

---

# ARNLA

AUSTRALIAN RESEARCH NETWORK ON LAW & AGEING

---

---

## Introduction

The Australian Research Network on Law and Ageing (ARNLA) is an Australian wide network of legal scholars who are experts in the field. Central to the work of ARNLA is the promotion of human rights and freedoms for older persons, drawn from the principal international instruments concerning older persons – the UDHR, ICCPR, ICESCR, CRPD and the UN Principles for Older Persons.

ARNLA is pleased to provide this submission, which echoes much of the submission made by ARNLA to the Australian Human Rights Commission Inquiry into Elder Abuse.

We have also attached two relevant appendices:

Appendix 1: Draft Charter of Rights and Freedoms of Older Persons. This Charter outlines a human rights framework that informs the work of ARNLA.

Appendix 2: ARNLA biography and bibliography



### *c) Identify the forms of elder abuse, including but not limited to neglect*

#### Examples of abuse involving enduring powers especially related to intimate relationships

ARNLA member Professor Robyn Carroll has experience as a member of a tribunal exercising original jurisdiction in adult guardianship and administration matters and with power to make orders with respect to enduring instruments. Professor Carroll has observed at times conduct by family members, carers, agencies and institutions that could be described as elder abuse.<sup>1</sup>

Professor Carroll would like to draw to the Commission's attention actions taken that interfere with an elderly person's personal and intimate relationships. Specifically, circumstances where children take actions, sometimes purporting to be in their parent's best interests, which interfere with a marriage, de facto or friendship relationship. This can have both emotional and financial implications for the elderly person.

There are some parallels between these situations and parenting disputes between adults concerning their children. The conduct often involves disputes between children, and siblings (including step children and other blended family members), and their (elderly) parent(s). Not surprisingly, there are parallels between family law parenting and property disputes (to which the *Family Law Act 1975* (Cth) applies) and family disputes concerning lifestyle decisions and the financial affairs of elderly parents.

Here are three examples.

1. Two children of a married couple apply to be appointed guardian and administrator of their mother. Their mother, who lives with their father, suffers dementia and is declared to be incapable of making decisions about her living arrangements and finances. The children make it known that they want their mother to leave the family home where she lives with her husband, their father, and be placed in an aged care

---

<sup>1</sup> The views expressed by Robyn Carroll in this submission are her personal views and do not represent the views of her employer the University of Western Australia or the Western Australian State Administrative Tribunal where she holds an appointment as a senior sessional tribunal member.

facility. No application is made in respect of the father who does not attend the hearing at which the children are appointed joint administrators of their mother. The children are not appointed joint guardians for their mother as there is no express support from their father or evidence that their father is unable to make lifestyle decisions for his wife. The children's proposal in this case would 'force' a separation of husband and wife and without the consent of the husband this is an interference with their parent's marriage relationship. If the children believe that their father is not competent to make decisions about his wife's best interests, their concern ought to be addressed through an application for separate guardianship applications for both of their parents.

2. An elderly woman has formed a close attachment to a man she has met in the retirement village in which she lives. The woman's daughter does not approve of the relationship. Potentially the daughter is concerned that the man may be able to bring family law proceedings as a de facto partner against her mother if their relationship continues and eventually breaks down. The daughter applies to be appointed as guardian for her mother and moves to another part of the state with her mother where her mother's close friend is unable to maintain a relationship with her. Rather than support meaningful relationships between her mother and others, the daughter's actions in forcing her mother apart from her close companion could constitute emotional abuse. If the elderly woman in his case does need a substitute decision maker and the absence of anyone other than her daughter making herself available to take on the role, there is little that can be done to prevent this occurring, other than through an appointment of the public advocate in preference to the daughter. There are funding implications of an appointment in these terms and it requires a finding that the daughter is not suitable to make interests in her mother's best interests. This may be difficult to substantiate.
3. The children of a man and his first wife manage their father's finances as he is no longer competent to make financial decisions for himself. They are the children of their father's first marriage. Their father is married to his second wife who is financially

dependent on her husband. Her husband has bequeathed to his second wife a life interest in his house and made known his wish to support her financially during his lifetime. His wife is not a beneficiary of his will. The children of the second wife are concerned that her husband's children are withholding financial support for their mother now that her husband has left the family home to live in an aged care facility. The suspicion is that the husband's children regard their step-mother's financial support as a responsibility of her family (here beneficiaries), not their father. The more that is paid to their stepmother the less that will be available under their father's will for them, his beneficiaries. To counter any financial abuse of the second wife in this case someone, most likely the mother's children, would need to commence spousal maintenance proceedings in the Family Court.

#### Examples of elder abuse by professionals abusing powers of attorney or enduring powers

The following examples are taken from Australian case law and provide examples of Elder abuse perpetrated by professionals. These cases raise the prospect of further hidden abuse perpetrated by professionals in circumstances where the older person may not have any close friends or relatives to make a complaint about the behaviour in question. These case studies demonstrate how powers of attorney and enduring guardianship can be used to facilitate financial abuse. In these case studies, the older person was wealthy and isolated, becoming increasingly dependent on the professional for assistance. The professional then used their relationship to access the older person's finances:

1. *The State of Western Australia v Atherley* [2015] WADC 45

As outlined in the overview of the prosecution case Mr Atherley was the accountant for Ms Mary Taylor Eva and the principal of an accounting practice in Osborne Park called Atherley's (Atherley's Accounting). He held an enduring power of attorney (EPA) for Ms Eva and he became her legal guardian following her decline from dementia. The Court found Mr Atherley guilty of stealing in excess of \$1.68 million from Ms Eva's accounts, a pattern that continued after her death when he failed to notify the beneficiaries of their status under her Will and continued to steal from the estate.

MrAtherly was found guilty of stealing and giving false testimony and sentenced to more than seven years jail.

## 2. *Legal Services Commissioner v O'Donnell* [2015] NSWCATOD 17

A lawyer was found guilty of professional misconduct and struck off the roll after it came to light that he had been charging legal fees to an older person with a cognitive impairment for work that was of a non-legal nature. For instance, he charged his professional hourly rate for taking Mr M for a drive and to attend an ACAT assessment.

Mr O'Donnell initially befriended the older person after buying a unit in the same complex. Mr M came to increasingly rely on the solicitor during a period of cognitive decline, first diagnosed in 2009. "On 12 June 2010 Mr M executed a will whereby he appointed, "my friend and Solicitor Bernard Kevin O' Donnell to be 'the executrix (sic) and trustee of this my will" and gave his entire estate (subject to payment of debts testamentary and funeral expenses) to "my friend and Solicitor Bernard Kevin O'Donnell".

On 2 March 2011 Mr M granted Mr O'Donnell an enduring Power of Attorney, witnessed by Ms O'Donnell, a solicitor and the daughter of Bernard O'Donnell. Numerous transactions made under the Power of Attorney, transferred funds to Mr O'Donnell's personal accounts. These transactions caused concern for Mr M's bank manager and for Mr M's former wife, the beneficiary of a previous will. Mr M's former wife consulted her own lawyers and initiated complaints about Mr O'Donnell's conduct.

Amongst other matters, the Tribunal found that Mr O'Donnell had charged Mr M a total of \$42,173.69 for non-legal matters, payments prohibited by section 12 of the *Powers of Attorney Act* 2003, as an act conferring a benefit upon himself. Mr O'Donnell was also found to have loaned money from Mr M.

## 3. *Berger v Council of the Law Society of NSW* [2013] NSWSC 1080

Mr Berger was suspended from practice after complaints were made that he had charged an elderly woman legal fees without adequately outlining his rates and charges, and that he had

charged legal fees for non-legal work. As Beech- Jones J observed in that case at [136] “The circumstances reveal that a very high degree of trust was placed in Mr Berger. While she was alive Mrs Domabyl was extremely vulnerable in terms of looking after her own interests. As her solicitor, donee of her power of attorney and co-executor of her will Mr Berger exercised a high degree of control over her assets both before and after her death. There was little scope for outside scrutiny and, to the extent that there was any, Mr Berger was able to avoid it for a period of time. He undertook the very type of transactions that reflect the great trust placed in solicitors and the necessity that, above all else, their honesty and probity not be in doubt.”

4. *Legal Services Commissioner of New South Wales v Reymond* [2014] NSWCATOD 14:

A solicitor was reprimanded and ordered to pay compensation to the family of an older woman he had befriended after he drew a will in which he was the sole beneficiary, executor and trustee. The Court held that MrReymond had deceived the older woman by not disclosing the requirement that she should receive independent advice about drawing a will.

