her unit.<sup>9</sup> She had died as a result of asphyxiation, both manually and through smoke inhalation, and she had been sexually abused.<sup>10</sup> Multiple fires were started in Ms Fenbow’s unit in what appeared to be an attempt to dispose of the evidence of the crime.<sup>11</sup> Ms Fenbow lived alone in a Housing Commission block and was described as someone who did not care for herself well, did not have visitors and was noticeably thin.<sup>12</sup> The police investigation stalled not long after the crime.<sup>13</sup> However, vaginal swabs that had been taken from the victim were retained, and in 2014 sperm found in the swabs were matched with Katsis’ DNA.<sup>14</sup> As a result of this forensic evidence, he was arrested in May 2014 and charged with these offences.<sup>15</sup>

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<sup>1</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

<sup>2</sup> *Ibid* s 21A(2)(l).

<sup>3</sup> *Katsis v The Queen* [2018] NSWCCA 9.

<sup>4</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).

<sup>5</sup> [2018] NSWCCA 9.

<sup>6</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017).

<sup>7</sup> *Ibid* 18 [1.6]; *Katsis v The Queen* [2018] NSWCCA 9, [61]–[64].

<sup>8</sup> *R v Katsis* [2015] NSWSC 1890.

<sup>9</sup> *Ibid* [7].

<sup>10</sup> *Ibid* [14].

<sup>11</sup> *Ibid* [9].

<sup>12</sup> *Ibid* [6].

<sup>13</sup> *Ibid* [20].

<sup>14</sup> *Ibid* [20]–[21].

<sup>15</sup> *Ibid* [21].

### III LITIGATION HISTORY

Katsis was found guilty of murder and sexual intercourse without consent on 21 October 2015. He was sentenced by Fagan J in the Supreme Court of NSW on 11 December 2015 to 26 years' imprisonment with a non-parole period of 15 years. Justice Fagan described the attack on a 'vulnerable, inoffensive, lonely old lady' as 'savage, inhuman and despicable'.<sup>16</sup> Despite having clearly considered the vulnerability of the victim to be a relevant factor, Fagan J did not refer to s 21A (2)(l) of the *Crimes (Sentencing Procedure) Act* in his sentencing judgment. Also taken into account was evidence of physical and sexual abuse to the offender in his early years, substance abuse issues, the absence of contrition or remorse and the sentences imposed in comparable cases of murder at the time of the 1988 offence.<sup>17</sup>

On 1 November 2017, the applicant sought leave to appeal the sentences on five separate grounds. The only relevant ground to this discussion is the first, in which Katsis argued that the sentencing judge had erred in taking into account the victim's vulnerability as an aggravating factor. The additional grounds of appeal involved the application of principles for sentencing historical offences, the downward adjustment of the ratio set out in s 44,<sup>18</sup> failure to assess the moral culpability of the applicant as a result of his deprived upbringing and failure to take into account the applicant's otherwise good character.<sup>19</sup> These grounds of appeal fall outside the scope of this discussion given its focus on the recognition of vulnerability in sentencing elder abuse cases. The Court gave leave to appeal, and made a decision on 14 February 2018.<sup>20</sup>

### IV THE DECISION IN *KATSI V THE QUEEN*

The applicant submitted that the age of the victim could not on its own provide grounds for vulnerability as she was not 'very old' and did not have a disability.<sup>21</sup> Thus, despite accepting the marginalised position in society that the victim occupied,<sup>22</sup> the applicant argued that this was not enough for her to fall into a particular 'class of victim' that was required according to *R v Tadrosse*.<sup>23</sup> The Crown argued that s 21A(2)(l) was not to be interpreted strictly, but instead as providing illustrative examples of characteristics that might make a person vulnerable.<sup>24</sup> The Crown drew on the decision in *Longworth v The Queen*<sup>25</sup> in making this argument, in which security guards working late at night were considered to be vulnerable people,<sup>26</sup> despite their occupation not being listed in s 21A(2)(l).<sup>27</sup>

In a unanimous judgment, Hoeben CJ, Schmidt J and Campbell J agreed with the Crown's submission.<sup>28</sup> It was held that s 21A(2)(l) should be interpreted as illustrative of some of the classes of people who might fall into the category of 'vulnerable'.<sup>29</sup> Further, the Court believed that the victim in this case fell into a class of vulnerable people in our society — the elderly who are living alone without support and who exhibit poor self-care.<sup>30</sup> Thus, it was held that

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<sup>16</sup> Ibid [27].

