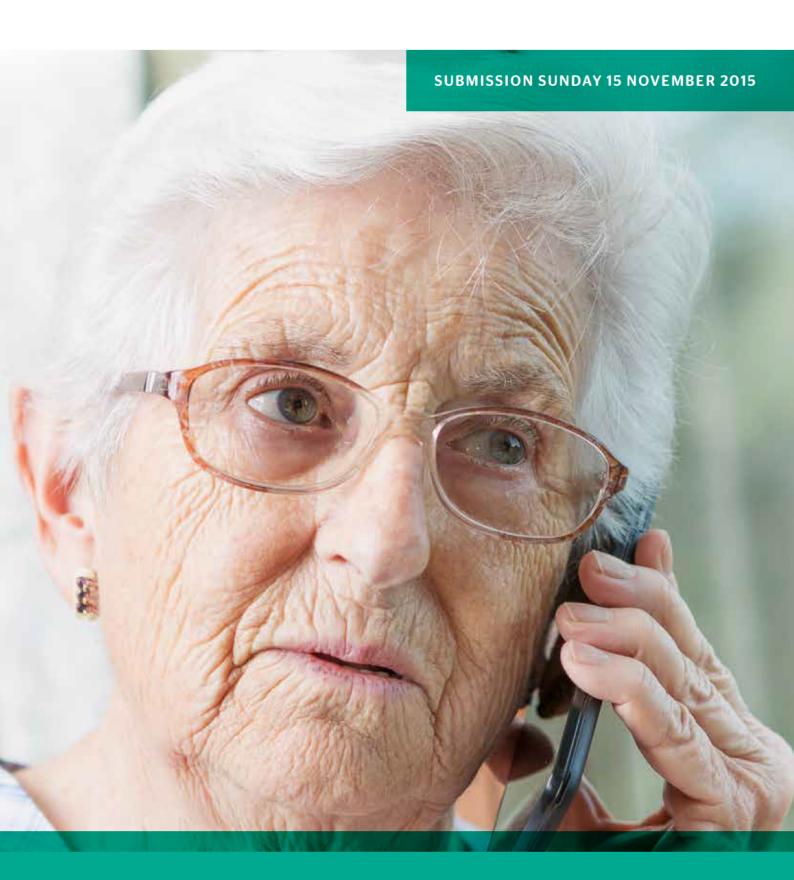
### INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES

Organisation: Seniors Rights Service (The Aged-care Rights Service Inc)

**Date received**: 13/11/2015

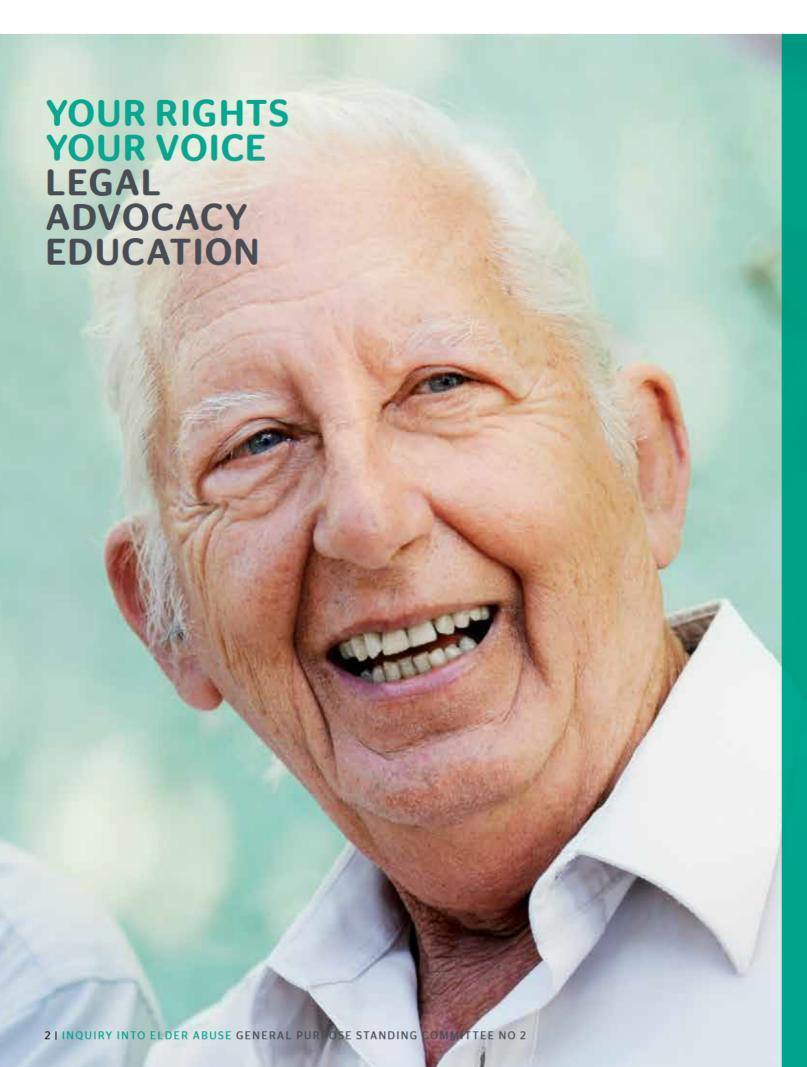




### **INQUIRY INTO ELDER ABUSE**

**GENERAL PURPOSE STANDING COMMITTEE NO 2.** 





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#### **ACKNOWLEDGMENTS:**

Seniors Rights Services acknowledges the contributions of Seniors Rights Victoria, Caxton Legal Centre Queensland, Justice Connect (Seniors Rights) Victoria, Queensland Elder Abuse Prevention Unit, NSW Elder Abuse Helpline. Henry Davis York. SRS staff and volunteer

The submission is prepared in response to an invitation issued by the General Purpose Standing Committee No 2 of the Legislative Council NSW into Elder Abuse.

The terms of reference of the report are stated as follows:

- 1. The **prevalence** of abuse (including but not limited to financial abuse, physical abuse, sexual abuse, psychological abuse and neglect) experienced by persons aged 50 years and over in New South Wales.
- 2. The most common **forms of abuse** experienced by older persons and the most common relationships or settings in which abuse occurs.
- 3. The types of government and community **support service**s sought by, or on behalf of, victims of elder abuse and the nature of the service received by those government support agencies.
- 4. The adequacy of the powers of the NSW Police Force to respond to allegations of elder abuse.
- 5. Identifying any **constraints** to elder abuse being reported and best practice strategies to address such constraints.
- 6. Identifying any strength based initiatives which empower older persons to better protect themselves from risks of abuse as they age.
- 7. The **effectiveness of NSW laws**, policies, services and strategies including the 2014 Interagency Policy Preventing and Responding to the Abuse of Older People, in safeguarding older persons from abuse.
- 8. The possible development of long term systems and proactive measures to respond to the increasing numbers of older persons, including consideration of cultural diversity among older persons, so as to prevent abuse.
- 9. The consideration of new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse, and
- 10. Any other related matter.

### PART 1: Introduction and Background

#### 1. Seniors Rights Service

The Aged-care Rights Service Inc. (TARS) trading as Seniors Rights Service (SRS) is a nonprofit community legal centre with specialist advocacy and legal services based in Sydney but providing assistance to all older people across NSW. SRS is a specialist service providing assistance to people over 60. There are 3 Divisions in the SRS:

- 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 home<sup>1</sup> the age pension is usually their only source of income and they have limited savings. We also provide assistance to clients who live in Residential Parks or Department of Housing accommodation, or reside in a Retirement Village.

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

#### 2. NSW Ageing Population - Client Profile

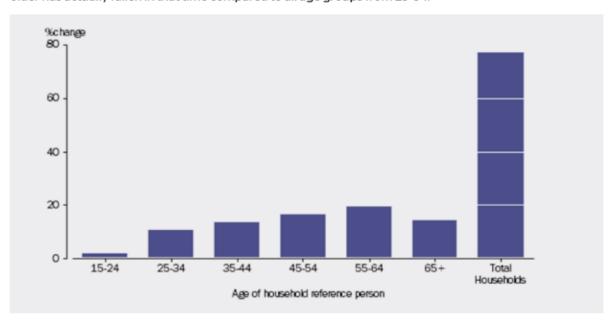
Number of Older People in NSW 2011 Australian Bureau of Statistics data TABLE 1

Age	New South Wales	%	Compare: 2006	%	Australia	%
60-64 years	390,678	5,6	317,624	4.8	1,206,116	5.6
65-69 years	304,327	4.4	254,425	3.9	919,319	4.3
70-74 years	237,362	3.4	210,903	3.2	708,090	3.3
75-79 years	186,032	2.7	188,091	2.9	545,263	2.5
80-84 years	150,724	2.2	140,702	2.1	436,936	2.0
85 years and over	139,735	2.0	111,653	1,7	402,681	1.9

The median age of people in New South Wales (State/Territory) was 38 years. Children aged 0 - 14 years made up 19.3% of the population and **people aged 65 years and over made up 14.7% of the population**. As we know this proportion will continue to increase for decades ahead.

#### Income of Older People in NSW

Graph 1 from National Census data shows the change in income for households categorized by age from 2003 to 2011. As can be seen the income for households where the reference person was aged 65 or older has actually fallen in that time compared to all age groups from 25-64.



**Graph 1** shows that households with age of reference person between 55-64 years showed the largest increase, 19.4% of the of 77% growth in gross disposable income (GDI) from 2003-04 to 2011-12, while the rest of the households with age of reference person over 35 years each contributed 14% or more to the increase in GDI and households under 35 years contributed a total of 12.6%. Similar patterns were observed for contribution to GDI growth for all periods analysed with the exception of the period during the GFC, 2007-08 to 2009-10, where the largest contributor to the increase in GDI was households with reference person between 45-54 years.

The reduced income of people over 65 means that these people are more vulnerable to socio-economic factors that adversely impact on the community as a whole. Moreover people over 65 are often on fixed incomes which do not keep up with the rising costs of living over time. A consequence of this is that older people who are experiencing elder abuse, including financial exploitation, are less able to afford the types of assistance that may be necessary to redress these problems. In particular, easily purchasing legal and financial advice is beyond the scope of most older people.