5. *Matouk v Matouk (No 2)* [2015] NSWSC 748

This case provides an example of the possible consequences of a lawyer’s failure to properly take instructions from an older person. The case involves two siblings who fraudulently obtained the transfer to them of their 75 yr old mother’s home after convincing their mother that she was signing a power of attorney. The solicitor who witnessed the property transfer spoke only English, whilst the mother spoke only Arabic. The same solicitor acted for the mother's son when she lodged a caveat on the title to the home. The solicitor’s failure to properly interview the older person, obtain instructions from her personally and ensure that she understood what she was signing, led to lengthy and expensive court proceedings. The solicitor was reprimanded for acting in a matter where there was a conflict of interest and ordered to pay compensation. The elderly woman’s daughter’s conduct was held to be unconscionable and the property transfer the result of undue influence.

## Examples of abuse involving older people from CALD background

These comments are based on research undertaken in Western Australia in 2014.<sup>2</sup> We acknowledge that the findings may not all flow through to the other Australian states and territories, but we believe there are some issues that will be reflected elsewhere and are relevant to a discussion of elder abuse.

In several instances the research noted that family relationships and cultural norms impact on many CaLD Seniors financial security. This is especially the case with older women who have lost their husband and have been persuaded to live with family. Indeed, Capacity Australia note that gender differences in elder abuse amplified by cultural determinants, for example in some cultures where women have inferior social status they are more at risk of being abandoned and their properties seized when their husbands die.<sup>3</sup>

6. For example, in one case an 80-year-old Italian woman wanted to remain living in her home after the death of her husband. She was mobile and was well networked in her local area. There were women her own age who used to speak to her in Italian. The woman could speak some English but preferred to speak Italian.

The woman's son 'decided' that she could not cope on her own. He arranged for the house to be sold and insisted that his mother execute the documents. The mother felt that she was obliged to do so and wanted to preserve the relationship with her son.

The mother moved in with the son's family and was very unhappy. The money from the sale of the house was taken by the son. She experienced social isolation as she was out of a familiar environment and did not have the same access to public transport. Eventually her daughter, concerned about what had occurred and about her mother,

---

<sup>2</sup> This research was undertaken by Eileen Webb and Ben Travia in the course of research for: Aviva Freilich, Pnina Levine, Ben Travia and Eileen Webb, *Security of tenure for the ageing population in Western Australia – Does current housing legislation support Seniors' ongoing housing needs?* November 2014 COTA Western Australia <<http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-pdf>> CALD Seniors did not form part of the final report for reasons of length but the research has been incorporated into a forthcoming journal article. The research can be made available upon request.

<sup>3</sup> Capacity Australia, *Elder Financial Abuse in CALD Groups*, May 2016 <<http://capacityaustralia.org.au/wp-content/uploads/2016/05/CALD-FIN-ABUSE-Sv.pdf>>

took the mother to live with her. The money is gone and the son no longer speaks to his mother.

7. In another case, recent immigrants who came to join relatives in Australia had experienced financial abuse by the family. The older couple brought a considerable amount of money with them as they were told they had to buy a house to emigrate. The family moved into the house and the older couple were effectively marginalised. Again language was a barrier and a reluctance to 'upset' family.
8. The relationship with sons in laws or daughters in laws was often fraught. For example, an older woman from a European background who had gone to live with her son and daughter in law. The daughter in law did not like the way the older woman ate (the daughter in law said that the older woman made too much noise) so she (the older woman) was not allowed to eat with the family anymore. Gradually the situation reached a point where she rarely left her room.
9. Responsibilities for cooking, cleaning and child care were often seen to be the 'duty' of the older person.<sup>4</sup> Failure to do this, or demonstrating a reluctance to do so, could be met with abuse, including physical abuse.

The main issues were the problems of social isolation, the language barrier, simply not realising that this was an instance of abuse – that the older person should be 'glad' to be living with family, and/or a fear of involving other people or authorities (either because of family pride or fear of authority figures emanating from experiences in home countries)

---

<sup>4</sup> C.Caperchione, G Kolt, R. Tennent, R., & W. Mummery, Physical activity behaviours of Culturally and Linguistically Diverse (CALD) women living in Australia: A qualitative study of socio-cultural influences. (2011) 11 *BMC Public Health*, 26.

## Solutions related to CaLD examples

- (a) A realisation that differing cultural norms do not regard the conduct as abuse and perceptions of abuse change depending on cultural practises and beliefs.<sup>5</sup>
- (b) A CaLD specific strategy which includes the recruitment of a bi-lingual and bi-cultural workforce and appropriate funding for language services.<sup>6</sup> Information and education regarding elder abuse must provided and ways to adequately disseminate the material developed.
- (c) As families tend to take on caring responsibilities within CaLD communities, it is important that this does not lead to an abdication of support from government and service providers.<sup>7</sup>
- (d) More specifically tailored residential models for CaLD communities.<sup>8</sup>
- (e) the use of culturally appropriate assessments and trained interpreters to ensure care plans are tailored with culturally appropriate goals.<sup>9</sup>
- (f) early referral to diagnose dementia in people from CaLd backgrounds.<sup>10</sup>

---

<sup>5</sup> Capacity Australia above n8.

<sup>6</sup> Office of Multicultural Interests, *Ageing in Culturally and Linguistically Diverse Communities*, 11.

<sup>7</sup> Pino Migliorino, 'Rights, respect and recognition for older CALD Australians' (Speech delivered at the COTA National Policy Forum: Rights, Respect, Recognition: a New Deal for Older Australians, National Press Club, 23 July 2013) 5.

<sup>8</sup> *Ibid.*

<sup>9</sup> Elaine Goddard, 'Delivering Culturally Appropriate Aged Care to All Australians (2013) 35 *Mosaic* <<http://www.fecca.org.au/mosaic/articles/item/480>>

<sup>10</sup> *Ibid.*

Regarding elder abuse specifically we support the work and findings of Dr Barbara Black Blundell and Dr Mike Clare: *Elder abuse in culturally and linguistically diverse communities: Developing best practice.*<sup>11</sup>

In particular, we support the findings (also reflected in our 2014 project) that:

- Language barriers, increased vulnerability, and decreased access - People who speak little English are at increased risk of elder abuse due to the difficulties in gaining information about services available and also due to challenges when navigating complex service systems and communicating their needs. Information about elder abuse and services available needs to be communicated in a variety of media and specifically targeted to reach those who are most isolated in the community.<sup>12</sup>
- Older people from non-English speaking backgrounds may need intensive assistance from interpreters to engage in mainstream services.<sup>13</sup>
- Isolation and increased vulnerability to elder abuse is a consequence of not being fluent in English and this is exacerbated by migration and loss of informal support networks. This may be addressed by programs designed to rebuild community support networks.
- Cultural mores as well as a desire to keep private matters within the family may also be barriers to seeking help in dealing with elder abuse. This may be combated by raising awareness of elder abuse and available service responses in a variety of languages and media.

---

<sup>11</sup> Dr Barbara Black Blundell and Dr Mike Clare: *Elder abuse in culturally and linguistically diverse communities: Developing best practice*  
[http://www.seniorsrights.org.au/toolkit/wpcontent/uploads/2013/09/Elder\\_Abuse\\_in\\_CALD\\_Communities\\_-\\_Developing\\_best\\_practice.pdf](http://www.seniorsrights.org.au/toolkit/wpcontent/uploads/2013/09/Elder_Abuse_in_CALD_Communities_-_Developing_best_practice.pdf)

<sup>12</sup> Ibid 3

<sup>13</sup> Ibid 4

## Examples of Elder Abuse directed toward LGBTI people

- (a) Instances of abuse in residential and aged care facilities are of considerable concern. This is despite training programs introduced by organisations such as GRAI in Western Australia to educate staff and administration in aged care facilities.
- (b) A range of examples have been raised, for example:
- denial of visits from family members or from friends without staff approval;
  - refusal to allow same-sex partners to room together; and
  - refusal to involve families of choice in medical decision making, even when there are legal directives in place.

### 10. Example Retirement Villages <sup>14</sup>

- (a) Each jurisdiction has legislation regulating the retirement village industry. There is no reference to discrimination in the legislation itself so reference must be made to the EO legislation. The religious exemption will be applicable so, theoretically, retirement villages overseen by religious providers could refuse entry to older people for, example, being a gay couple.
- (b) The Western Australian research heard some anecdotal reports of discrimination but the complaints were mainly in relation to other residents rather than the organisations themselves.<sup>15</sup> Barrett et al report the concerns of older lesbians with regard to moving into a retirement village because: “she would have to put up with other residents who

---

<sup>14</sup> The retirement village issue overlaps to some degree with aged care facilities. For the purposes of this article retirement villages refer to independent living arrangements for relatively healthy older people that do not require residential aged care. Some facilities offer a transition of aged care within retirement villages but this is subject to receipt of Commonwealth funding.