<sup>17</sup> Ibid.

<sup>18</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>19</sup> *Katsis v The Queen* [2018] NSWCCA 9.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid [57].

<sup>22</sup> Ibid.

<sup>23</sup> *R v Tadrosse* [2005] 65 NSWLR 740.

<sup>24</sup> *Katsis v The Queen* [2018] NSWCCA 9, [58].

<sup>25</sup> *Longworth v The Queen* [2017] NSWCCA 119.

<sup>26</sup> Ibid [20].

<sup>27</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>28</sup> *Katsis v The Queen* [2018] NSWCCA 9, [61]–[64].

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

in determining whether a victim was vulnerable under s 21A(2)(l),<sup>31</sup> a variety of factors may be taken into account that might contribute towards placing the individual into a category or class of persons, rather than viewing the age or capacity of that person in isolation.<sup>32</sup> All five grounds of appeal were dismissed.<sup>33</sup>

## V CRITIQUE AND COMMENTARY

### A Evidence of Recognition and Progression

This decision appears to contribute towards the growing recognition of elder abuse as an imperative issue in Australian society. The 2017 ALRC Report into elder abuse suggested that ‘older people should not be considered vulnerable merely because of their age’,<sup>34</sup> as ‘vulnerability does not only extend from intrinsic factors such as health, but also from social or structural factors, like isolation and community attitudes’.<sup>35</sup> Similarly, the decision in *Katsis v The Queen*<sup>36</sup> attempts to separate the vulnerability of certain older people from their age in years or the presence of a disability,<sup>37</sup> and instead place them into a wider context in which older members of society are often ostracised or mistreated. The decision in *Katsis v The Queen*,<sup>38</sup> alongside the 2017 ALRC Report into elder abuse,<sup>39</sup> has the potential to ensure that any form of abuse towards or neglect of an older person is condemned in an appropriate manner through harsher sentencing penalties. The decision may also assist in identifying classes of older people who are susceptible to mistreatment in situations in which they may not have traditionally been considered to be vulnerable, such as financial manipulation in the planning of wills, superannuation and family agreements.<sup>40</sup>

The decision in *Katsis v The Queen*<sup>41</sup> also appears to fall into a general progression in judicial and legislative thinking towards stricter sentencing principles for crimes committed against vulnerable victims. The original provision in the *Crimes (Sentencing Procedure) Act 1999*<sup>42</sup> that dealt with the judicial power to increase or decrease penalties had no reference to vulnerable victims and provided no specific guidance in regard to this matter. In fact, no guidance was provided at all to judges in relation to the types of matters that should be seen as aggravating or mitigating an offence.<sup>43</sup> This provision was modified in 2002 to include the consideration of ‘any vulnerability of the victim arising because of the nature of the victim’s occupation’,<sup>44</sup> but did not cover any other areas of vulnerability. In 2003, the provision was again changed to include the vast majority of the examples that are now a part of the provision.<sup>45</sup>

<sup>31</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>32</sup> *Katsis v The Queen* [2018] NSWCCA 9, [61]–[64].

<sup>33</sup> *Ibid.*

<sup>34</sup> Australian Law Reform Commission, above n 6, 18 [1.4].

<sup>35</sup> *Ibid* 18 [1.6].

<sup>36</sup> [2018] NSWCCA 9.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Australian Law Reform Commission, above n 6.

<sup>40</sup> *Ibid* 203–90.

<sup>41</sup> [2018] NSWCCA 9.

<sup>42</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21, as amended by *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002* (NSW).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002* (NSW), amending *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(iii).

<sup>45</sup> *Crimes Legislation Amendment Bill 2003* (NSW), amending *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).

