



SUBMISSION 31 AUGUST 2016

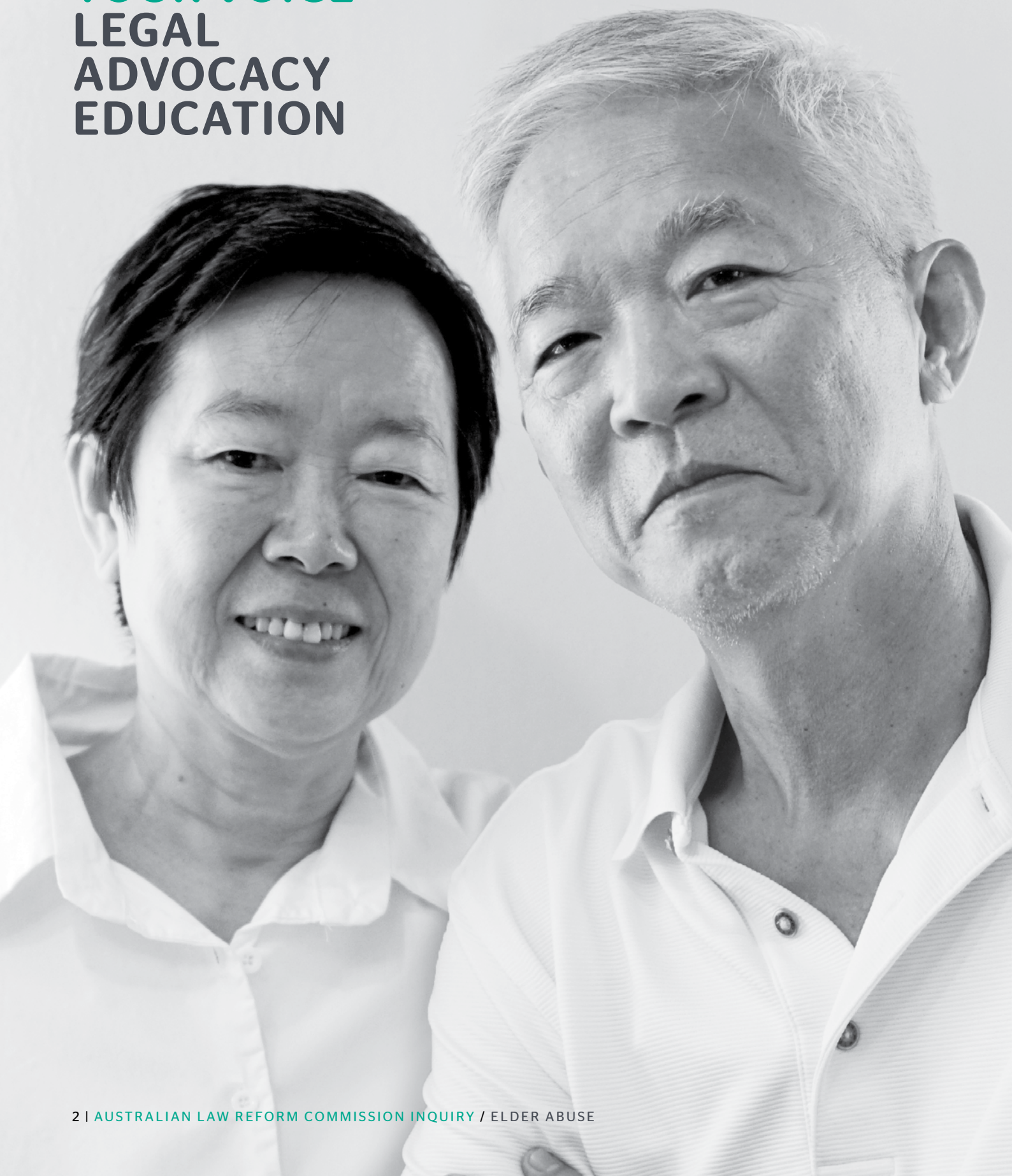
INQUIRY INTO ELDER ABUSE

AUSTRALIAN LAW REFORM COMMISSION INQUIRY



Seniors Rights Service

**YOUR RIGHTS
YOUR VOICE
LEGAL
ADVOCACY
EDUCATION**



Executive Summary

CONTENTS

Introduction and Background	Page 4
Response to ALRC Question #1	Page 6
Response to ALRC Question #2	Page 8
Response to ALRC Question #3	Page 10
Response to ALRC Question #4	Page 15
Response to ALRC Question #5	Page 16
Response to ALRC Question #6	Page 18
Response to ALRC Question #7	Page 19
Response to ALRC Question #8	Page 20
Response to ALRC Question #9	Page 21
Response to ALRC Question #10	Page 22
Response to ALRC Question #11	Page 23
Response to ALRC Question #12	Page 24
Response to ALRC Question #13	Page 25
Response to ALRC Question #14	Page 28
Response to ALRC Question #15	Page 29
Response to ALRC Question #16	Page 30
Response to ALRC Question #17	Page 31
Response to ALRC Question #18	Page 32
Response to ALRC Question #19	Page 33
Response to ALRC Question #20	Page 34
Response to ALRC Question #21	Page 36
Response to ALRC Question #22	Page 37
Response to ALRC Question #23	Page 37
Response to ALRC Question #24	Page 38
Response to ALRC Question #25	Page 39
Response to ALRC Question #26	Page 40
Response to ALRC Question #27	Page 42
Response to ALRC Question #28	Page 44
Response to ALRC Question #29	Page 46
Response to ALRC Question #30	Page 48
Response to ALRC Question #31	Page 49
Response to ALRC Question #32	Page 51
Response to ALRC Question #3	Page 52
Response to ALRC Question #34	Page 53
Response to ALRC Question #35	Page 54
Response to ALRC Question #36	Page 55
Response to ALRC Question #37	Page 56
Response to ALRC Question #38	Page 57
Response to ALRC Question #39	Page 58
Response to ALRC Question #40	Page 59
Response to ALRC Question #41	Page 60
Response to ALRC Question #42	Page 61
Response to ALRC Question #43	Page 64
Response to ALRC Question #45	Page 65
Response to ALRC Question #46	Page 66
Response to ALRC Question #47	Page 66
Response to ALRC Question #48	Page 66
Response to ALRC Question #49	Page 67
Response to ALRC Question #50	Page 67
Conclusion	Page 67
Summary of Recommendations	Page 68

In this submission, we emphasise the importance of strengthening and expanding advocacy and legal services in a way that reaches out to these marginalised groups of older people. In providing our submission, we implore the Federal Government to specifically legislate and draft in a way that ensures inclusion of these marginalised groups of older people.

It is our primary submission that the application of Human Rights Principles must be recognised and legislated for with respect to Australia's older people.

In this respect, we make the following key recommendations:

1. Definition of elder abuse – We recommend that a definition of elder abuse be expanded to include contractual relationships between aged care provider companies that are regulated by the Aged Care Act 1997 (Aged Care Act). We also believe that any definition must include a separate form of elder abuse by an elderly spouse against their spouse. This would provide a better understanding of the range of inter-spousal abuse that might occur in old age including abuse that is a continuation of a history of domestic violence and abuse that might be triggered by onset of dementia.
2. Need for further research – We recognize the lack of sound, valid statistical data on a national level as to the scope and depth of elder abuse in Australia and we urge that more well-funded research be provided in this area.
3. Uniformity of documents and laws – We recommend the implementation of national laws and the use of uniform documents across the various States and Territories of Australia in relation to Power of Attorney, guardianship and substitute decision making; and
4. Register for Power of Attorney documents – We recommend the introduction of a National register for Power of Attorney and Enduring Guardianship documents that would give financial and commercial organisations certainty about the legal position of such documents and reassurance that they are dealing with the correct person.

We support the establishment of national laws in relation to enduring power of attorney and guardianship documents and that a national register be established and regulated by an Integrity Commission to which the substitute decision maker would be required to submit returns of decisions taken and accounts every 6 or 12 months.

We set out a full summary of our recommendations at the end of these submissions.

Level 4, 418A Elizabeth St.
Surry Hills NSW 2010
P (02) 9281 3600
P 1800 424 079
F (02) 9281 3672

info@seniorsrights.service.org.au
www.seniorsrights.service.org.au

The Aged-care Rights Service Inc. trading as
Seniors Rights Service. ABN 98 052 960 862

Tom Cowen - Principal Solicitor
Russell Westacott - Chief Executive Officer

ACKNOWLEDGMENTS: Seniors Rights Service acknowledges the contributions of our organisation's legal staff: Melissa Chaperlin, Nalika Padmasena, Meg Small, Kim Boettcher, Tim Tunbridge. We also acknowledge and are grateful for the input of the Older Persons' Legal Services Network, Welfare Rights Services and a particular thanks to Henry Davis York.

Introduction and Background

Seniors Rights Service (**SRS**) is a nonprofit community legal centre with specialist advocacy and legal services based in Sydney. SRS is a specialist service which provides assistance to people over the age of 60 across all of New South Wales (**NSW**).

The SRS is composed of three Divisions:

- 1 A professional Advocacy service, which advocates for people who are residents in aged care facilities or receive in home care assistance.
- 2 The Older Persons Legal Service, which provides free legal assistance to disadvantaged and vulnerable older persons living in NSW.
- 3 The Retirement Village Legal Advice Service, which provides free legal assistance to residents of retirement villages who have issues with the village operator.

The majority of our clients are socially and economically disadvantaged and vulnerable in some way. Although many of our clients may own their own home¹ the age pension is usually their only source of income.

All three divisions of the SRS conduct rights education to older people, their carers, professional carers and the community.

Purpose

Seniors Rights Service fosters communities where older members of society are aware of, actively exercise and defend their individual human rights, in a society that respects and values older people and promotes and upholds their rights.

Principles

In all of its endeavours, the Seniors Rights Service:

1. empowers older people as rights holders and active contributors to society;
2. provides high quality and timely service;
3. provides access and equity in service to disadvantaged vulnerable and marginalised seniors without discrimination;
4. supports capacity development of all staff assisting older people to ensure that they can deliver high quality service;
5. collaborates with other organisations in pursuit of common goals; and
6. works with the broader civil society to foster respect for older members of society and their individual rights.

Priority populations

The Seniors Rights Service Strategic Plan prioritises engagement with older people who are:

1. disadvantaged and vulnerable
2. live in regional, rural and remote locations
3. culturally and linguistically diverse
4. Aboriginal or Torres Strait Islander
5. lesbian, gay, bisexual, transgender or intersex.

¹Indeed, possible loss of an older person's home, due to financial exploitation, is one of the key issues that we see in our daily work.

Elder Abuse

Setting The Scene - some key statistics and facts

In NSW, the following statistics apply

- There are 1.2 million older people
- 5% prevalence of elder abuse in the community which equates to 55,000 older people get abused
- 250,000 older people are from non-English speaking backgrounds
- 900 aged-care facilities with 90,000 residents in facilities
- 250,000 receive aged care at home
- There are 600 retirement villages with more than 36,000 residents

In Australia more broadly, the following statistics apply

- 1.3 million people are aged care consumers – expected 3.5 million by 2050
- There are approximately 3.6 million older people in Australia with >5% prevalence of elder abuse in the community which means there are an estimated 180,000 older Australians who will experience elder abuse in their lifetime (minimum as abuse is underreported)
- 231,000 access permanent residential care
- 975,000 access home or other care packages
- About 2,500 cases of reportable assault each year in aged care
- The national aged-care budget: 0.8% of GDP or \$15 billion a year
- There are more than 45,000 older people from non-English speaking backgrounds in care
- About 377,000 Aboriginal people receive aged care
- Advocacy services are free and confidential and are not governed by any Government department
- 17,000 older people per year call for advocacy services
- Most elder abuse across the community occurs within relationships of trust, often between family members
- Financial abuse is the most common form of elder abuse

Responses to ALRC Questions

We refer the ALRC to the November 2015 SRS Submission to the NSW Parliamentary Inquiry into Elder Abuse (NSW Inquiry). A number of recommendations in the SRS submission are relevant to this inquiry.

Question 1: Defining Elder Abuse

The WHO-CIG adopted the definition developed by Action on Elder Abuse (UK) in 1995: “Elder abuse is 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.”

RECOMMENDATION 1

SRS recommends that a definition of elder abuse should be expanded to include contractual relationships between aged care provider companies which are regulated by the Aged Care Act 1997 (**Aged Care Act**). SRS recommends this on the basis that there has been much discourse in relation to the need for further refinement of that definition, particularly the “expectation of trust” element of the definition. The 2008 WHO report entitled: *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main Report* expands on this.

SRS also suggests that a revised definition should be guided by the conclusions of the two year study led by Professor Lyn McDonald at the *Canadian National Initiative for the Care of the Elderly (NICE)*. That report concluded that a clear definition of elder abuse and neglect involves clear definitions for mistreatment of older adults, as well as for specific types of mistreatment, including physical abuse, financial abuse, sexual abuse, and neglect. The abuser may be family, friend, carer, or person providing services to the older person or a spouse.

SRS, for clarity, sees elder abuse falling into 2 categories. The first is physical abuse (which includes psychological abuse and neglect inter alia) and the second is financial exploitation. Where we discuss physical abuse below we are including all elements of abuse other than financial exploitation. We do recognise that financial exploitation can be accompanied by other forms of abuse and vice versa.

SRS supports the definition of elder abuse in the *NSW Interagency Protocol*:

While abuse is a term that can mean different things to different people, it is fundamentally a violation of an individual's human rights by another person or persons. Abuse can take many forms including, but not limited to, abuse of older people by a friend, relative, carer, paid or unpaid worker, partner abuse, abuse of parents by adult children and sexual abuse.

Abuse of older people is any behavior that causes physical, psychological, financial or social harm to an older person”.

SRS submits that the ALRC also consider, in coming to an understanding of how elder abuse is defined, the *Victorian Government, Department of Health, Elder Abuse and Prevention Guidelines 2012 to 2014*. The guidelines provide a set of circumstances outlining the different ways that elder abuse may arise:

- Physical - non accidental acts that result in physical pain, injury or physical coercion;
- Psychological - Inflicting mental stress via actions and threats that cause fear, violence, isolation, deprivation of feelings of shame or powerlessness. These behaviours both verbal and non-verbal are designed to intimidate, are characterised by repeated behaviours over time, and are intended to maintain a hold of fear over a person;
- Social - The forced isolation of older people, with the sometimes additional effect of hiding abuse from outside scrutiny and restricting or stopping social contact with others, including attendance at social activities;

- Sexual – unwanted sexual acts, including sexual contact, rape, language or exploitative behaviours, where the older person's consent is not obtained, or where consent was obtained through coercion;
- Neglect – Failure of a carer responsible for the person to provide the necessities of life such as adequate food, shelter, clothing, medical or dental care, as well as the refusal to permit others to provide appropriate care (also known as abandonment). This definition excludes self-neglect by an older person of their own needs.
- Financial – illegal use, improper use or mismanagement of a persons money, property or financial resources by a person with whom they are having a relationship implying trust.

RECOMMENDATION 2

SRS has noted a high incidence of abuse by a spouse against an elderly partner, both verbal and non-verbal abuse. We recognise that elder abuse may be a continuum of behaviour that has been in place for many years as domestic violence and note that while there are laws in relation to domestic violence in this area, it is our submission that verbal and non-verbal elder abuse by an elderly spouse against another spouse should be recognized as a separate form of elder abuse. This is particularly important where the abuse has commenced only as the couple have grown older and may have been triggered by dementia.



Responses to ALRC Questions

Question 2 : What are the key elements of best practice legal responses to elder abuse?

There are a number of elements to address elder abuse, some of which are direct legal responses and others are responses that might have a legal element to them. Efforts to reduce the risk of elder abuse occurring and to minimise the impact where it has already occurred commence with an education program. This education program can be divided into two categories. Firstly a general community education program to raise awareness of elder abuse and the consequences of it. And secondly an education program directed at the professionals who are responding to elder abuse. The first category would involve education about the rights of older people and the law pertaining to those rights. The second involves training professionals, what their legal responsibilities are and what is the most appropriate approach to situations where elder abuse may be occurring.

Education programs need to be supported by appropriate legislation and regulations.

Professional Training

SRS submits that the foundation for best practice responses to elder abuse begins with providing those services (legal services, general practitioners, police, aged care assessment teams, hospitals and emergency services staff) with the training, resources and facilities required to appropriately analyse, evaluate and respond to this issue.

Key elements to identification and management of resolution of elder abuse incidents are:

- professional development and mandatory training for police, social workers, hospital staff, emergency services, and aged care providers and their staff. We note that the current levels of education about abuse of older people is voluntary and limited and is thus inadequate. It is important to:
 - establish the level of risk of abuse or further abuse;
 - determine the older person's wishes and considering the older person's preferred outcomes to avoid imposing a solution that might precipitate an even more adverse outcome for the older person;
- finding a safe avenue for the person to seek advice and support
- Time-limited, goal focused care co-ordination
- the provision of crisis accommodation, day care centres and short term accommodation under the regulatory regime set out in the Aged Care Act.