<sup>15</sup> Chapter 6 Aviva Freilich, Pnina Levine, Ben Travia and Eileen Webb, *Security of tenure for the ageing population in Western Australia – Does current housing legislation support Seniors’ ongoing housing needs?* November 2014 COTA Western Australia < <http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-pdf>>

would be looking down their noses because they would be of an age when it was taboo.”<sup>16</sup>

- (c) The heteronormative environment in some retirement villages may see older LGBTI people excluded from the village ‘community’<sup>17</sup> and there are also concerns about the attitudes of management and staff.<sup>18</sup>
- (d) There are issues with respecting people's privacy and the ability of same-sex couples to make decisions for each other, ensuring that friends and people in the community are welcome to visit, and specific issues for transgender and intersex older people.<sup>19</sup>
- (e) Obviously such concerns could be countered by claiming discrimination but the concern would be whether it would make the situation worse.
- (f) Before entering into a retirement village, the nature of the financial commitment and the difficulty in leaving a village must be considered. Many older LGBTI people are not wealthy and are less likely than the general population to be home owners. Therefore, buying into a retirement village is a significant – and continuing - financial commitment. If a person is unhappy and wants to leave the village, the effect of exit fees and the structure of the financial arrangements means that often an older person gets little money back, usually not enough to purchase property elsewhere.

## 11. Examples Aged Care

---

<sup>16</sup> Catherine Barrett, Catharine Whyte, William Leonard, Jude Comfort, ‘No Need to Straighten Up: Discrimination, depression and anxiety in older lesbian, gay, bisexual, transgender and intersex Australians.’ (July 2014) Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne Australia, 9 < <https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0263-no-need-to-straighten-up---full-report---pdf.pdf?sfvrsn=2> > 27.

<sup>17</sup> Ibid 27

<sup>18</sup> Ibid, 27-28.

<sup>19</sup> Adele Horan *Retirement villages: new-age communities or grey ghettos?* May 17, 2015 < <http://adelehoran.com.au/2015/05/17/retirement-villages-new-age-communities-or-grey-ghettos/> >

- (a) Aged care refers to a range of services including in home care<sup>20</sup> and temporary or permanent residential care. Aged care is frequently provided in combination with basic medical services<sup>21</sup>
- (b) For some time there has been concern regarding the experiences of older LGBTI people in aged care environments.<sup>22</sup>
- (c) In relation to in-home care, the main issues are feelings of lack of privacy and judgement by carers.
- (d) In aged care facilities concerns have been in relation to people wanting to go into aged care as a couple, transgender people wanting to live as their chosen gender and feelings of stigma as a result of the treatment by staff and other residents.
- (e) Research indicates that although there may not be ill intent involved, there was a lack of understanding and ignorance about the needs and concerns of LGBTI people.<sup>23</sup> In the past, aged care providers have been less likely to recognise and address the needs of LGBTI clients, in terms of health, sexual and cultural expression.<sup>24</sup>
- (f) A common sentiment was the need to hide one's identity in aged care. This can have serious consequences on mental health and undermine other health issues as older

---

<sup>20</sup> In home care is a particularly attractive option given that most older people prefer to 'age in place' and allows older people to stay in the home for as long as possible thus taking pressure off the public purse.

<sup>21</sup> Productivity Commission 2011, *Caring for Older Australians: Overview, Report No. 53, Final Inquiry Report*, Canberra Glossary: Medical assistance refer to help with wound dressing, pain management, medication, health monitoring), prevention, reablement or palliative care services.

<sup>22</sup> Anne K Hughes et al, 'Awareness of LGBT ageing issues among ageing services network providers' (2011) *Journal of Gerontological Social Work* 659.

<sup>23</sup> Productivity Commission *Caring for Older Australians: Overview, Report No. 53, Final Inquiry Report*, (2011) Canberra

<sup>24</sup> Ibid.

LGBTI people may not feel comfortable disclosing relevant personal information relating to care.<sup>25</sup>

(g) The National LGBTI Ageing and Aged Care Strategy lend credence to this view, stating that there is a direct correlation between discrimination and poor health.<sup>26</sup> The lack of opportunity for physical intimacy in aged care facilities is a concern for LGBTI people.<sup>27</sup>

(h) The composition of the aged care workforce may present further difficulties for LGBTI elders. Staff in the industry are culturally diverse and often from regions where homophobia is commonplace or homosexuality criminalised.<sup>28</sup> Also, the positions tend to be paid poorly and require few qualifications. There is a considerable amount of turnover in the industry and keeping staff updated on culturally appropriate responses to clients can be difficult.<sup>29</sup> Research elsewhere and in Australia is consistent in that many older LGBTI people feel they need to hide their sexuality or gender identity because of the attitudes of care staff.<sup>30</sup>

(i) Theoretically, older LGBTI people experiencing discrimination in an aged care environment may proceed through the Aged Care Complaints procedure or proceed under the Commonwealth sex discrimination legislation. These reforms will provide

---

<sup>25</sup> Curtin Health Innovation Research Institute and GRAI (GLBTI Retirement Association Inc), *"We don't have any of those people here": Retirement Accommodation and Aged Care Issues for Non-Heterosexual Populations* (May 2010) <<http://grai.org.au/wordpress/wp-content/uploads/2010/07/We-dont-have-any-of-those-people-here.pdf>>, 62.

<sup>26</sup> Australian Government, Department of Health and Ageing, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2012) 7.

<sup>27</sup> Ruth McNair and Jo Harrison. 'What's the difference? Health issues of major concern to gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians' (2002) edited by Victorian Government Department of Human Services. Melbourne: Rural and Regional Health and Aged Care Services Division.

<sup>28</sup> Curtin Health Innovation Research Institute and GRAI (GLBTI Retirement Association Inc), *"We don't have any of those people here": Retirement Accommodation and Aged Care Issues for Non-Heterosexual Populations* (May 2010) <<http://grai.org.au/wordpress/wp-content/uploads/2010/07/We-dont-have-any-of-those-people-here.pdf>>, 62.

<sup>29</sup> Chapter 12 Aviva Freilich, Pnina Levine, Ben Travia and Eileen Webb, *Security of tenure for the ageing population in Western Australia – Does current housing legislation support Seniors' ongoing housing needs?* November 2014 COTA Western Australia < <http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-pdf>>

<sup>30</sup> C. Barrett, J. Harrison and J. Kent, 'Permission to Speak. Towards the Development of Gay, Lesbian, Bisexual, Transgender and Intersex Friendly Aged Care Services' (2008) <[www.glhv.org.au](http://www.glhv.org.au)>

some relief to those concerned about encountering stigma through either in home services and residential facilities. The concern is, however, that laws are all very well but in reality will older LGBTI people be able – or willing – to avail themselves of the laws if they experience discrimination? They may prefer to hide their identity and ‘disappear’ or to simply put up with discrimination or harassment as they are too unwell or feel the situation may get worse. Also, once a complaint is made there may be fear of reprisals.

- (j) This is an area where, sadly, the law will probably be of little use, except in the most extreme cases. Therefore, it is important for the goals under the National LGBTI Aged Care Strategy to be embraced and rolled out across the sector. It seems that the key to overcoming historical stigma for older LGBTI people in aged care is not the law but the education of management and staff and an empowerment of LGBTI seniors and their advocates. Cultural awareness and intergenerational understanding are likely to be the keys to diluting historical stigma within the aged care sector

#### How useful are anti- discrimination legislation and complaints procedures?

- (a) Despite the amendment of laws to promote a degree of equality and protection from discrimination, the reality is that statutes are only as good as the willingness and ability to take action.
- (b) Of concern is whether, due to the stigma of times past and the realities of the ageing process, older LGBTI people may take the path of least resistance and not be aware of, or choose not to avail themselves of, legal protection.
- (c) Indeed, the likelihood of an older person, especially one requiring a significant level of residential care, navigating the Aged Care Complaints Scheme<sup>31</sup> or commencing legal action against those providing that care is likely to be small.

---

<sup>31</sup> Australian Government, Aged Care Complaints Scheme, 2015 Department of Social Services, Canberra <https://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/programs-services/aged-care-complaints-scheme/about-the-aged-care-complaints-scheme>.