When analysing the development in judicial thought surrounding s 21A(2)(1),<sup>46</sup> it becomes apparent that the courts have progressively worked towards viewing the examples included as merely guiding terms, as was held in *Katsis v The Queen*.<sup>47</sup> In *Tregeagle v The Queen*,<sup>48</sup> the NSW Court of Criminal Appeal held that a shopkeeper fell into the category of a vulnerable victim despite not being an example of a vulnerable person included in s 21A(2)(1).<sup>49</sup> In the following year, the NSW Court of Criminal Appeal held in *R v Longworth* that a security guard could be considered to be a vulnerable person as the ‘examples given ... are not exhaustive. They are concerned with classes of persons’.<sup>50</sup> *R v Longworth*<sup>51</sup> also limited the relevance of cases such as *R v Tadrosse*<sup>52</sup> to circumstances in which the vulnerability of the victim had not been raised at trial.<sup>53</sup> Thus, there appeared to be a progression in judicial thinking towards s 21A(2)(1) being merely illustrative, and not exhaustive, prior to the decision in this case.<sup>54</sup> When placed in a social, political and judicial context, it is evident that *Katsis v The Queen*<sup>55</sup> may be part of a broader recognition of the seriousness of crimes against vulnerable victims, particularly in cases of elder abuse.

## B Limitations

Despite the significance of the decision<sup>56</sup> in recognising the seriousness of elder abuse, it could be somewhat limited in its applicability. One of the most significant areas of elder abuse highlighted in the 2017 ALRC report was institutional elder abuse occurring in aged care facilities.<sup>57</sup> The decision in *Katsis v The Queen*<sup>58</sup> would likely not affect the consideration of sentencing principles for crimes committed in these institutions, or in many care relationships, as those individuals would likely be considered ‘very old’, or would be suffering from a cognitive or physical disability.<sup>59</sup> Thus, the decision in *Katsis v The Queen*<sup>60</sup> would only affect cases of elder abuse that have occurred to individuals outside the scope of the examples provided in s 21A(2)(1).<sup>61</sup> Further, the consideration of s 21A(2)(1) in *Katsis v The Queen*<sup>62</sup> is not extensive – there is little to no extrapolation to other ‘classes’ of vulnerable people outside of the very specific class of victim in this case, that is, an elderly woman who ‘lives alone, does not associate with other persons, has no community support and does not look after herself’.<sup>63</sup> Thus, it is unclear as to how this decision<sup>64</sup> would apply to future cases in which, for reasons not analogous to the victim in *Katsis v The Queen*,<sup>65</sup> an elderly person could be considered vulnerable. Finally, the longevity and significance of the decision remains uncertain, as it could be appealed or reversed by the High Court in similar circumstances.

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<sup>46</sup> Ibid.

<sup>47</sup> [2018] NSWCCA 9.

<sup>48</sup> [2016] NSWCCA 106.

<sup>49</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>50</sup> *Longworth v The Queen* [2017] NSWCCA 119, [17].

<sup>51</sup> Ibid.

<sup>52</sup> *R v Tadrosse* (2005) 65 NSWLR 740.

<sup>53</sup> *Longworth v The Queen* [2017] NSWCCA 119.

<sup>54</sup> [2018] NSWCCA 9.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Australian Law Reform Commission, above n 6, 101–57.

<sup>58</sup> [2018] NSWCCA 9.

<sup>59</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(1).

<sup>60</sup> [2018] NSWCCA 9.

<sup>61</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>62</sup> [2018] NSWCCA 9, [61]–[64].

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

## VI CONCLUSION

Despite being prima facie limited in its applicability, the decision in *Katsis v The Queen*<sup>66</sup> is indicative of a broader shift in the fabric of Australia's social, political and judicial thinking surrounding the abuse of older people in our society. Further, it has the potential to increase the sentences imposed on offenders who mistreat those who, through a variety of interdependent factors, are victims of what we now understand to be elder abuse. In order to determine the significance of *Katsis v The Queen*<sup>67</sup> in relation to s 21A(2)(1),<sup>68</sup> the progression of this area of law will need to be continually monitored as the recognition of elder abuse becomes further entrenched within Australian society.

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).