Changes to the law may be required to facilitate these groups, as first responders, to remove the abused older person from the perpetrator either temporarily or permanently.

RECOMMENDATION 3

SRS supports and recommends the need for education and training of agencies and their staff involved in the reporting of elder abuse, both in the identification of the abuse and identification of the barriers professionals as well as older people face in reporting elder abuse.

Overseas training models such as those in *Quebec, Canada, and United Kingdom* should be considered and adopted as appropriate. In that regard, the training programs established for police and banking institutions by *Susan Somers MD*, former Deputy Attorney General for the State of New York, heading sections of the Consumer Frauds Bureau and The Elder Protection Unit should be replicated where relevant in Australia rather than reinvented.

Crisis Accommodation has been well-established in elder abuse prevention models in Canada and also Hong Kong. The Hong Kong respite and day care centres would be a good model for Australia.

The Israeli experience of practice interventions in the area of elder abuse and neglect is also a worthwhile resource as the University of Haifa has been active in this area.

RECOMMENDATION 4

Crisis Accommodation should be funded and regulated in the Aged Care Act along with long term aged care accommodation.

RECOMMENDATION 5

That the ALRC consult widely with Aged Care Assessment Teams on the issue of best practice first response prior to making its recommendations.

Identifying and addressing Barriers that older people face in reporting abuse

A crucial step in developing best practice responses to reduce or eliminate the incidence of elder abuse is for professionals to be sufficiently skilled to identify the barriers that older people experience in reporting elder abuse. If these barriers are identified then steps can be taken to overcome them. Coupled with this is better response practices by professionals in responding appropriately having understood these barriers.

Researchers have identified a range of barriers confronting the victim to reporting elder abuse. SRS noted these in its submission to the NSW Inquiry.

These barriers include:

- The older person may not realise that they are subject to elder abuse;
- They may think that the treatment is normal;
- The older person may have diminished awareness capacity, such as cognitive barrier;
- There may be a physical or mental disability that restricts their capacity to report abuse or which reduces their understanding of what is happening or reduces their capacity to explain it to a third person;
- They may have restricted mobility and thus cannot go to an authority or someone else with whom they can raise their concerns;
- They may lack knowledge about their rights or resources available to them;
- The older person may be in isolation and reliant on the perpetrator for care and companionship;
- Their need to preserve their relationship with the abuser may overwhelm their desire to report the abuse;
- They may be so dependent on certain individuals, including the abuser, that they cannot risk reporting the abuse;
- They may be concerned about the stigma or shame that would flow from reporting the abuse;
- They may fear reprisal by the abuser if they report the abuse;
- There may be cultural, religious or generational barriers that inhibit the reporting of the abuse;
- There may be literacy or language barriers that inhibit the reporting of the abuse; and
- There may be a perceived or actual lack of access to support services or options for the older person.
- They may have a fear of being institutionalised;
- They may fear family members being penalised or prosecuted;
- They may have a desire to preserve family relationships;
- They may experience cultural stigma and shame that abuse has occurred;
- They may blame themselves or feel responsible for the perpetrator's actions;
- Fear of loss of independence;
- Poor health impacts on energy and motivation to manage emotional conflict and physical change.

A barrier particular to CALD and LGBTI communities is the stigma attached to disclose abuse to services or outsiders and lack of awareness of rights and where to go for assistance.

Responses to ALRC Questions

Question 3 : The ALRC is interested in hearing examples of elder abuse in relation to:

Aboriginal and Torres Strait Islander People

The Seniors Rights Service NSW would not presume to make submissions on behalf of the Aboriginal people. We support the view stated by Aboriginal Associate Professor Ted Wilkes “Aboriginal people must address issues that they see as relevant to their older people themselves”. The questions posed are considerable and make responding to the inquiry quite overwhelming and time consuming for any organizations that do, to respond. Not all questions would be relevant to Aboriginal communities a more specific questionnaire may be more appropriate in this instance.

The Aged Rights Advocacy Service in South Australia working with the South Australian Council of Elders were quoted as defining the elder abuse of Aboriginal people as:

“bashing an elder, taking their food, their money, their medications, their possessions, threatening elders with violence, or want to see their grandchildren or cutting them off from their community support and their everyday needs.

Mick Gooda², Aboriginal and Torres Strait Islander Social Justice Commissioner added that “elder abuse is not confined only to economic or financial abuse, it also includes psychological, physical, sexual, spiritual and social abuse and neglect”.

The key elements of best practice responses to elder abuse in Aboriginal communities should be directed to and relevant to Aboriginal culture and practice and connected to their obligations and beliefs which only they are qualified to express.

RECOMMENDATION 6

SRS urges the formation of Aboriginal consultation groups across Australia at metropolitan and Regional, Rural and Remote (RRR) areas (keeping their moiety in mind) to address this issue. These groups should be provided with a list of relevant organisations, such as the various Seniors Rights Services across Australia, with whom they might be willing to form partnerships for consultation and advice where they consider it appropriate.

RECOMMENDATION 7

Centrelink’s response to Aboriginal people at risk of financial abuse should include the appointment of appropriately trained Aboriginal field officers. Where concerns arise about nominees inappropriately accessing older people’s money there should be put in place a system of payday supervision by Aboriginal Elders and the field officers. The importance of the notion of reciprocity to older Aboriginal people would need to be investigated in the light of today’s social attitudes and behaviour and how it can be managed.

According to Mick Gooda one form of abuse that regularly arises is young people who “often hold their old people to ransom, bullying them to pay bills, look after children, stick up for them with authorities and finance their substance abuse and gambling.”

²Gooda, M. Aboriginal and Torres Strait Islander Social Justice Commissioner AAG Elder Abuse and Neglect Conference, presentation, Wednesday 5 September 2012.

³Ingram, M. The Role of Community in Aboriginal Aged Care. Inner Sydney Voice, Autumn 2016 p⁹.

Aboriginal grandparenting is another serious issue that may lead to elder abuse within Aboriginal communities. Often the grandchildren are used as pawns in threats to remove them from their Grandparents care if the grandparent does not give the parent money. Any recommendation in this regard should again be in direct consultation with Aboriginal kinship groups themselves supported by other non-Aboriginal community groups of their choosing.

Aboriginal Aged Care

Millie Ingram³, was born and raised in Wiradjuri country (Cowra) in central NSW. She has worked in Aboriginal Affairs all her life and is a recognised Aboriginal Elder. Aunty Millie is of the opinion that older Aboriginal people would be better served in their senior years by being to be cared for in in their own country. Where they would have social inclusion provided by their own people.

“Instead of large institutionalised nursing homes , they would prefer smaller group homes built in their community, run by community, paid for by governments”. (5)

If there has been limited response from Aboriginal people and interest groups to this inquiry we suggest that this inquiry makes a special effort to reach out to Aboriginal groups and communities, especially in RRR areas, for them to provide information on how best they see the problem of Elder Abuse may be addressed in their communities.

We would suggest that the issue of reciprocity and how it can be addressed in the modern historical context be high on the agenda.

People from Culturally and Linguistically Diverse (CALD) Backgrounds

SRS has established a Culturally and Linguistically Diverse community working group within our organisation in order to reach more CALD communities, and it is comprised of staff and Directors. About 15% of our clients are CALD, yet in NSW figures show that the percentage of Australians of non-English speaking background is 25%. NSW has the largest CALD communities. We need better resources to build better relationships with CALD communities to specifically address the issues of elder abuse. Data from the Australian Bureau of Statistics (ABS) show that of the 1.1 million older people in NSW 28% have been born overseas. It notes that of this group many were born in English speaking countries – such as the UK and New Zealand.

Hard to Reach:

It is the experience of SRS that some CALD populations are very difficult to reach due to cultural and language barriers that may exist. This makes addressing elder abuse issues even more difficult. As a consequence access to information about the extent and scope of elder abuse within some CALD communities is very restricted. SRS does deliver a wide range of community legal education to CALD groups using interpreters. A good example to illustrate this point is Arabic-speaking women in Western Sydney. Our advocates and educators have long-standing relationships with various Arabic communities. We conduct many education sessions with this population. Many sessions are only attended by men within those communities. As a result, staff at SRS developed simple playing cards with legal facts messages in Arabic that were handed to women at Arabic community centres.

It is important to obtain any community's trust in general terms before addressing the issue of elder abuse. This is even more crucial with CALD communities. The approach adopted by SRS to achieve this includes:

- Small, personalised engagement steps are crucial with community leaders to increase understanding and gain trust.
- The collaboration with community organisations or contacts that are already respected increases engagement with the community.

Responses to ALRC Questions

- Involvement of relevant community media and their interest are important to engage with community members.
- Community leaders and religious leaders play a crucial part in accessing the communities.

Some activities that SRS have recognised which may be or lead to elder abuse include:

- Elders may want to gift, loan or guarantee money to assist family members and it is a normal cultural practice within communities, this attitude may be take advantage of less scrupulous loved ones;
- Elder widows may be unaware of correct procedures to access the assistance they need to enter into loan or guarantee arrangements. Major High Court cases demonstrate this issue.
- Elders may be used to 'trust' practices concerning loans;
- The idea of contracts may be considered offensive in some communities;
- Independent legal information or advice is often not sought before signing documents;
- Elders are often not informed when loans they have guaranteed are 'going bad'.

RECOMMENDATION 8

Financial Regulation can be changed to ensure that vulnerable and disadvantaged older people have extra risk management regimes put in place by lenders and other financial institutions for their protection.

Family Agreements

In one case example through our service a woman from a Greek background and her husband, lived in their own villa in NSW. Their daughter encouraged them to sell their home and contribute to a granny flat on the daughter and son-in-law's property in another state. They followed the daughter's suggestion and 2 years later the relationship broke down and they returned to NSW and were reduced to renting. The client was very distressed and was advised to place a caveat on the daughter and son-in-law's property protecting her right to claim an equitable interest (constructive trust) for the return of her contribution.

See below for further discussion about such arrangements. It would be beneficial to have a forum other than the Supreme Court, such as the NSW Civil and Administrative Tribunal, for property orders to be made in relation to family agreements to reduce time, cost, and stress for older people in bringing proceedings against family members.

Borrowers Beware Program

SRS conducted a program called "Borrowers Beware" in conjunction with Legal Aid NSW. The program was designed to create awareness in CALD communities about the legal problems which may arise when giving loans to family members, agreeing to be guarantor to a family members loan, moving in with the family, and impacts on the age pension. The program was developed in response to the large number of calls received by the SRS and Legal Aid from CALD communities in relation to older people who had entered such arrangements without seeking prior legal advice.

Gifting

SRS had an inquiry from an elderly Vietnamese woman whose son had encouraged her to transfer the title of her house into the son's name. The son told her she could reside in the house for her lifetime until she passed away or required aged care. The elderly woman did not realise such a gift could impact on her

age pension. A person on the age pension is unable to gift more than \$10,000 a year or \$30,000 over 5 years without it being deemed an asset and reducing the age pension. She also did not realise she had lost her security in her residence in that she was no longer on the legal title. If the son tried to evict her then she would have to take expensive action in the Supreme Court to try to claim an equitable interest in the property.

LGBTI

New South Wales has the largest LGBTI community with most older LGBTI people settled in Sydney and the Northern Rivers. The Northern Rivers in particular has a large population of older gay men who are HIV Positive. Many cashed in their super and retired to the Northern Rivers. With the advent of treatment for HIV Positive patients, many in this community are living longer but have limited finances.

LGBTI people have often experienced past discrimination and are alienated from mainstream services because they no longer feel comfortable approaching these services. Additional resources are required to assist such people who are more difficult to reach.

LGBTI clients often do not have planning ahead documents in place such as Wills, Power of Attorney and Guardianship documents. This can be problematic as the person may have certain wishes, such as how they want their funeral conducted, which is not respected by family members in the absence of a will setting out their instructions to their executor. It is also problematic as the person has not legally articulated who they would want to make decisions for them if they lost capacity or became unwell and this can give rise to disputes between the person's partner and family members. If a person passes away without a will then their estate falls under the intestacy provisions of NSW. It is likely their estate would not be left to the people of their choosing. This discriminatory conduct against LGBTI people has induced a wariness about revealing abuse within relationships of trust and by other non LGBTI family members.

SRS works closely with ACON on these issues. We refer the ALRC to the ACON Health Outcome Strategy for LGBTI Ageing of 2015-2020 for further information. We also refer the ALRC to the report of the ACON LOVE (Living Older and Visibly Engaged) Project for further information.

People with disability

These SRS Case Studies are enlightening on the scope and nature of the elder abuse that people with disabilities may experience. We include more in our submission to the NSW Legislative Council Inquiry into Elder Abuse 2015.

CASE STUDY - DISABILITY

A man in his 80s who was blind contacted SRS. He resided in Department of Housing Accommodation. He appointed his nephew his enduring power of attorney. Over the course of 3 years his nephew would empty his uncle's bank account each pension day on the premise he was making withdrawals for his uncle's shopping. He would only give his uncle basic supplies (weetbix and bread) and spend the rest of the pension money on himself.

The fraud was discovered when the Home Care Service Provider intervened to assist him with his shopping and discovered the theft. The older person sought advice from SRS and was advised to revoke the power of attorney which he did. The matter was also reported to NSW Police for investigation.

It is unlikely the funds will be recovered due to difficulties in gathering evidence of sufficient probity to prove the case. Even if evidence is obtained, recovering funds from the nephew, who is also on Centrelink benefits and lives in Department of Housing accommodation, would prove impossible or extremely difficult.

Responses to ALRC Questions

CASE STUDY - DISABILITY & FINANCIAL EXPLOITATION

An aged care resident received a bank statement of purchases from her credit card. These were purchases that she was unaware of and could not recall making. Following an internal investigation by management, and the bank, a staff member of the aged care home was interviewed by police and the spending was linked to her. The resident lost faith in the aged care facility and relocated to another aged care home and her health deteriorated rapidly.

Perpetrators of financial exploitation often rely on an older person's failing memory to cover their crimes.

CASE STUDY - DISABILITY & FINANCIAL ABUSE

A new resident came to an aged care home and was asked to sign a resident agreement. He could not read English as it was not his first language. He was not offered the assistance of an interpreter to assist him to understand what he was agreeing to. His contract stated that he agreed to allow the aged care provider to have a caveat on his title in the event he could not pay his fees.

People from rural, regional and remote communities.

Sydney and its adjacent urban areas are often viewed as the basis of the population base of NSW. While Sydney's population of around 5 million people provides many challenges in terms of service provision – particularly due to its cultural diversity – it should also be acknowledged that more than 2.5 million people live in NSW outside of Sydney. Regional centres along coastal NSW are becoming favorite places for people to retire and as a result have quickly growing ageing populations. In western NSW the population is hard to reach due to its remoteness. Areas to the west around Broken Hill and the north west such as Bourke and Lightning Ridge have communities that are beyond these regional locations. Providing adequate legal, advocacy and rights-based education to these areas is challenging. It is particularly challenging when funders often provide additional resources to larger geographic states based on remote populations. While NSW has hard to reach diverse populations closer to Sydney the state also has a large remote population. Regardless, SRS is not adequately resourced such as other jurisdictions in terms of regional branch offices and significantly more funding for travel.

Regional and remote older people face additional difficulties when subjected to elder abuse. It is a well known maxim that justice delayed is justice denied. With remote residents justice may not only be delayed but may never arrive due to distance from the agencies and professionals who have expertise in assisting older victims of elder abuse.

RECOMMENDATION 9

Special consideration be given to establishing legal hubs, based on or as an extension of community legal centres, to service remote and regional communities to provide legal services to put in place strategies to eliminate or reduce the risk of elder abuse in those locations.

Question 4: The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence.

Older women and homelessness

Older, homeless women who are the victims of elder abuse are likely to be statistically invisible in data systems according to a 2014 University of Queensland report. Older women are left homeless due to physical or emotional abuse by a partner, family member (for example a granny flat situation) or due to financial abuse. Older women are more likely to “couch-surf,” sleep in their car or sleep in the bush. For safety, they are less likely to be found on a park bench. Further research is needed in this area as anecdotal evidence indicates that this type of homelessness is increasing.

A majority of older women, particularly those born before 1940 who are now 70 years and over, because of the social and financial constraints that existed in their younger years, may have not been able to establish financial independence. If married or partnered, they may have had limited opportunity to develop skills in money management as their husbands usually managed the finances. In these instances it is more likely that the older woman may pass this job over to a child by way of power of attorney or informally.

Limits on financial independence experienced by these women include:

- initially the inability to accrue Superannuation
- inability to obtain higher paying work
- being expected to be a home parent for their children particularly in the children's early years
- If women did work, it was likely to be part time and relatively low paying.

RECOMMENDATION 10

There is a lack of research producing sound valid statistical data on a national level as to the scope and depth of elder abuse and it is urged that more well funded research be provided in this area.

Responses to ALRC Questions

Social Security

Question 5: How does Centrelink respond to people experiencing or at risk of experiencing elder abuse? What changes could be made to improve processes for identifying and responding to elder abuse.