- (d) This is especially the case where other pressing issues associated with ageing, such as assistance with day to day tasks and increasing frailty or illness, take precedence over legal proceedings. Certainly advocates may assist but the realities of doing so – and the associated stresses on the older person – may tell against such action in all but the most extreme circumstances.<sup>32</sup>
- (e) For example, interviews with older people in relation to accommodation issues have revealed a desire to ‘remain invisible’ in relation to anything that may cause them to experience harassment or discrimination. The ageing process, with all its challenges, may not be a stage in life where people want to ‘make a stand’.
- (f) There can also be concern that reporting an issue may only make things worse for them. There is a fear too that if they complain about, for example discrimination regarding LGBTI status, the resultant reactions from the perpetrator may make it difficult to stay in a particular place. The present housing affordability issues and lengthy waiting lists for suitable retirement and aged care facilities makes many older people fearful of having to move and having ‘nowhere to go’.
- (g) As many LGBTI people have experienced unlawful discrimination over the course of their lives, it is thus imperative to ensure that this discrimination does not continue into old age.<sup>33</sup>

## Family Agreements

### 1. Assets for Care Arrangements: What are they?

- (a) “Assets for Care”, or Family Accommodation Arrangements (FAA’s) are increasing in number and kind. The essential feature is the transfer of an asset or money in a manner recognised at law, in exchange for a promise for care. The paradigm example is a parent building a granny flat, extension or paying an adult child’s mortgage, in exchange for care and accommodation as the parent(s) age.

---

<sup>32</sup>T.Lienert T, C. Cartwright , K. Beck., *The Experiences of Gay, Lesbian, Bisexual and Transgender People around End-of-Life Care Scoping Study Report* (2010 ) Southern Cross University (School of Health and Human Sciences) < [http://epubs.scu.edu.au/hahs\\_pubs/1467/](http://epubs.scu.edu.au/hahs_pubs/1467/)>.

<sup>33</sup> Australian Human Rights Commission, *Respect and Choice - A Human Rights Approach to Ageing and Health*, 2012 Sydney 21-22<<https://www.humanrights.gov.au/human-rights-approach-ageing-and-health-aged-care-reforms-and-human-rights>>

- (b) Prima facie, the arrangement can be mutually beneficial to both parties. Parents have the opportunity to be exposed to a 'vertical' age spectrum (adult children, grandchildren) rather than 'horizontal' (all older people as would be the case in aged care facilities).
- (c) Arrangements tend to be informal – there is rarely any written agreement, nor have parties anticipated what would happen if something goes wrong; eg the parent becomes incapacitated, the child and their spouse divorce (NB, the older party in this scenario may be a party in Family Court proceedings), the adult child dies, leaving the parent to be cared for by the daughter or son in law, or the relationship breaks down. Further, these arrangements tend to be entered into after a crisis – death of a spouse, illness etc, and proceed sometimes without the knowledge or input of other adult children.
- (d) Assets for care arrangements come within the category of financial abuse, but are not (for the most part) within the category of 'fraud', and may be better described as 'elder exploitation'.

What happens when an assets for care arrangement breaks down? Shortcomings of the current law.

- (a) Arrangements may fail due to a number of reasons. From a legal perspective, the issue is property or money has been transferred to the adult child, who now has legal title. There is generally no contract to argue either breach or failure of consideration.
- (b) The presumption of advancement can operate, which presumes the property was a gift rather than held on trust. The presumption is difficult to rebut, as intention is determined at the time of the transfer. The operation of resulting trust does not 'see' the transfer undertaken in exchange for the promise to care. As such, the law recognises 'assets' but not 'care'.

- (c) In New South Wales, Northern Territory, Queensland, Victoria and Western Australia, legislation provides that no resulting trust will arise on the conveyance of land despite an absence of consideration.<sup>34</sup>
- (d) A resulting trust will not arise where a parent extends or renovates an existing property. Any contribution to property must be towards the purchase price, or costs necessarily incurred in the acquisition of the property.<sup>35</sup> In these cases, the older party would need to look to other equitable causes of action, such as claiming the arrangement was analogous to a failed joint venture, or claiming relief based on the principles of estoppel.
- (e) An older party may undertake to recover property in equity, relying on the doctrines of unconscionable conduct or undue influence. However the specific requirements of those causes of action need to be established. Often an older party will enter into the arrangement with no vitiating conduct by the adult child.
- (f) Alternative causes of action in equity include estoppel or ‘failed joint venture’.
- (g) Recovery of property via equitable action is rarely undertaken. The proceedings must commence in the Supreme Court (or sometimes District). They are expensive, time consuming and stressful, and it is unlikely an older party has either the financial or emotional resources to commence proceedings.
- (h) As such, the current law raises serious access to justice issues.

---

<sup>34</sup> *Conveyancing Act 1919* (NSW) s44; *Law of Property Act* (NT) s6; *Property Law Act 1974* (Qld) s7; *Property Law Act 1958* (Vic) s 19A; *Property Law Act 1969* (WA) ss38, 39.

<sup>35</sup> *Currie v Hamilton* [1984] 1 NSWLR 687, 691; *Pettit v Pettit* [1970] AC 777.

## Assess and Review the Legislative and Policy Frameworks

- (a) Preventative measures: education, provision of standard form agreements having contractual force. Encouraging parties to undertake property-sharing agreements, ie co- housing. These measures may however have an impact on centrelink payments or tax.
- (b) The above may be problematic as parties perceive any ‘formal’ arrangement as being ‘distrustful’, and expensive if legal advice is necessary.
- (c) Possible amendments to property law principles to better protect an older party’s position. For instance, looking at laws concerning indefeasibility, in personam exceptions, caveats, the granny flat being a registerable interest. This however does not negate the access to justice issues raised in (3) above., and there is tension between the aims of systems such as Torrens with providing relief for an older party in a vulnerable situation.
- (d) Reforms aimed at providing a new forum whereby disputes can be resolved. The difficulty is providing a forum that has the power to make orders concerning the distribution of property, while keeping proceeding low cost, accessible and informal with adequate support.
  - a. Amendments to the FLA enabling disputes to be heard in the Family Court. This could provide a more informal environment and could include compulsory ADR before coming before a judge. The advantages are the expertise of family court judges in property disputes. Disadvantages include the jurisdiction of the Commonwealth to legislate in this area (external affairs power?). The expense associated with proceedings, and the complex nature of commencement of proceedings. Therefore although the forum may be more desirable than the Equity division of the Supreme Court, there may still be access to justice issues to overcome. A further issue may be if proceedings become too complicated,

the family Court may refer to issue to the Equity Division of the Supreme Court.

- b. Amendments to State legislation to include an 'Elder' division within the current 'super tribunal' system (Civil and Administrative Tribunals). The tribunals operate with minimal formality and expense, and specialist panels comprising of legally trained personnel and laypeople could be constituted to resolve disputes.

### Addressing Family Conflict linked to abuse allegations

Family conflict is linked to abuse in a number of ways. Firstly conflict can mask abuse. Conflict can drive families apart and can isolate older people from protective relationships with people who may be able to identify and report instances of physical, financial and emotional abuse. Studies have also demonstrated that family conflict can impact on the amount and type of care provided to older people.<sup>36</sup>

Conflict also affects the decision making capacity of older people with a cognitive impairment and thus renders them more vulnerable to abuse.<sup>37</sup>

The primary international human rights instrument relating to the right of older people with a cognitive impairment to exercise their legal decision making capacity is the *Convention on the Rights of Persons with Disabilities* (CRPD).<sup>38</sup> Under the CRPD, people under a disability require the provision of reasonable accommodations to exercise their legal capacity.<sup>39</sup>

Where family conflict is identified as a factor impairing the decision making of older people with a cognitive impairment, a reasonable accommodation should be provided in the form of family mediation, restorative justice, family therapy or conflict resolution services.

---

<sup>36</sup>Peisah, C., Brodaty, H., and Quadrio, C., 'Family Conflict in Dementia, Prodigal Sons and Black Sheep' (2006) 25 (1) *International Journal of Geriatric Psychiatry*, 486.

<sup>37</sup>Nick O'Neill and Carmell Peisah, 'Capacity and the Law' (2011), Sydney University Press, <http://worldlii.austlii.edu.au/au/journals/SydUPLawBk/2011/1.html>, 2.3.2.

<sup>38</sup>*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art12.

<sup>39</sup>Committee on the Rights of Persons with Disabilities, *General Comment No. 1* (2014), CRPD/C/GC/1, 11th Session, (19 May 2014).

