ADDRESSING ELDER ABUSE: PERSPECTIVES FROM THE COMMUNITY LEGAL SECTOR IN THE ACT

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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.¹ 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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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, with 6,158 of these being persons over the age of 85. 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.

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. 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. 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. 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.

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, will result in elder abuse. However, such arrangements increase the dependence of the elderly person on their caregiver, elevating the risk of abuse. 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.

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3 Ibid.
8 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.
A Current Service Challenges in Addressing Elder Abuse in the ACT

Canberra, as an ‘age-friendly city’, 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, 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. 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.

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.

These statistics are further compounded by the fact that social isolation may be a predictor of abuse. 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, 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. 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

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11 World Health Organisation, *Canberra, Age-Friendly World* [https://extranet.who.int/agefriendlyworld/network/canberra/>]


14 Internal Legal Aid ACT figures, so far in 2017-18 (as of 10 May 2018) 282 services to clients over 65 have been provided.

15 Ashurst Australia, ‘Older People Law Brief’ (Report, Ashurst Australia, 14 January 2016). This report was prepared by Ashurst Australia for Legal Aid ACT.


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. 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 risk of elder abuse than simply age itself. 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. 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.

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. 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. 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.

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. While this gap has slowly been closing over the years, 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. With these factors in mind, how we define an elder 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...
in the Aboriginal and Torres Strait Islander community, being associated with authority and knowledge. 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. 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. 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. Even more problematic, impairment of capacity can be a consequence of elder abuse, with those who suffer abuse more likely to be hospitalised, even when accounting for other factors such as socioeconomic status. 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. 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. 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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29 Ibid.
33 Ibid 11–12.
34 Xinqi Dong and Melissa Simon, ‘Elder Abuse as a Risk Factor for Hospitalization in Older Persons’ (2013) 173(10) JAMA Internal Medicine 911.
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.37 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.38 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.39 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),40 which regulates funding and performance indicators along with indicating priority clients (such as those who are over 65).41 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).42 CLE is a critical tool in intervening early before legal issues become serious,
or before they even arise at all.\textsuperscript{43} This is done through informing people about their rights and empowering them to solve legal issues as they arise.\textsuperscript{44} 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 \textit{ALRC Report} on education regarding wills, especially do-it-yourself dispositions.\textsuperscript{45} 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.\textsuperscript{46} 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.\textsuperscript{47} 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,\textsuperscript{48} 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.\textsuperscript{49}

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.\textsuperscript{50} 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.\textsuperscript{51} 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.

\begin{itemize}
\item \textsuperscript{43} National Association of Community Legal Centres, Submission No 91 to Productivity Commission, \textit{Inquiry into Australia’s System of Civil Dispute Resolution}, November 2013, 30.
\item \textsuperscript{44} Ibid.
\item \textsuperscript{45} ALRC Report, above n 1, 290.
\item \textsuperscript{46} Productivity Commission, \textit{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.
\item \textsuperscript{47} 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.
\item \textsuperscript{49} Ibid, 15. The common law tests for testamentary capacity are well established: see \textit{Banks v Goodfellow} (1870) 5 QB 549, 565.
\item \textsuperscript{50} 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.
\item \textsuperscript{51} As noted by Kunc J in \textit{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.
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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. 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. Furthermore, many principals and attorneys enter these agreements without regard to the legal ramifications involved or the obligations imposed upon the attorney. 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.

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. 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.

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.

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. 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.

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53 ALRC Report, above n 1, 163.
54 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.
55 Legal Aid ACT, above n 20, 58.
56 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. This risk was outlined in Alizar-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.
57 Powers of Attorney Act 2006 (ACT) s 22.
58 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.60

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.61 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.62 Considering an attorney is burdened with similar fiduciary duties to a director, due to the vulnerability of the principal,63 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.64

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,65 and indeed submitted by Legal Aid ACT, an exception should exist to criteria (d) for family members who provide care for an elderly person.66 Despite the fact that often elder abuse will be perpetrated by a close family member,67 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.68 In other cases, the attorney may attempt to make a decision against the principal’s wishes before the principal loses their capacity.69 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.70 The potential for conflicts of interest when a family member is appointed as an

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60 ALRC Report, above n 1, 174.
61 Guardian and Management of Property Act 1991 (ACT) s 10(2).
62 Corporations Act 2001 (Cth) s 206B.
65 ALRC Report, above n 1, 174.
66 Legal Aid ACT, Submission No 223 to Australian Law Reform Commission, Inquiry into Protecting the Rights of Older Australians from Abuse, February 2017, 9.
69 Ibid.
70 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*.

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. This would be in addition to the already present legislative provisions dealing with conflict transactions generally. 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. 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, providing more accountability for decisions made under an EPOA and an additional safeguard for any appointment. 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, 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.

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. 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. This agreement does not necessarily lead to elder abuse, but certainly increases the risk of it occurring.