SRS supports the role of social workers at Centrelink. Social work officers are able to meet with the older person to ascertain their needs, identify risk factors of abuse and assist them accordingly.

Social workers should be appropriately trained in identification of risk factors of elder abuse: social isolation, dependency on family members, frailty, capacity.

Social workers can assist elderly people and provide case management to meet their specific needs.

It is best to recommend independent financial advice with social worker support when providing services to the older person.

There should be some mechanism such as checklist to screen and identify elder abuse which could roll out into every department.

Granny Flat arrangements

RECOMMENDATION 11

It is proposed that Centrelink develop an education and awareness campaign as to the risk factors associated with granny flat arrangements and the need for older persons to obtain independent legal and financial advice and for some arrangements to be put in writing. Centrelink has an interest in ensuring that the assets of the older person in contributing to these arrangements are protected. Centrelink also has an interest in ensuring that older persons comply with Centrelink's granny flat rules relating to the maximum contribution allowable.

In relation to provisions regarding granny flat arrangements we recommend that the older people should be referred to a Financial Information Service Officer trained in assessing the risks associated with such transactions so that the older person is fully aware of the risks of entering into these arrangements.

Training of community members could be conducted by an organisation such as SRS familiar with the risks of such arrangements and importance of obtaining independent legal advice prior to entry into these arrangements.

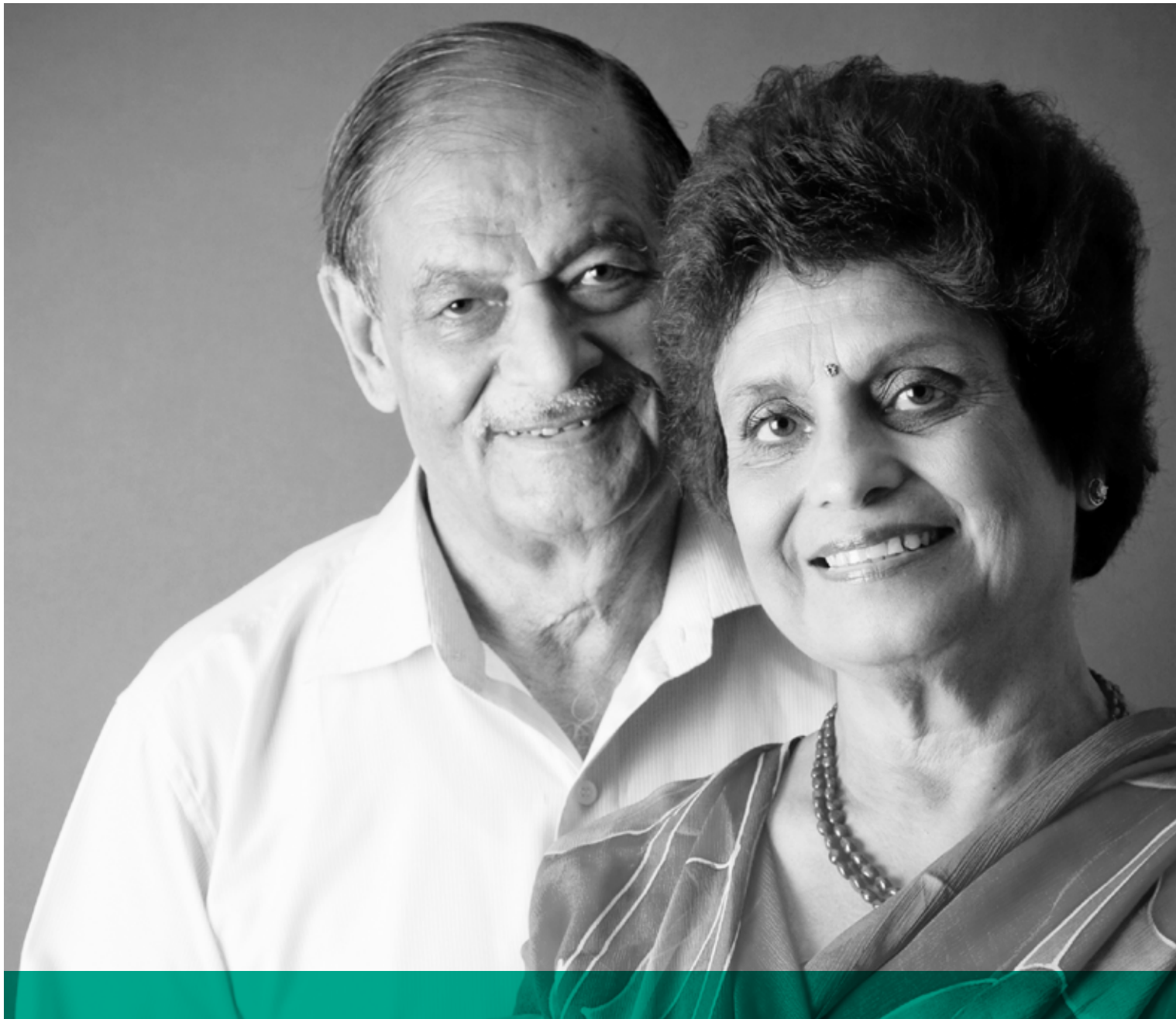
The financial information service officer may refer the older person to a solicitor for a family agreement to be drawn up and for the older person to discuss with the solicitor having their name placed on the legal title to the adult child's home.

RECOMMENDATION 12

There would be a need to educate banks to allow the name of the older person on the legal title where there is also to be a mortgage burdening the property. Our service has assisted clients who have had problems with banking institutions refusing to place their name on the legal title as if there is a mortgage on the title to be repaid and the older person is not working and is unable to make a financial contribution to the repayment of the mortgage, the banking institutions will not consent to add the older person to the legal title, despite the older person having made a significant lump cash sum contribution to the property.

Centrelink should develop a form for the older person and the adult child that can be signed by both parties reducing to writing the understanding of the intention of the parties as to the arrangement between them. However, such a form should not be signed without appropriate advice on the legal and financial risks of the arrangement from a Financial Information Service Officer and / or solicitor.

Centrelink should develop a checklist to screen and identify elder abuse while advising older clients. There should be put in place proper training for Centrelink staff to appropriately refer such clients to advice and or advocacy services.



Responses to ALRC Questions

Question 6: What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?

RECOMMENDATION 13

An older person who wants to set up a nominee for Centrelink purposes and has capacity should ideally be required to attend the office with the proposed nominee and a Centrelink social security officer who is trained in identifying risk factors associated with issues concerning capacity and undue influence, and the social worker must assess the genuineness of the proposal to ensure the older person is making a free and independent decision. The Centrelink social security officer could ideally see the older person on their own to ascertain they are making a free and independent decision. However, given the large volume of nominee arrangements we understand that a risk profile tool for social security officers which targeted a review of nominee arrangements might be more cost effective and appropriate.

If an older person lacks capacity, only a formally appointed attorney or financial manager should be able to be a nominee for such an older person.

Training should be provided to officers as requirements of validity for power of attorney forms and that financial management orders when made override a power of attorney.

SRS is in a position to provide training on setting up Powers of Attorney as it has a knowledge of legal requirements of power of attorney and provisions of Guardianship Act 1987 under which NSW Civil and Administrative Tribunal make guardianship and financial management orders.

A checklist to screen and to identify risks should be developed. An appointment should be conducted with a social worker so that indicators of any possible elder abuse can be identified and respond appropriately.

Question 7: What changes should be made to the laws and frameworks relating to social security payments for carers to improve safeguards against elder abuse?

RECOMMENDATION 14

Where a carer neglects their role as the carer for the older person and this is reported to Centrelink there should be appropriate investigation and suspension of payments if the carer is found to be neglecting their duties.

Where Centrelink receives complaints from the general public that a carer is not fulfilling the requirements and obligations for eligibility for a carers payment or allowance, or is notified that an older person is being neglected, Centrelink should be able to refer such complaints to a central investigative body such as a Public Advocate for further investigation. We refer to our comments regarding a Public Advocate on a following page.



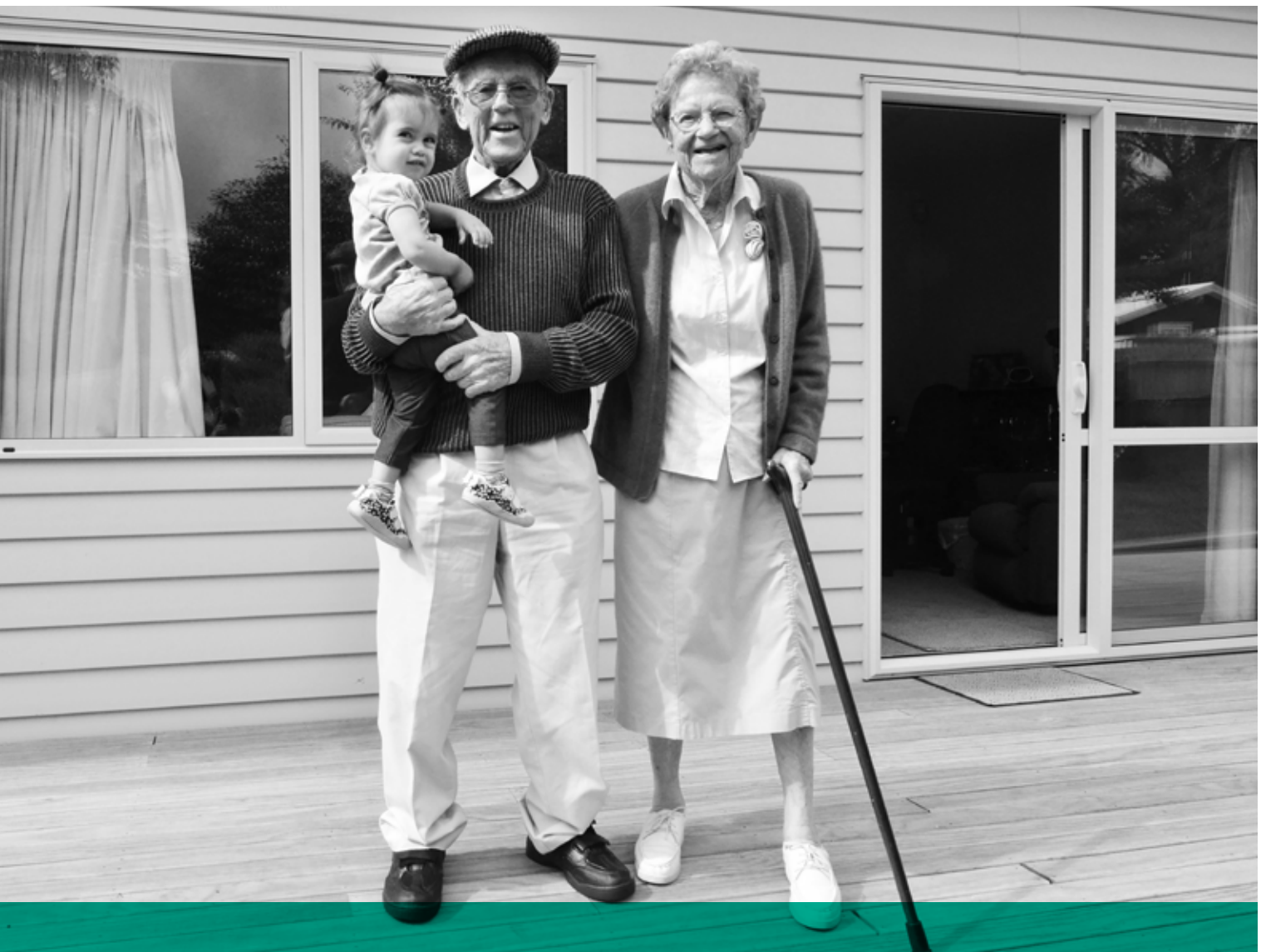
Responses to ALRC Questions

Question 8: What role is there for income management protection in providing protections or safeguards against elder abuse?

There is a need for more research as there is a risk that if an older person is subject to abuse, the older person is penalised by removal of autonomy under an income management scheme.

RECOMMENDATION 15

SRS proposes that education and training of the older person is a better option than income management. This training would cover how to manage finances or simple budgets and to set up their own automatic deductions for bills, with assistance of a social worker at Centrelink, to avoid further abuse. Training could be provided by the SRS in conjunction with Centrelink.



Question 9: What changes should be made to residence requirements, or waiting periods for qualifications of social security payments, or the assurance of a support scheme, for people experiencing elder abuse?

In Australia circumstances arise when a person may reside in Australia and then return home after many years. The older person may gift family property overseas to their children, and return to Australia and discover they do not qualify for the age pension. This leaves the older person reliant on family members for support.

Where an older person is subject to neglect and elder abuse by family members in this situation it can leave them vulnerable with no accommodation, or leave them living in at risk situations.

Many CALD older people migrate to Australia as sponsored aged parent visa arrivals and they find themselves in a very difficult position, unable to talk about their issues fearing they may lose family relationships, particularly with their grandchildren and not having other extended support as they used to have in their own communities.

CASE STUDY

An older single parent arrived in Australia under the aged parent sponsorship. She brought all her money to pay for the visa fees and deposited the money into a term deposit to access when her visa was finalised. The money was inappropriately managed by one of her children and all the money has spent. When the visa application was determined, the older person was not only without any money to pay for the visa fees but was also requiring more intensive health care and found herself at risk of becoming homeless because her children are refusing to care for her.

RECOMMENDATION 16

SRS supports the introduction regulations providing guidelines on hardship provisions for elderly migrants where they are reliant on family members in Australia for support, do not qualify for the age pension, and are subject of elder abuse. We propose that provision be made for the age pension to be provided to clients in these situations.

There should be an interim protection procedure within the migration process.

Responses to ALRC Questions

Question 10: What other risks arise in social security laws and legal frameworks with regard to elder abuse? What other opportunities exist for providing protections and safeguards against abuse?

Centrelink could create a formal register for family agreements. *Rodney Lewis' NSW Inquiry submission* (pg 21) states that such a register:

- Could be required in relation to any person over 65 entering a family agreement;
- Could be relied on as a defense to a charge of fraud or aggravated undue influence;
- The agreement would be unenforceable without registration.

Rodney Lewis (at p. 21) states that the requirements for registration include the older person obtaining appropriate financial and legal advice before registration. Evidence for this would be a certificate by a certified legal practitioner. There may be mandatory clauses required to be included in the Agreement as a condition for registration (such as separation by parties to contract, entitlement to caveatable interest). Registration could be refused in the event that the elder is found to be vulnerable in the process of making the agreement for registration.



Aged Care

Question 11: What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

SRS includes an advocacy service dedicated to assisting residents of aged care homes. An analysis of over 1800 calls to the SRS Advocacy Service reveals the most common categories of concerns being raised. The issues raised were as follows (in order):

1. Physical abuse
2. Restraint
3. Exploitation
4. Harassment
5. Intimidation
6. Human or consumer rights
7. Complaints
8. Quality of care issues
9. Staff levels and training
10. Skin care
11. Social/emotional
12. Standards inadequate
13. Continence support inadequate
14. Behavior management
15. Specified care and services
16. Duty of care
17. Fees and charges disputes
18. Care planning to meet individual needs and consumer directed care.

Some examples of elder abuse which have come to the attention of the advice line include:

CASE STUDIES

An aged care resident returned home for a weekend with the family and when she returned staff noticed bruising on the arms and body which indicated rough handling. The resident's behavior was noticed to be over - reactive and stressed to sudden noise of staff members.

An aged care resident received a visit from her nephew every month who asked her to sign blank cheques. Months later it was discovered that large transaction amounts had been withdrawn from her bank account. The advocates referred the resident to the SRS to explain her rights and legal action she could take to have a financial manager appointed. The NSW Trustee and Guardian also provided her with assistance.

CASE STUDY

There are some aged care homes and retirement villages adjacent to each other which are run by the same operator. Some operators compel residents of the retirement village to sign up to aged care agreements telling them that they might miss out if they require to enter an aged care home later. This is not only a deceptive conduct but also deprives older people of funds and resources to pay for services that they do not require at the time.

Responses to ALRC Questions

Question 12: What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?’

Currently the Aged Care Assessment Team program (ACAT) is understaffed and under resourced. ACAT assesses the eligibility of older people for appropriate care and accommodation. We refer the ALRC to our comments at Question 2 of our submission. As the frontline for identifying and responding to people at risk of elder abuse, collaboration of ACAT teams and other services focused on elder abuse should be enabled to create an elder abuse response pathway. This elder abuse pathway must recognise that victims of elder abuse will not automatically leave the abuser and may make several attempts to do so. Indeed where elder abuse is a continuation of a long history of domestic violence women, in particular, may make as many as 30 attempts to leave before successfully doing so. An older victim of domestic abuse will be even less able to leave due to age and health factors and also due to the fact that they are unlikely to be financially independent.