# **PUBLIC TRUSTEE (WA) V MACK: AN UNCERTAIN FUTURE FOR THE FORFEITURE RULE IN ELDER ABUSE CASES?**

MIKAYLIE PAGE\*

## I THE FACTS

In 2012, Brent Mack ('Mack') was found guilty of the 2008 murder of his mother Ah Bee Mack. Following his conviction, the court ordered that the operation of the forfeiture rule precluded Mack from inheriting any part of his mother's estate, and instead ruled that her estate would pass to her only other son Adrian Mack.<sup>1</sup> However, Adrian Mack died intestate in 2014 and, as a result, the Public Trustee of Western Australia, acting as the Administrator of Ah Bee Mack's estate, brought an action to prevent Mack from indirectly inheriting any part of his mother's estate through the estate of his brother.<sup>2</sup> There had been no suggestion that Mack was involved in his brother's death.<sup>3</sup>

The forfeiture rule is a common law rule that developed to prevent those convicted of murder from inheriting directly from their victims.<sup>4</sup> This rule is based on the principle that a person should not be able to receive the benefits that stem from their wrongful actions,<sup>5</sup> and is strictly enforced at common law against those who are convicted of murder.<sup>6</sup> The operation of the forfeiture rule had already prevented Mack from directly inheriting any of his mother's estate after being convicted for her murder.<sup>7</sup> However, the question before the court was whether this rule should be extended beyond simply precluding Mack from inheriting from his mother, and should prevent him from inheriting anything from his mother's estate through his brother also.<sup>8</sup> This would represent an extension of the forfeiture rule so that it would operate not only operated to prevent direct inheritance from victims, but also to prevent indirect inheritance of a victim's property.

## II THE OPERATION OF THE FORFEITURE RULE IN AUSTRALIA

The forfeiture rule in Australia relies on the principle that one should not benefit from their wrongdoing. This principle is a well-established interpretive principle that assumes that Parliament could not have intended that any benefit conferred by statute would be awarded as the result of an unlawful act.<sup>9</sup> On this basis, the forfeiture rule can be justified with reference to these public policy concerns, which override the usual laws of succession and inheritance set out in statute. It is considered against public policy to allow a person who is culpable for the death of another to benefit from their wrongful actions by inheriting any part of the victim's estate.<sup>10</sup> It was on the basis of these public policy concerns that the operation of the forfeiture rule was extended to prevent those convicted of manslaughter, not only those convicted of murder, from inheriting from victims.<sup>11</sup> These principles that underpin the rule clearly also apply to a situation where someone is convicted of manslaughter. Where a person

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<sup>1</sup> *Public Trustee (WA) v Mack* [2017] WASC 325, 328.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Helton v Allen* (1940) 63 CLR 691 ('*Helton*').

<sup>5</sup> *Ibid* 709.

<sup>6</sup> *Troja v Troja* (1994) 33 NSWLR 269, 299.

<sup>7</sup> *Public Trustee (WA) v Mack* [2017] WASC 325, 328.

<sup>8</sup> *Ibid.*

<sup>9</sup> F A R Bennion, *Statutory Interpretation*, (Lexis Nexis, 5<sup>th</sup> ed, 2008) 1141.

<sup>10</sup> *Helton* (1940) 63 CLR 691, 709.

<sup>11</sup> *Re Hall* [1914] All ER Rep 381, 384.

has committed manslaughter, there remains a high level of moral culpability that should also preclude them from benefiting from their wrongdoing by preventing their inheritance of the victim's property.<sup>12</sup>

Although the forfeiture rule was established at common law, there have been significant statutory inroads into its operation in both NSW and the ACT.<sup>13</sup> In these jurisdictions there is now considerable scope for judicial discretion in the application of the rule. In the 1980s and 1990s, case law began to suggest that equity provided a basis for introducing judicial discretion into the otherwise strictly applied operation of the forfeiture rule.<sup>14</sup> In response, the NSW Court of Appeal firmly upheld that the rule from the High Court in *Helton v Allen* ('*Helton*')<sup>15</sup> was to be strictly applied against anyone found culpable for homicide.<sup>16</sup> Following this decision, NSW introduced the *Forfeiture Act*,<sup>17</sup> which mirrored similar statutes already enacted in England in 1982,<sup>18</sup> and the ACT in 1991.<sup>19</sup> These statutes allow courts to amend the application of the rule for reasons relating to public policy, or to avoid unduly harsh results.<sup>20</sup> These statutory inroads into the forfeiture rule mean that there is a disparity between the application of the rule in states where the strict common law operates, and where statute has superseded the common law and allowed for increased judicial discretion.

