

DISCUSSION RESOURCE

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PROJECT OF  
5TH NATIONAL ELDER  
ABUSE CONFERENCE

HOSTED BY SENIORS  
RIGHTS SERVICE



# ELDER ABUSE, CIVIL AND CRIMINAL LAW

BRIAN HERD





## ABOUT THIS PROJECT

In February 2018, Seniors Rights Service hosted the 5th National Elder Abuse Conference, which brought together more than 500 delegates from a broad range of backgrounds. The conference culminated in an announcement by the Commonwealth Attorney-General, Hon Christian Porter MP, that a “National Plan” would be developed to ensure the protection of older people in Australian society.

To further the conversations generated by the conference, Seniors Rights Service engaged Ellen Fanning to conduct a series of interviews with experts who attended the conference. These videos, along with a discussion sheet for each video, are freely available to community members, professionals and students of all sectors, to enable engagement with the content using suggested discussion questions and to follow up with further reading.

### IMPORTANT! READ THIS BEFORE HOLDING A DISCUSSION GROUP

Many people will share and benefit from participating in study and discussion on the topics.

Due to the sensitive nature of the topics, however, group leaders should ensure they are prepared to support individuals to find qualified assistance in a timely manner, should a topic generate personal concerns or issues for individuals.

As a minimum, group leaders should have available information sheets and phone numbers from the relevant seniors' legal rights service and/or elder abuse prevention service in your state or territory (on page 5 and current as of 2018).

## ABOUT THIS RESOURCE

### SHORT DESCRIPTION

Mr Herd explains how financial elder abuse can be difficult to prove. Perpetrators of financial elder abuse may have no understanding that what they are doing is wrong. He argues that discrete criminal offences that target the conduct of the abuser can act as disincentives to elder abuse. He also discusses his view that increasing awareness of elder abuse must come with the ability to prosecute.

### FOCUS AREA

Elder abuse, civil and criminal law

### RELATED TOPICS

Elder abuse prevention, elder abuse intervention, financial elder abuse, legal responses, law, social work, protection, autonomy, safeguarding

### AUDIENCES

Legal professionals, police officers, community members, health workers, aged-care workers, community workers, researchers, students, advocates, policy officers

### MATERIALS FOR FURTHER READING

Australia Law Reform Commission (2017), Elder Abuse – A National Legal Response: Final Report; Australian Law Reform Commission, [www.alrc.gov.au/publications/elder-abuse-report](http://www.alrc.gov.au/publications/elder-abuse-report)



## BRIAN HERD

PARTNER, CRH LAW,  
ELDER LAWS SERVICES

## BIOGRAPHY

**Brian Herd is a partner in the firm CRH Law and has been a lawyer since 1983. He is recognised as one of Australia's leading experts in the areas of elder law, retirement, disability and aged care. He also has extensive experience in life planning for older people and the legal issues affecting them. Mr Herd is a popular presenter in public forums on elder law issues and is also regularly invited to address the changing legal dynamics and needs of the aged-care and disability sectors at industry conferences. In 2017, for the second consecutive year, Mr Herd was named one of Australia's best lawyers in retirement villages and senior living law.**

# ELDER ABUSE, CIVIL AND CRIMINAL LAW

## DISCUSSION QUESTIONS

***What examples does Mr Herd give of what he sees as "deficiencies" in civil and criminal law in Australia in relation to elder abuse?***

In civil law (disputes between people), Mr Herd gives the examples of presumptions in law, such as the presumption of innocence and the presumption of advancement. In the latter, the law assumes that if a parent advanced money to a family member, it is deemed to be a gift. This is not the case if you advance money to a stranger, where the presumption is that the money is held in trust for you by that stranger. In the latter case, the law still regards it as your money. But families have "special" treatment in the law, which reflects a very old cultural view about families. This presumption, Mr Herd says, makes it difficult for an older person to disprove the presumption that it was a gift. In criminal law, using financial elder abuse as an example, Mr Herd describes how difficult it is to prove financial abuse as theft. Under the law, Mr Herd says that for something to be considered be stolen, you must: 1) take something that wasn't yours; 2) do so without the consent of the owner; and 3) have the intention of "permanently depriving the person" of the money or object. In families, the perpetrator can say, "Mum gave that to me and I said I would give it back whenever I could." So, Mr Herd says, the criteria aren't satisfied, and this is particularly so because, in many cases, "mum may have lost her capacity".