SRS has been made aware, through the advice line, that assessment teams will often refuse to speak to the carer making the referral for home assistance and will only speak to the older person. The older person often states “I am fine”. They might be vulnerable and subject to exploitation by family members, but the older person does not agree to an assessment and the assessment team make no further enquiries. There may be many reasons why the older person would decline an assessment in a situation of elder abuse including fear of social isolation, and family loyalty.

Police should be available to do a welfare check at the request of someone worried about the older person and can ask to see the older person, not just the carer or family member.

Question 13: What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?

It is the observation of SRS that specified care and services have been simplified to benefit the provider, rather than protect the recipient of the service.

Specified Care and Services Guidelines have been simplified and as a result, providers are not giving older people a full explanation of who is responsible for paying for items and services.

Aged Care Accommodation Agreements

SRS recommends the introduction of a standard aged care accommodation agreement. The NSW Retirement Village Act 1999 and accompanying legislation provides an example of a standard retirement villages contract and disclosure documents which was introduced in 2013. Section 56(1)(h) of the Aged Care Act states that an approved provider is obliged to:

“offer to enter into a resident agreement with the care recipient and if the care recipient wishes, to enter into such an agreement.”

There may be standard precedents available to providers but these are written by a solicitor acting for the aged care provider. A solicitor acting for an aged care provider company would have a one-sided view. There is no standard agreement drafted by a committee of providers, consumers, government and advocates. Alarming, a large number of prospective residents and their families are not encouraged to seek independent legal advice in relation to the contract before they sign it. The transition to aged care is a very stressful one, and the consumer should be better protected during this vulnerable time.

RECOMMENDATION 17

A plain English standardised aged care agreement should be developed. The Agreement should be drafted in plain English and should summarise key financial and other aspects of the contract at the beginning of the document. This would encourage aged care providers to comply with modern consumer standards.

It has been commented upon by SRS advocates that the privatisation of aged care so that private companies run the homes, and private assessors assess older people means that the principles underpinning consumer law are often neglected. The aged care industry is big business and profits, even for “charitable” homes, are paramount.

RECOMMENDATION 18

The Aged Care Act should be amended to make the quality of the service provision the fundamental operating criteria for retaining a licence.

Responses to ALRC Questions

CASE STUDIES

Set out below are examples of oppressive terms in contracts signed by our clients and obtained by SRS after our clients have entered into the contracts:

Fees and Charges.

The SRS is concerned that there has been a discrepancy in the interpretation of the fee guidelines. In one example an aged care home attempted to back date a resident agreement by two years to enable them to negotiate a bond and a deposit when the home is included in an assets assessment. Providers have also made attempts to charge fee increases retrospectively after the older person has passed away in the aged care home.

SRS notes that overcharging is systemic. Overcharging is an insidious form of financial abuse. It relies either on the older person not being aware of the contractual obligations and rights or of the grieving family not noticing. Examples also include the creation of extra fees and charges which were not included in the contract between the two parties.

A standard contract would reduce this behavior, by clearly setting out financial terms for the older person and for their formal and informal representatives to be able to read and re-read.

Security of Tenure.

SRS receives calls in relation to issues concerning security of tenure. Residents have the right to stay in aged care homes unless exceptional circumstances apply. Pursuant to the terms of the Aged Care Act, there is no longer a distinction between high care and low care in aged care homes.

Operators of aged care homes do not always comply with the regulatory procedures for ejecting a resident.

If an aged care home wants a resident to leave the facility the aged care home must:

- Issue the resident with a letter providing the resident with 14 days notice to vacate and stating the reasons (under the Aged Care Act) they have been asked to vacate
- Advise the resident of their right to an aged care advocate
- Advise the resident of their right to another ACAT assessment
- If the resident has reason to believe they have the right to return to the aged care home, and the aged care home has not followed the above procedure, then the aged care home must accept their readmission.

The security of tenure requirements have not changed but they are being by-passed enabling the provider to cancel contracts and discharge residents and refuse to take them back from the hospital when they are due to be returned to their aged care home.

Rendering or threatening to render residents homeless is elder abuse. “Discharging” them or “terminating their contract” is an abuse of power.

RECOMMENDATION 19

A standard contract setting out termination provisions would go some way to reduce such behavior.

Any clause requiring that the older person must provide a financial security when they are paying the bond by periodic payments should be prohibited.

A clause requiring that the resident pay for extra fees and charges such as for incontinence products. This should only apply to low care situations, so there would need to be an approved fee schedule for both for low care and high care. This may seem trivial to some, but overcharging of residents in this way can cause quite an impact financially and can cause much distress to them and to their family.

EXAMPLES OF CLAUSES IN AGED CARE AGREEMENTS CURRENTLY USED BUT WHICH SHOULD BE PROHIBITED:

A clause stating that the resident will not pay for the cost of cleaning their room except where the resident willfully causes destruction or damage. There is no provision in the Aged care Act for such a clause.

A clause stating that the resident must have appointed an Attorney or Guardian and must provide a copy of that document to the provider. A resident should have the right to choose whether or not they will appoint a substitute decision maker. The provider may wish to take steps to ensure that their fees are paid but this should not encroach on the fundamental rights of the resident to make their own decisions.

A clause requiring a home care recipient to allow the provider to place a caveat on the title to their property. This is a classic example of the power imbalance between an older person and the provider.

RECOMMENDATION 20

SRS proposes that regulations be amended prohibiting this conduct by Service Providers. Criminal sanctions for providers who breach their duty of care and obligations. Also we suggest some informal dispute resolution procedure. Further, the complaints investigation scheme be given powers to impose fines for breaches or any other sanctions.

Responses to ALRC Questions

Question 14: What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

Some Home Care Package Providers are charging up to 53% in administration charges which severely reduces available funds for the actual care and services.

It has been proposed (by providers) that Exit fees of 100% of unspent funds should be charged by Home Care Package Providers, coming into effect in 2017.

In relation to Home Care Package Providers, Consumer Directed Care should be fluid, with care recipients being easily able to move from one service to another, even to a lower level of care when they choose. If the older person is able to take unspent funds, it will assist them to move easily. It is our understanding that this will change in 2017 however some certainty on this issue would assist consumers.

More information needs to be available to prospective care recipients on what their rights are in choosing aspects of care and services. More advocacy education to community seniors is required so they can access information about services, and access services, especially people from diverse backgrounds and communities. When establishing care packages to CALD clients, the need of the interpreter services should be considered. This should not be included as part of the care package which compromises the required care need of the individual.

RECOMMENDATION 21

Regulations be amended to require service providers to provide plain English information about the services they offer and the costs involved prior to the recipient entering into an agreement. The regulations should define what information and how that information is provided.

My Aged Care My Aged Care Website

This is a privatised community service funded by the Commonwealth government and SRS staff have received regular complaints about the paucity of advice that they provide and the inflexibility of their lines of communication. Technology can be harnessed to make communication and the provision of aged care services easier, so that aged care recipients, their families and carers can access and understand the system. We accept that the use of technology, websites and apps are the way of the future and can save the government's valuable resources, if used appropriately for the relevant client group. Older people should not and cannot be directed to a website unless they are computer literate and also have access to a computer. It is unreasonable to expect older people who are used to communicating by phone, speaking to someone or meeting face to face to use technology that they are not able, and confident, to use.

Question 15: What changes to the requirements concerning quality of care in aged care should be made to improve safeguards against elder abuse?

Staff training

Those aged care providers which do not provide adequate training for staff are breaching their duty of care to residents. If staff are not appropriately trained in behavior management for residents suffering dementia or mental health conditions then the resident will suffer, as indeed may the staff. If staff are not trained to provide oral care, provide foods and fluids and continence assistance, then the provider has neglected their duty of care.

SRS is concerned by the inconsistency in the staff mix and clinical planning and supervision of care. There are fewer registered nurses in aged care homes in NSW attending to the care of more residents. This declining ration must be reversed. There are increasing instances of poor clinical care, harassment and intimidation by residents and staff, who are not being supervised. Inadequate qualifications can also contribute to the compromised care of an individual.

RECOMMENDATION 22

It is recommended that regulations be amended to require an appropriate ratio of trained staff to look after the needs of older people and enough staff to provide appropriate supervision of less experienced staff.

In NSW there is no requirement for a registered nurse to be available to plan and supervise care.

There has been an increased number of complaints in advocacy matters due to indications that nursing care may be in decline and because of the lack of Registered Nurses (RN). Older people have complex clinical needs that require expert care and planning.

CASE STUDY

In relation to aged care services, residents are often kept in bed for days at a time as there are insufficient numbers of chairs for the residents to use to allow them to sit in the dining room and socialise with other residents. It is proposed that there be regulations in place to ensure that suitable chairs are made available for all residents.

RECOMMENDATION 23

Minimum standards for staffing and training must be enshrined in the Aged Care Act. The quality agency must be adequately funded to ensure conformity across Australia and prevent diminished responsibility on the part of providers through false representations or highly favourable assessments when this is not the case.

Responses to ALRC Questions

Question 16: In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

Some family members contact SRS as they are of the view that their loved ones are over sedated to keep them calm and to stop them wandering.

The use of physical and chemical restraint occurs in aged care and disability settings and is often used to control “non-compliant” residents. Residents in aged care have the right to move freely and independently, to take risks and to access expert clinical assessment, care planning and care by trained professionals.

RECOMMENDATION 24

There is a need for national reform to regulate the use of chemical and physical restraints. The SRS propose there be a widely publicized regime of standards for reporting of instances of overmedication or suspected overmedication in an aged care environment.

It is noted that the function of investigation was removed from the previous complaints system. This should be re-instated.

We refer to our comments below regarding elder abuse offences in relation to the misuse of physical and chemical restraints.

Question 17: What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?

The SRS supports the requirement that there be mandatory reporting of all instances of elder abuse or suspected abuse in aged care, including resident on resident abuse. There should be no discretion allowed to the aged care provider to NOT report assault because of the lack of capacity of a resident.

Mandatory reporting should be for all types of elder abuse including financial, psychological, sexual, neglect and resident-resident assaults which are now at the discretion of the provider so many are not reported. The SRS has received reports of residents, who lack capacity, exhibiting aggressive behaviour and pushing and shoving other residents causing serious injuries, such as broken bones.



Responses to ALRC Questions

Question 18 : What changes to aged care complaints mechanisms should be made to improve responses to elder abuse?

The Commissioner

Complaints are dealt with by the Aged Care Complaints Commissioner in a conciliatory manner. The Commissioner can examine complaints and apply penalties and sanctions as deemed necessary. In reality, the complaints commissioner has been long seen as a “toothless tiger” by people who make complaints. Many make complaints and “nothing happens.”

RECOMMENDATION 25

SRS recommends a review of national Complaints boards- their processes and their compliance mechanisms.

The view of older people and relatives who have made complaints should be considered.

Complaints commissions ought to have authority and resources to enforce rulings.

Sanctions are imposed by the Aged Care Commissioner if a matter is referred by the Quality Agency. It is too early to say how effective the establishment of an independent Commissioner has been to date. It will depend if the Commissioner effectively responds to concerns raised by third parties and whether the Commission investigates matters properly. An example of this would be a complaint of rough handling of residents witnessed by tradespeople at an aged care home.



Question 19: What changes to the aged care sanctions regime should be made to improve responses to elder abuse?

Sanctions Regime

It is the strong view of SRS that there is a huge disconnect between Parts 4.1, 4.2, 4.3 of the Aged Care Act and Part 4.4, so that the default position or result of actions leading to non-compliance with the Act is that there are little or no sanctions imposed. This leads to further non-compliance with the Act because aged care providers know that they will rarely be sanctioned.

Sanctions are meant to be made when aged care homes breach the Accreditation Standards. There should be specific sanctions prescribed for neglecting elder abuse instances and currently these are not legislated.

Further, a financial penalty for providers who have been found to be negligent or at fault should be imposed – as one advocate stated, “hit them in the hip pocket instead of just the current slap with a wet sponge.

RECOMMENDATION 26

We recommend that complaints mechanisms are reviewed and that the sanctions regime in the Aged Care Act is expanded and strengthened to include financial sanctions for specific breaches of the Act and also specific financial sanctions particularly for systemic problems within one aged care facility and/or for serious breaches which cause harm or injury to older people.

Complaints Commission Officers should be empowered to issue “on the spot fines” for minor breaches of the regulations, including deficient quality of services.

Responses to ALRC Questions

Question 20: What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?

There is a need for well-resourced advocacy from the start. Advocates are in a position to identify abuse early or even prevent abuse. Advocates can refer elder abuse victims to a range of support with resources at the early intervention stage. SRS rights-based community education programs can improve knowledge and understanding of the issues of elder abuse and therefore reduce the risks of abuse or motivate family or community to identify and report abuse or support someone being abused.

The Commonwealth Government is currently reviewing the National Aged Care Advocacy Program. The review commenced in December 2014.

RECOMMENDATION 27

It is submitted that any advocacy body should be fee free, independent, and provide individual advocacy. This should be enshrined in the regulations.

The Community Visitors Scheme is now able to be accessed by Home Care clients.

CVA visitors are volunteers and are only allowed to provide social company for residents on an individual basis. If a volunteer becomes aware of any example of abuse either with the resident they visit or another resident, then they are supposed to immediately report the incident to their coordinator. What the coordinator does with the information depends on whether they follow their organisations policy & procedures. This is an area that needs further improvement. CVA visitors need improved access to appropriate authorities to make complaints such as the Commissioner, police, ACAT and advocates.

RECOMMENDATION 28

SRS, as well as the national advocacy network organisation Older Persons Advocacy Network (OPAN) supports the creation of a nationally consistent, accessible and flexible end to end aged care advocacy program by building on the existing NACAP and HACC Advocacy services that are currently provided by the nine OPAN services.

The strengths of the services include:

- A high level of knowledge and expertise in aged care and CHSP/HACC service delivery in each jurisdiction.
- A detailed understanding and experience in working with the relevant legislation and service standards for both residential and community care.
- A trained and experienced advocacy workforce seasoned in providing independent, individual advocacy services to older people and their families.
- Highly developed networks which include consumer organisations, carers organisations, service providers (both individual providers and through their peak bodies), special needs groups (e.g. CALD, ATSI, LGBTI⁴ and dementia specific) again as individual agencies and peak bodies but also commonly through direct contact with specific communities, government agencies (e.g. Aged Care Complaints Commissioner and Department of Health) and statutory authorities (Aged Care Quality Agency).

⁴CALD: Culturally and Linguistic Diverse, ATSI= Aboriginal Torres Strait Islander, LGBTI Lesbian, Gay, Bisexual, Transsexual, Intersex

- Synergies that are gained from either providing other associated services or programs ourselves (e.g. aged care legal services, elder abuse prevention, disability advocacy, retirement village advocacy, ATSI specific advocacy, guardianship advocacy) or through colocation (e.g. colocation with community legal services).

The end-to-end advocacy program is already three quarters built. It just remains that funding for Victoria and Central Australia needs to be provided along with improved funding for NSW in relation to CHSP advocacy funding - these jurisdictions are clearly underfunded for CHSP advocacy. Elder abuse can 'play out' differently in diverse communities. Also, elder abuse can often be under-reported in some CALD, LGBTI and ATSI communities.

Specifically funded special needs advocate positions, which some member state and territory organisations receive, provide for the establishment and continuation of appropriate networks leading to greater access for clients from special needs groups. It allows for continual internal training and support to advocates to ensure consistent and effective service delivery to these client groups across the organisation and the accessibility for clients whose preference is an identified advocate to support them. The advantage of having specifically funded special needs advocates ensures the expertise of advocacy support and consistent advocacy approach is maintained across aged care advocacy and equitable access is achieved throughout the sector. Advocates should be resourced to effectively provide much-needed advocacy services to all special needs populations based on each jurisdiction's population diversity.



Responses to ALRC Questions

Question 21: What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

The separation of the powers

Elder abuse will be reduced or stopped and lives will be saved with a unified regulatory regime with appropriate complaint mechanisms. Currently residents of aged care homes and recipients of in home care services face a range of jurisdictions in which legal action of some kind is the only recourse left to resolve their issues. They can either go to the Complaints Commission or they can take civil or criminal action with the assistance of a solicitor. Both options are rarely entertained by an elderly person. Taking Court or Tribunal action is, in all practical terms beyond the reach of residents of aged care homes. Even their legal representatives (such as an attorney or guardian) are often too intimidated by the enormity of the task to take it on.

RECOMMENDATION 29

The pathways for achieving justice need to be made much more accessible and less daunting to traverse for older victims of abuse or financial exploitation in the aged care system. Both choices need to become a real option. The role of both the Complaints Commissioner and Quality Agency must be strengthened and provision of legal assistance and representation by Legal Aid and Community Legal Centres must be expanded. If this occurs, the behavior of perpetrators will be reformed. In the long term, both measures will ensure that the incidence of elder abuse is halted.

The Commonwealth and State Governments both have a role to play in this. We refer to the pioneering 2014 work by Professor Wendy Lacey in that regard. We support her comments in relation to the increasing role of the Commonwealth government in aged care and also the need for reform in the local, state, national and international sphere.