Community Legal Centres in NSW are established to provide free assistance to disadvantaged people in the community and are one measure that can assist such people. SRS, in particular, is established to provide legal advice to older vulnerable and disadvantaged people. However, with limited resources and a growing potential client pool there is a large cohort of older people whose needs are unmet.

<sup>&</sup>lt;sup>1</sup>Indeed, possible loss of an older person's home is one of the key issues that we see in our daily work.

<sup>&</sup>lt;sup>2</sup>Data obtained from the most recent National Census 2011

### **PART 1: Introduction and Background**

#### Older People with Disability in NSW<sup>3</sup>

The prevalence of disability in older people is substantial and it increases exponentially with increasing age. At the age of 85 years or more, the Australian Bureau of Statistics has shown that 47% of Australians have a disability requiring the assistance of another person with core daily activities such as bathing, dressing and mobility<sup>4</sup>. As is well known, the number of older people in Australia is increasing rapidly with an increase of 700% expected in the number of older people in the next 50 years<sup>5</sup>.

Older people with a disability are particularly vulnerable to elder abuse.

Where dementia is an element of the disability, carer burnout must be recognised as a serious contributing factor to the abuse.

### 3. Seniors Rights Service Programs and Projects for Assisting Older People in NSW

The SRS has participated in and contributed to many conferences on Elder Abuse. SRS is part of a network of Community Legal Centres throughout Australia that specialise in providing legal and other support for older vulnerable people. In SRS's view elder abuse has a common thread across all jurisdictions. We have drawn on data provided by our interstate colleagues as well as our own data and data from other NSW agencies to inform our understanding of Elder Abuse in this state.

Abuse can occur in any socio-economic setting. It is not confined to one cultural or economic group.

Many of our clients come to us for assistance, ostensibly for a simple legal advice but during the course of the client – solicitor or advocate interview elements of abuse are revealed.

This is an area where SRS has grassroots experience as well as knowledge of research and understanding of the issues of Elder Abuse in NSW.

(1) The prevalence of abuse (including but not limited to financial abuse, physical abuse, sexual abuse, psychological abuse and neglect) experienced by persons aged 50 years and over in New South Wales.

The first point that needs to be made concerning the prevalence of Elder Abuse in NSW is the lack of comprehensive research into this area. While there are many research projects that have been conducted these are mostly very specific studies of small populations that cannot be reliably extrapolated to give us good figures for the older population at large. Interstate studies have the same difficulty and applying international research to NSW conditions raises transferability issues that means we are not getting an accurate picture of the circumstances, scope and nature of elder abuse in this state.

Furthermore different inter-jurisdictional definitions of elder abuse have meant that we are not considering consistent data upon which to base our understanding of elder abuse.

#### RECOMMENDATION

That NSW adopts the definition of Elder Abuse in current use by many organisations working in this field and which has been adopted by the Australian Network for the Prevention of Elder Abuse (ANPEA):

Elder Abuse is any act (or failure to act where a duty of care exists) occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.

The World Health Organisation (WHO) describes elder abuse as follows:

Elder abuse is a violation of human rights and a significant cause of injury, illness, lost productivity, isolation and despair. (WHO 2002 Active Ageing, a policy framework, (page 29)

SRS recognises that one narrow definition might deter some service providers from providing a service if they interpret the definition too narrowly so as to exclude some older people as not falling into the category of the definition. Caution therefore needs to be applied in training and education programs aimed at professional service providers to ensure this does not occur.

The age at which we define someone as an older person or an elderly person should also be clarified for the purposes of establishing a definition of elder abuse.

#### RECOMMENDATION

Training into the meaning, identification and appropriate responses by service providers to elder abuse be conducted by or be required of all organisations that provide care services in home or residential care to older people.

<sup>&</sup>lt;sup>3</sup> Older people with age-related disabilities living at home: health and support service implications Report of FACS Cameron ID, Lawton J, Wasilewicz C, Hughes J.Rehabilitation Studies Unit, University of Sydney 2008

<sup>&</sup>lt;sup>4</sup> Australian Bureau of Statistics, Census 2006, Canberra 2007. Available from http://abs.gov.au/websitedbs/censushome.nsf/home/historicaldata2006

<sup>&</sup>lt;sup>5</sup> Australian Bureau of Statistics. Publication 3222.0 - Population Projections, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3222.02012%20(base)%20to%202101?OpenDocument

SRS assists people generally over 60 or 65 (depending on the funding criteria) so our own statistics are restricted to that group. We do not have many statistics relevant to the age group 50-60.

References to age discrimination refer to an older person as being a person 40 years and above<sup>6</sup>. It is important that we clarify the age group that we refer to when we speak about an "elder" or "an older person".

It is important that people over 60 are not seen as a homogeneous group. People aged 65 do not have the same needs and facility for self-empowerment and satisfaction of those needs as a person aged 75, nor they with a person aged 85. Council on the Ageing (NSW) (COTA) have done some good research into the stratification of people by age who the general society might be tempted to think of as one category of "old people". Age dependent solutions will be different for different people just as their needs and personal circumstances are different.

Furthermore older people from different cultural groups may need different types of assistance to overcome the harm suffered from elder abuse.

### The Queensland Elder Abuse Prevention Unit has attempted to analyse elder abuse in the following terms:

Elder Abuse is a relatively recent term for a form of mistreatment that, in reality, is just one part of a spectrum of violence that occurs when differences in power exist in relationships between people. Simply put, where there is an imbalance of power in a relationship there is a risk of abuse occurring from the dominant person or persons. These power differences have been interpreted, particularly in relation to domestic violence, as the result of living in a patriarchal or male orientated society where males and male values dominate.

This type of gendered analysis of power and violence can easily be justified by noting that, in all age groups, the majority of those being abused are female while the abusers are mainly male. However, this gendered view of violence and abuse becomes blurred somewhat when the abuse occurs in older populations.

Even though there are more women than men in older populations, older women are still more likely to be abused than older men. A major 1998 incidence study conducted by the National Center on Elder Abuse (NCEA\*) found that overall a disproportionate number of older women were victims of abuse compared to men, although older men were more likely to be victims of abandonment. However women also represented nearly half (47.5%) of the perpetrators of abuse in this NCEA study while adult sons and daughters combined to create the single biggest category of abusers. This would suggest that there are more factors than gender at work in elder abuse situations.

Other than gender, age discrimination or 'Ageism' is a factor that should be considered when discussing abuse in older populations. Certainly in western societies there appears to be a general negative attitude towards ageing and older people, a manifestation of which is the often patronising stereotypes of older people portrayed by the media. These attitudes create a fertile ground for age discrimination and like any form of discrimination it devalues and disempowers the group it is directed against.

In SRS's view these comments of the Queensland Elder Abuse Prevention Unit are equally applicable to the older population of NSW. NSW has established an Elder Abuse Helpline, which responds to elder abuse after it has occurred. The Elder Abuse Helpline is in the process of developing education units and promoting strategies to reduce the incidence of elder abuse occurring but as with all not for profit organisations (NFP) it is not as well-resourced as the task demands. Other NFP organisations that provide assistance to older people experiencing elder abuse are also under funded or under trained for the task. For example SRS are aware that the NSW Police are putting in place Vulnerable Persons Officers. Police who might have to respond to incidents of elder abuse or are asked to investigate financial elder abuse need training in this specific area, similar to the sorts of training that is provided for domestic violence.

#### RECOMMENDATION

It is recommended that improved resource allocation, including funding, be provided to those existing organisations already working in the field of Elder Abuse to conduct research and develop approaches to improve the prevention of elder abuse.

Incidence of Elder Abuse as reported to SRS October 2014 - October 2015.

#### Elder Abuse incidence as reported by clients of SRS

Of the 2305 Issues identified in this period, 4.3% were specific to a category of Elder Abuse.

It is SRS's experience that clients will more readily seek help from community legal services for a financial exploitation issue than physical or psychological abuse. It is often during the course of the interview with a client about financial rights that it emerges that other forms of abuse are also present in the client's life.

Specific instances of Elder Abuse reported to SRS include physical abuse, sexual assault, assault, psychological abuse, financial exploitation, misuse of Powers of Attorney, misuse of Enduring Guardianship and isolation and neglect.

The existing discrimination faced by minority groups also compound the effects of ageism. Other factors such as language barriers, access to culturally appropriate services, lack of a support infrastructure within some community groups, and so on, make detecting and responding appropriately to abuse in these communities a major challenge. Rural and remote communities within Queensland present another set of challenges associated with distance, availability and access to services and the understated issue of maintaining confidentiality within small community groups.<sup>7</sup>

<sup>&</sup>lt;sup>6</sup> Raised by the Older Woman's Network in discussions of Enquiry into Older people and the Law, AHRC 2006 p3 at 6.6. Reference to high number of complainants being 40-55 years old.

<sup>&</sup>lt;sup>7</sup> http://www.eapu.com.au/elder-abuse at 20 October 2015, and \*NCEA figures were based on an analysis of nearly 60,000 substantiated incidents of elder abuse in the U.S. This study can be found at the NCEA web site.

#### **Case Study**

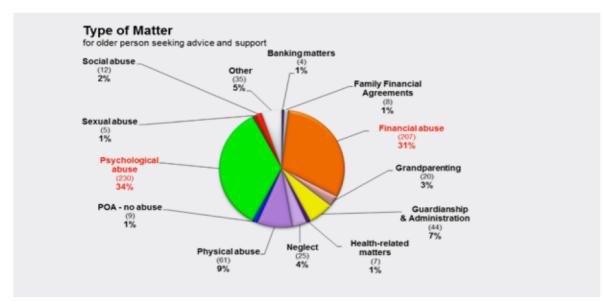
An older person entered into an arrangement with his daughter where he sold his home and gave funds to his daughter to purchase a new home with a granny flat. The older person would live in the granny flat and be cared for by his daughter. The daughter and her husband had a falling out and the older person was psychologically abused and told to move out. Now with no home, no funds and a reduced pension as a consequence of the earlier gift the older person is facing extreme hardship.