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71 [2017] NSWSC 1419, [380]–[381].
72 Ibid.
73 In the ACT this is found in s 42 of the *Powers of Attorney Act 2006* (ACT).
74 Legal Aid ACT, above n 66, 8.
75 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).
76 Stewart, above n 68, 206.
80 Kyle, above n 10, 9.
81 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.\(^82\) 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.\(^83\) 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.\(^84\)

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.\(^85\) This may mean, as noted by the ALRC, proprietary or equitable estoppel provides a more appropriate remedy.\(^86\) 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.\(^87\) While this conduct can be assessed on inferences and conduct alone,\(^88\) 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.\(^89\)

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.\(^90\) 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.\(^91\) The provision of independent legal advice is a critical factor in rebutting the presumption that a transaction was unduly influenced.\(^92\) 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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\(^{82}\) [*Christodoulou v Christodoulou* [2009] VSC 583, [70].]

\(^{83}\) See *Re Mahoney* [2015] VSC 606, [186].


\(^{85}\) *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.

\(^{86}\) *ALRC Report*, above n 1, 213.

\(^{87}\) The principles regarding estoppel were outlined in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9.

\(^{88}\) *Rixon v Horseshoe Pastoral Co Pty Ltd* [2017] NSWSC 1293, [58].

\(^{89}\) 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.

\(^{90}\) Legal Aid ACT, above n 20, 28.

\(^{91}\) Samra, above n 50, 11.

\(^{92}\) *Christodoulou v Christodoulou* [2009] VSC 583, [76].
payments.\textsuperscript{93} 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.\textsuperscript{94} 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,\textsuperscript{95} depending on the monetary value disputed.\textsuperscript{96} 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.\textsuperscript{97} 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.\textsuperscript{98} 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.\textsuperscript{99} 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.

\textsuperscript{93} ALRC Report, above n 1, 224; Social Security Act 1991 (Cth) ss 12A(2), 12C(3), 1118.
\textsuperscript{94} Coumarelos et al, above n 36, 17.
\textsuperscript{95} 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.
\textsuperscript{96} For instance, in the ACT see Magistrates Court Act 1930 (ACT) s 257.
\textsuperscript{97} 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).
\textsuperscript{98} ALRC Report, above n 1, 178, 218.
\textsuperscript{99} Guardianship and Management of Property Act 1991 (ACT) s 62(2).
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.\textsuperscript{100} 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.\textsuperscript{101} 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.\textsuperscript{102} It is important that, in line with the ALRC’s focus on respecting the autonomy and agency of the elderly,\textsuperscript{103} we ensure that we do not take away the ability of elderly people to make informed decisions about their treatment and care.\textsuperscript{104}

1 \textit{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.\textsuperscript{105} 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.\textsuperscript{106} 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.\textsuperscript{107} 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.\textsuperscript{108}

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?\textsuperscript{109} 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.\textsuperscript{110} As noted by the ALRC, a balance between protection and respect for an older person’s rights is required.\textsuperscript{111} 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.\textsuperscript{112} 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

\textsuperscript{100} ALRC Report, above n 1, 375.
\textsuperscript{101} Ibid 376.
\textsuperscript{102} Harbison, above n 21, 95.
\textsuperscript{103} ALRC Report, above n 1, 69.
\textsuperscript{104} Billy Boland, Jemima Burnage and Hasan Chowhan, ‘Safeguarding Adults at Risk of Harm’ (2013) 346 BMJ 30, 32–3.
\textsuperscript{105} ALRC Report, above n 1, 20.
\textsuperscript{106} Re T (An Adult: Consent to Medical Treatment) [1992] 4 All ER 649.
\textsuperscript{107} Ibid above n 1, 395–6.
\textsuperscript{108} Ibid 396.
\textsuperscript{109} Ibid 393.
\textsuperscript{111} Ibid.
\textsuperscript{112} 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.\(^{113}\) 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.\(^{114}\) 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.\(^{115}\) 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.\(^{116}\) 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.\(^{117}\) 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.\(^{118}\) Having a coordinated response is critical, as the current safeguard system is quite disjointed with multiple services and agencies involved in protecting the elderly.\(^{119}\) 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.\(^{120}\) 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.\(^{121}\) 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,\(^{122}\) it is possible different organisations may assess a person’s capacity in different ways – whether

\(^{113}\) Children and Young People Act 2008 (ACT) s 349(1).

\(^{114}\) Human Rights Act 2004 (ACT) s 12(3).

\(^{115}\) Secretary-General, Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General, 66th sess, UN Doc 66/173 (22 July 2011) 8–9 [28].


\(^{117}\) Mental Health Act 2015 (ACT) s 7.

\(^{118}\) ALRC Report, above n 1, 25.

\(^{119}\) Ibid 378–9.


\(^{121}\) Legal Aid ACT, above n 66, 4.

\(^{122}\) Powers of Attorney Act 2006 (ACT) s 9; Mental Health Act 2015 (ACT) s 7.
from a legal or medical perspective. 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. 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. 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-envision 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. Many elderly people may not understand their rights or are not aware of the availability of legal services to address their problems. 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. This is not unsurprising as cultural attitudes regarding the elderly (or indeed reporting abuse inflicted by family members) can differ wildly between cultures. Furthermore, using the internet or phone services can be a difficult task that prevents those elderly people with a cognitive impairment from seeking advice.