The *CRPD* also requires State parties to provide appropriate safeguards for persons under a disability. These safeguards should include education and awareness raising about elder abuse for any person authorised to witness or approve of substitute decision making powers such as an Enduring Power of Attorney. Similarly members of State-based Tribunals who play a role in appointing legal guardians for older people should be required to receive training and education in identifying and responding to elder abuse. Medical practitioners who may provide supporting documentation to attest to an older person's capacity for a legal decision, should also be trained to identify and respond to abuse.

### *Should powers of attorney and other decision-making instruments be required to be registered?*

Registration of decision-making instruments has a number of advantages. It provides proof and transparency by maintaining a record and may well work protectively.

There are also disadvantages of having a registration system. It may deter people from creating an instrument if it has to go onto a public record. It may deter potential donees of decision making powers. It may deny protection to donors and donees if an instrument is created, and relied upon, but not registered.

A register that creates a rebuttable presumption of decision making power would be preferable to one that is conclusive by registration. Otherwise the register itself might become an instrument of abuse.

There would be a cost of maintaining a register. A registration fee may deter people from creating and/or registering their instruments and in doing so disadvantage an elderly person who would otherwise make an appointment.

Any person appointed by a state/territory tribunal is on a register and can be held to account for decisions made under guardianship legislation. This is also the case for those appointed as enduring guardians<sup>40</sup>. It is submitted that suspected physical and sexual abuse by carers and

---

<sup>40</sup> See, eg., Guardianship and Management of Property Act 1991 (ACT) ss 16, 62; Guardianship and Administration Act 2000 (Qld) ss 43, 115; Guardianship and Administration Act 1990 (WA) ss110V, 110W.

relatives can be dealt with by other mechanisms including mandatory reporting and the imposition of a duty of care in criminal law (see below).

*Should the statutory duties of attorneys and other appointed decision-makers be expanded to given them a greater role in protecting older people from abuse?*

Incorporating a specific statutory responsibility on substituted decision-makers to report suspicion of abuse by others (within existing statements of guardians' responsibilities) could assist in protecting elders from abuse, but this would then represent a specification of duties which may be counterproductive; the listing of specific responsibilities and duties may deter persons from becoming guardians. It is submitted that a better option is to provide systematic training to substituted decision-makers on how to make 'in the moment' decisions for the older person should be introduced. This is particularly important in relation to medical decisions toward the end of life.<sup>41</sup> In this respect the older person's interests will be better protected and decisions made about health care treatment and lifestyle decisions will be more likely to reflect the older person's preferences, and therefore their dignity rights. The development of guidelines to support substitute decision-makers can assist in achieving this outcome. It is suggested that the decision-making principles set out in the ALRC report 'Equal recognition before the law and legal capacity for people with disability' (2014) could underpin the development of more specific guidance.

As one Queensland study identified, there is an opportunity to educate attorneys about their role through better design of the forms and guidelines and improved education at the time of witnessing the documents.<sup>42</sup>

In Professor Carroll's experience as a tribunal member in the guardianship and administration jurisdiction, most guardians and administrators carry out their functions well with little assistance from the state. There are cases where through incompetence or ill-intent guardians and administrators commit elder abuse. It seems it is not an absence of legal duties or legal consequences of abuse that need to be tackled. It is prevention, detection and powers of investigation and prosecution that present the greatest difficulty.

---

<sup>41</sup> Rebecca L Sudore and Terri R Freid , 'Redefining the 'Planning' in Advance Care Planning: Preparing for End-of-Life Decision-Making', *Annals of Internal Medicine* , 17 Aug 2010, Vol 143, No. 4.

<sup>42</sup>Tilse, C., Wilson, J., White, B., Willmott, L., McCawley, AL., 'Enduring Powers of Attorney. Promoting Attorneys' Accountability as Substitute Decision Makers', *Australasian Journal of Ageing* (2014) 33 (3) 193.

### *Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?*

There is merit in considering adult protection legislation if this creates an agency that is able to monitor, investigate and commence appropriate proceedings to protect a vulnerable older person who is not a person for whom a guardianship or administration order can be made. It seems there are adequate civil and criminal laws to provide remedies and sanctions for many forms of abuse. What is needed is a level of support by a state agency for cases where a civil action may be pointless (because assets have been dissipated) or would have an anti-therapeutic effect on the older person in view of their family and personal relationships. A similar situation may exist for criminal proceedings.

### *Safeguarding: How can the role that health professionals play in identifying and responding to elder abuse be improved?*

Health professionals may suspect physical or emotional abuse in their treatment of their older patients, or in their role as accident and emergency health professionals.

Better identifying situations of abuse may be improved by educating health professionals on the sorts of questions to ask older persons who present to them, given that an older person may be reticent to identify the abuser because of factors such as feelings of shame and dependency on the abuser.

Better responding to abuse may be effected by the introduction of a statutory duty to inform authorities where there is suspicion of sexual or physical abuse. Most jurisdictions already have laws which require various professionals, including health professionals, to report suspected sexual and/or physical abuse of children.<sup>43</sup> Failure to do so constitutes a criminal offence. Mandatory reporting attracting criminal penalties should be restricted to those situations which involve the most vulnerable in society or pose a significant threat to public health. While there is no question that many older adults are vulnerable to abuse of various sorts, introducing such mandatory reporting in relation to older persons poses the question

---

<sup>43</sup> See, eg., Children and Young People Act 2008 (ACT) section 356; Child Protection Act 1999 (Qld) section 148; Children and Community Services Act 2004 (WA) section 124B.

of the scope of the requirement. For example, the inclusion of emotional abuse (commonly experienced by older persons), may be difficult to enforce, as the evidence may present ambiguously.

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

The introduction of mandatory reporting (above) may assist in better responding to situations where there is a suspicion of abuse.

The network of privacy legislation is complicated. The existence and scope of state and territory legislation varies significantly<sup>44</sup>. The Commonwealth legislation only applies to Commonwealth institutions and private health care providers. Under the Australian Privacy Principles personal information about an individual who is physically or legally incapable of giving consent can be disclosed to a 'responsible person' if 'the disclosure is necessary to provide appropriate care or treatment of the individual'<sup>45</sup>. This may be utilised then by a carer of an older person in relation to suspected abuse by a 3<sup>rd</sup> party. It is also possible under Part 3 of the APPs permits the release of personal information where it is believed there is 'a serious and imminent threat to an individual's life, health or safety'. Conceivably this exception may be relied upon by a health professional in releasing information about an older person where there is suspicion of abuse by a carer, or another person. This exception is reflected in the equitable duty of confidence; in that context the information released about an individual has been done to protect other individual(s) from harm. It is not clear whether this exception could be utilised to protect the person to whom the information pertains. There are a number of uncertainties associated with the scope of health care information protection under the new APPs, and, given the complexity associated with the State and Territory regimes, it is suggested that the preferable option for law reform is to consider the introduction of mandatory reporting.

**Law and Policy: Tribunals**

Civil and administrative tribunals have a limited ability to respond to allegations and evidence of elder abuse due to the limited jurisdiction that is conferred by existing legislation. If there

---

<sup>44</sup> See Allan and Blake., above n51, Chapter 7.

<sup>45</sup> A 'permitted health situation' under APP section 16B(5).

were legislation, for example adult protection legislation, then there are some proceedings and orders that would be suitable to these tribunals.

There are reasons why these tribunals can be well suited to dealing with disputes arising between family members and the elderly. This is where tribunal members and processes are designed for and knowledgeable of family conflict, family dynamics and the scope for less restrictive alternatives than tribunal orders in appropriate cases. For a discussion of features of Australian tribunals exercising jurisdiction in guardianship and administration matters and enduring powers of attorney and guardianship see Carroll and Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective'<sup>46</sup>

The advantage of using tribunal processes is the powers invested in these bodies to obtain evidence and make orders. This is premised, of course, on the tribunal being invested with jurisdiction (original or by way of administrative review) to determine matters where elder abuse may arise as an issue or an allegation and make orders and impose sanction.

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

There are a range of considerations that need to be given to elderly people to ensure that the forum in which elder abuse concerns are dealt with do not compound the abuse. These are familiar to tribunals and boards exercising guardianship jurisdiction, and include separate hearing rooms, hearing loops and access for people with physical disabilities.