### III THE DECISION

Master Sanderson held that the forfeiture rule, previously used only to preclude those convicted of murder from inheriting directly from their victims, could be extended to prevent Mack from inheriting that part of his brother's estate that was made up of Ah Bee Mack's estate.<sup>21</sup> Master Sanderson focused his analysis on the construction of the forfeiture rule outlined in *Helton* where the High Court described the principle as meaning 'that a man should not slay his benefactor and thereby take his bounty'.<sup>22</sup> He tracked the development of the rule in Australian law and held that the application of the forfeiture rule is founded on the jurisprudential position stated in *Helton*. Noting that there were no Australian cases on point relating to the indirect inheritance of property as a result of murder, Master Sanderson looked to decisions from the United States to support his ruling that Mack should not inherit from his mother's estate through the estate of his brother.

The forfeiture rule, referred to as the 'slayer rule' in the United States, similarly applies to those culpable of murder or manslaughter and prevents them from directly inheriting from their victims.<sup>23</sup> Further, the American 'slayer rule' has been extended to prohibit those found guilty of murder or manslaughter from indirectly inheriting from victims such as in the current case.<sup>24</sup> The primary justification for Master Sanderson's extension of the forfeiture rule is derived from his treatment of the American case of *Riggs v Palmer*,<sup>25</sup> wherein the court upheld the extended rule by reason of the common law maxim that 'no one shall be permitted to acquire property by his own crime'.<sup>26</sup> Master Sanderson found that because the principle

<sup>12</sup> Ibid.

<sup>13</sup> *Forfeiture Act 1995* (NSW); *Forfeiture Act 1991* (ACT).

<sup>14</sup> *Public Trustee v Evans* (1985) 2 NSWLR 188; *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Re Keitley* [1992] 1 VR 583.

<sup>15</sup> (1940) 63 CLR 691.

<sup>16</sup> *Troja v Troja* (1994) 33 NSWLR 269, 299.

<sup>17</sup> *Forfeiture Act 1995* (NSW).

<sup>18</sup> *Forfeiture Act 1982* (UK) c 34.

<sup>19</sup> *Forfeiture Act 1991* (ACT).

<sup>20</sup> Ibid s 3(2); *Forfeiture Act 1995* (NSW) s 5(2).

<sup>21</sup> *Public Trustee (WA) v Mack* [2017] WASC 325, 334–35.

<sup>22</sup> *Helton* (1940) 63 CLR 691, 709.

<sup>23</sup> *Riggs v Palmer*, 115 NY 506, 511 (1889).

<sup>24</sup> *Re Estate of Vallerius*, 259 Ill App 3d 350 (Ct App, 1994).

<sup>25</sup> 115 NY 506 (1889).

<sup>26</sup> Ibid 511.



underpinning the decision in *Riggs v Palmer* was significantly similar to the Australian position, the rule should similarly be extended in relation to Mack.

Examining various applications of the extended forfeiture rule in the United States, Master Sanderson cited *In Re Estate of Vallerius*,<sup>27</sup> where a grandson, found responsible for murdering his grandmother, was prevented from indirectly inheriting any part of her estate through the estate of his mother.<sup>28</sup> Similarly, he also referenced *In Re Estate of Macaro*,<sup>29</sup> where the court was in a similar position. In this case, there was also no precedent in the state of New York for determining the question of indirect inheritance. Without a case on point, the court held that the principle in *Riggs v Palmer* provided a basis for ruling that one cannot indirectly inherit any part of a victim's estate, even if it is being inherited from someone other than the victim. This, Master Sanderson opined, pointed to a well-established principle in the United States that a person is unable to *indirectly* inherit from a victim if that person is morally culpable for the victim's death. Drawing on the similarities between the principles found in the Australian case of *Helton* and the American case of *Riggs v Palmer*, Master Sanderson concluded that the extended rule should also apply in Australia.

While the decision of the court represents a significant development of the forfeiture rule in Australian common law, such an extended interpretation of the rule creates considerable uncertainty as to the rule's operation. Master Sanderson's decision was practically possibly largely because the estate of Ah Bee Mack remained almost completely unchanged since it had been inherited by Adrian Mack.<sup>30</sup> However, there is now uncertainty about how this extended rule will operate in circumstances where the property is no longer clearly defined or has merged with other property.