#### Incidence of Elder Abuse as reported by clients of Seniors Rights Victoria.

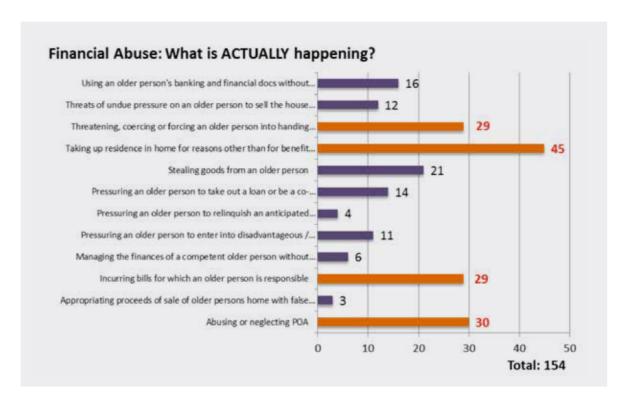
Chart 1 below looks at Type of Matter as reported by callers to the Seniors Rights Victoria (SRV) advice line. As illustrated in Chart 1, SRV not only assists with the main types of abuse but also other areas as well, such as giving advice on Powers of Attorney, Guardianship and Administration. It is noted that psychological and financial abuse constitute a higher levels of calls SRV receive – here shown in red.

Note that SRV are only looking at data about the older people who call their service.

#### CHART 1: courtesy of Seniors Rights Victoria:



Seniors Rights Victoria collected data for a finite period of time, analyzed that data and produced the report that this chart comes from. Of the 154 incidents of financial exploitation the 4 most common are highlighted in orange.



**CHART 2:** Calls for assistance to Victorian Elder Abuse Helpline 1 May 2012 - 30 April 2013 Courtesy of Seniors Rights Victoria.

The Chart below shows the relationship of the person perpetrating the elder abuse to the older person.

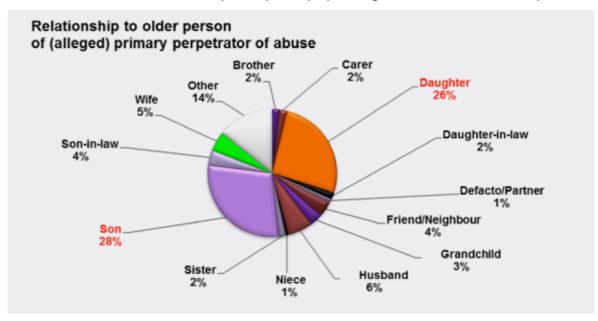


CHART 3 Courtesy of Seniors Rights Victoria.

Consistent with the definition of elder abuse as occurring within a relationship of trust, over 80% of the perpetrators are close family members.

#### Incidence of Elder Abuse in Western Australia

Due to a range of complicated, interconnected factors, no single source of data provides a comprehensive window into the nature and extent of elder abuse. In the previous research conducted in Western Australia, sample surveys of the population seem to yield higher estimates (2.7% – 8.9%) than in the case of per agency approach. Contacting older people directly, e.g. via in person or telephone interviews, seems to result in higher estimates of elder abuse prevalence<sup>8</sup>.

#### Elder Abuse in Queensland

In the Elder Abuse National Annual report 2013-2014 <sup>9</sup> Queensland reported 1266 cases of Elder abuse. The Chart below is produced by the Elder Abuse Prevention Unit Queensland and shows data from calls to the helpline during 2011. The proportions of elder abuse types fit with the data from other jurisdictions and reflects similar patters that have been noted in NSW.

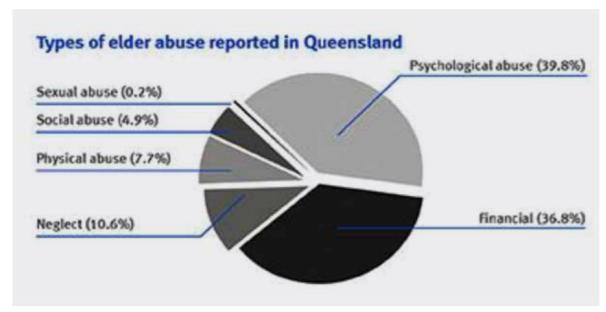


CHART 4: Types of Elder Abuse in Queensland

### (2) The most common forms of abuse experienced by older persons and the most common relationships or settings in which abuse occurs.

An analysis of the SRS data from existing clients and the issues that they raise reveal that of the 2314 legal issues reported by older people in the past year, 12.6% were categorized as falling into one of the traits of elder abuse. 100 were directly identified by the older person as elder abuse (physical or financial) and another 192 were identified as possible abuse from the information provided by the older person. This raises the very real issue that older people themselves do not necessarily see their treatment as a form of abuse. This is one of the barriers that SRS has identified in reporting elder abuse.

The Chart below shows the proportion of legal issues for each category of Elder Abuse that NSW clients reported to SRS during the past year to September 2015. The Physical Elder Abuse category includes the type of abuse defined as falling into elder abuse above and were identified as such by the older person. For statistical purposes SRS separates Domestic Violence from Elder Abuse Physical but in reality one is a subset of the other.



CHART 5: Legal Issues identified as Elder Abuse raised by residents of NSW with SRS in the year September 2014 to September 2015.

In respect of minority groups there is anecdotal evidence that there is a higher incidence of domestic violence in same sex partnerships that continues into old age. This is an area of concern that should not be ignored in developing strategies to address elder abuse generally.

It may be difficult to extrapolate the figures provided for abuse generally within same sex relationships to gain an insight into the scope and extent of elder abuse within same sex relationships of older people. ACON, a health promotion organisation in New South Wales, told Fairfax Media<sup>10</sup> that about one in three LGBTI people will experience abuse in their relationships, but too little research has been conducted on abusive LGBTI relationships and whether people sought help, to be confident in these statistics.

<sup>&</sup>lt;sup>8</sup> Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data, Professor Mike Clare, Dr Barbara Black Blundell, and Dr Joseph Clare, Crime Research Centre, The University of Western Australia Joint Initiative with Advocare Inc. April 2011 p 27

<sup>&</sup>lt;sup>9</sup> Elder Abuse National Annual Report, Sarah Patterson, Advocare Incorporated 2014, as reported by the Queensland Elder Abuse Helpline.

http://www.smh.com.au/nsw/domestic-violence-a-silent-epidemic-in-gay-relationships-20150415-1mm4hg.html Read more: http://www.theage.com.au/victoria/domestic-violence-in-gay-and-transgender-community-neglected-report-20150531-ghdimv.html#ixzz3qTRTJq4Z

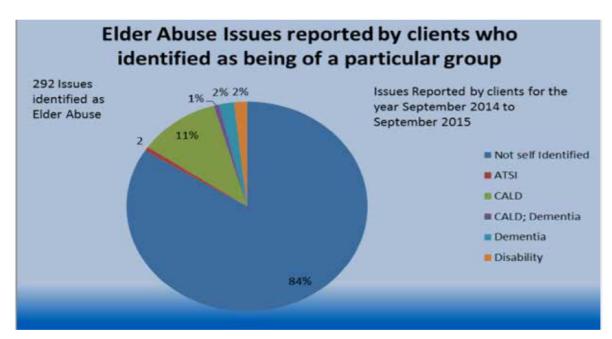


CHART 6: Elder Abuse victims who identify as belonging to particular communities

The above chart shows the proportion of clients who identified as belonging to a particular group when they sought advice about their elder abuse issue from SRS. Not all clients will identify as belonging to any particular group so it is highly likely that the proportions of the population in each group are higher than SRS statistics indicate.

Culturally and linguistically diverse groups (CALD) have been further categorised into those members who also suffer from dementia.

Aboriginal and Torres Strait Islanders are a seriously unreported demographic. SRS has found that during our education program delivered to older people in remote and rural NSW as well as to specifically targeted groups in the metropolitan region, Aboriginal audiences do raise the issue of elder abuse but this is not reflected in individuals seeking advice on specific legal issues from SRS. Consequently we do know that abuse of older people in Aboriginal and Torres Strait Islander communities does occur but we have extreme difficulty pinning down the rate or scope of incidents in those communities.

Also we need to be careful with our language use when talking about Elder Abuse and Aboriginal communities (and some religious groups) as those communities do have a system of respect for Elders in the community and it might be ambiguous to talk about elder abuse when we mean abuse of older people.

#### Financial Abuse

#### Misuse by Attorney of Funds of the Principal under Enduring Power of Attorney Appointments

An attorney has a fiduciary obligation in equity to use the funds of the older person under an Enduring Power of Attorney appointment in the older person's best interests. The only exception is where there is express authorization to give gifts under the prescribed form for the Enduring Power of Attorney under Schedule 2 Power of Attorney Regulation 2011 (NSW).

At our service we receive reports of abuse by the attorney of the older person in situations where the older person is vulnerable.

Some of the instances in which our service has been approached for assistance regarding financial abuse include:

- · A person accessing the older person's key card and using it for personal benefit;
- A person having authority to use the older person's bank account and stealing from the account;
- A person making the older person guarantor on a loan that was not paid and thereby making the older person liable for its repayment (and putting them at risk of losing their home);
- An older person contributing to the purchase price of their child's house and not having their name
  placed on the legal title. When the child mortgages the property and ceases to make the repayments,
  the bank foreclose on the house and the older person's contribution to the property is lost;
- An older person transferring an interest in a house to their child in return for a right to live there for life and receive ongoing care from the child. The older person is later told to leave the house. These arrangements are called "granny flat arrangements" and are a systemic issue for older persons. We refer to these arrangements below;
- An older person transferring an interest in property to their child and not receiving independent legal advice from a solicitor different to the child's solicitor;
- Inappropriate use by a child of an Enduring Power of Attorney to obtain financial advantage both when the parent has Dementia and when they do not;
- A child having the older person transfer the title to their property to the child after being unduly
  influenced when the child is aware the older person is under a disability and do not understand the
  transaction they are entering into;
- A child taking advantage of an older person lacking capacity for the child's benefit in relation to property and financial transactions;
- Transgression of duties of an Enduring Power of Attorney to act in the older person's best interests, to be honest and diligent, to be accountable with funds, to keep records, and to keep funds separate from that of the older person.

#### Case Study

A man, in his 80s, who was blind, contacted SRS. He resided in Department of Housing accommodation. He appointed his nephew his Enduring 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, bread) and spend the rest of the pension money on himself.

The fraud and theft was discovered when the Home Care service provider intervened to assist the older person with 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 Home Care now manage his shopping. The matter was also reported to the NSW Police for investigation.

It is unlikely that the older person will be able to recover the misappropriated funds due to the difficulty of gathering evidence of sufficient probity to prove the case. Even if the evidence is obtained, recovering funds from the nephew, a person who is also on benefits and lives in Department of Housing Accommodation, will be difficult.