### *Alternative Dispute Resolution Mechanisms*

There is a need for further research into the circumstances in which mediation is used to resolve disputes when there are concerns about or allegations of elder abuse. There are a number of concerns that arise when mediation and other forms of alternative dispute resolution, including restorative justice processes are used in cases where abusive conduct has

---

<sup>46</sup> Robyn Carroll and Anita Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (2010) 28 *Windsor Yearbook of Access to Justice* 53.

or may have occurred. There are a number of process design features and interventions that may mean that ADR processes can safely be used, but further work is needed to develop and test these models.<sup>47</sup> In many cases ADR will not be an appropriate process. It is important to distinguish between circumstances in which an elderly person would be in mediation with their abuser and those where the elderly person is unwilling or incapable of participating in the process.<sup>48</sup>

Most importantly there is a need for a model of legal representation of an elderly person that takes account of the impact on an elderly person of legal proceedings against a family member or close friend or carer. Legal proceedings can detrimentally affect the health of the elderly person and their relationship with others.

*Law and Policy: In what ways should criminal laws be improved to respond to elder abuse? For example should there be offences specifically concerning elder abuse?*

Mandatory reporting represents a criminal offence where that requirement is breached (see above).

A further option for criminal law reform is the creation of a specific statutory provision which creates a duty to act in cases where a person has assumed responsibility for the care of an older person, or is in a particular familial relationship to an older person.

There is a rich ethical discourse surrounding the issues which arise in connection with imposing criminal liability for omissions, or failures to act, as opposed to those more commonly criminalised situations where the accused acts and inflicts harm. An 'omission' refers not to simply the 'absence of physical movement' but is a contextual judgment made over a period which may in fact include 'acts'.<sup>49</sup>

---

<sup>47</sup>The development of appropriate ADR processes for dealing with legal and other problems faced by an elderly person who is a victim of elder abuse can draw on the development of ADR processes in family law cases where there is a history of family violence between the parties to a dispute.

<sup>48</sup>For a discussion of these different situations and examples of interventions that may be appropriate see Robyn Carroll 'Appointing Decision Makers for Incapable Persons – What Scope for Mediation' (2007) 17 *Journal of Judicial Administration* 75-92;

<sup>49</sup> See, eg., Andrew Ashworth, 'Positive Obligations in Criminal Law' (2013, Hart).

The Codes (WA and Qld) are notable for their explicit reference to specific duties associated with the 'Preservation of Life'. These are found in the following sections: WA (ss 262-267) and Qu (ss 285-290) Criminal Codes. There are differences between the two jurisdictions, but they are similar in that they present a way to construct criminal liability, and are not tied to specific offences as such, although are limited to those associated with 'consequences which result to the life of health' of a person. These duties include a duty to provide the necessaries of life where one person has the 'charge' of another who is unable to remove him/herself from such charge; and duties arising from occupying the 'head of the family' or as a parent.

In common law, the main decision in *R v TakTak* (1988, NSW) quoted from the earlier decision in *Gibbins and Proctor* (1919, Eng), in outlining the situations in which a duty arises in criminal law:

'There are at least four situations where the failure to act may constitute the breach of a legal duty. One may be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless persons as to prevent others from rendering aid.'

The common law duties have almost exclusively been associated with gross negligence manslaughter, unlike the Code (statutory) duties which extend to cover general bodily harm and death. Secondly it appears that under the common law there is a separate requirement to prove a causal link between the breach and the consequence, whereas under the Codes, the breach of the duty deems there to be a causal link to the consequence.

There is little evidence in the case law of the duty sections being invoked in relation to prosecutions concerning the death/injury of older persons as a result of carer/familial abuse. It is certainly possible for a prosecution to be based upon the duty to provide the necessaries of life (which include medical treatment, clothing and housing as well as sustenance)<sup>50</sup> to an older person but under both the Codes and the common law, this would require a situation where the person has assumed the care of the older person and the older person is

---

<sup>50</sup>*R v Macdonald and Macdonald* (1904) St R Qd 151.

demonstrated to be incapable of removing him/herself from that care. Most of the case law with respect to this duty has been associated with the failure to care for children<sup>51</sup>, and it may well be harder for older persons to 'fit' within the scope of this duty, particularly if they retain mental and/or physical capacity.

The familial duties under the Code and at common law again have tended to centre around the protection of children from criminal neglect.

It is suggested that introducing a specific criminal statutory duty on those who have the care of older persons may be an effective way to *penalise* the abuse of older persons, where that has resulted in physical and psychological harm. It opens the possibility of avoiding the need to prove causation as a separate element, which is particularly helpful in those cases where the harm is associated with neglect rather than positive violence. Criminal law does aim to deter certain behaviours; and if such a change in the law is associated with increasing community awareness of the need to be proactive in relation to the protection of older persons, then this could well contribute towards the *prevention* of abuse.

### *Law and Policy: Responding to Abuse - What role might restorative justice processes play in responding to elder abuse?*

There is merit in developing processes with adequate safeguards that offer the opportunity of restoring the relationship between and elderly person who has been the victim of abuse with their abuser.

One possible model would be victim/offender conferences similar to Youth Justice Conferences that are run under the *Young Offenders Act 1987* (NSW). This model of conferencing can accommodate some of the dynamics of elder abuse, including a desire for the acknowledgement of a crime and the harm that ensues, the impact of the crime on the victim's family and the wider community, the making of personal reparation and monitoring of the outcome.

One trial of a restorative project in Canada rejected the involvement of Police in dealing with elder abuse because of fears that this would be adversarial and confrontational. In NSW,

---

<sup>51</sup>Eg. Young [1969] Qd R 417; Gibbins and Proctor (1919), Eng.

specialist Police are trained to refer and work with young offenders and play a constructive role in restorative conferences. Specialist officers could be trained to deal with victims and offenders in elder abuse cases including making referrals to restorative conferences. The advantage of Police involvement is that this can act as recognition that the harm done is not only personal and private harm, but a societal harm that requires a State response.

Research into elder abuse regularly acknowledges that victims may be reluctant to pursue charges in court because of the personal relationship with the perpetrator and/or a continued reliance on their care. A victim/offender conference in these circumstances may provide a suitable alternative to Court, but would not be appropriate in all situations.

### **What role might civil penalties play in responding to elder abuse?**

Civil penalties may be appropriate for institutions who engage in abusive behavior. It is assumed that the civil remedies already available in law and criminal penalties are appropriate for individual abusers. If there is a concern that the usual civil and criminal consequences of elder abuse are insufficient to deter abusive behaviour then attention needs to be given to introducing a broader range of unlawful conduct rather than creating civil penalties for individuals.

## Appendix 1: Charter of Rights and Freedoms of Older Persons

Every human, by virtue of their humanity, has fundamental rights and freedoms. As humans, we are entitled to enjoy, and have respected by others, those rights for the entirety of our lives. Human rights do not fluctuate or wane as we age, but policy interventions may be required to enable older persons to fully enjoy and realise their basic human rights, as well as ensure that others continue to respect the rights of older persons.

However, in order to combat ageism and adequately prepare for the needs of an ageing population, a rights based approach to care services and policies around ageing is necessary. Until such time as a new convention on the rights of older persons is adopted at the international level, Australians must work with the existing international human rights instruments, adopting a progressive approach to their interpretation in seeking to protect and promote the rights and freedoms of older persons. The following Charter has been drafted with this objective in mind.

The Charter contains rights and freedoms that are drawn from the principal international instruments concerning older persons – the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Covenant on the Rights of Persons with Disabilities (CRPD) and the UN Principles for Older Persons. In this respect, the Charter replicates existing rights already contained in binding treaties or in declaratory instruments which further articulate the rights of older persons (such as the UN Principles). However, the Charter's rights also include specific mention of rights not currently recognised in international treaties – lifelong learning, the freedom to choose the time of one's retirement from work, the right to be presumed as having full decision-making capacity, the right to make personal decisions for as long as possible and to receive support in making decisions, the right to choose one's preferred place of residence, the right to access an appropriate level of humane and secure residential care, the right to palliative care, and a dignified death. In these respects, the rights represent a progressive development on the existing international human rights instruments which bind nation-states. However, these rights are already reflected in many non-binding instruments, can be linked to existing rights already protected (such as the right to palliative care being one aspect of the right to adequate health care), and have been

recognised by the United Nations Office of the High Commission for Human Rights as needing specific recognition and protection under international law.<sup>[1]</sup>

Few human rights are absolute or non-derogable (torture is an exception); most are able to be limited or derogated from where such limitation or derogation can be demonstrably justified in a free and democratic society. This will generally require, first, that the offensive law, policy, decision or action has been developed or made for a legitimate purpose that is consistent with a free and democratic society and, secondly, that the means used to pursue that purpose are proportionate to the end being sought. Human rights are also recognised as inhering in every human being; thus, with human rights also comes the responsibility of recognising and respecting the rights of other human beings.