Coumarelos et al, above n 36, 361. Issues arise using the over 65 metric as an indicator are noted in the paper above.


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.\textsuperscript{131} 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.\textsuperscript{132} 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.\textsuperscript{133} 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.\textsuperscript{134} Even with this ad-hoc approach, referrals to different agencies are critical in addressing the complex environmental and social factors associated with elder abuse.\textsuperscript{135} 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.\textsuperscript{136} This often means that prevention will not often be the primary goal of a legal services provider.\textsuperscript{137} 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.\textsuperscript{138} 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.

\textbf{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 inabilities to go out to legal services.\textsuperscript{139} 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.\textsuperscript{140} Not only can education be provided through

\begin{itemize}
\item \textsuperscript{132} See Adria Navarro et al, ‘Do We Really Need Another Meeting? Lessons from the Los Angeles County Elder Abuse Forensic Center’ (2010) 50(5) \textit{The Gerontologist} 702.
\item \textsuperscript{134} Ibid.
\item \textsuperscript{135} Arlene Groh and Rick Linden, ‘Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse Project’ (2011) 25(2) \textit{Journal of Elder Abuse & Neglect} 127, 144.
\item \textsuperscript{136} 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.
\item \textsuperscript{137} Xin Qi Dong, ‘Elder Abuse: Systemic Review and Implications for Practice’ (2015) 63 \textit{Journal of the American Geriatrics Society} 1214, 1234.
\item \textsuperscript{138} David Burnes, ‘Community Elder Mistreatment Intervention with Capable Older Adults: Toward a Conceptual Practice Model’ (2017) 57(3) \textit{The Gerontologist} 409, 412.
\item \textsuperscript{139} People with Disability Australia, above n 130, 7.
\item \textsuperscript{140} Ashurst Australia, above n 15, 26.
\end{itemize}
outreach, but a lawyer can also be present to provide limited legal advice or to facilitate a further session if needed.\textsuperscript{141}

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.\textsuperscript{142}

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.\textsuperscript{143} A vulnerable older person may have experienced forms of social exclusion or marginalisation in the past, making them reluctant to access a legal service.\textsuperscript{144} 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.\textsuperscript{145} In fact, a socio-legal approach rather neatly relates to discussion of respecting a person’s equality before the law.\textsuperscript{146} 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.

\section{V HOW LEGAL AID SERVICES ARE RESPONDING TO THE CHALLENGES OF ELDER ABUSE}

The responses to the \textit{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.\textsuperscript{147} 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.

\begin{thebibliography}{9}
\bibitem{141} Ibid 24.
\bibitem{142} Ibid 23.
\bibitem{144} Elizabeth Peel, Helen Taylor and Rosie Harding, ‘Sociolegal and Practice Implications of Caring for LGBT People with Dementia’ (2016) 28(10) \textit{Nursing Older People} 26.
\bibitem{145} Sage-Jacobson, above n 128, 156–7.
\bibitem{146} Ibid 157.
\end{thebibliography}
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. 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. 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. These partnerships ultimately allow for a greater awareness of legal issues for health practitioners and indeed awareness of medical issues for lawyers. 

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. 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.

In the context of elder abuse, 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, it also illustrates why hospitals and other health care facilities

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148 See Tanton, Miranti and Vidyattama, above n 18.
153 Bishop, Shahkhan and Loff, above n 152, 679.
154 Ibid 680.
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. 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). 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. 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. 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. 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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156 Dong, above n 137, 1234.
157 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.
159 Legal Aid ACT, above n 20, 14.
use of FDR-like conferencing in elder abuse matters would likely be best placed as an early intervention service.\textsuperscript{161} 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.\textsuperscript{162} 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.\textsuperscript{163} 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.\textsuperscript{164} 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.\textsuperscript{165} 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.\textsuperscript{166} 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.\textsuperscript{167} 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.\textsuperscript{168} With Legal Aid ACT approving 28 grants of 73 applications received from those over 65 in 2016-17,\textsuperscript{169} and the majority of these applications being rejected on the means test,\textsuperscript{170} this option should be given serious consideration, including possible amendments to legal aid commission legislation across the country.

\section*{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 \textit{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.

\begin{thebibliography}{99}
\bibitem{161} Ian Fletcher, ‘Can Specialised Family Mediation Prevent Elder Abuse in Australia’ (Paper presented at the Australian Mediation Conference, Sydney, 2012) 2.
\bibitem{162} Samra, above n 50, 11.
\bibitem{164} Lise Barry, ‘Elder Mediation’ (2013) 24 \textit{Australasian Dispute Resolution Journal} 251, 254–5.
\bibitem{165} Fletcher, above n 161, 2.
\bibitem{166} Productivity Commission, above n 46, 1020.
\bibitem{167} Samra, above n 50, 20.
\bibitem{168} \textit{Ibid} 22.
\bibitem{169} Samra, above n 50, 20.
\end{thebibliography}
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. 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 bourgeoning 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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171 See Productivity Commission, above n 46.