There is no section under the Power of Attorney Act stating that theft or fraud by an attorney is a criminal offence and attaching a penalty. There is only a penalty under the legislation if the attorney continues to act after being served a notice of a revocation. While there are provisions of the criminal law that could be applied to these types of situations the difficulty is in finding evidence that the transactions were not valid under the relevant instrument appointing the attorney. Further the burden and level of proof are obstacles for an older person who may have a capacity issue to meet.

New legislation in Victoria has made it an offence for an attorney to misuse a principal's funds. This legislation includes expanded powers for the Victorian Civil and Administrative Tribunal (VCAT). The Act provides VCAT with additional powers, including the power to order compensation for any loss caused by the enduring attorney in contravening the Act and to provide advice to multiple attorneys on resolution of disputes. The Act also creates new indictable offences. The Act creates new offences for dishonestly obtaining or using an enduring power of attorney, which are punishable by up to five years' imprisonment.

### Contribution to a Child's Home or Construction of a Granny Flat on a Child's Property

Older people often enter informal arrangements with their children to contribute to the cost of purchase of a home or the existing mortgage on their child's home or to construct a granny flat on the child's home. The arrangements are often partly oral and partly in writing. The older person often does not insist on having their name put on the legal title to the home. If the property is to be mortgaged the bank may not allow the older person to have their name put on the legal title as the older person has no means of making the repayments under the mortgage. The older person may expect future care from the child which is not forthcoming from the child.

When the relationship breaks down in the family the older person is often asked to leave and is not given back their contribution to the home. This is likely to be the older person's life savings. Legal Aid may help but, if they have no funds for alternative accommodation or a suitable aged care place, they must rely on a concessional place from the government.

#### Case Study

In one case at our centre an older person entered into a family agreement with her daughter and son-in-law and the solicitor acted for both parties. The agreement left out crucial clauses which could have protected the older person, such as her right to lodge a caveat to protect her equitable interest and her right to a repayment of the loan should the arrangement not work out.

Whilst the Supreme Court allows a person to claim an equitable interest, lodge a caveat on title and establish an equitable interest at a hearing (within 28 days of the lodgment of a lapsing notice) these proceedings can be expensive and take several years to be dealt with and the older person may find it very confronting especially if they have never before been involved in legal action. We refer you to our discussion below on the barriers faced by older people in reporting and obtaining redress for elder abuse

*Cirillo v Manieri & Anor* [2013] VSC 399 is a case where the client obtained a successful award for an equitable claim but the matter proceeded to Court of Appeal and litigation continued for 3 years.

Many older people come to arrangements with their adult children for their accommodation and care in later life. These arrangements often involve the sale or transfer of the older person's assets (usually their home) as part of the agreement. Often it will be done informally and sometimes with no intention to create a legal relationship. Older people considering doing this need to be properly and independently advised and it is SRS's view that the arrangements should be documented.

Appointing an attorney under an Enduring Power of Attorney instrument can be a protection for the older person, so long as the older person is comprehensively advised on the benefits and disadvantages and the range of conditions that they can attach to the authority being given. This is discussed further below.

#### RECOMMENDATION

That the NSW Civil and Administrative Tribunal be given jurisdiction to approve family agreements for the accommodation and care of elderly parents, dissolve family agreements when they are being disregarded, misused or are not protecting the older person and to make a compensation award. This would benefit elderly victims with a more expeditious solution. We refer to our further recommendations at page 29-30 of this report.

#### Domestic Violence (Physical and Verbal Abuse)

SRS has many reported cases of elder abuse being perpetrated in the domestic environment, which can be classified as a form of domestic violence. Domestic violence situations often arise for an older person when an adult child returns home to live with the older person rent-free. They may have alcohol, drug or gambling problems and dependency issues and inflict violence on the older person who is vulnerable and scared to evict their child.

We receive calls from older persons who are carers of partners with a diagnosis of dementia, who may begin to demonstrate aggressive behaviours. The older person/carer needs support in managing solutions for these behaviours or finding appropriate aged care.

We also receive calls from older people who receive verbal abuse of threats by spouses. One client reported their spouse had told them "I will get a knife and put it right through you".

We get a lot of calls from people who reside in Department of Housing accommodation who are being verbally abused and harassed by neighbouring tenants. These callers are often elderly, disabled, blind and vulnerable and sometimes the person harassing them is a younger person with mental health issues. The Tenants Union does not have the resources or ambit to deal with these complaints as they act for Tenants in disputes with the landlord. SRS offers assistance in these cases.

Thus over time SRS has developed experience and expertise in dealing with elder abuse matters and we can, as a result, identify the many barriers to reaching solutions that improve the life of the older person.

#### RECOMMENDATION

The NSW Police Force should have vulnerable persons officers present within each area command who are familiar with the considerations which relate to domestic violence and abuse of the elderly. These officers should be aware of the Elder Abuse Protocols and of the issues surrounding the capacity of the victim (are they able to give evidence and if not what protections can be afforded to this person?). They should also be aware clients can be intimidated to not make complaints as they could be reliant on the abuser for care and accommodation. This needs to be addressed with care and consideration by officers.

There should be more funding to NSW Police to establish these services to train officers appropriately.

#### Neglect

SRS receives reports of neglect. Neglect of an older person in need of care where a duty exists to provide that care can have very serious consequences

An older person may have capacity issues and live on their own and the house may be in a squalid condition. The responding agency needs advice on applications for guardianship and financial management orders if the family will not assist or there is no family to assist.

#### **Case Study**

In one case an older person with a diagnosis of dementia was living at home with a recently separated son who purported to be her carer. It was reported that she was living in squalid conditions. Issues were raised about the conditions of the home and of the toileting arrangements. It was clear from the conditions that the older person was not coping with day to day activities however she was refusing further help and relocation to aged care. It was necessary for the local Aged Care Assessment Team to attend the older person at the request of her daughter and make applications to the Guardianship Division of the NSW Civil and Administrative Tribunal for a guardianship order to be put in place with an accommodation function.

#### Case Study

In another case of gross neglect a family member and carer had left an older person lying in bed with a broken hip. She was fed only ice cream. She was not toileted and her fingers and toe nails were left unattended to. She remained in pain for 3 weeks after a fall until the daughter-carer could no longer stand the screaming and called an ambulance for her. By then it was too late and she passed away shortly after in hospital.

Section 44 of the Crimes Act 1900 (NSW) provides a penalty for such neglect. Section 44 states:

- 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 a danger of death or causes serious injury, or the likelihood of serious injury, to that person.

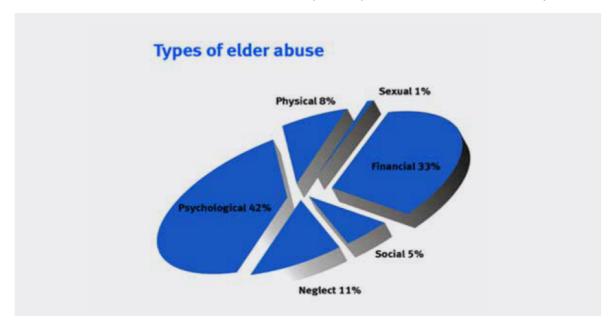
Maximum penalty: Imprisonment for 5 years.

The community, people working in the aged-care and home-care sector and the police should be made more aware of the existence of this section. More prosecutions should be brought under it. Successful prosecutions should be publicised by the Department of Public Prosecutions.

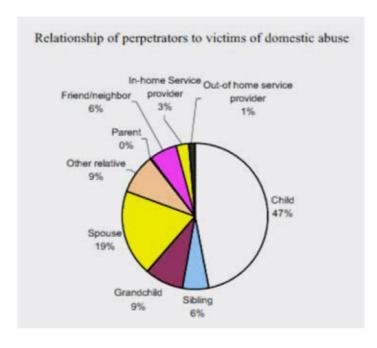
The Criminal Code should be amended to make Elder Abuse involving neglect and Elder Financial Exploitation specific offences with appropriate and serious penalties.

The most common relationships or setting in which abuse occurs.

CHART 7: The most common forms of elder abuse as reported by the Queensland Elder Abuse Helpline 2011.



#### **CHART 8: Perpetrators of Elder Abuse**



Almost four times as many incidents of abuse, exploitation and neglect as are reported are not reported.

The spousal incidence of Elder Abuse that is apparent in Chart 8 may be a continuation of a pattern of domestic violence that exists in that family relationship and would consist mainly of men being violent against their wives.

While these figures are somewhat dated (1998) it is unlikely that the proportions have changed dramatically. Given the commonality of the traits of Elder Abuse it is considered that similar statistical proportions would be found in NSW.

Carers play an important role in caring for an elderly person with capacity or mobility issues and it is important that support agencies remain available to provide support and relief for carers so that they are able to continue in their caring role and avoid carer burnout that might lead to taking their frustrations out on the vulnerable older person.

Common settings in which financial abuse and physical and psychological abuse occurs include:

- Relationships between partner and spouse living in the one house where there are verbal threats against a person's safety;
- Relationships between older person and adult child living in one home particularly where older person
  has contributed to home and is not on legal title. This means that the older person has no security of
  tenure and is vulnerable to the whims of the adult child and events beyond their control. SRS has many
  clients who are in this situation. The legal remedy involves an application to the Supreme Court in the
  Equity Division. This is itself fraught with difficulties, is expensive and invariably takes a long time to
  work through the system;

#### Case Study

SRS received reports of an older woman living in her car. She had contributed to her daughter's property but the daughter began using drugs when she met her new partner. Together they made it unbearable for the older woman to live in the house. She would sleep in the car. Several times she would contact police to apply for an AVO but then withdraw the application as her daughter's behavior would settle down again.

- Relationships between attorney and the older person particularly where the older person lacks mental
  capacity and the attorney decides they want to access early inheritance;
- Relationships between child/carer and older person where the child carer lives in the older person's
  house. When the older person needs to use the house to pay for a permanent aged care place the child
  carer refuses to leave. Some purported child/carers do not provide care to the older person but merely
  seek to exploit them.

In the only study that attempted to define the scope of elder abuse on a national level in the United States, the vast majority of abusers were found to be family members (approximately 90%), most often adult children, spouses/partners and others<sup>11</sup>.

This correlates with the data produced by the Victorian Study referred to above in Chart 3.