### Part I Dignity and Self-Determination

1. Older persons have the right to be treated with dignity and humanity and to be free to exercise personal self-determination.<sup>[2]</sup> This includes the right to be presumed as having full decision-making capacity unless otherwise determined in accordance with law, the right to make decisions regarding their present and future circumstances, and to be supported to make decisions if they have difficulty in doing so.<sup>[3]</sup>

2. Older persons have the right to freedom of movement, to choose their preferred place of residence and to access transport and mobility services which enable them to exercise their human rights. These rights shall only be restricted in accordance with law, where such restriction is necessary to protect public health, public order or morals, and the rights and freedoms of others.<sup>[4]</sup>

### Part 2 Liberty and Security of the Person & Property

3. Older persons have the right to be free from torture or other forms of cruel, inhuman or degrading treatment.<sup>[5]</sup>

4. Older persons have the right to liberty and security of the person and to be free from exploitation and physical, social, psychological and sexual abuse. No person shall be deprived of their liberty, including by forced or involuntary institutionalisation, except in accordance with procedures established by law.<sup>[6]</sup>

5. Older persons have the right to own property, the right to exercise self-determination with respect to that property, and the right not be arbitrarily or unlawfully deprived of their property.<sup>[7]</sup>

### Part 3 Equality, Non-Discrimination & Legal Rights

6. Older persons have the right to exercise their rights free from all forms of discrimination, whether on the basis of age, sex, colour, sexual orientation, religion, political opinion, educational qualification, national origin, ethnicity or disability.<sup>[8]</sup>

7. Older persons have the right to recognition as a person before the law and to be treated equally before the law.<sup>[9]</sup>

8. Older persons have the right, both in criminal and civil proceedings, to a fair trial before a competent, independent and impartial tribunal.<sup>[10]</sup>

9. Older persons are entitled to access and seek remedies for breaches of their rights, including when they occur in institutional settings.<sup>[11]</sup>

### Part 4 Minimum Standards of Living and Care

10. Older persons have the right to life, to adequate food, water, clothing, shelter and sanitation and, to enjoy the highest attainable standards of physical and mental health.<sup>[12]</sup> This includes the right to palliative care in order to preserve the best possible quality of life until death,<sup>[13]</sup> and the right to a dignified death.<sup>[14]</sup>

11. All older persons have the right to social security<sup>[15]</sup> and to access an appropriate level of humane and secure institutional care, where the fundamental rights and freedoms of residents are recognised and protected.<sup>[16]</sup>

## Part 5 Privacy and Family

12. Older persons have the right to be free from arbitrary or unlawful interferences with his/her privacy, family, home or correspondence,<sup>[17]</sup> and respect for a person's privacy must be maintained in institutional settings.

13. Older persons have the right to a family life, to marry and enjoy intimate relationships, and to have their family unit and personal relationships respected by others, including government agencies and officials and the operators and managers of residential care facilities.<sup>[18]</sup>

## Part 6 Social, Economic & Political Participation

14. Older persons have the right to freely associate with others and to participate fully in the social and cultural life of their community.<sup>[19]</sup> This may include participation in voluntary work both before and following retirement, as well as the formation of, and engagement in, movements or associations of older persons.<sup>[20]</sup>

15. Older persons have the right to engage in work until such time as they choose to leave the workforce, to receive fair wages and equal remuneration for equal work and to work in safe and healthy working conditions.<sup>[21]</sup>

16. Older persons have the right to lifelong learning, to access and participate in education and training programs and to access the scientific, cultural, educational and spiritual resources of the community.<sup>[22]</sup>

17. Older persons have the right to take part in the conduct of public affairs, to vote, to stand for election and to be elected to parliament, and to have access, on equal terms, to public service.<sup>[23]</sup>

## Part 7 Freedom of Thought, Conscience, Religion and Expression

18. Older persons have the right to exercise freedom of thought, conscience and religion.<sup>[24]</sup>

19. Older persons have the right to freedom of opinion and expression and to seek, receive and impart information and ideas, particularly in respect of policies which affect their wellbeing or interests.

20. Older persons also have the right to seek, and be provided with, personal information about him/herself held by government agencies of officials.<sup>[25]</sup>

---

[1] Office of the High Commissioner for Human Rights, *Normative Standards in International Human Rights Law in Relation to Older persons, Analytical Outcome Paper*, August 2012, available at, <http://social.un.org/ageing-working-group/thirdsession.shtml> (accessed 2 July 2013).

[2] Articles 1 & 10, International Covenant on Civil and Political Rights (ICCPR); Article 1, International Covenant on Economic, Social and Cultural Rights (ICESCR); Principles 3, 14, 15, UN Principles for Older Persons; Articles 3 & 12 Convention on the Rights of Persons with Disabilities (CRPD).

[3] Sections 10(c) and (d), *Advance Care Directives Act 2013 (SA)*.

[4] Article 12, ICCPR; Principle 6, UN Principles for OlderPersons.

[5] Article 7, ICCPR; CAT; Principle 17, UN Principles for OlderPersons; Article 15 CRPD.

[6] Article 9, ICCPR; Article 12, ICESCR; Principle 17, UN Principles for OlderPersons; Article 16 CRPD.

[7] Article 17, Universal Declaration of Human Rights; Articles 1, ICCPR and ICESCR; Article 12 CRPD.

[8] Article 2, ICCPR; Article 2, ICESCR; Principle 18, UN Principles for OlderPersons, Article 5, CRPD.

[9] Articles 16 & 26, ICCPR; Principle 12, UN Principles for OlderPersons Article 12 CRPD.

[10] Article 14, ICCPR.

[11] Articles 2 & 14, ICCPR; Article 2, ICESCR; Principle 12, UN Principles for OlderPersons.

[12] Article 6, ICCPR; Articles 11 & 12, ICESCR; Principles 1, 10-13, UN Principles for OlderPersons; Article 25 CRPD.

- [13] See, *The Prague Charter: Relieving Suffering*, available at: <http://www.avaaz.org/en> (accessed 13 August 2013).
- [14] See, *Draft Strategy for Safeguarding Older South Australians 2014-2021*, available at: <http://www.sahealth.sa.gov.au>, (accessed 13 August 2013).
- [15] Article 9, ICESCR; Article 18 CRPD.
- [16] Principles 13 & 14, UN Principles for OlderPersons.
- [17] Article 17, ICCPR; Principles 5, 10, 17, UN Principles for OlderPersons; Article 31 CRPD.
- [18] Article 23, ICCPR; Article 10, ICESCR; Principles 10, 5, UN Principles for OlderPersons.
- [19] Article 25, ICCPR; Article 15, ICESCR; Principles 7, 8, & 9, UN Principles for OlderPersons; Article 29 CRPD.
- [20] Principle 9, UN Principles for OlderPersons.
- [21] Articles 6 & 7, ICESCR; Principles 2 & 3, UN Principles for OlderPersons; Article 27 CRPD.
- [22] Articles 13 & 15, ICESCR; Principles, 4, 15 & 16, UN Principles for OlderPersons; Article 24 CRPD.
- [23] Article 25, ICCPR; Article 29 CRPD.
- [24] Article 18, ICCPR.
- [25] Article 19, ICCPR; Principles 4, 15, 16, UN Principles for OlderPersons. This right is also supported by Freedom of Information legislation throughout Australia.

## APPENDIX 2: ARNLA Biographies

### Professor Wendy Lacey

Wendy Lacey is a Professor of Law, Dean and Head of the University of South Australia Law School. She holds honours degrees in Arts (Political Science) and Law from the University of Tasmania, and was conferred her PhD in Law in 2006. Professor Lacey has published widely in the field of human rights and Australian Public Law and her research has been widely cited. Areas of research and teaching expertise include constitutional law, administrative law, human rights and the domestic application of international law.

With a long-standing interest in the protection of human rights in the Australian legal system, Wendy's involvement as Co-Convenor of UniSA's Human Rights and Security Research and Innovation Cluster lead to her engagement in a collaborative, multidisciplinary project with the South Australian Office of the Public Advocate in 2011 on the topic of safeguarding vulnerable adults. Through her work on that project, Wendy developed a particular interest in the subject of elder abuse and for the need to develop stronger legal mechanisms for protecting the rights of older Australians. She is a member of the Minister for Health's Steering Committee in South Australia, which is currently reviewing the State's policy on the prevention of elder abuse and she regularly delivers papers on the subject at conferences and seminars.