***What examples of overseas laws addressing elder abuse does Mr Herd give?***

Mr Herd talks about laws in the United Kingdom, which introduced a serious crime called "controlling and coercive behaviour". This enables an adult child to be charged with a serious crime if they behave in a controlling and coercive way towards a member of the family. Mr Herd argues that discrete offences such as these would act as a deterrent or disincentive, particularly in financial areas. And, he believes laws such as this would help raise awareness in families, the community, and even with police officers, that such behaviour is a serious offence.

Another example of an overseas law Mr Herd gave was in the US, where there are discrete criminal offences such as "isolating an elder", "exploiting an elder", and "depriving an elder of their liberty". Following the introduction of these laws, he says, there was an almost sixfold increase in prosecutions regarding elder abuse.

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### ***What does Mr Herd say about the law's treatment of perpetrators of elder abuse?***

Mr Herd argues there are not enough disincentives and not enough accountability in the law when considering the impacts on perpetrators. He says perpetrators "have the sense they're untouchable, immune and inoculated by the ineptness of the law" and by the culture that "whatever happens in the family stays in the family". He says the lack of laws prescribing that this type of behaviour is wrong, and criminal, shores up the common belief by some adult children who are perpetrators that they have done nothing wrong. He says it shores up the belief that they are entitled to the finances of their elder parent, or the justification in their mind that their parent would have "wanted it" or said they could take the older person's property or money.



STATE/TERRITORY	AGENCY CONTACT	CONTACT
<b>AUSTRALIA-WIDE</b>	<b>Older Persons Advocacy Network (OPAN)</b>	1800 700 600 Connects you with aged-care advocacy services in your state or territory
<b>NEW SOUTH WALES</b>	<b>Seniors Rights Service</b>	1800 424 079
	<b>NSW Elder Abuse Helpline</b>	1800 628 221
<b>AUSTRALIAN CAPITAL TERRITORY</b>	<b>Older Persons Abuse Prevention Referral and Information Line (APRIL)</b>	(02) 6205 3535
	<b>A.C.T. Disability, Aged and Carer Advocacy Service (ADACAS)</b>	02 6242 5060
<b>NORTHERN TERRITORY</b>	<b>Elder Abuse Information Line</b>	1800 037 072
	<b>Seniors and Disability Rights Service of Darwin Community Legal Service</b>	1800 812 953
<b>QUEENSLAND</b>	<b>Elder Abuse Prevention Unit</b>	1300 651 192
	<b>Aged and Disability Advocacy Australia (ADA Australia)</b>	1800 818 338
	<b>Caxton Legal Centre</b>	(07) 3214 6333
<b>SOUTH AUSTRALIA</b>	<b>Aged Rights Advocacy Service</b>	(08) 8232 5377 (Adelaide)
	<b>Alliance for the Prevention of Elder Abuse</b>	1800 700 600 (rural)
	<b>Legal Services Commission of South Australia</b>	1300 366 424 (08) 8111 5555
<b>TASMANIA</b>	<b>Tasmanian Elder Abuse Helpline</b>	1800 441 169
	<b>Advocacy Tasmania Inc. (ATI)</b>	(03) 6224 2240
	<b>Legal Aid Commission of Tasmania</b>	1300 366 611 (03) 6236 3800
<b>VICTORIA</b>	<b>Seniors Rights, Victoria</b>	1300 368 821
	<b>Elder Rights Advocacy (ERA)</b>	(03) 9602 3066 1800 700 600 (rural)
<b>WESTERN AUSTRALIA</b>	<b>Advocare Inc.</b>	1300 724 679 (Perth) 1800 655 566 (rural)
	<b>Older Persons Rights Service, Northern Suburbs Community Legal Centre</b>	(08) 9440 1663 (Mirrabooka) (08) 9301 4413 (Joondalup)

## DISCLAIMER

This is information only, not legal advice. If you have a legal problem, call our service directly or see your lawyer. The views expressed in the video are the views of the individual making them, not those of Seniors Rights Service Inc.