#### IV IMPACT ON CURRENT LAW

The extension of the forfeiture rule not only complicates what was previously a clearly expressed common law doctrine, but also complicates the operation of the rule which has, until now, been strictly applied in common law jurisdictions. The decision to extend the forfeiture rule in Western Australia, a state that still relies on the common law to dictate the rule's operation,<sup>31</sup> is significant because it remains unclear whether this extended forfeiture rule will be enforced with the same rigidity. If it is not to be strictly applied, then this would represent a significant departure from the formulation of the rule that the common law has applied to date.<sup>32</sup> However, strict enforcement of the extended forfeiture rule would cause significant complexities for courts where property is not as clearly defined as it was in this case.<sup>33</sup> Further, the increasing distance between the moral culpability of the offender, and the benefit obtained as a result, diminishes the weight to be given to the public policy justification for the extended forfeiture rule. This is especially true in situations where the extended forfeiture rule interferes with an innocent beneficiary's ability to freely dispose of property. This represents a particular problem in circumstances where the innocent beneficiary has been able to consider the wrongdoing of the offender before their death, and nevertheless wills them property which has come into their possession from the victim.

As there was no Australian authority on point, this decision has the potential to establish a precedent for the operation of the rule around Australia, except in NSW and the ACT where the rule is found in statute rather than at common law. In this way, Master Sanderson's

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<sup>27</sup> *Re Estate of Vallerius*, 259 Ill App 3d 350 (Ct App, 1994).

<sup>28</sup> *Ibid* 354–55.

<sup>29</sup> *Re Estate of Macaro*, 182 Misc 2d 625 (NY, 1999).

<sup>30</sup> *Public Trustee (WA) v Mack* [2017] WASC 325, 334.

<sup>31</sup> Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 343.

<sup>32</sup> *Troja v Troja* (1994) 33 NSWLR 269, 299.

<sup>33</sup> *Public Trustee (WA) v Mack* [2017] WASC 325, 334.

decision has inserted considerable uncertainty about the continued operation of the rule in most state jurisdictions around Australia. Thus, this case has transformed the forfeiture rule from a clearly defined doctrine to a more expansive but less defined principle that has the potential to complicate the law if it is not clarified.<sup>34</sup>

Given the significance of the decision and the lack of in-depth analysis of its effects in the Australian context, an appeal to the Western Australian Court of Appeal is likely. However, the fact that the estate of Ah Bee Mack remained almost completely discrete and identifiable from Adrian Mack's estate means that it is unlikely that the decision will be overturned. Nevertheless, an appeal would allow the court to consider issues relating to the operation of the forfeiture rule that stem from this decision. Due to the unique circumstances of this case, it is likely that, even with an appeal, significant questions as to the future operation of the forfeiture rule would remain outstanding until further case law on the issue is developed.

## V POSSIBILITIES FOR THE FORFEITURE RULE IN CASES OF ELDER ABUSE

The extension of the forfeiture rule, particularly in light of Master Sanderson's reliance on the extended rule found in the United States, has prompted at least one commentator to consider the possibility of further expansion of the forfeiture rule.<sup>35</sup> Significant debate on this issue in the United States has prompted some states to use the forfeiture rule as a means of deterring elder abuse by extending the rule to prevent those who have perpetrated elder abuse from inheriting from their victims.<sup>36</sup> However, as discussions about elder abuse legislation in Australia have found,<sup>37</sup> elder abuse is a difficult issue to define, and this impacts the effectiveness of this technique as a means of deterrence.<sup>38</sup> Further, the adoption of this kind of expansion in Australia has been discouraged by the Australian Law Reform Commission ('ALRC') in favour of exploring other strategies for responding to elder abuse.<sup>39</sup> Although the ALRC has not explicitly stated that the forfeiture rule should not be expanded to disinherit abusers of the elderly, it has highlighted a number of major concerns that arise in relation to expanding the rule in this way.<sup>40</sup> Firstly, the expanded forfeiture rule in the United States exists in the context of specific criminal laws that prohibit elder abuse.<sup>41</sup> As the ALRC has previously recommended against the introduction of specific criminal legislation to deal with elder abuse, introducing a forfeiture rule would be particularly difficult without the existence of clear criminal statute that could determine when abuse has been perpetrated.<sup>42</sup> Additionally, the ALRC has discouraged the rule's expansion because of the operation of family law provisions that affect the distribution of estates.<sup>43</sup> Thus, introducing an expansion of the forfeiture rule that prohibited abusers from inheriting would be particularly complex in the Australian legal framework. However, this expansion in the United States highlights the potential for the forfeiture rule to develop in a way that can be used as a deterrent in other areas of the law.