### Professor Eileen Webb

Eileen joined the Curtin Law School in 2016. She is the Director of the Consumer Law and Small Business Discipline and will introduce and coordinate the elder law program. Eileen teaches and researches in real property law, particularly housing and tenancy law, competition and consumer law (including small business law) and elder law. Her research focusses on housing issues affecting vulnerable members of society. Recent research considers security of tenure for older people, particularly how the operation of existing laws may make Seniors susceptible to financial exploitation and examined how revised property and planning laws could facilitate downsizing options for Seniors. She has also canvassed law reform as a response to assets for care arrangements and considered whether property law and human rights principles can alleviate the plight of older women who have become homeless.

Eileen has been awarded funding by various organisations including AHURI; COTA(WA); Lotteries WA; National Seniors Australia and, most recently, the Queensland Department of Communities, Child Safety and Disability Services.

Eileen is a member of an AHURI project examining the scope for social impact investment to alleviate housing vulnerability and an interdisciplinary team reviewing the prevalence and characteristics of elder abuse in Queensland. She is coordinating the Australian arm of *The Dynamics of Enduring Property Relationships* Project, a collaboration of international real property scholars and is a member of the Expert Reference Group for the international cross-organisational research initiative, *The Implications of the Tenure Revolution for New Zealand and its Ageing Society*. Eileen is a co-author of *Real Property Law in Western Australia* and a foundation member of the Australian Research Network on Law and Ageing (ARNLA); a member of the Western Australian Ministerial Committee on Consumer Law, the Shelter WA Board, the Shelter WA Advisory Committee on Homelessness and the Tenancy WA Boarders and Lodgers Working Group.

#### [Professor Robyn Carroll](#)

Robyn is a professor at the Law School at the University of Western Australia. Her teaching and research interests include Family Law, Contract Law, Civil Remedies and Mediation. Robyn is co-author of *Family Law in Australia* (LexisNexis 9th Edition, 2016), co-editor with Meredith Blake and Eileen Webb of *Ageing and the Law, Law in Context Special Issue Vol.33* (The Federation Press, 2015) and editor of *Civil Remedies: Issues and Developments* (The Federation Press, 1996). She has published numerous articles and book chapters on remedies, mediation, guardianship and family law and the role of apologies in the resolution of legal disputes. Robyn is an accredited mediator and a senior sessional member of the Western Australian State Administrative Tribunal with expertise in guardianship and administration matters.

### [Associate Professor Meredith Blake](#)

Meredith Blake is Associate Professor at the University of Western Australia. She has taught and researched in the areas of medical law and criminal law for over 12 years, with an emphasis on the law and ethics of end-of-life decision making. In the late 1990's she taught at the Centre of Medical Law and Ethics at King's College London. She regularly presents to health care professionals and the general public on the law relating to end-of-life decision-making, particularly as it relates to elderly persons. She has been a member of the UWA Human Research Ethics Committee and the Ethics Committee of the Genetic Council of Australia for several years. Meredith is the co-author (with Dr Sonia Allan) of 'The Patient and the Practitioner: Health Law and Ethics in Australia' (LexisNexis, 2013).

### [Dr Susannah Sage-Jacobson](#)

Susannah is a Senior Lecturer in modern Australian Administrative Law at Flinders Law School. She currently teaches disability and mental health law and a comparative elective in Indonesian Law. Susannah was a foundation supervising solicitor for the Flinders Legal Advice Clinic between 2011-2016 and retains a leadership role in research relating to the clinical program at the Law School. She holds a Doctor of Juridical Science (Monash 2009) as well has over 12 years experience as a practicing lawyer. Prior to transition to academia in 2010 Susannah was a Manager at the Public Interest Law Clearing House in Melbourne where she served for 7 years in various roles including as founding coordinator and Principal Solicitor of the Seniors Rights Legal Clinic.

Susannah's research interests encompass socio-legal methods and relate to access to civil justice in Australia. She has particular expertise in tribunal decision-making affecting migrants and older people and the experience of these groups in their interactions with the law. In addition to her research activities with ARNLA, Susannah is currently undertaking an independent evaluation of the dispute resolution service at the Office of the Public Advocate in South Australia established under the Advance Care Directives Act 2013 (SA).

### Ms Teresa Somes

Teresa graduated with degrees in Arts and Law from the Australian National University, and is admitted as a barrister and solicitor of the ACT Supreme Court. She is currently undertaking her PhD through the University of South Australia. Her topic considers how an older person may protect their interests when entering an asset for care arrangement, the limitations of the present law and proposals for reform.

Teresa has presented her research at a number of conferences in Australia, including the National Elder Abuse Conference, the Melbourne Law School Trusts Conference and the Legal Aid WA Summer Series Conference, and has co-authored a number of articles with Professor Eileen Webb concerning older people and family accommodation arrangements.

Teresa has taught a number of undergraduate subjects in the UK, and at universities in Australia, including UNSW, Sydney University and UTS. She specialises in equity and trusts law, and remedies.

### Ms Lise Barry

Lise Barry is a Senior Lecturer at Macquarie Law School where she convenes courses in Legal Ethics and ADR and her research interests span the areas of professional ethics, human rights, mediation and elder law. Lise is a member of the NSW Guardian Ad Litem panel, representing people who lack the capacity to instruct a solicitor or to represent themselves in NSW Courts and Tribunals. In this role, Lise has been involved in a number of protracted disputes about capacity, powers of attorney and guardianship for older people that helped to spark her interest in the field of elder law. Lise is a nationally accredited mediator currently working with the NSW Community Justice Centre and is a member of EMAN - 'Elder Mediation Australasian Network.' Lise is currently conducting research related to the role of lawyers in capacity assessments and the intersection between philosophy, human rights and ethics in substitute decision making.

## ARNLA Bibliography

Allen, S., and Blake, M., *The Patient and the Practitioner: Health Law and Ethics in Australia* (Lexis Nexis, 2014)

Barry, L., (2017) 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients', 25 (1) *Journal of Law and Medicine*, 267.

Barry, L., and Sage-Jacobson, S., (2015) 'Substitute Decision Making for the Elderly in Australia', in Ralph Ruebner, Teresa Do and Amy Taylor (eds) *International and Comparative Law on the Rights of Older Persons*, Vandepas Publishing.

Barry, L., and Sage-Jacobson, S., (2015) 'Human Rights, Older People and Decision Making in Australia' 9 *Elder Law Review* 1.

Barry, L., 'Elder Mediation', *Australian Journal of Dispute Resolution*, November 2013, 251.

Barry, L., 'Elder Mediation: What's In A Name?', *Conflict Resolution Quarterly*, April 30, 2015.

Carroll, R., 'Appointing Decision Makers for Incapable Persons – What Scope for Mediation' (2007) 17 *Journal of Judicial Administration* 75-92

Carroll, R., 'Family Law, Involuntarily Separated Couples and their Property' (2015) 33 *Law in Context* 87 – 122.

Carroll, R., and Smith, A., Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective, *Windsor Yearbook of Access to Justice* 28 (2010)53.

Freilich, A., Levine, P., Travia, B., and Webb, E., *Security of Tenure for the Ageing Population in Western Australia – Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?* November 2014 COTA Western Australia <<http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-pdf>>.

Lacey, W., 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia', (2014) 36 *Sydney Law Review* 99.

Lacey, W., 'Beyond the Legalese and Rhetoric: Improving Human Rights Protection in Australia' (2010) 16 *Australian Journal of Human Rights* 1-36.

Somes T., and Webb, E., (2015) What Role for the Law in Regulating Older Peoples' Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' in Reubner, Do and Taylor (eds) *International Perspectives on the Rights of Older Persons*, Vanderplas Publishing.

Somes, T, Webb, E., (2016) *What Role for Real Property in Combatting Financial Elder Abuse Through Assets for Care Arrangements?* (Forthcoming Canterbury Law Review)

Travia, B, Webb, E. (2015) 'Housing Vulnerability and Homelessness in an Ageing Society: Australia's Neglect of Security of Tenure for Older Women – and What the Law Can Do About It', *Law in Context* 33(2) 52

Webb, E, Lacey, W, Annand, K (2015) *Seniors Downsizing on Their Own Terms: Overcoming Planning, Legal and Policy Impediments to the Creation of Alternative Retirement Communities*, National Seniors Australia

[http://nationalseniors.com.au/system/files/09151399PAC\\_SeniorsDownsizing\\_Report\\_FN\\_Web.pdf](http://nationalseniors.com.au/system/files/09151399PAC_SeniorsDownsizing_Report_FN_Web.pdf)