Family members who abuse drugs or alcohol, who have a mental/emotional illness, and who feel burdened by their caregiving responsibilities, abuse at higher rates than those who do not <sup>12</sup>.

#### Elder Abuse and the Aged Care Sector

The federal government funds an independent aged care advocacy program in each state. Aged Care Advocates in NSW present education sessions on Residents' Rights and Responsibilities to residents and staff at all aged care homes (877 aged care homes are accredited) as well as education sessions to the staff and clients of Home Care services across NSW.

The community expects aged care homes to provide a safe, secure and homelike environment which supports all the older person's care and emotional needs and promotes independence, confidence and security.

Advocates talk to older people living in aged care homes who are receiving respite care – temporary residential care - and are sometimes asked by the older person if it is possible for the older person to remain at the aged care home, as they are fearful of returning to their own home where they are often isolated or lonely, or have to deal with adult children who are abusing them psychologically or who have financial, alcohol or drug issues.

Other issues that have been encountered include information from residents, family members or friends of residents who claim that the resident has been placed into residential care prematurely by a family member or their appointed guardian when they wished to remain in their own home. At the opposite end of the spectrum, we hear of family members who keep the older person in their home or granny flat and take their pension and assets, but do not provide emotional support, food or a clean environment.

The majority of residents and their families are reluctant to complain about the service they are receiving, and tell us they are frightened of repercussions. It has been reported to us that sometimes staff and management have intimidated or treated the person differently following a complaint. Thankfully most advocacy issues raised with us are readily addressed by management when the older person allows an advocate of their choice, who understands their rights and will stand by them, to assist them to resolve any concerns.

<sup>&</sup>lt;sup>11</sup> The National Elder Abuse Incidence Study, Final Report, September 1998

<sup>&</sup>lt;sup>12</sup> An Ecological Framework for Contextual Risk Factors in Elder Abuse by Adult Children, Schlamberg, Lawrence B. & Gans, Daphna (1999), Journal of Elder Abuse & Neglect, 11 (1), 79-103.

Each year we receive alarming information and have documented alleged abuse or neglect witnessed in aged care homes in NSW. This includes:

- Abuse by aged care staff;
- Abuse by other residents;
- Abuse by family, other residents or staff accused of stealing money, valuable items and clothing from the older person;
- · Psychological abuse by and disrespect from staff members, family or other residents
- Residents being coerced into signing legal documentation that they have not agreed with, read or understood:
- Unexplained bruising, sexual assault of both older women and men, signs of neglect in the form of dehydration, unexplained weight loss, infected pressure sores, poor oral and personal care, overmedication and chemical and physical restraint.

Each year up to 100 cases of threatened eviction of residents from aged care homes are brought to our attention. The majority of these are unfounded and are a breach of the resident's rights under the Aged Care Act 1997, User Rights Principles – Security of Tenure. This threatened eviction from care services also occurs with clients receiving home care services.

There needs to be a clear strategy to identify and respond to abuse of older people in all its forms.

Maintaining quality in aged care service delivery is an over-riding principle in ensuring incidents of abuse are prevented, that the risks are identified, and all aged care organisations have the appropriate policies, processes and procedures in place in NSW in accordance with the "NSW Interagency Protocol for Preventing and Responding to Abuse of Older People 2014" to protect vulnerable older people in our community.

#### RECOMMENDATION

SRS recommends a robust and strong aged care complaints mechanism to address any shortcomings or deficiencies in aged care services and to continue to apply quality assessment of every accredited aged care home and home care provider service in New South Wales. This will aim to ensure a consistently high standard of care and services as well as skilled, qualified and capable staff in aged care homes and organisations in the community providing in-home care.

SRS recommends that the NSW Government improve upon and work with the Commonwealth to enhance the Commonwealth's existing National Aged Care Advocacy Program. Currently NSW has the largest population of older people, the greatest diversity of older people but the least resourced Advocacy Program.

Early Intervention Advocacy Programs should be resourced as these are effective in reducing the incidence of Elder Abuse.

There is also a need for systemic advocacy and systems to respond to organisational abuse or neglect of older people receiving aged care services, who we know do not generally speak out about the abuse, and feel powerless to access assistance to support them in the process.

# (3) The types of government and community support services sought by, or on behalf of, victims of elder abuse and the nature of the service received by those government support agencies

The types of available government services and agencies, and government contracted services to not for profit organisations include:

- · Department of Family and Community Services;
- · NSW Police Force;
- Specialist legal and advocacy services for older residents in NSW who provide contracted services, such as Seniors Rights Service;
- Community Legal Centres which provides legal assistance to seniors over 60 yrs and aboriginal people over 55 years. SRS also have retirement village solicitors and aged care advocates;
- The Elder Abuse Help Line. The NSW Elder Abuse Help Line is a point for information, advice, referral
  and data collection on elder abuse. It assists older people, carers, family, support workers and service
  providers. It provides training and education for front line workers, creates community awareness
  about abuse and provides data reporting;
- Carers NSW;
   Support organization for carers;
- Alzheimer's Association NSW;
   Organisations creating awareness about dementia and Alzheimer and providing support for people with the disease and their carers;
- Aged Care Assessments Team (ACAT) Assessments for in-home care services provided by Commonwealth Government and Aged Care
- Homes;
   In Home Care Services.

We have sought to be comprehensive in the above list but may have omitted some organisations or types of community assistance groups inadvertently. We have endeavoured to capture the range and scope of types of services that exist.

SRS provides a range of levels of assistance to victims of elder abuse. As we indicated in Part 1 of this submission, SRS provides legal and advocacy support to disadvantaged older people. However a range of responses to elder abuse is needed. The legal option is not always the best or most appropriate option. A holistic approach to elder abuse resolution is needed. The Queensland model of Seniors Legal and Support Services attempts to address "whole person issues" in cases of elder abuse. In this model a solicitor and a social worker/counsellor work together to assist the older person to address and set right the elder abuse issues. A number of offices have been established in major towns and cities throughout Queensland and outreach work is also undertaken. These units are auspiced by community legal centres and have proved to be highly effective in responding to elder abuse.

### (4) The adequacy of the powers of the NSW Police Force to respond to allegations of elder abuse.

#### Prosecution of Misuse of Funds by Attorney

There is a tendency to characterise misuse by an attorney of the funds of an older person as a civil dispute or a matter for the family to decide, rather than a crime. Misuse of funds is a crime and should be prosecuted accordingly.

Greater training should be provided to the Police Force in relation to the powers granted under an enduring power of attorney. Officers should be trained to identify when the obligations of an attorney have been breached. The Police Force should also ensure that appropriate resources are allocated to investigate and prosecute these matters.

It would also assist if the Power of Attorney Act 2003 specifically stated that the misuse of funds outside the scope of the power in the enduring power of attorney constituted a specific crime, where not only criminal proceedings and convictions and sentencing would be provided for but also civil restitution could be Ordered at the same Hearing.

#### **Vulnerable Persons Officer**

We refer to our observations in relation to Domestic Violence above.

The NSW Police Force should have Vulnerable Persons Officers present at each area command centre who are familiar with the considerations which relate to domestic violence and abuse of the elderly. These officers should be aware of the Elder Abuse Protocols and of the issues surrounding the capacity of the victim, including whether the relevant individual is able to give evidence and whether steps should be taken to protect the person. They should be trained to undertake the training of other officers in identifying and responding appropriately to elder abuse occurrences.

Officers should also be aware that clients may be too intimidated to make or pursue complaints if they are reliant on the alleged abuser for care and accommodation. This issue needs to be addressed with care and consideration by officers.

#### **Police Prosecutions**

We submit that the prosecution should be able to tender victim statements as evidence in Court and that older persons should be allowed the opportunity to decline to be cross examined in front of the defendant. This is a special consideration that recognises the vulnerability and pressure experienced by an older person when giving evidence of abuse in front of an abuser. It is challenging enough for an older person to express themselves, particularly where they need time due to age, health issues or even mild cognitive impairment.

Capacity is a fluid concept and whilst a person has a diagnosis of dementia it does not follow that they do not understand what occurred to them. A capacity assessment can test this and police need to be aware of capacity and the assessment process.

#### RECOMMENDATION

That NSW Police Vulnerable Persons Officers be established in every Area Command in NSW. That these Officers be trained to provide training to other general duties officers in identifying and responding appropriately to incidents of elder abuse.

The Police should be able to make applications for Apprehended Violence for elder abuse on the same terms as are available for domestic violence. This could be achieved easily by adding an additional criteria of Vulnerable Person (appropriately defined) to the class of people that the Police can make applications to protect. Parent and child are defined within the domestic class.

### (5) Identifying any constraints to elder abuse being reported and best practice strategies to address such constraints.

SRS has identified 2 types of barriers to elder abuse being reported. The first category are personal barriers where the elements are specific to the older person. These barriers could be seen as "internal barriers". The second category are the systemic barriers external to the older person.

Barriers that the older person may experience include:

- 1 The older person may not realise that they are being subject to elder abuse. They may consider the treatment they are experiencing a normal part of their life;
- 2 The older person may have diminished awareness capacity, such as a cognitive barrier;
- 3 There may be a physical or mental disability that either reduces their understanding of what is happening to them or reduces their capacity to explain it to a third person;
- 4 They may have restricted mobility and thus cannot go to an authority or someone else that they can raise the issue with:
- 5 They may lack knowledge about their rights or the resources that could be available to them;
- 6 They may be victims of social isolation;
- 7 Their need to preserve their relationship with the abuser may overwhelm their desire to report the abuse:
- 8 They may be so dependent on certain individuals, including the abuser, that they cannot risk reporting the abuse:
- 9 They may be concerned about the stigma or shame that would flow form reporting the abuse;
- 10 They may fear reprisal by the abuser if they report the abuse;
- 11 There may be cultural, religious or generational barriers that inhibit the reporting of the abuse;
- 12 There may be literacy or language barriers that inhibit the reporting of the abuse; and
- 13 There may be a perceived or actual lack of access to support services or options for the older person.

The SRS experience is that very often the older person does not want to take action against their children or other family members they just want the abuse to stop.

There are a range of systemic (external) barriers that might inhibit the reporting of elder abuse.

The first barrier that should be mentioned is that staff in organisations that deal with older people may not listen clearly to the older person. This is actually quite a serious problem. SRS has many case studies where a parent is being controlled by their adult child to the extent that the child instructs solicitors, aged care staff, doctors and others about the older person's needs. Often the older person is not present or does not speak up at that time.