RECOMMENDATION 30

SRS recommends that more training be provided for staff of aged care homes and providers of home care services on abuse and support in identifying and responding to allegations of elder abuse, including calling police. This should include compulsory education for staff of aged care providers on the rights of residents and the role of complaints and advocacy. Now in NSW, some service providers decline or refuse education for residents, carers and staff, stating that it is not necessary as they provide their own or they “do not see a need for it” as they do not receive complaints.

Feedback from providers is that they would like to be able to report suspected or real abuse to ‘someone’. There is currently no central authority with the power to investigate and take action. There is also no mandatory reporting for many categories of abuse, only reporting for assault which has limited reach and too many exclusions.

There is support for national scheme for Enduring Power of Attorney and Enduring Guardianship legislation. There is also support for a national register of these documents. These matters are dealt with later in this submission.

If the older person has been the subject of an ACAT assessment for the purpose of a hearing before the Guardianship Division of NSW Civil and Administration Tribunal, after admission to hospital, the ACAT assessment should be conducted after a period of 6 to 8 weeks. This provides the older person a period of recovery before formal assessment on their capabilities.

The National Disability Insurance Scheme

Question 22: What evidence exists of elder abuse being experienced by participants in the National Disability Insurance Scheme?

We recommend that the Australian Law Reform Commission analyse the records of the Guardianship Division of the NSW Civil and Administrative Tribunal in relation to this issue.

Older people in the National Disability Insurance Scheme under the age of 65 years can choose to remain in the scheme above the age of 65 years.

Question 23: Are the safeguards and protections provided under the National Disability Insurance Scheme a useful model to protect against elder abuse?

Where a person lacks capacity, and has no family member or friend to act as a nominee under the scheme, there is a need to ensure that the nominee is not a staff member of the provider and that there is not a conflict of interest.

In these situations, where a person lacks capacity and there are no informal family supports in place, guardianship orders may be required to provide protection to the older person.



Responses to ALRC Questions

Superannuation

Question 24: What evidence is there of older people being coerced, defrauded or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and addressed?

There are many older people who do not have superannuation funds and are reliant on the age pension. Community Legal Centres provide an active role in assisting these clients. This is particularly the case for older widows who may have been the home maker and care giver and reliant on their partner working full time and managing the finances during their lifetime.

RECOMMENDATION 31

SRS support the view that it would be beneficial for the Superannuation Complaints Tribunal to provide access to restorative justice. In this way the older person could access the superannuation funds of the abuser for compensation. We would recommend that the Superannuation Complaints Tribunal be given such powers of enforcement.



Financial Institutions

Question 25: What evidence is there of elder abuse in banking or financial systems?

The SRS service as part of its advice line has been made aware of different examples of financial abuse in the banking system. These include:

CASE STUDIES

Many banks have declined to accept powers of attorney on the basis that they are uncertain as to the legitimacy of the documents and have required the older person to sign their own authorities. The older person may lack the capacity to do this.

It is noted that too many customer-facing bank staff do not have a basic understanding of the purpose of a power of attorney document, and that if a customer requests that it is placed on their computer system, they should comply with that request. A relative who is an informal representative should not be able to override the directions set out in a power of attorney document.

There have been cases where the older person has been taken to the bank by a family member who is not the attorney and prompted to make account withdrawals under duress or undue influence or pressure.

There have been cases where the older person has been taken to an ATM and pressured to withdraw funds or hand over bank cards and pin numbers.

Adult children have used the credit cards of the older person to spend funds on themselves.

Loan and guarantee documents have been signed by the older person under pressure of adult children without the older person getting independent legal advice and the bank obtaining a solicitor certificate.

Responses to ALRC Questions

Question 26: What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

Guidelines of the Australian Banking Association

RECOMMENDATION 32

SRS recommends that the voluntary guidelines be developed into industry standards which bind all financial institutions.

The SRS endorse the development of the following guidelines:

- Guidelines of the Australian Banking Association Protecting Vulnerable Customers from Financial Abuse. We refer in particular to “What can Banks Do” on page 4 of the document.
- Guidelines of Australian Banking Association Responding to Requests from a power of attorney for a court appointed administrator.

We endorse in particular the requirement of banks to obtain medical evidence where the power of attorney is specified to commence when the person lacks the mental capacity to manage their financial affairs.

We also support to the requirement that banking staff check the conditions of the power of attorney to check for any limitations on the attorney’s powers such as whether the attorney is limited to certain types of financial transactions but not property transactions refer page 4.

Compulsory Accredited Training

The SRS supports compulsory accredited training of client-facing banking staff and endorses the training conducted by Capacity Australia to date in making banking staff aware of the Guidelines and the factors to consider in identifying people with dementia and susceptibility to elder abuse.

SRS would be able to provide expertise and assistance in development and implementation of training programs for financial institutions’ staff on elder abuse.

Reporting of Financial Abuse.

RECOMMENDATION 33

SRS endorses the introduction of laws that require banks to report suspected financial exploitation (elder abuse) to police for investigation and or the Public Advocate for prosecution.

To enable banking institutions to report on theft from accounts to appropriate authorities it may be necessary for the parliament to examine the laws in relation to contract law, privacy of contract, confidentiality and defamation to provide for clear exemptions to allow for the reporting of suspected financial elder abuse.

Banking institutions are in the best position to know the pattern of withdrawals of clients and to alert clients and the appropriate authorities of any alleged unauthorised transactions from the account.

We would recommend that banking institutions be held liable in negligence for a failure to report elder abuse.

National Register for Power of Attorney Documents

We would recommend a register for Power of Attorney documents. Banks are often cautious when accepting power of attorney documents from an older person because they are uncertain if the document is the most recent document or if the power of attorney document has subsequently been revoked.

If there was a register it would give financial and commercial organisations certainty about the legal position of documents and reassurance that they are dealing with the correct person.

We support the establishment of national laws in relation to enduring power of attorney and guardianship documents and that a National Register be established governed by an Integrity Commission. The attorney could be required to submit accounts every 6 to 12 months to the Integrity Commission.



Responses to ALRC Questions

Family Agreements

Question 27: What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

CASE STUDIES

SRS assists clients through its advice line and in case work when an older person enters into a granny flat arrangement or an assets for care arrangement. Difficulties often arise in protecting the interests of the older person when relationships break down or informal family agreements break down.

These are common arrangements or agreements where an older person decides they are no longer able to live on their own and wish to move in with adult children or other family members. This can involve older persons selling their home and contributing the proceeds of sale to the family member towards acquiring a new property; or making payments to the family member's mortgage; or paying to have a second story or granny flat constructed on the family member's property. The older person normally does not have their name recorded on the legal title to the property.

Such financial agreements are often made verbally and without any written documentation and without independent legal advice.

There are many factors which contribute to the break-down of this family relationship (which are often entered into verbally and without any legal documentation in writing.)

Reasons for these failed relationships include where the adult child:

- can no longer afford to make mortgage repayments on the existing property;
- no longer wishes to care for the client and evicts the client. The client is left being required to apply for rent or apply for hardship for aged care;
- the relationship with the parent breaks down irretrievably;
- the relationship between their partner ends in divorce and the contribution of the older person may be divided as part of the property settlement (unless family law action is taken).

CASE STUDY - "GRANNY FLAT ARRANGEMENT"

In 2010 Mr and Mrs P. (P) then aged 75 and 73 respectively, received the age pension which was their only income. They owned their own home valued at \$800K but found they could not afford to service the mortgage over their home. The balance owing to the Bank was about \$230K. P entered into an oral agreement with their daughter and son in law whereby P would contribute \$500K from the sale proceeds of their home to the purchase of a new larger house, the title of which was to be put into the names of the daughter/son in law. In return for their financial contribution P would acquire a right of residence in the new house for life. The financial arrangement was never reduced to writing nor did P obtain any independent legal advice. Moreover P did not lodge a caveat on the title to protect their equitable interest in the house.

P did however, later on notify Centrelink of the financial arrangement they had entered into. Centrelink determined that their contribution of \$500K in return for a right of residence for life was allowable in accordance with Centrelink's granny flat rules. As there had therefore been no 'asset deprivation' there was no reduction in P's age pension.

Some years later there was a falling out in the relationship between P and their daughter/son in law. P were told to vacate the house and that none of their contribution to the purchase price would be refunded. P's daughter/son in law alleged that the contribution had been a gift.

In 2015, P sought assistance from Seniors Rights Service. A grant of legal aid was made which funded an advice and representation by Counsel. Action was commenced in the Supreme Court of NSW for recovery of the contribution of \$500K plus interest and costs. The matter settled 4 weeks before the final hearing date on satisfactory terms whereby P recovered most of their contribution.

In many cases, the older person does not get legal advice before entering into a granny flat or assets for care arrangement. This is despite the serious consequences which can flow from the agreement, in return for, such arrangements. The older person can lose their contribution to the child's home, and can lose their income from Centrelink if they do not notify Centrelink of the arrangements and check that their contribution falls within Centrelink's guidelines.

The informal nature of these agreements can make it difficult to enforce an older persons rights if the arrangements break down and it can be difficult to have their rights recognised at law without expensive Supreme Court legal action.

RECOMMENDATION 34

Since elderly people who experience financial exploitation usually have little left in the way of assets or cash (but often are still over the Legal Aid test) SRS recommends that the rules for and quantum of funding by Legal Aid be amended for older people, to allow more expeditious resolution of these types of wrongs.

Advertising and Education

The SRS assist many clients with granny flat and asset for care arrangements after the arrangement has been entered into. The SRS supports the view that there is a need for greater advertising and education and awareness of these types of arrangements and the need for independent legal advice before entering these arrangements. Centrelink have an interest in ensuring such arrangements are entered into with adequate legal protections for the older person so that the person does not become reliant on social security through loss of assets to children. We therefore recommend Centrelink take a greater role in this area. See Recommendation 11 above.

Responses to ALRC Questions

Question 28: What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

Referral Financial Information Service Officer

A Financial Information Service Officer could be trained in outlining the risks of the arrangement to the older person and an appropriate referral could be made referring the older person to a solicitor for independent legal advice. We are of the view that the SRS would be an appropriate body to provide such training.

Recording an Agreement in Writing

Some consideration could be given for a form, to be executed by the older person and the adult child, which would reduce the terms of the arrangement between the parties into writing. We acknowledge that it may not be possible to record the full terms of such an agreement by way of a form as there is a need for an agreement to reflect the parties' individual circumstances. For this reason early referral to a Financial Information Service Officer and a solicitor may be more appropriate.

In NSW where the granny flat type of arrangements are entered into but the relationship is in jeopardy a party may file a caveat application, after establishing a caveatable interest, with the Supreme Court to protect their interest. The other party may then file a Notice to remove a caveat and the caveat holder has just 21 days to commence an action in the Court to stop the caveat being removed. This can be an expensive process for an age pensioner, and can also take time, and involves the stress of lengthy proceedings against a family member.

In Victoria, in relation to granny flat agreements and asset for care agreements, proceedings are brought through the Victorian Civil and Administration Tribunal (VCAT) for co-ownership property orders and compensation orders.

RECOMMENDATION 35

SRS recommends that a national approach be adopted with the Victorian model being accepted and similar powers being conferred on other states and territories Tribunals.

This is particularly important where the older person sells a house in one jurisdiction and contributes to a child's property in another jurisdiction.

We refer in particular to Recommendation 11 of the NSW SRS submission to the NSW Inquiry which provides that

"It is...recommended that there be new legislation establishing a jurisdiction for the NSW Civil and Administration Tribunal to dissolve agreements that are not working and make compensation payments to the older person. This would provide a more efficient measure to resolve proceedings rather than expensive Supreme Court litigation. We note that such jurisdiction has been conferred on the Victorian Civil and Administration Tribunal".

We refer to the response of the Elder Abuse Inquiry to these recommendations at page 102 of the Report into Elder abuse in NSW Report 44 June 2016 that the issue as to whether NCAT be conferred jurisdiction in this matter

“We strongly encourage the NSW Department of Attorney General and Justice to examine this issue in greater detail”.

We endorse this approach and that further investigation be conducted into such legislation.

On the other hand, there is a need to consider whether a forum such as NCAT would be adequately equipped to deal with complex equitable principles which arise when a Court or Tribunal considers extending the operation of a caveat after a lapsing notice is lodged.

We submit there is a need to closely examine the operation of the VCAT and the decisions in relation to division of property in cases relating to informal family agreements. An analysis of how this system is operating is required to determine if complex legal issues are being addressed appropriately and to determine if the process is in fact less costly and more efficient.



Appointed Decision-makers

Question 29: What evidence is there of elder abuse committed by people acting as appointed decision – makers under instruments such as power of attorney? How might this type of abuse be prevented and redressed?

The SRS through its telephone advice line, has assisted many clients, where a substitute decision maker used their enduring power of attorney appointment to perpetrate financial abuse.

Any stage in the lifecycle of a power of attorney document – from drafting to execution to delivery to the bank and aged care home and wherever it ends up being recognised and used, may generate potential for elder abuse.

CASE STUDIES

The examples of types of financial abuse which have been brought to the notice of our service are set out in Submission to Enquiry into Elder Abuse NSW SRS (p. 15) and some examples are set out below:

- An attorney uses the older person's funds and spends the money on themselves;
- The attorney lives in the older person's home and obtains a benefit but does not pay market rent;
- The attorney enters into a conflict transaction where they themselves benefit (they pay themselves for the care provided to the older person or they mortgage the older person's home and keep the proceeds);
- The attorney breaches the conditions of the enduring power of attorney;
- The attorney mixes the funds of the attorney and the older person (such as placing the funds of the older person in a joint account) once the older person loses capacity.
- An attorney taking money from bank accounts and through an ATM and spending the funds on themselves.

There is a need for enforcement measures to make attorneys appointed under an enduring power of attorney accountable to the older person for any breach of their fiduciary duty.

RECOMMENDATION 36

The introduction of measures to improve accountability of substitute decision makers could include:

- 1) Introduction of new criminal offences in the Power of Attorney Act NSW to provide a penalty where the attorney breaches its obligations to the principal and acts to obtain a benefit under the authority for themselves where this has not been authorised. The only current offence in NSW is where an attorney continues to act as attorney when the attorney has been given notice of revocation of the power of attorney (s. 49 Power of Attorney Act 2003 NSW). If an attorney steals the funds of the older person the older person is currently reliant on the offences of theft and fraud against the family member. If there were clear offences under legislation this would highlight the importance of the contravention and the elements to be satisfied for prosecution.
- 2) Introduction of a Mandatory Registration Scheme for Power of Attorney (refer comments below) and file regular returns of decisions made together with accounts.

A mandatory registration scheme would provide assurance for third parties that they are dealing with the most recent power of attorney and not a power of attorney that has been revoked.
- 3) Random audits of attorneys appointed under enduring power of attorney.

A random audit or mandatory audit for all attorneys under an appointment would lessen elder abuse as attorney's would be more likely to comply with their obligations at the prospect of a random audit. The obligations of an attorney under the Powers of Attorney Act and pursuant to their fiduciary obligations are to keep all funds separate from their own, keep a record of all transactions, not undertake conflict transactions, act in the best interests of the principal at all times. Random audits could ensure that these obligations are being met.

If any person or aged care provider or support group suspected financial abuse then they could report to this registration authority which would have the power to access bank records of the older person i.e. to investigate.

Responses to ALRC Questions

Question 30: Should powers of attorney and other decision making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?

Mandatory Register for Power of Attorney

As indicated in our response to question 29 above SRS recommends that a mandatory registration scheme for Powers of Attorney together with random audits or compulsory audits for appointed decision makers should be adopted. We make the following points:

- Banking institutions, in particular, have shown that they often require an older person to enter into the bank's authorities rather than rely on the power of attorney. The reason for this appears to be that banking institutions are uncertain about whether a power of attorney is the most recent document or whether the document has been revoked. If there was a register it would give financial and commercial organisations certainty about the legal position of documents.
- A random audit or mandatory audit for all attorneys under an appointment would prevent elder abuse as attorney's would be more likely to comply with their obligations at the prospect of a random audit. These views are supported by the Submission into NSW Enquiry into Elder Abuse by Seniors Rights NSW and the Submission in NSW Enquiry into Elder Abuse by Seniors Rights Victoria (p. 24).

Operation of Register

The SRS support the view that a national register for mandatory registration of Powers of Attorney be established. A register could be regulated by a National Community Integrity Commission at a Commonwealth level.

Our service has some concern that our clients would not be able to meet the cost of an onerous registration fee in relation to an enduring power of attorney. It is important that client's not be reluctant to make these documents where they are of limited means.

We suggest that avenues for funding for such a register be examined including the NSW Government, the Commonwealth Government, the finance and legal sector.

A national register would require mirror legislation between the Commonwealth Government and the other state and territory governments and the need for collaboration.

Question 31: Should statutory duties of attorneys and other appointed decision makers be expanded to give them a greater role in protecting older people from abuse by others?

Powers of Attorney

The SRS assists many persons with enduring power of attorney documents, including advising attorneys of their rights and responsibilities under the document.