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<sup>34</sup> Karen J Sneddon, 'Should Cain's Children Inherit Abel's Property? Wading into the Extended Slayer Rule Quagmire' (2007) 76(1) *University of Missouri-Kansas City Law Review* 101, 111.

<sup>35</sup> Barbara Hamilton, 'Be Nice to your Parents: or Else!' (2006) 4 *Elder Law Review* 8.

<sup>36</sup> Jennifer Piel, 'Expanding Slayer Statutes to Elder Abuse' (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369, 371.

<sup>37</sup> Hamilton, above n 35, 8.

<sup>38</sup> *Ibid* 12.

<sup>39</sup> Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) 165–66.

<sup>40</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 17, 280–81.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* 281.

Extending the forfeiture rule can be considered a contentious issue that delves into the debate between testamentary freedom and public policy concerns.<sup>44</sup> Although prohibiting named beneficiaries from inheriting property does significantly interfere with freedom to dispose of property, this is not a concept that is unheard of in the legal context.<sup>45</sup> The law has made substantial inroads into testamentary freedom for the provision of property in relation to family provisions,<sup>46</sup> and therefore further inroads into testamentary freedom for the purpose of preventing elder abuse is arguably equally justified. In relation to testamentary freedom and the forfeiture rule, the public policy benefit of prohibiting those convicted of killing from profiting from their crime is clearly beneficial. However, when extending the reach of testamentary interference to prohibit abusers from benefiting from their victims, one must consider the balance between upholding the wishes of a deceased, and deterring elder abuse by ensuring that one cannot benefit from their abuse actions.<sup>47</sup> Further, this area cannot be clearly explored while we still lack a definition of elder abuse.<sup>48</sup>

Trends towards expanding the use of the forfeiture rule in countries such as the United States suggest that further development in this area of the law is likely with new cases. However, while Master Sanderson's decision indicates a move in the direction of expansion, it remains unclear how this extended forfeiture rule will operate in Australia.

## VI CONCLUSION

Under current law, there is no crime in any Australian jurisdiction that specifically relates to abuse of the elderly.<sup>49</sup> There is an increasing recognition of the need for the law to protect elderly individuals from abuse where that abuse occurs as a result of their vulnerability. One of the difficulties in conceiving a framework for the dignified protection of the elderly, compared to those frameworks designed to protect other vulnerable groups such as children, is that the consequences of ageing are unpredictable and widely inconsistent. On the one hand, legislative frameworks devised to protect the elderly from harm can be an effective way to ensure against abuse, particularly because much elder abuse occurs within the private family setting.<sup>50</sup> On the other hand, excessive intervention in the lives of the elderly suggests that society disregards the autonomy and dignity of elderly people in favour of paternalistic policies and legislation. Extending the forfeiture rule to disinherit those who have subjected elderly people to abuse could help protect those who are vulnerable in the community. However, adopting a paternalistic approach that interferes with testamentary capacity may disregard the need to uphold the dignity and autonomy of the elderly. This is a difficult balance for the law, particularly when there continues to be no clear legal definition about what constitutes an act of elder abuse.<sup>51</sup> The ruling in this case represents an interesting opportunity to examine how existing laws can impact elderly Australians. Further, it presents an opportunity for the law to expand in ways that could better protect elderly people in society. However, the definitional issues relating to the concept of elder abuse, and continuing tension between protection and autonomy, present significant challenges for this area of the law.

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<sup>44</sup> Rosalind F Croucher, 'How Free is Free? Testamentary Freedom and the Battle Between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9, 10.

<sup>45</sup> *Ibid* 23.

<sup>46</sup> *Succession Act 2006* (NSW) ch 3.

<sup>47</sup> Croucher, above n 44, 9.

<sup>48</sup> Piel, above n 36.

<sup>49</sup> Australian Law Reform Commission, above n 39, 364.

<sup>50</sup> *Ibid* 96.

<sup>51</sup> Piel, above n 36, 371.



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