When the older person does speak up it is often too late – the crucial decisions about accommodation, health care or finances have been made or the staff member being spoken to does not listen or take seriously the older person's expressed concerns, choosing instead to rely on conversations with the support person.

Often the "system" gets blamed. SRS submits that the system is comprised of the individuals who make and implement specific decisions. These individuals must able to communicate effectively with the older person.

The Elder Abuse Protocol was replaced by the NSW Interagency Policy for responding to abuse of older people in 2014. This policy sets out the circumstances in which an event of elder abuse is to be reported to the police without the older persons consent. These circumstances include:

- (a)The person lacks capacity
- (b) The matter requires criminal investigation (an offence has occurred)
- (c)It is in wider public interest.

Presumably wider public interest includes situations where the older person's welfare is at risk or where a systemic issue exists.

#### RECOMMENDATION

That the NSW Government establish clear plain English guidelines for recognising and responding to elder abuse and promote and educate communities about those clear guidelines as to when mandatory reporting of elder abuse is required.

(6) Identifying any strength based initiatives which empower older persons to better protect themselves from risks of abuse as they age.

#### Financial Abuse

#### Contributions to the adult child's home or construction of granny flat on property

We refer to our comments in relation to the types of financial abuse facing older persons earlier in this submission.

An older person may enter into arrangements where they contribute to the home of a child, whether it be an extension to their property, a granny flat constructed on the property, or a financial contribution to the child's home.

These arrangements are often entered into informally without the involvement of solicitors for each party.

The older person rarely gets their name on the legal title due to pressure applied by the child, or due to the fact that the child wants to mortgage the property and the bank declines to allow the older person to have their name on the legal title because the older person is not able to make repayments under the mortgage.

When the arrangements break down due to family breakdown or the older person requires aged care, the older person is often unable to retrieve their contribution because they have not protected themselves by being placed on the legal title or entered some other registered interest on the title such as a life interest, long term lease or loan protected by a caveat.

Where these arrangements are entered into on an unprotected basis it is left for the older person to argue that a resulting trust (trust based on mutual intentions of the parties) or that there is trust arising from the unconscionable conduct of the child toward the older parent asking the parent to leave. However, this legal action can be expensive and time consuming and these are important factors to consider, in terms of efficiency of justice, for an ageing client.

To protect an older person they need a document that clearly sets out the terms of the arrangement. We recommend that legislation be introduced to provide a standard Family Agreement relating to the creation of a granny flat arrangement or any other family financial agreement.

#### RECOMMENDATION

It is submitted new legislation should be drafted setting out model arrangements for solicitors for the preparation of Family Agreements to protect older clients.

#### RECOMMENDATION

#### That

- Legislation to make provision for clauses to be included in family agreement arrangements under model provisions be drafted including:
- The deduction of fees for care;
- A calculation of contributions towards the cost of accommodation and utilities;
- Consideration of child minding;
- A calculation as to contributions to be returned should the arrangement not work out;
- A calculation of the cost of aged care fees should the older person need a higher degree of care;
- · Arrangements for respite care for the older person each year if required;
- · What is to happen if the younger parties relationship with the older person breaks down; and
- What is to happen if the younger party passes away.

#### RECOMMENDATION

The new legislation set up the presumption of a constructive trust between the parties to a family arrangement when awarding compensation payments for the break down in the relationship.

This means that should the relationship break down the older person would not just be entitled to the refund of their contribution but to any improvement in the capital value of the home.

It is also recommended that the new legislation establishing a jurisdiction for the NSW Civil and Administrative Tribunal with jurisdiction 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 Administrative Tribunal.

The last recommendation was a recommendation in the previous Standing Committee Report on Legal and Constitution Affairs Enquiry into Older People and the Law 2007 (See Chapter 4 Family Agreements para 4.45 Recommendation 30).

#### Power of Attorney

Appointing an attorney can be an effective measure to help protect an older person's assets and income provided that several safeguards are in place. First the person being appointed must be trustworthy. Second very specific instructions must be provided if particular assets are to be utilised in a specific way. Third all attorneys should undertake training to ensure that they understand their obligations and how to carry out the duties. Fourth an attorney who is capable of managing the principal's estate should be appointed.

SRS solicitors have examined many Enduring Power of Attorney instruments over the years and very few utilise the section that allows the principal to set conditions on the use of the authority or provide detailed instructions to assist the attorney in their decision making. This can be attributed, in many cases, to a failure of the solicitor drafting the instrument to adequately advise the principal on all the options available to them.

A general power of attorney appoints a person to manage the older person's finances when they still have the capacity to direct the attorney as to what is to happen to their affairs. An enduring power of attorney appoints a person to manage the financial affairs of the older person and continues to be effective in the event that they lack mental capacity.

There are several obligations imposed on an attorney. These obligations are set out in the prescribed form attached to Schedule 2 Power of Attorney Regulation 2011.

#### An attorney under an Enduring Power of Attorney is obligated 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.

Where the attorney breaches these obligations the older person (if they have capacity) or the appointed tutor (if they do not have capacity) may seek compensation for the breach in the equitable jurisdiction of the Supreme Court.

If the older person has capacity they can revoke the attorney's appointment.

If the older person lacks capacity a concerned person can apply to the Guardianship Division of the NSW Civil and Administrative Tribunal to have the attorney removed and replaced, but this may be after all of the funds are lost.

In the event of the theft by the attorney from the older person, where the attorney uses the older persons assets for his or her own ends without authorisation, the police have shown a reluctance to investigate the matter. The police appear to view these matters as family matters and not matters for criminal investigation or they form the view that the standard of evidence required is not sufficient for a criminal prosecution.

There are no criminal sanctions or recognized offences in the current legislation for breaches of the fiduciary obligations of the attorney for an older person.

The current *Power of Attorney Act 2003* (NSW) only provides an offence where an attorney continues to act in his or her role despite being served with a written notice to revoke the Power of Attorney. The penalty imposed is up to 5 years imprisonment (section 49).

The *Powers of Attorney Act 1998* (Qld) provides that a breach of an attorney's obligations under an enduring power of attorney is an offence.

Specifically, the Queensland Act provides:

- (a) An attorney must act honestly and diligently to protect the principal's interest (and compensate the principal for any loss suffered as a result of any breach of this obligation) 200 penalty units (s 66);
- (b) An attorney who knows a power of attorney has been revoked must not exercise or purport to exercise that power 200 penalty units (s 71);
- (c)Pursuant to section 73, an attorney for a financial matter must not enter into a "conflict transaction" without the permission of the principal. A conflict transaction is defined as where the duty owed by the attorney to the principal conflicts with the interests of the attorney or a business associate or a close friend of the attorney. Under section 105 the attorney is personally liable for losses to the principal resulting from a breach of this obligation; and
- (d) An attorney is obligated only to use confidential information about the principal in certain circumstances authorized by the Act 200 penalty units (section 74).

The implementation of these sections would require appropriate support and investigation by the police. We would recommend that there would be a police liaison officer specifically address financial and physical abuse of older persons.

We support the implementation of a national register of powers of attorney and for revocations of power of attorney prepared by the older person. This would enable police, financial institutions, and other third parties to check the register to confirm the validity and authenticity of the document. We recommend that there be a prescribed form for revocation of Enduring Power of Attorney included in the Schedule to the Power of Attorney Act 2003.

#### RECOMMENDATION

SRS submits that a system of registration of enduring powers of attorney and enduring guardianship be developed where 6 monthly reports are required that includes detail of the decisions made and information relating to the accounts.

#### RECOMMENDATION

#### SRS recommends that:

- 1. A power of attorney register be established that records the name of the older person and the name of the attorney so that the attorney can be traced should suspected abuse arise.
- That offences be introduced under the Powers of Attorney Act 2003 (NSW) as a deterrent to any abuse. This could involve re-instating s169 of the Criminal Code that created an offence for fraudulent misappropriation by an attorney of a person's property, which was repealed by the Crimes Amendment (Fraud, Identity and Forgery Offences) ACT 2009 NSW No 99, Sch 2.
- 3. That the most appropriate court for cases involving abuse of enduring power of attorney to be heard is in the lower courts. To bring action in the Supreme Court Equity Division for breach of a fiduciary obligations of an attorney is an expensive and lengthy process.
- 4. That the Federal Government commence dialogue with and encourage the States to give their powers to the Commonwealth Government in relation to uniform laws regarding Powers of Attorney and in relation to the abuse of Powers of Attorney so that these laws apply across all of the states. This will resolve issues in relation to the enforcement of criminal proceedings against attorneys who reside interstate and avoid the need for extradition.
- 5. That there be greater education provided to older persons on the making of Enduring Power of Attorney and the conditions that can be placed in the document that may offer them greater protection.

We submit that such a system would greatly reduce the instance of misuse of Powers of Attorney and would provide evidence where a breach of the fiduciary duty did occur.

#### Abuse and Neglect

We refer to our comments on page 18 in this submission.

#### Centrelink Implications of Elder Abuse

Where there is theft by an attorney against the older person, Centrelink requires evidence that the older person has commenced legal proceedings against the abuser to recover the funds. If there is no such evidence Centrelink presumes the transfer of funds to be a gift by an older person to the abuser. The older person's pension is therefore reduced as under the assets and income test, Centrelink view the gift as a deprived asset.

#### **CASE STUDY**

In one case an adult child used the enduring power of attorney to mortgage the mother's house. The adult child failed to make repayments on the mortgage and used all the funds for his business which failed. The bank foreclosed on the house. Centrelink discontinued the older person's pension and her fees in the nursing home were not being paid.

In another case, an adult child was having difficulty getting the mother's pension reinstated as she was deemed to have gifted her house to the other adult son.

#### RECOMMENDATION

Centrelink review its hardship provisions to allow for circumstances of elder abuse where it is cost prohibitive for the older person to commence legal action to recover the funds stolen and where legal action would have no merit because the abuser has no assets.

(7) The effectiveness of NSW laws, policies, services and strategies including the 2014 Interagency Policy Preventing and Responding to the Abuse of Older People, in safeguarding older persons from abuse.

The Interagency Policy replaced the Elder Abuse Protocol and sets out the circumstances in which an event of elder abuse is to be reported to the police without the older person's consent.

These circumstances include:

- (a) Person lacks capacity;
- (b) Matter requires criminal investigation (an offence has occurred);
- (c) It is in wider public interest.