The obligations of an attorney, under the Powers of Attorney Act 2003 and pursuant to their fiduciary obligations, are to keep all funds separate from their own, keep a record of all transactions, not to undertake conflict transactions, and act in the best interests of the principal at all times.

The attorney, under an enduring power of attorney, is unable to give gifts to themselves or to a third party, unless express authorisation is provided in the enduring power of attorney document.

The older person has the ability under the appointment to further restrict the powers of the attorney by setting out further conditions in the power of attorney form. For example the older person may want to require the attorney to sell assets in a certain order if funds are required for aged care. These conditions are rarely utilised by older persons under an appointment and we would advocate further education of options for conditions to older persons by solicitors.

RECOMMENDATION 37

SRS recommends that further education and training occur in the legal profession of types of conditions that ought to be considered by an older person.

Training should also be compulsory for people who are appointed as attorneys so that they understand their duties and obligations as well as rights in relation to their role as an attorney.

Substitute Decision Making and Supported Decision Making.

We support the Enquiry of the NSW Law Reform Commission into the Guardianship Act 1987 and we have put a Submission in to the Enquiry.

The Submission sets out our support for the development of law reform in the area of Guardianship Law for Supported Decision Making model to be adopted in preference to a substitute decision making model. We advocate for the adoption of this model in accordance with the United Nations Convention on People with Disability Article 12 which advocates that people with a disability be given full legal capacity before the law.

National laws for Guardianship and Financial Management Orders

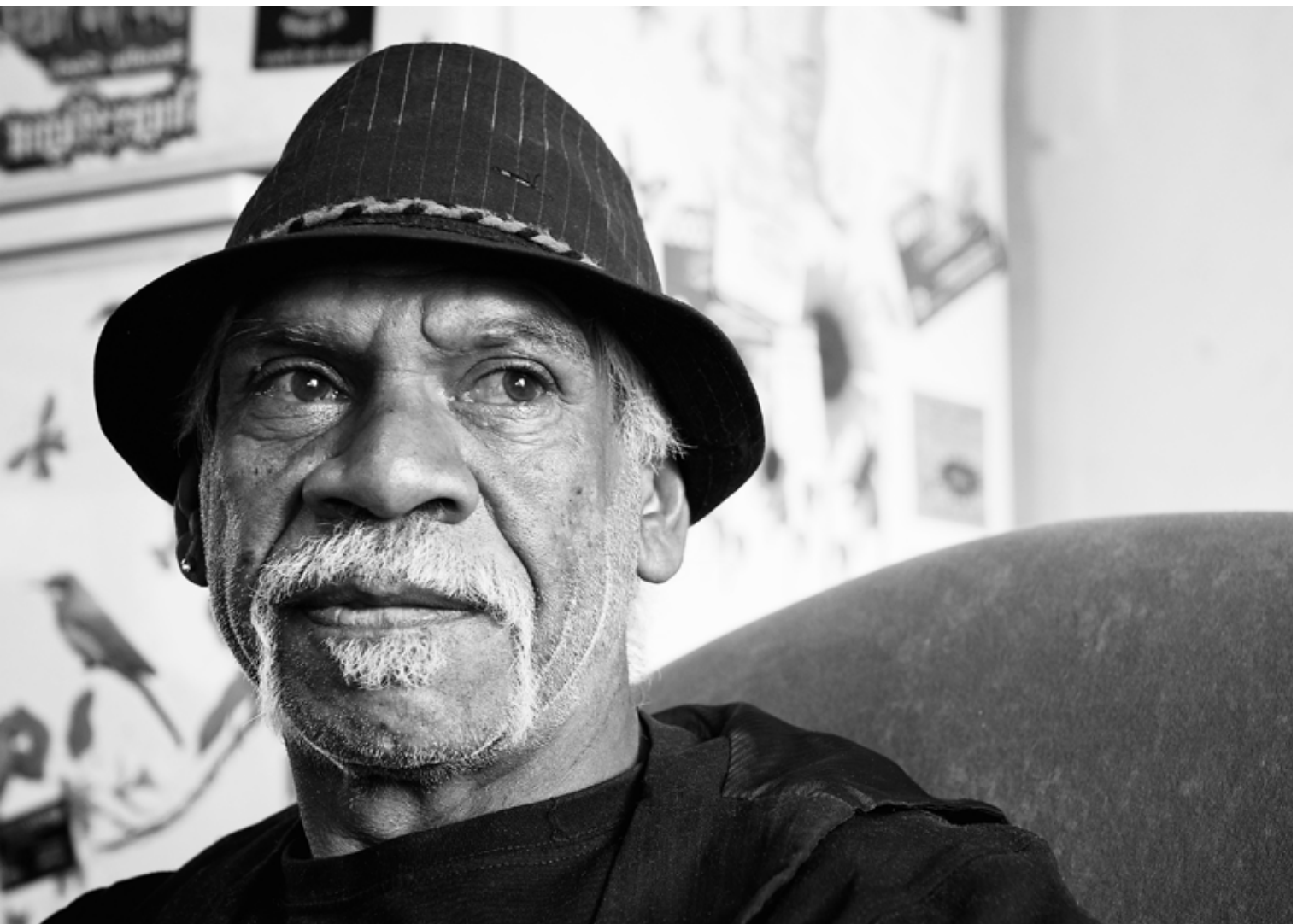
RECOMMENDATION 38

SRS recommends the implementation of national laws in relation to power of attorney, guardianship, and substitute decision making (financial management and guardianship orders). Currently there are differences between all states in relation to power of attorney and guardianship laws and substitute decision making laws.

The SRS has advised family members which have been distressed because another family member, in an effort to frustrate the process of the NSW Civil and Administrative Tribunal, has moved the older person interstate. Alternatively the family member has moved the person interstate after the order has been

Responses to ALRC Questions

made, in an effort to argue that the order no longer applies to the older person. A financial management order or guardianship order in NSW can be confirmed in another state by application to the relevant tribunal. It would be useful, however, if families did not have this temptation to relocate an older person in a misguided attempt to avoid an order. A further benefit of national laws would be that, if a criminal offence was committed by an attorney in one state, and that attorney moved to another state, there would not be a need to implement extradition laws. If there are standardised laws implemented by the Commonwealth Government, then, what would be a criminal offence in one state would be a criminal offence in all states.



Question 32: What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?

The SRS has assisted clients where the authority provided by the appointment by the Tribunal has been abused.

Guardians and financial managers appointed by the Tribunal are required to act according to the principles of section 4 of the Guardianship Act 1987.

CASE STUDY

In one example the SRS provided advice in relation to a guardian who was appointed for an older person who had taken the older person home from hospital. The older person had issues with their esophagus and mucus was penetrating from the esophagus making it difficult for the person to breath. The guardian refused to provide consent for medical treatment to assist the older person. The matter was required to be reviewed by the Guardianship Division of the NSW Civil and Administrative Tribunal for a coercive order and an urgent temporary guardianship order appointing the Public Guardian for a period of 30 days.

Our service has also assisted clients where:

- A guardian has refused to allow the older person (the spouse) who is resident in aged care to return home with the children to share birthdays and family events;
- The guardian has tried to remove the older person from aged care to return home to live with them when the medical evidence states that the older person requires permanent aged care;
- The guardian has stopped the grandchildren having access to an older person with dementia and has been unable to provide a reasonable explanation for limited access and has no access function in the guardianship appointment.
- The guardian moved in with the older person and refused telephone contact with other family members and also refused them access to visit the older person.

Currently the process for redress of abuse by a guardian of its role to protect the welfare and interests of the older person is for a person “concerned with the welfare” of the older person, whether it be a health care professional, family member, or friend, to apply for a review of a guardianship appointment. This relies on the diligence of those concerned with the care of the older person or family members to be alert to the guardians role and make the application where abuse is suspected.

RECOMMENDATION 39

Training of guardians should be instituted to ensure that they fully understand their role and duties and obligations.

Responses to ALRC Questions

Public Advocates

Question 33: What role should public advocates play in investigating and responding to elder abuse?

The SRS endorse the role of a Public Advocate as an investigative body for elder abuse. The SRS support Recommendation 11 of the NSW Government Enquiry into elder abuse.

RECOMMENDATION 40

That the Commonwealth government commence a national law unification program so that each jurisdiction introduce legislation to establish a Public Advocate's Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults, at risk of abuse. The operation of the Office be Reviewed after 3 years.

We support the view as to the role of the Public Advocate as set out in the submission of the *NSW Trustee and Guardian* to the NSW Inquiry. The Submission stated that:

1. *The Public Advocate have the function of receiving and investigating complaints into:*
 - (a) *the abuse, neglect, or exploitation of people;*
 - (b) *the misuse of powers by private individuals or organisations appointed to substitute decision making, co-decision making, and supporter roles.*
2. *Where the Public Advocate believes that an investigation is warranted she/ he should be able to conduct an investigation on her / his own motion in relation to the above;*
3. *The power to investigate complaints should be supported by the following additional powers:*
 - (a) *serve a written notice on a person requiring them to give the Public Advocate specified documents or other materials relevant to an investigation being undertaken;*
 - (b) *serve a written notice on a person requiring them to give written answers to questions;*
 - (c) *require a person to attend a conference for the purposes of seeking to resolve a matter being investigated;*
4. *It should be an offence for a person to refuse or fail to provide information, or to attend a conference or interview, when directed by the Public Advocate to do so;*
5. *The Public Advocate should have the power of entry and inspection;*
6. *The Public Advocate should be permitted to apply to the appropriate Courts and Tribunals for a warrant authorising entry to premises where he/she believes that a person is being abused, exploited or neglected....*
7. *The Public Advocate should be permitted to give the Chief of Commissioner of Police a report concerning any investigation he / she conducts and allow the Commissioner access to any evidence gathered in the course of an investigation if he/she considers criminal proceedings are necessary.*

8. The Public advocate should have the function and power to advocate for the rights and interests of all people with impaired decision making. The Public Advocate should also have the power to engage in individual and systemic advocacy.

9. The Public Advocate powers should include seeking leave in any Court or Tribunal proceedings when the rights and interests of a person with impaired decision making are in question.

We refer to the Report of Preventing Financial Abuse of People with Dementia produced by Alzheimer Australia in June 2014 at page 23 recommending the introduction of a Public Advocate. They identify the difficulties raised with reporting financial abuse of a person with dementia including lack of public awareness of a central body for reporting elder abuse and difficulties associated with gathering evidence where a person lacks capacity.

We also endorse the comments of Imelda Dodds from the NSW Trustee and Guardian in her submission to the NSW Enquiry into Elder Abuse (Standing Committee No 2) and to her support for a Public Advocate which would be in a position to focus on the investigation of matters relating to complaints of elder abuse in the community, which is a function that is currently lacking in the state of NSW, and that it was imperative the Public Advocate be able to investigate complaints brought to its attention by the general public and of its own motion (pg 136).

It is important that the body of the Public Advocate be given the required powers to conduct thorough investigations and to make reports of instances of abuse to the appropriate authorities.

Question 34: Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?

SRS supports the submission of Professor Wendy Lacey to the NSW Inquiry in that regard.

Responses to ALRC Questions

Health Services

Question 35: How can the role that health professionals play in identifying and responding to elder abuse be improved?

SRS refers to the factors that are barriers for elderly people coming forward about elder abuse. We listed these factors at Question 2 of this Submission.

SRS conducts community education on elder abuse and rights of residents in aged care homes and residents and staff in aged care homes across NSW. This education is conducted to ensure that the staff identify the rights of residents and identify when elder abuse occurs. The SRS also conducts education on elder abuse to health workers and aged care assessment services in NSW.

It is important that people who work with older people, and whom older people trust, are trained to identify elder abuse when it occurs. Health professionals play an important role as an older person is likely to meet with medical staff and confide in them.

Seniors Rights Victoria (SRV) also engages in education and training for professional staff. In SRV's submission, at page 16, they identify some barriers to health professionals identifying elder abuse:

- Limited consensus and understanding of what constitutes elder abuse;
- Lack of knowledge of reporting or referral frameworks;
- Concerns about confidentiality
- Concerns referral may compromise therapeutic relationships;
- Consequences for the older person;
- Impact of the legal process on the older person;
- Reluctance to become involved in the legal process;
- Outside scope of professional responsibility;
- Dissatisfied with authority's response to elder abuse;
- Lack of conviction that referral would improve outcomes;
- Older person has denied mistreatment;
- Abuse only involved subtle signs;
- Difficulties in obtaining necessary evidence.

We support the view of Seniors Rights Victoria that the effective method for overcoming the deficiency in reporting of elder abuse by health professionals is education. We are of the view that if ongoing training is maintained in relation to rights of older persons such as:

- Rights of an older person under the User Rights Principles of the Aged Care Act (Cth)
- Rights of an older person under the elder abuse protocol NSW;
- Rights of an older person under the relevant laws relating to abuse;

then the health professionals are more likely to more readily identify elder abuse and make the appropriate referral to the agencies there to advise and assist clients with abuse.

We also support the view of Seniors Rights Victoria that a risk assessment tool would be of use to identify elder abuse. We understand that risk assessment tools for health professionals have been developed by Women's Legal Services NSW in relation to assessment of domestic violence by general practitioners and we would support a similar tool for identification of elder abuse, in conjunction with community education.

Question 36: How should professional codes be improved to clarify the role of health professionals in identifying and responding to elder abuse?

SRS supports the view that the definitions of elder abuse and the risk factors associated with elder abuse be clearly articulated in any professional codes regulating the health profession. Contact numbers for agencies who specialise in the area of elder abuse, for referrals by health professionals, should also be set out in these guidelines. It should be a requirement that the health professional act as a support person with the older person in contacting these agencies.

The professional codes should stipulate that mandatory reporting of elder abuse in all its forms is a professional obligation.

RECOMMENDATION 41

SRS recommends a comprehensive compulsory module on elder abuse awareness and identification and appropriate response be included in the health professionals training



Responses to ALRC Questions

Question 37: Are health-justice partnerships a useful model for identifying and responding to elder abuse? What other health service models should be developed to identify and respond to elder abuse?

The evidence from the Domestic Violence health partnership experiences can be taken into consideration. The NSW health system, systematically use a checklist to identify or screen for signs of abuse and then use the appropriate referral methods established to facilitate appropriate intervention. This also includes the compulsory training for the health professionals and industry staff.

In this area we note the work of the Seniors Rights Service Victoria.

Seniors Rights Service Victoria state (at pg 28) The Health Justice Partnership set up by this service has the following service model:

- Inter disciplinary collaboration - lawyers guide health professionals in identifying legal issues that may impact on health, and work together in providing a holistic service to address the social determinants of health.
- Legal assistance within a health care setting - provide more responsible legal assistance for acute legal issues, while also promoting early intervention and prevention strategies to avert legal crisis;
- Policy change : legal health and community professionals jointly advocate for policy reform to systemically improve the health and well being of clients.

The surveys of these Partnerships in the US, (National Centre for Medical - Legal Partnerships Making the Case for MLPs review of the Evidence February 2013) as reported by Seniors Rights Victoria (at pg 28) state that these partnerships

- Provide financial benefits to clients and partnering organisations;
- Improve health and wellbeing of clients
- Increase knowledge and confidence of health professionals to address legal issues.

Seniors Rights Victoria Submission notes the following Centres received funding for an HJP:

- Melbourne Community Legal and Royal Womens Hospital Victoria - assisting family violence for health professionals;
- Redfern Legal Centre and Royal Prince Alfred Hospital - assisting indigenous clients with drug issues.
- Seniors Rights Victoria has received funding for HJP with Footscray and St Vincent's Hospitals.

In NSW funding was received for the development of a partnership between Justice Connect and a Sydney Hospital (to be confirmed). SRS has been approached to provide assistance with this project.

We support Seniors Rights Victoria Submission that greater funding be received for elder abuse legal organisations for a Health Justice Partnership model to assist people at risk of experiencing elder abuse.

Question 38: What changes should be made to laws and legal frameworks, such as privacy laws, to enable hospitals to better identify and respond to elder abuse?

RECOMMENDATION 42

The privacy laws require that personal information about a patient can only be disclosed with the patient's consent. There should be exemptions clearly articulated in privacy legislation (e.g. Commonwealth Privacy Act section 16A) that where elder abuse is suspected by hospital staff that they may report the suspected abuse to the appropriate agency including the police.

RECOMMENDATION 43

It is submitted that if there were clear criminal offences for elder abuse, this would assist to clarify when mandatory reporting would be required. It is submitted there should be clear criminal offences for abuse of an older person with more severe penalties such as: aggravated unlawful restraint of a person with a disability, aggravated battery of an elderly person, aggravated assault of an elderly person, aggravated neglect of an elderly person, aggravated elder abuse. We refer to our submissions below at Question 42 and in particular we support the elder abuse offences outlined in Rodney Lewis's submission to the Elder Abuse Enquiry NSW (Submission No 59 at pg 15 onwards).

The checklist procedure similar to that for Domestic Violence would assist to identify possible Elder Abuse and inform the individual of their rights and perhaps mandatory reporting to police may prevent further abuse. However, the procedures need to be developed to determine at what point the line is to be drawn to mandatory reporting.



Responses to ALRC Questions

Forums for Redress

Question 39: Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?

Compensation Orders for Powers of Attorney

SRS supports the view that there should be greater accountability of attorneys appointed under enduring power of attorney instruments.

RECOMMENDATION 44

SRS recommends that the powers of the Guardianship Division of the NSW Civil and Administrative Tribunal should be expanded to allow for compensation orders to be made where an attorney uses a power of attorney in their own self-interests, or their own benefit, rather than the benefit of the older person and this is not authorised in the document.

Property Orders for Granny Flat and Asset for Care Agreements

In Victoria, in relation to granny flat agreements and asset for care agreements, proceedings are brought through the Victorian Civil and Administration Tribunal for co-ownership property orders and compensation orders. We would support similar powers being conferred on the NSW Civil and Administration Tribunal.

We refer in particular to Recommendation 11 of our submission to the NSW Inquiry that:

“It is ..recommended that there be new legislation establishing a jurisdiction for the NSW Civil and Administration Tribunal to dissolve agreements that are not working and make compensation payments to the older person. This would provide a more efficient measure to resolve proceedings rather than expensive Supreme Court litigation. We note that such jurisdiction has been conferred on the Victorian Civil and Administration Tribunal”.

We support the statement at page 102 of the *Report of the NSW Inquiry* that the issue as to whether NCAT be conferred jurisdiction in this matter

“We strongly encourage the NSW Department of Attorney General and Justice to examine this issue in greater detail”.

We endorse this approach and support legislative reform.

Question 40: How can the physical design and procedural requirements of courts and tribunals be improved to provide better access to forums to respond to elder abuse?

SRS is of the view that elder abuse raises specific concerns for a client. We refer to the factors listed at Question 2 of this submission as to barriers in reporting elder abuse.

Victims of elder abuse are very often old frail and not mobile. This needs to be taken into account when planning hearings for older people generally and for applicants seeking redress for instances of elder abuse in particular.

Design

SRS recommends that the design of the Courts be made informal, with conference style seating, unlike an advocacy court. The organisation of a forum in this matter reduces the intimidating nature of the setting which would be magnified for a person with a capacity impairment.

Procedure

RECOMMENDATION 45

SRS proposes, in relation to procedural requirements, that these be designed to facilitate the speedy resolution of the issues, be flexible so that the best interests of the older person are taken into account. We endorse the approach of the Guardianship Division of NSW Civil and Administrative Tribunal which is conducted by a panel member with a legal qualification but the Tribunal has a discretion not to be bound by the rules of evidence.

Procedural directions should be focused on an efficient process so that the older person is not engaged in lengthy proceedings (which can add increased stress and aggravation to health of an older person).

There is a fundamental need to ensure that the process is overseen by a legal panel member to ensure that there is a legal process to the proceedings so that the older person is given a fair hearing and is not overborne by any power imbalances in relation to the stronger party. We refer in this regard to similarities with the Guardianship Division of the NSW Civil and Administrative Tribunal which have a legal panel member present at all times.

It is important, no matter what procedure that is followed, older people have access to legal advice and representation. Any reduction in Legal Aid funding will lead to an increase in the financial abuse of older people.

Responses to ALRC Questions

Question 41: What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services, and where should they be located?

ADR (alternative dispute resolution) usually describes dispute resolution where an independent person (an ADR practitioner, such as a mediator) helps people in dispute to try to sort out the issues between them. ADR can help people to resolve a dispute before it becomes so big that a court or tribunal becomes involved. ADR can be very flexible and can be used for almost any kind of dispute; even those that would never go to a court or tribunal.

Mediation is unlikely to be suitable in instances of physical elder abuse due to the severe power imbalances that often has given rise to the abusive behaviour. Mediation is inappropriate in these circumstances.

Mediation may be appropriate in individual cases of financial abuse where the older person has capacity, the older person expresses a wish to attempt mediation, the older person wants to develop and improve the relationship with the abuser in the long term. The mediator should be trained to identify the power imbalances prevalent in elder abuse and to address these. The mediator should also be trained in identifying capacity issues and be able to terminate a mediation if the mediator forms the view the older person lacks the capacity to engage in the process. It is important in mediation that both parties are of the view they are able to own the outcome of the mediation.

In his submission to the NSW Inquiry (at pg 20), *Rodney Lewis* states that in matters involving undue influence, unconscionable conduct and constructive trusts, “*Ordinary people with ordinary means are excluded from seeking equitable relief because of the very substantial costs and risks of an adverse costs order being awarded against them*”.

He further states that:

“it would seem criminalisation of these situations is as a last resort, because while it may be a helpful remedy in some cases, there are all kinds of issues with enforcement and bringing claims in the first place. We would advocate at first instance, information and education programs on the part of older persons, their families, their carers and solicitors”. This was also supported by State Trustees, who suggested “having dispute resolution mechanisms available where the mediation can be used rather than having people finishing up in courts and tribunals. Mediation can be used as a precursor before things get to the stage of involving lawyers”.

He proposes that mediation could be used along side the criminal justice system and that matters in financial elder abuse cases be referred to mediation at the first instance. The Court would make the referral and oversee the mediation and, if mediation failed to settle the matter, refer the matter back to the Courts or arbitration for qualified decision making by lawyers.

This is a controversial area of discussion, and should be treated with caution given that many elder abuse cases involve financial and other abuse, hand in hand. In that regard we refer the ALRC to the insightful statement of *Paul R. Greenwood, Deputy District Attorney, Head of Elder Abuse Prosecution Unit, San Diego DA’s Office to the United States Special Committee on Ageing in 2011*.

Criminal Law

Question 42: In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

Elder abuse, because it occurs in a relationship of trust, is at risk of being viewed as a family issue rather than a crime. The SRS supports the introduction of laws creating specific offences in relation to elder abuse because it will raise community awareness about the issue and it will deter potential offenders.

Seniors Rights Service endorses the position adopted by *Rodney Lewis in his submission to the NSW Enquiry into Elder Abuse*⁵ who suggests the creation of the following offences:

Aggravated Undue Influence -

Undue influence involves a person acting in a way which gives financial advantage over another person (often a family member) in circumstances where the elder is aware and appears willing to give effect to the transaction but in fact is acting not with their own will but because of the overbearing will of the other person and because of a special relationship which exists between them. These and similar transactions can be seen as unconscionable conduct and can be set aside in expensive Supreme Court proceedings. Rodney Lewis submits that a specific offence with a criminal sanction would act as a deterrent for such activities.

Aggravated Breach of Fiduciary Duty -

Where an older person appoints a person such as a family member as their attorney, they are under a fiduciary duty to act in the best interests of the older person. Sometimes, it is often the case, the attorney loses sight of this duty and acts for their own interests. Rodney Lewis submits an offence be established with the following elements:

The elements of the offence are:

- (i) Appointment of an offender as an attorney under an Enduring Power of Attorney;
- (ii) Knowingly breaching the fiduciary duty of the attorney resulting in financial advantage to the attorney;
- (iii) The offence occurs at a time when the principal is under a disability including cognitive impairment and the attorney knew or ought to have known of the disability;
- (iv) The victim is 65 years or older.

Prescribed Power of Attorney Form

In relation to powers of attorney, the prescribed form set out in Schedule 2 of the Power of Attorney Regulation 2011, sets out the obligations of the attorney. The obligations stated are that the attorney is to:

- (a) Comply with the directions of the Principal if the Principal has capacity;
- (b) Act in the best interests of the Principal;
- (c) Be accountable to the Principal if the Principal lacks capacity and keep records of all transactions;
- (d) Keep the Principal's funds separate from their own.

The form then states that “*Failure to do any of the above may incur civil and / or criminal penalties*”.

⁵Rodney Lewis Submission to Elder Abuse Enquiry No 59 (at page 14 to page 20).

Responses to ALRC Questions

Currently, the only legislative offence for breach of an attorney's obligations to the principal under the Power of Attorney Act 2003 NSW is where the attorney continues to act when given notice of a revocation (s49 of the Power of Attorney Act 2003 NSW). It could be argued that the above statement contemplates further legislative development in this area.

Power of Attorney Act 1998 (Qld)

We refer to the SRS Submission to the NSW Elder Abuse Enquiry (at pg 29) where we refer to the Power of Attorney Act 1998 (Qld) which sets out criminal offences for breach of an attorney's obligations under the legislature. We propose a similar legislative regime be considered in this state and that the offence of aggravated breach of fiduciary duty, as set out above, be adopted.

Aggravated Unlawful Restraint of a Person with a Disability -

Unlawful restraint under common law is known as a trespass to person. The occurrence of restraint is ongoing particularly in institutional settings where a person lacks capacity.

Rodney Lewis proposes elements of the offence as follows:

- (i) Unlawful restraint by means where consent not given;
- (ii) Victim over age of 65 years;
- (iii) Victim has a cognitive impairment or disability rendering them vulnerable to accept or acquiesce in the restraint.

Available defenses should include

- (i) Urgent necessity including imminent harm to the person or others;
- (ii) Informed consent including legal guardian or person nominated by guardianship law.

Aggravated Battery of an Elder Person-

Battery is physical contact by one person with another without the other person's consent. It may or may not result in physical injury. When medical treatment is given without consent this will be battery. Medical treatment including administration of prescription drugs and anti-psychotics without consent can occur commonly.

Rodney Lewis proposes the following elements of the offence:

- (i) The offender is in a position of authority such as health care professional;
- (ii) The offender causes the medication to be administered without prior consent;
- (iii) The victim is disabled or has a cognitive impairment
- (iv) The victim is over the age of 65 years.

Defenses might include

- (i) Urgent necessity in the interests of health of the patient
- (ii) The act is done in the best interests of the patient to prevent imminent harm to self or others;
- (iii) Notes are made and kept
- (iv) The person whose consent is required legally is informed of circumstances a) and b) above as soon as possible.

Aggravated Assault of an Elder Person

Cases of assault often occur in relationships of trust with family members, carers or residential care staff. Rodney Lewis proposes following elements of offence:

- (i) Victim over 65 years;
- (ii) Offender in position of dominance
- (iii) Victim in position of dependence
- (iv) Offender has duty of care towards victim
- (v) Victim suffers assault, battery, harassment, intimidation;
- (vi) Victim has reasonable apprehension of all or any of assault, battery, harassment or intimidation
- (vii) In special case offender resides in same aged care home as victim and no barriers to stop reoccurrence and where occurrence likely to be by reason of cognitive impairment coupled with tendency to aggression.

Proposed are 2 year imprisonment, good behavior bond, ADVOs.

Aggravated Neglect of an Older person

Elements of Offence-

- (i) Assumption by adult of care of an elder (whether or not related by blood or marriage) whether voluntarily or for some advantage or reward;
- (ii) The care may be general care of for some particular health or disability;
- (iii) The duty of care has been willfully and deliberately or recklessly or negligently without caring about the consequences, under performed;
- (iv) The person in care has suffered pain or injury as a result of the lack of care or failure to provide sufficient care.

Aggravated Elder Abuse

Elements of offence include:

Repeated or persistent emotional, verbal or physical abuse by a carer or other person upon whom the vulnerable elder is dependent and whose conduct is causing or may potentially cause serious harm, and where the perpetrator knows or ought to know of the harm suffered by the elder;

Defenses to the charge could include 'reasonable excuse'

That the elder has reasonably available means to avoid or terminate the harm themselves and the court would need to balance the needs of the victim against the potential penalties for the offender (for example requiring the offender to leave home, requiring the offender to undertake not to approach the victim).

Responses to ALRC Questions

Question 43: Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?

In Australia there are very few laws that actually regulate criminal behaviour perpetrated against older people specifically. In the Queensland Criminal Code the offence of assault is aggravated if the victim is over 65 years old. The Aged Care Act also has mandatory reporting obligations. Otherwise there is no body of law that could be categorized as “elder law”.

Consequently, even though older victims may be frail and vulnerable they are treated the same as any other adult in the criminal justice system.

Section 44 of the Crimes Act NSW provides :

Failure of Persons to Provide Necessities of Life

- (1) A person:
 - (a) Who is under a legal duty to provide another person with the necessities of life; and
 - (b) Who, without reasonable excuse, intentionally or recklessly fails to provide that person with the necessities of life;
- Is guilty of an offence if the failure causes danger of death or causes serious injury or the likelihood of serious injury to that person.
- Maximum penalty: Imprisonment for 5 years.

RECOMMENDATION 46

The SRS understand that there have been some prosecutions under this section but advocate for greater awareness amongst the police and the legal profession of the existence of this offence and its applicability to older people.

The SRS commends the work of Vulnerable Persons Police Officers which have been set up in some area commands with particular expertise in elder abuse, who work in partnership with elder abuse services. The Service recommends additional funding to expand this initiative throughout NSW for such officers.

Question 45: Who should be required to report suspected elder abuse, in what circumstances and to whom?

The NSW Interagency Protocol for Elder Abuse provides some guidance on this point as to whether the reporting of elder abuse should be mandatory. It states that:

"In all circumstances, an older person who has experienced abuse has a right to report and be supported in reporting an offence to NSW Police. Any requests to report to NSW Police should be facilitated immediately. In all situations where workers are not required to notify NSW Police, the victims right to pursue or not to pursue the crime with NSW Police and report the offence should be respected".

In circumstances in which reporting will overcome the requirements of confidentiality, as suggested in the Protocol, are:

"In circumstances where the situation may override an older person's right to confidentiality requirements, workers should always consult their supervisors. Some examples are:

- *Instances where there may be reasonable grounds to believe that a serious crime or offence has been, or may be, committed and a criminal investigation by NSW Police may be required;*
- *Where disclosure is in the person's interest (e.g. the person is suicidal) or where the safety of others is at risk;*
- *Whether there may be a duty to warn a third party who is in danger.*

RECOMMENDATION 48

The SRS supports further discussion and investigation into requirements for mandatory reporting of both physical and financial abuse.

Clear guidelines should be set by elder abuse protocols, so that these instances of abuse could be reported to the Public Advocate for further investigation who could then refer matters to the police if criminal offences had been committed.

Mandatory reporting considerations need to balance the autonomous determination and rights of the older person (who may not want to report elder abuse) against the clear public interest in seeing that instances of elder abuse are reduced or eliminated.

Where mandatory reporting is required considerations needs to be given to the real possibility that the reporting may result in a worsening position for the older person. That is not to say that report should not be made but that the repercussions of the reporting process be considered in determining what course of action is to be put in train to resolve the problem.

Any person who witnesses an incident of elder abuse should report it.

Any person acting in a professional capacity who suspects that elder abuse has occurred should be required to report it. All agencies and organisations should have established protocols for their staff to follow where elder abuse is detected or suspected.

Responses to ALRC Questions

Question 46: How should the police and prosecution responses to reports of elder abuse be improved? What are best practice police and prosecution responses to elder abuse?

SRS refers to its recommendations for question 43 pertaining to the work of Vulnerable Persons Police Officers. These officers should have specialist training in dealing with elderly clients, addressing capacity issues, gathering evidence in relation to family physical abuse and financial abuse, and dealing with family dynamics. The SRS would be in a position to further contribute to training with police officers and building these working relationships.

Responses to elder abuse need to target the abuse with a view to eliminating it from the relationship. SRS clients often say that they do not want actions taken against their abuser but they just want the abuse to stop.

Question 47: How should victims services and court processes be improved to support victims of elder abuse?

Elderly persons are particularly vulnerable victims to elder abuse due to cognitive impairments, stress of bringing action against family members, health concerns, isolation, shame, blaming themselves for perpetrators actions.

RECOMMENDATION 49

We support the view that the person be given the option to give their evidence in an environment away from the presence of the offender. We refer to our previous Submissions as to the set up of this forum, informal conference room, in interests of older person giving evidence.

Many of our clients do not have the time, energy or good health to endure several years of court action to obtain justice. Court processes need to be made more flexible for older people to achieve justice in a timely manner at the lowest level of heat for them.

In cases of physical elder abuse police should be enabled to collect evidence on the domestic violence model.

Similarly, Court Assistance procedures should also be available for older victims of elder abuse.

Question 48: How should sentencing laws and practices relating to elder abuse be improved?

We support the view that the sentencing laws be developed to accord with special elder abuse offences. We are of the view that the offences of elder abuse should amount to aggravated offences given the vulnerability of elderly people in our community over the age of 65, including factors such as physical frailty, cognitive impairment, disability (both mental and physical), and dependency.

Question 49: What role might restorative justice play in responding to elder abuse?

Restorative justice (mediation between the victim and the perpetrator) may play a role in financial abuse cases where the older person wants to maintain a relationship with the abuser and see if steps can be taken to improve and repair the relationship.

Mediation is more probably not appropriate in aggravated assault cases due to the intimidation likely to be experienced by the victim and the power imbalances.

Question 50: What role might civil penalties play in responding to elder abuse?

Civil penalties which make use of civil court proceedings to penalise an offender accused of neglect, abuse or exploitation, may be appropriate as a course of action to punish the offender.