It is submitted that the existence of an Elder Abuse Protocol which applies to all agencies is a positive initiative in protecting the welfare of older persons from abuse.

Presumably wider public interest includes situations where the older person's welfare or life is at risk. If this is the case, this should be specifically stated in the Elder Abuse Protocol.

There will be cases where a person has capacity and may not want to report an offence, even if the offence is a criminal offence or if the person is living in poor or squalid conditions and not receiving appropriate care.

It would be useful for the protocol to list a series of considerations specific to dealing with the elderly as to how to weigh their wishes and wants for the future with the legal process and the outcome of criminal proceedings.

There should be guidelines as to when agencies are able to explore alternative solutions at the instructions of the older person with capacity if they do not want to take criminal proceedings but they can work with legal authorities to ensure their future welfare is protected.

#### RECOMMENDATION

SRS recommends that in circumstances where an older person has capacity and may not want to take criminal proceedings that the Elder Abuse Protocol set out a list of considerations for the agency to take into account. The Elder Abuse Protocol should provide guidelines to the agency as to when alternative solutions to legal proceedings can be explored at the request of the older person in order to protect their welfare.

(8) The possible development of long term systems and proactive measures to respond to the increasing numbers of older persons, including consideration of cultural diversity among older persons, so as to prevent abuse.

Raising of community awareness of the correct way to assist older people through Education and the availability of easily accessed independent legal and financial advice is fundamental to reducing the risk of elder abuse.

While there are people who are quite ready to trammel the rights of older people to satisfy their own desires many transgressions occur simply because the perpetrators do not know and do not understand that what they are doing is not right. Many people appointed to be attorneys for their aged parents just do not know what the position entails. These people need to be educated about their responsibilities. This would entail a long term program but the benefits in better results for vulnerable older people would be a considerable saving over the long term.

We request that further funding be provided for specialist projects to communicate with culturally diverse organisations in order to create awareness about elder abuse.

The Borrowers Beware program was undertaken by Seniors Rights Service to increase awareness amongst Arabic and South Eastern European (Serbian, Macedonian, Croatian) older persons of the risks of entering into financial products secured against their homes and where they can obtain legal assistance.

The groups were chosen due to their high usage of Legal Aid NSW for issues including will advances (24.8% Arabic, 15.9% South Eastern European).

After consultation with 6 relevant multicultural community organizations and 8 community radio stations in the relevant language programs a series of advertisements were created to communicate the risks of lending or guaranteeing money to family.

Seniors Rights Service received calls to our service in response to these programs enabling us to tailor advice to individual client needs through the telephone interpreter service (TIS National).

The statistics from this project are set out below:

#### Quantitative data from Borrowers Beware August to October (2015)

Caller's Background	Date rang	Radio Station	Issue	DOB/Age	Outcome
Croatian	24/8	Croatian radio	Loan	Over 60	Ringing back with TIS
Arabic	26/8	SBS Radio	Buy house with son	/46	Given advice
Croatian	26/8	Do not know	Will	Over 60	Asked name & hung up
Croatian	27/8	Croatian radio	Residential care	/44	Given advice by RV solicitor
Arabic	26/8	2RRR Arabic	Guarantor	Over 60	Given advice
Croatian	27/8	SBS Croatian	Process to go into residential care	/41	Given advice
Croatian	27/8	Croatian Radio	Will	Over 60	Given advice

Caller's Background	Date rang	Radio Station	Issue	DOB/Age	Outcome
Arabic	2/9	SBS Arabic	Loan to buy house with son	/43	Given advice
Macedonian	4/9	2SSR	Loan/debt	Over 60	Given advice
Macedonian	4/9	SBS Macedonian	Pension issue/too many assets/needed interpreter	/49	Referred to FISO
Serbian	2/9	BEO	Investment property with son	Over 60	Hung up when asked surname
Serbian	4/9	BEO Serbian	Loan	/33	Given advice
Croatian	4/9	Croatian Radio	Pension, Rights, Carers Allowance,	/53	Sent Croatian Insert/Referred to FISO
Macedonian	4/9	SBS Macedonian	Pension/too many assets	Over 60	Referred FISO
Arabic	4/9	SBS Arabic	Parents want to buy house with children. Child to pay off loan	/49	Given advice
Macedonian	7/9	SBS Macedonian 99.7	Inherited from father & bought overseas. Will affect father's pension	/48	Referred to RD Legal Ald
Arabic	14/9	SBS	Wanted more Information on project & ads	n/a	SGMRC Arabic worker/liaised with Diana
Arabic	24/9	2RRR	Co secured loan	/42	Given advice by solicitor
Arabic	12/10	2ME	Advice on loans/injury/ pension	Over 60	Referred to FISO
Arabic	14/10	2ME	Home modification discrimination	Over 60	Referred to Anti- Discrimination Board
Arabic	29/10	2ME	Guarantor Issue for money for son's house	/51	Given advice by solicitor
Greek	20/10	Friend heard on Arabic 2ME	Director on sons company when son arranged money for business	/41	Given advice by Solicitor & Referred to barrister
Philipino	26/10	3XY radio Melb	Lending to family	over 60	Given advice
Total Callers 30	/10/15				
Arabic	Croatian	Macedo	onian Serbian	Other	Total
8	6	4	2	2	22

The project was also evaluated for qualitative feedback from participating radio stations and participating community organisations. A few examples of the positive feedback received include:

"Stories were informative, breaking taboos and opening people to talk about the problem whilst knowing they are not alone in the situation" - SBS Executive Producer.

"It was great to target the ads at adult children as well as this was necessary" - 2 SSR Macedonian.

"The examples were really relevant as they allowed the issue to be understood by the audience" - SBS Programs Manager

"Thank you so much for your support of the seniors of these specific communities and for all your important work providing awareness to seniors on radio" - CEO Arab Council of Australia.

#### RECOMMENDATION

It is submitted further funding should be provided for projects which target the identified needs of these CALD and other minority group communities.

### (9) The consideration of new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse, and

We refer to our legislative reform recommendations above.

Other proposed areas of reform include:

- A Power of Attorney register be established that records the name of the older person and the name
  of the attorney so that the attorney can be traced should suspected abuse arise.
- That offences be introduced under the Powers of Attorney Act 2003 (NSW) as a deterrent to any abuse.
- Increased funding to enable community legal centres to obtain medical reports for the purpose
  of completing capacity assessments of older persons. This enables appropriate advice and
  representation to be provided to the client, including possible representation before the Guardianship
  Division of NCAT is needed.
- Funding to improve education awareness for individuals appointed as enduring power of attorney about the importance of enduring power of attorney and guardianship documents.
- Funding for programs to prepare enduring power of attorney and guardianship documents of older persons on low incomes facing medical issues, including dementia diagnosis.
- A register of enduring power of attorneys so that attorneys are accountable for actions.
- The introduction of reporting requirements for attorneys for people lacking mental capacity. This would include reporting on financial accounts.
- New legislation surrounding family agreements and new legislation providing NCAT with jurisdiction to dissolve family agreements and make orders for compensation.
- Greater funding for projects to reach CALD and LGBTI communities such as projects conducted by Seniors Rights Service above.

- Funding for training of Vulnerable Person Officers at each Area Command in NSW to investigate abuse by attorneys, including financial, physical and psychological abuse.
- Funding for training of Police Prosecutors in relation to capacity of older persons and sensitivity to giving evidence in Court.
- Legislation protecting older persons when giving evidence about elder abuse in Court.
   These protections would include that the option that the older person does not have to give evidence in front of victims.
- Funding for a well-resourced public awareness campaign targeting elder abuse prevention and promotion of existing services designed to reduce the risk of elder abuse in our community.

#### (10) Any other related matter.

#### Housing

We understand that Public Housing in NSW is not readily available and there is a waiting list for placement. We understand that there is some emergency housing available but that this is also limited.

Many older women, because of social 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 the man usually managed the general family finances. In these instances it is more likely that the older woman, when widowed or separated, would pass this job over to an adult child under a power of attorney.

Limits on financial independence of older women include:

- · The initial inability to accrue superannuation;
- · Inability to obtain high paying jobs;
- Being expected to be a stay-at-home parent for their child particularly in the child's early years; and
- If a woman did work in the past, it was often part time and relatively low paying.

#### RECOMMENDATIONS

That the Federal Government increase funding for affordable housing especially for older women who enter retirement with limited assets due to having worked in low income jobs and who have never had the opportunity to purchase their own home.

That the Federal Government fund the establishment and continuation of Women's Refuges allowing specific refuges to be built for older women.

That where older women are successful in obtaining public housing, that they be placed in accommodation specifically set aside for older persons.

It is important that specialised accommodation be provided for older people and older women in particular. We receive reports to our service of elder abuse in social housing where younger persons with mental health issues have moved into a complex of older persons and have created a disruptive environment for the older persons. They engage in verbal abuse, threatening behavior and harassment. Our service assists these older people where we can but it is submitted more funding is required for advice and support services for these persons.

#### Eviction of Adult Child in the Home

One problem that we have encountered on many occasions is the adult child returning to reside in the family home. Often this occurs when there is only one parent left, usually the mother. The home is the only asset and the older person is in receipt of the Aged Pension.

A formal agreement is not normally entered into in these circumstances. If an agreement is reached, it is often verbal agreement and usually involves a request for the adult child to pay a nominal amount towards ongoing costs. It is often agreed verbally that the adult child can stay for a couple of weeks whilst the adult child "gets back on their feet", however, it is common that the adult child then continues to stay. The problem is that the adult child does not contribute financially to the household costs, including utility and food costs. The adult child takes over the house without doing any work around the home. The older person may be relegated to the garage or to a single room and their belongings thrown out or crammed into a single room or the garage

It is often very difficult to evict these occupants.

If they are regarded as tenants they are protected as such and are able to obtain free advice to maintain or prolong their tenancy. There is no service that provides owners' advice for the older person, because being homeowners they are regarded as wealthy and not in need of protection.

The adult children that move into the family home are rarely regarded as tenants. The main reasons for this are:

- (a) The adult child and the older person rarely enter into a residential tenancy agreement in accordance with the Residential Tenancies Act (NSW) prior to entering into the living arrangements;
- (b)According to the general law, agreements regarding living arrangements are presumed to establish no intention to create legal relations (and are therefore not legal contracts) unless there is evidence to rebut this position.