We maintain, however, that the older person should still be entitled to bring a civil claim for compensation for injury and loss arising from such an offence and that the offender be held liable to pay for such losses. Civil penalties would be in addition to any Order restoring the victim to a position they might have been in before the abuse occurred.

Conclusion

SRS thanks the Australian Law Reform Commission for the opportunity of being involved in this very important Inquiry. Please do not hesitate to contact us should you require further clarification or information in relation to our submission.

Summary of Recommendations

RECOMMENDATION 1

SRS recommends that a definition of elder abuse should be expanded to include contractual relationships between aged care provider companies which are regulated by the Aged Care Act 1997 (Aged Care Act). SRS recommends this on the basis that there has been much discourse in relation to the need for further refinement of that definition, particularly the “expectation of trust” element of the definition. The 2008 WHO report entitled: ‘A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main Report’.

RECOMMENDATION 2

SRS has noted a high incidence of abuse by a spouse against an elderly partner, both verbal and non-verbal abuse. We recognise that elder abuse may be a continuum of behaviour that has been in place for many years as domestic violence and note that while there are laws in relation to domestic violence in this area, it is our submission that verbal and non-verbal elder abuse by an elderly spouse against another spouse should be recognised as a separate form of elder abuse. This is particularly important where the abuse has commenced only as the couple have grown older and may have been triggered by dementia.

RECOMMENDATION 3

SRS supports and recommends the need for education and training of agencies and their staff involved in the reporting of elder abuse, both in the identification of the abuse and identification of the barriers professionals as well as older people face in reporting elder abuse.

RECOMMENDATION 4

Crisis Accommodation should be funded and regulated in the Aged Care Act along with long term aged care accommodation.

RECOMMENDATION 5

That the ALRC consult widely with Aged Care Assessment Teams on the issue of best practice first response prior to making its recommendations.

RECOMMENDATION 6

SRS urges the formation of Aboriginal consultation groups across Australia at metropolitan and Regional, Rural and Remote (RRR) areas (keeping their moiety in mind) to address this issue. These groups should be provided with a list of relevant organisations, such as the various Seniors Rights Services across Australia, with whom they might be willing to form partnerships for consultation and advice where they consider it appropriate.

RECOMMENDATION 7

Centrelink’s response to Aboriginal people at risk of financial abuse should include the appointment of appropriately trained Aboriginal field officers. Where concerns arise about nominees inappropriately accessing older people’s money there should be put in place a system of payday supervision by Aboriginal Elders and the field officers. The importance of the notion of reciprocity to older Aboriginal people would need to be investigated in the light of today’s social attitudes and behaviour and how it can be managed.

RECOMMENDATION 8

Financial Regulation can be changed to ensure that vulnerable and disadvantaged older people have extra risk management regimes put in place by lenders and other financial institutions for their protection.

RECOMMENDATION 9

Special consideration be given to establishing legal hubs, based on or as an extension of community legal centres, to service remote and regional communities to provide legal services to put in place strategies to eliminate or reduce the risk of elder abuse in those locations.

RECOMMENDATION 10

There is a lack of research producing sound valid statistical data on a national level as to the scope and depth of elder abuse and it is urged that more well-funded research be provided in this area.

RECOMMENDATION 11

It is proposed that Centrelink develop an education and awareness campaign as to the risk factors associated with granny flat arrangements, as Centrelink has an interest in ensuring that the assets of the older person in contributing to these arrangements are protected.

RECOMMENDATION 12

There would be a need to educate banks to allow the name of the older person on the legal title where there is also to be a mortgage burdening the property. Our service has assisted clients who have had problems with banking institutions refusing to place their name on the legal title as if there is a mortgage on the title to be repaid and the older person is not working and is unable to make a financial contribution to the repayment of the mortgage, the banking institutions will not consent to add the older person to the legal title, despite the older person having made a significant lump cash sum contribution to the property.

RECOMMENDATION 13

An older person who wants to set up a nominee for Centrelink purposes and has capacity should be required attend the office with the proposed nominee and a Centrelink social security officer who is trained in identifying risk factors associated with issues concerning capacity and undue influence must assess the genuineness of the proposal to ensure the older person is making a free and independent decision. The Centrelink social security officer should also see the older person on their own to ascertain they are making a free and independent decision.

If an older person lacks capacity, only a formally appointed attorney or financial manager should be able to be a nominee for such an older person.

Training should be provided to officers as requirements of validity for power of attorney forms and that financial management orders when made override a power of attorney.

Summary of Recommendations

RECOMMENDATION 14

Where a carer neglects their role as the carer for the older person and this is reported to Centrelink there should be appropriate investigation and suspension of payments if the carer is found to be neglecting their duties.

Where Centrelink receives complaints from the general public that a carer is not fulfilling the requirements and obligations for eligibility for a carers payment or allowance, or is notified that an older person is being neglected, Centrelink should be able to refer such complaints to a central investigative body such as a Public Advocate for further investigation. We refer to our comments regarding a Public Advocate below.

RECOMMENDATION 15

SRS proposes that education and training of the older person is a better option than income management. This training would cover how to manage finances or simple budgets and to set up their own automatic deductions for bills, with assistance of a social worker at Centrelink, to avoid further abuse. Training could be provided by the SRS in conjunction with Centrelink.

RECOMMENDATION 16

SRS supports the introduction regulations providing guidelines on hardship provisions for elderly migrants where they are reliant on family members in Australia for support, do not qualify for the age pension, and are subject of elder abuse. We propose that provision be made for the age pension to be provided to clients in these situations.

There should be an interim protection procedure within the migration process.

RECOMMENDATION 17

A plain English standardised aged care agreement should be developed. The Agreement should be drafted in plain English and should summarise key financial and other aspects of the contract at the beginning of the document. This would encourage aged care providers to comply with modern consumer standards.

RECOMMENDATION 18

The Aged Care Act should be amended to make the quality of the service provision the fundamental operating criteria for retaining a licence.

RECOMMENDATION 19

A standard contract setting out termination provisions would go some way to reduce such behavior.

Any clause requiring that the older person must provide a financial security when they are paying the bond by periodic payments should be prohibited.

A clause requiring that the resident pay for extra fees and charges such as for incontinence products. This should only apply to low care situations, so there would need to be an approved fee schedule for both for low care and high care. This may seem trivial to some, but overcharging of residents in this way can cause quite an impact financially and can cause much distress to them and to their family.

RECOMMENDATION 20

SRS proposes that regulations be amended prohibiting this conduct by Service Providers. Criminal sanctions for providers who breach their duty of care and obligations. Also can suggest some informal dispute resolution procedure. Further, the complaints investigation scheme be given powers to impose fines for breaches or any other sanctions.

RECOMMENDATION 21

Regulations be amended to require service providers to provide plain English information about the services they offer and the costs involved prior to the recipient entering into an agreement. The regulations should define what information and how that information is provided.

RECOMMENDATION 22

It is recommended that regulations be amended to require an appropriate ratio of trained staff to look after the needs of older people and enough staff to provide appropriate supervision of less experienced staff.

RECOMMENDATION 23

Minimum standards for staffing and training must be enshrined in the Aged Care Act. The quality agency must be adequately funded to ensure conformity across Australia and prevent diminished responsibility on the part of providers through false representations or highly favourable assessments when this is not the case.

RECOMMENDATION 24

There is a need for national reform to regulate the use of chemical and physical restraints. The SRS propose there be a widely publicized regime of standards for reporting of instances of overmedication or suspected overmedication in aged care environment.

It is noted that the function of investigation was removed from the previous complaints system. This should be re-instated.

RECOMMENDATION 25

SRS recommends a review of national Complaints boards- their processes and their compliance mechanisms.

The view of older people and relatives who have made complaints should be considered.

Complaints commissions ought to have authority and resources to enforce rulings.

RECOMMENDATION 26

We recommend that complaints mechanisms are reviewed and that the sanctions regime in the Aged Care Act is expanded and strengthened to include financial sanctions for specific breaches of the Act and also specific financial sanctions particularly for systemic problems within one aged care facility and/or for serious breaches which cause harm or injury to older people.

Complaints Commission Officers should be empowered to issue “on the spot fines” for minor breaches of the regulations, including deficient quality of services.

Summary of Recommendations

RECOMMENDATION 27

It is submitted that any advocacy body should be fee free, independent, and provide individual advocacy. This should be enshrined in the regulations.

RECOMMENDATION 28

SRS, as well as the national advocacy network organisation Older Persons Advocacy Network (OPAN) supports the creation of a nationally consistent, accessible and flexible end to end aged care advocacy program by building on the existing NACAP and HACC Advocacy services that are currently provided by the nine OPAN services.

RECOMMENDATION 29

The pathways for achieving justice need to be made much more accessible and less daunting to traverse for older victims of abuse or financial exploitation in the aged care system. Both choices need to become a real option. The role of both the Complaints Commissioner and Quality Agency must be strengthened and provision of legal assistance and representation by Legal Aid and Community Legal Centres must be expanded. If this occurs, the behavior of perpetrators will be reformed. In the long term, both measures will ensure that the incidence of elder abuse is halted.

RECOMMENDATION 30

SRS recommends that more training be provided for staff of aged care homes and providers of home care services on abuse and support in identifying and responding to allegations of elder abuse, including calling police. This should include compulsory education for staff of aged care providers on the rights of residents and the role of complaints and advocacy. Now in NSW, some service providers decline or refuse education for residents, carers and staff, stating that it is not necessary as they provide their own or they “do not see a need for it” as they do not receive complaints.

RECOMMENDATION 31

SRS support the view that it would be beneficial for the Superannuation Complaints Tribunal to provide access to restorative justice. In this way the older person could access the superannuation funds of the abuser for compensation. We would recommend that the Superannuation Complaints Tribunal be given such powers of enforcement.

RECOMMENDATION 32

SRS recommends that the voluntary guidelines be developed into industry standards which bind all financial institutions.

RECOMMENDATION 33

SRS endorses the introduction of laws that require banks to report suspected financial exploitation (elder abuse) to police for investigation and or the Public Advocate for prosecution.

RECOMMENDATION 34

Since elderly people who experience financial exploitation usually have little left in the way of assets or cash (but often are still over the Legal Aid test) SRS recommends that the rules for and quantum of funding by Legal Aid be amended for older people, to allow more expeditious resolution of these types of wrongs.

RECOMMENDATION 35

SRS recommends that a national approach be adopted with the Victorian model being accepted and similar powers being conferred on other states and territories' Tribunals.

RECOMMENDATION 36

The introduction of measures to improve accountability of substitute decision makers could include:

- 4) Introduction of new criminal offences in the Power of Attorney Act NSW to provide a penalty where the attorney breaches its obligations to the principal and acts to obtain a benefit under the authority for themselves where this has not been authorised. The only current offence in NSW is where an attorney continues to act as attorney when the attorney has been given notice of revocation of the power of attorney (s49 Power of Attorney Act 2003 NSW). If an attorney steals the funds of the older person the older person is currently reliant on the offences of theft and fraud against the family member. If there were clear offences under legislation this would highlight the importance of the contravention and the elements to be satisfied for prosecution.
- 5) Introduction of a Mandatory Registration Scheme for Power of Attorney (refer comments below) and file regular returns of decisions made together with accounts.

A mandatory registration scheme would provide assurance for third parties that they are dealing with the most recent power of attorney and not a power of attorney that has been revoked.

- 6) Random audits of attorneys appointed under enduring power of attorney.

RECOMMENDATION 37

SRS recommends that further education and training occur in the legal profession of types of conditions that ought to be considered by an older person.

Training should also be compulsory for people who are appointed as attorneys so that they understands their duties and obligations as well as rights in relation to their role as an attorney.

RECOMMENDATION 38

SRS recommends the implementation of national laws in relation to power of attorney, guardianship, and substitute decision making (financial management and guardianship orders). Currently there are differences between all states in relation to power of attorney and guardianship laws and substitute decision making laws.

RECOMMENDATION 39

Training of guardians should be instituted to ensure that they fully understand their role and duties and obligations.

RECOMMENDATION 40

That the Commonwealth government commence a national law unification program so that each jurisdiction introduce legislation to establish a Public Advocate's Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults, at risk of abuse. The operation of the Office be Reviewed after 3 years.

Summary of Recommendations

RECOMMENDATION 41

SRS recommends a comprehensive compulsory module on elder abuse awareness and identification and appropriate response be included in the health professionals training.

RECOMMENDATION 42

The privacy laws require that personal information about a patient can only be disclosed with the patient's consent. There should be exemptions clearly articulated in privacy legislation (e.g. Commonwealth Privacy Act section 16A) that where elder abuse is suspected by hospital staff that they may report the suspected abuse to the appropriate agency including the police.

RECOMMENDATION 43

It is submitted that if there were clear criminal offences for elder abuse, this would assist to clarify when mandatory reporting would be required. It is submitted there should be clear criminal offences for abuse of an older person with more severe penalties such as : aggravated unlawful restraint of a person with a disability, aggravated battery of an elderly person, aggravated assault of an elderly person, aggravated neglect of an elderly person, aggravated elder abuse. We refer to our submissions below at Question 42 and in particular we support the elder abuse offences outlined in Rodney Lewis's submission to the Elder Abuse Enquiry NSW (Submission No 59 at pg 15 onwards).

RECOMMENDATION 44

SRS recommends that the powers of the Guardianship Division of the NSW Civil and Administrative Tribunal should be expanded to allow for compensation orders to be made where an attorney uses a power of attorney in their own self-interests, or their own benefit, rather than the benefit of the older person and this is not authorised in the document.

RECOMMENDATION 45

SRS proposes, in relation to procedural requirements, that these be designed to facilitate the speedy resolution of the issues, be flexible so that the best interests of the older person are taken into account. We endorse the approach of the Guardianship Division of NSW Civil and Administrative Tribunal which is conducted by a panel member with a legal qualification but the Tribunal has a discretion not to be bound by the rules of evidence.

Procedural directions should be focused on an efficient process so that the older person is not engaged in lengthy proceedings (which can add increased stress and aggravation to health of an older person).

There is a fundamental need to ensure that the process is overseen by a legal panel member to ensure that there is a legal process to the proceedings so that the older person is given a fair hearing and is not overborne by any power imbalances in relation to the stronger party. We refer in this regard to similarities with the Guardianship Division of the NSW Civil and Administrative Tribunal which have a legal panel member present at all times.

RECOMMENDATION 46

The SRS understand that there have been some prosecutions under this section but advocate for greater awareness amongst the police and the legal profession of the existence of this offence and its applicability to older people.

The SRS commends the work of Vulnerable Persons Police Officers which have been set up in some area

commands with particular expertise in elder abuse, who work in partnership with elder abuse services. The Service recommends additional funding to expand this initiative throughout NSW such officers.

RECOMMENDATION 47

The law could be further developed in this area to cover where an older person lacks capacity and is unable to contact the police or give instructions to the police. A person such as a tutor could act on behalf of the older person to take out an AVO excluding a person from the home and prohibiting behavior. Appropriate support networks would need to be put in place by service providers if the abuser was the primary care giver to ensure that person was supported in the home or suitable alternative care arrangements put in place.

RECOMMENDATION 48

The SRS supports further discussion and investigation into requirements for mandatory reporting of both physical and financial abuse.

Clear guidelines should be set by elder abuse protocols, so that these instances of abuse could be reported to the Public Advocate for further investigation who could then refer matters to the police if criminal offences had been committed.

Mandatory reporting considerations need to balance the autonomous determination and rights of the older person (who may not want to report elder abuse) against the clear public interest in seeing that instances of elder abuse are reduced or eliminated.

Where mandatory reporting is required considerations needs to be given to the real possibility that the reporting may result in a worsening position for the older person. That is not to say that report should not be made but that the repercussions of the reporting process be considered in determining what course of action is to be put in train to resolve the problem.

Any person who witnesses an incident of elder abuse should report it.

Any person acting in a professional capacity who suspects that elder abuse has occurred should be required to report it. All agencies and organisations should have established protocols for their staff to follow where elder abuse is detected or suspected.

RECOMMENDATION 49

We support the view that the person be given the option to give their evidence in an environment away from the presence of the offender. We refer to our previous Submissions as to the setup of this forum, informal conference room, in interests of older person giving evidence.

Many of our clients do not have the time, energy or good health to endure several years of court action to obtain justice. Court processes need to be made more flexible for older people to achieve justice in a timely manner at the lowest level of heat for them.

In cases of physical elder abuse police should be enabled to collect evidence on the domestic violence model.

Similarly, Court Assistance procedures should also be available for older victims of elder abuse.



**YOUR RIGHTS
YOUR VOICE
LEGAL
ADVOCACY
EDUCATION**



Seniors Rights Service

Level 4, 418A Elizabeth St. Surry Hills NSW 2010
P (02) 9281 3600 P 1800 424 079 F (02) 9281 3672
info@seniorsrightsservice.org.au www.seniorsrightsservice.org.au
The Aged-care Rights Service Inc. trading as Seniors Rights Service. ABN 98 052 960 862