If the adults are not tenants, the NSW Civil and Administrative Tribunal has no jurisdiction to hear an application to evict the adult child under the Residential Tenancies Division of the Tribunal.

The only other recourse is for the older person to seek legal advice as to whether there is another method available at law to evict the adult child. Other methods include applying for an Apprehended Domestic Violence order where the adult child is violent. If the adult child is just lazy and living off the parent the older person is left with a cause of action in trespass. If the police do not assist the older person to evict the tenant, the older person must seek to obtain a Supreme Court Order for eviction which would be a serious drain on the older person's resources.

The legal costs could easily result in the older person having to sell their house or take out a reverse mortgage. If the older person needs to go into aged-care at a later stage in life they may not have the equity left in their home to pay for this service.

Apart from financial abuse there may also be physical, psychological, or emotional abuse, including general neglect. Often the older person is unwilling or feels unable to do anything to eject the adult child.

This is an issue that needs to be publicised in order to increase community awareness of this issue. Furthermore, Commonwealth and State governments should undertake to increase the provision of specific community legal education.

#### RECOMMENDATION

#### SRS recommends that

- Specific legislation be considered to provide for a procedure for eviction and enforcement of eviction of adult children residing with an older person in circumstances where there is no formal lease, boarding or tenancy arrangement. This is necessary due to the presumption at law in family relationships that there is no intention to create legal relationships when entering into such living arrangements.
- 2 An advisory body be established to make recommendations on policy governing procedures for eviction, including how the police are to handle the enforcement of these sorts of evictions and resolution of disputes arising from evictions.
- 3 A Seniors Commissioner be established with the role of resolving disputes and determining disputes in relation to the eviction of the adult child by the older person. This could be performed by a separately established Commissioner or within the existing jurisdiction of NCAT.

#### **PREVIOUS SUBMISSIONS**

We note that there have been several enquiries into elder abuse and our organisation has submitted responses in relation to some of those previous enquiries into elder abuse. We list those enquiries below for your information:

- The NSW Law and Justice Foundation (NSW) report addressing "The Legal needs of Older People" (2004):
- 2. The House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law (The Report)(2007);
- 3. Financial Abuse of Elders: a review of the evidence, Protecting Elders Assets Case Study (2009);
- 4. Prevalence of Financial Abuse in Victoria: Protecting Elders Assets Study (2010);
- 5. The Need for Law Reform Enduring Powers of Attorney and Family Agreements (2010);
- 6. Enquiry into Domestic Violence in Australia (2010); and
- 7. NSW Whole of Government Strategy (2012).

#### RECOMMENDATION

SRS recommends that funds be applied to ensure the implementation of recommendations already made in the many enquiries into the issues facing the ageing population. We refer to our previous submissions in relation to many of these enquiries and further endorse those submissions and recommendations.

### **PART 3: Summary of Recommendations**

#### **RECOMMENDATION 1**

That NSW adopts the definition of Elder Abuse in current use by many organisations working in this field and which has been adopted by the Australian Network for the Prevention of Elder Abuse (ANPEA):

Elder Abuse is any act (or failure to act where a duty of care exists) occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.

The World Health Organisation (WHO) describes elder abuse as follows:

Elder abuse is a violation of human rights and a significant cause of injury, illness, lost productivity, isolation and despair. (WHO 2002 Active Ageing, a policy framework, (page 29).

#### **RECOMMENDATION 2**

That training into the meaning, identification and appropriate responses by service providers to elder abuse be conducted by or be required of all organisations that provide care services in home or residential care to older people.

#### **RECOMMENDATION 3**

It is recommended that improved resource allocation, including funding, be provided to those existing organisations already working in the field of Elder Abuse to conduct research and develop approaches to improve the prevention of elder abuse.

#### **RECOMMENDATION 4**

That the NSW Civil and Administrative Tribunal be given jurisdiction to approve family agreements for the accommodation and care of elderly parents, dissolve family agreements when they are being disregarded, misused or are not protecting the older person and to make a compensation award. This would benefit elderly victims with a more expeditious solution. We refer to our further recommendations at page 29-30 of this report.

#### **RECOMMENDATION 5**

The NSW Police Force should have vulnerable persons officers present within each area command who are familiar with the considerations which relate to domestic violence and abuse of the elderly. These officers should be aware of the Elder Abuse Protocols and of the issues surrounding the capacity of the victim (are they able to give evidence and if not what protections can be afforded to this person?). They should also be aware clients can be intimidated to not make complaints as they could be reliant on the abuser for care and accommodation. This needs to be addressed with care and consideration by officers.

There should be more funding to NSW Police to establish these services to train officers appropriately.

That NSW Police Vulnerable Persons Officers be established in every Area Command in NSW. That these Officers be trained to provide training to other general duties officers in identifying and responding appropriately to incidents of elder abuse.

#### **RECOMMENDATION 6**

SRS recommends a robust and strong aged care complaints mechanism to address any shortcomings or deficiencies in aged care services and to continue to apply quality assessment of every accredited aged care home and home care provider service in New South Wales. This will aim to ensure a consistently high standard of care and services as well as skilled, qualified and capable staff in aged care homes and organisations in the community providing in-home care.

SRS recommends that the NSW Government improve upon and work with the Commonwealth to enhance the Commonwealth's existing National Aged Care Advocacy Program. Currently NSW has the largest population of older people, the greatest diversity of older people but the least resourced Advocacy Program.

Early Intervention Advocacy Programs should be resourced as these are effective in reducing the incidence of Elder Abuse.

#### **RECOMMENDATION 7**

That the NSW Government establish clear plain English guidelines for recognising and responding to elder abuse and promote and educate communities about those clear guidelines as to when mandatory reporting of elder abuse is required.

#### **RECOMMENDATION 8**

It is submitted new legislation should be drafted setting out model arrangements for solicitors for the preparation of Family Agreements to protect older clients.

#### **RECOMMENDATION 10**

#### That

Legislation be considered to make provision for clauses to be included in family agreement arrangements under model provisions including:

- · The deduction of fees for care;
- A calculation of contributions towards the cost of accommodation and utilities;
- · Consideration of child minding;
- A calculation as to contributions to be returned should the arrangement not work out;
- A calculation of the cost of aged care fees should the older person need a higher degree of care;
- · Arrangements for respite care for the older person each year if required;
- What is to happen if the younger parties relationship with the older person breaks down; and
- What is to happen if the younger party passes away.

#### **RECOMMENDATION 11**

The new legislation set up the presumption of a constructive trust between the parties to a family arrangement when awarding compensation payments for the break down in the relationship.

This means that should the relationship break down the older person would not just be entitled to the refund of their contribution but to any improvement in the capital value of the home.

It is also recommended that the new legislation establishing a jurisdiction for the NSW Civil and Administrative Tribunal with jurisdiction 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 Administrative Tribunal.

#### **RECOMMENDATION 12**

SRS submits that a system of registration of enduring powers of attorney and enduring guardianship be developed where 6 monthly reports are required that includes detail of the decisions made and information relating to the accounts.

### **PART 3: Summary of Recommendations**

#### **RECOMMENDATION 13**

SRS recommends that:

- 1. A power of attorney register be established that records the name of the older person and the name of the attorney so that the attorney can be traced should suspected abuse arise.
- 2. That offences be introduced under the Powers of Attorney Act 2003 (NSW) as a deterrent to any abuse. This could involve re-instating s169 of the Criminal Code that created an offence for fraudulent misappropriation by an attorney of a person's property, which was repealed by the Crimes Amendment (Fraud, Identity and Forgery Offences) ACT 2009 NSW No 99, Sch 2.
- 3. That the most appropriate court for cases involving abuse of enduring power of attorney to be heard is in the lower courts. To bring action in the Supreme Court Equity Division for breach of a fiduciary obligations of an attorney is an expensive and lengthy process.
- 4. That the Federal Government commence dialogue with and encourage the States to give their powers to the Commonwealth Government in relation to uniform laws regarding Powers of Attorney and in relation to the abuse of Powers of Attorney so that these laws apply across all of the states. This will resolve issues in relation to the enforcement of criminal proceedings against attorneys who reside interstate and avoid the need for extradition.
- That there be greater education provided to older persons on the making of Enduring Power of Attorney and the conditions that can be placed in the document that may offer them greater protection.

#### **RECOMMENDATION 14**

That Centrelink review its hardship provisions to allow for circumstances of elder abuse where it is cost prohibitive for the older person to commence legal action to recover the funds stolen and where legal action would have no merit because the abuser has no assets.

#### **RECOMMENDATION 15**

SRS recommends that in circumstances where an older person has capacity and may not want to take criminal proceedings that the Elder Abuse Protocol set out a list of considerations for the agency to take into account. The Elder Abuse Protocol should provide guidelines to the agency as to when alternative solutions to legal proceedings can be explored at the request of the older person in order to protect their welfare.

#### **RECOMMENDATION 16**

It is submitted further funding should be provided for projects which target the identified needs of these CALD and other minority group communities.

#### **RECOMMENDATIONS 17**

That the Federal Government increase funding for affordable housing especially for older women who enter retirement with limited assets due to having worked in low income jobs and who have never had the opportunity to purchase their own home.

That the Federal Government fund the establishment and continuation of Women's Refuges allowing specific refuges to be built for older women.

That where older women are successful in obtaining public housing, that they be placed in accommodation specifically set aside for older persons.

#### **RECOMMENDATION 18**

SRS recommends that

- Specific legislation be considered to provide for a procedure for eviction and enforcement of eviction of adult children residing with an older person in circumstances where there is no formal lease, boarding or tenancy arrangement. This is necessary due to the presumption at law in family relationships that there is no intention to create legal relationships when entering into such living arrangements.
- 2 An advisory body be established to make recommendations on policy governing procedures for eviction, including how the police are to handle the enforcement of these sorts of evictions and resolution of disputes arising from evictions.
- 3 A Seniors Commissioner be established with the role of resolving disputes and determining disputes in relation to the eviction of the adult child by the older person. This could be performed by a separately established Commissioner or within the existing jurisdiction of NCAT.

#### RECOMMENDATION 20

SRS recommends that funds be applied to ensure the implementation of recommendations already made in the many enquiries into the issues facing the ageing population. We refer to our previous submissions in relation to many of these enquiries and further endorse those submissions and recommendations.

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### **Notes**




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