

Royal Commission into Family Violence

Submitted on behalf of St Kilda Community Legal Services Co-op Limited

Introduction

This submission to the Royal Commission into Family Violence by the St Kilda Community Legal Service has as its focus the issue of elder abuse. Paragraph 6 of the terms of reference makes mention that the Commission *'may make such recommendations arising out of your inquiry as you consider appropriate, having regard to any matters you consider relevant includingthe needs and experiences of people affected by family violence with particular regard children, seniors'*¹

The St Kilda Community Legal Service would like to draw on the extensive experience the legal service has of working with clients over the age of sixty five to make a submission addressing the issue of family violence in the context of elder abuse. Over the last few years the legal service has offered community education forums to community workers and members of the community on World Elder Abuse Awareness Day. These forums are designed to specifically address the issues of elder abuse in all its forms. The focus of these forums is to assist community workers identify and respond to family violence as it impacts on the lives of older people. The St Kilda Legal Service has for many years also run sessions focusing on the legal needs of older people, these sessions are held each year during Seniors Week. The aim of these sessions is to inform older people of their legal rights and enable them to act on their own behalf. The major focus of the legal service community forums is to educate the older members of the community of their legal rights. The majority of participants attending the forums live independently in the community and maintain a reasonably high degree of self-determination and of autonomy. . However the legal service has also become increasingly concerned at the unmet needs of the most vulnerable and disengaged older individuals who come to the attention of the legal service because of the physical and financial abuse they experience predominately at the hands of family members.

Definition of Elder Abuse.

One of the complexities of understanding elder abuse is that observers have used varying definitions for 'elder abuse'. To date definitions have been variable and ambiguous. Legal definitions vary within jurisdictions both within Australia and internationally. This highlights the

¹ His Excellency the Honorable Alex Chernov, Governor of the State of Victoria in the Commonwealth of Australia at Melbourne on the 22nd of February 2015 by his Excellency's Command The Hon Daniel Andrews MP. Premier of Victoria. under section 5 of *the Inquiries Act 2014* appointed Honorable Marcia Neave OM as Chairperson to constitute a Royal Commission to inquire into and report on the matters specified in the terms of reference.

need for definitions to be consistent so as to appropriately and effectively inform policy and legislative reform.

The definition of elder abuse generally used in the Australian context is:

*“An act 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”*²

A commonly accepted definition of elder abuse is lacking at an international level, thus rendering it difficult to correlate research findings to assist in the development of policy and effective law reform nationally.³ However there appears to be acceptance that elder abuse can include physical, sexual, financial/material, psychological and social abuse and neglect.

As shown, elder abuse can be defined as any act that results in harm to an older person, which occurs in a relationship where there is an implication of trust. American studies have defined the problem as ‘elder mistreatment’ which refers to (a) intentional actions that cause harm or create a serious risk of harm (whether or not harm is intended) to a vulnerable elder by a caregiver or other person who stands in a trust relationship to the elder or (b) by failure by a caregiver to satisfy the elder’s basic needs or to protect the elder from harm.⁴ The term used here is meant to exclude cases of so-called self-neglect-failure of an older person to satisfy his or her own basic needs and to protect himself or herself from harm. It also excludes cases involving victimization of elders by strangers.

Overseas studies have examined the relationship between self-neglect and subsequent elder abuse as reported by social services agencies and found that self-neglect is strongly associated with elder abuse amongst older people living in the community.⁵

In Queensland, an Inquest was held into the death of Cynthia Thoresen on 22nd of May 2013 by the Office of the State Coroner.⁶ It was found that Mrs Thoresen died as a result of neglect by her daughter who was her primary carer. The Coroner made the following comments in the

² AdvocacyTasmania www.advocacytasmania.com.au. This definition was adopted in 1999 by the Australian Network for the Prevention of Elder Abuse.

³ Sarah Ellison et al, Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs ; the Legal Needs of Older People in NSW* (2004) p 267.

⁴ National Academy of Sciences: *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America* (2002)

⁵ Dong, X; Simon, Mellissa; Evans, D: “*Elder Neglect is Associated with Increased Risk of Elder Abuse in a Community Population*” Findings from the Chicago Health and Aging Project. *Journal of Health and Aging*: February 2013 Vol. 25. No 1. [pp80-96]

⁶ Queensland Courts : Office of the State Coroner Findings of Inquest into the death of Cynthia Thorsten.: Chris Clements Deputy State Coroner 22 May 2013

interest of ‘public health and safety, the administration of justice and ways to prevent deaths for happening in similar circumstances in the future,’ when she went on to say

“in a time of an aging population and pressure in access to services to care for the elderly, there is likely to be an increase in circumstances where families take on the care of their elderly relatives. The responsibility can be a difficult challenge for a family. Our society acknowledges and supports the efforts of family by providing carers benefit to provide some limited assistance to a care giver in discharging their responsibilities. It is important to note an elderly person may be entirely dependent upon their family for provision of physical and medical care as it was in the above case. “

The Coroner went on to note that caregivers in receipt of a carers benefit are not required to submit any further regular evidence of the health status of the person being cared for.

Prevalence rates

Providing an estimate of elder abuse in the community with any accuracy has been shown to be difficult. This is seen to be because of the difficulties faced when attempting to correlate research from overseas and Australia. This is further exacerbated by the inconsistencies in definitions of ‘elder abuse’ used both within Australian and overseas jurisdictions.

Various studies have been conducted in Australia and the estimates of prevalence vary from below 1 percent to 5 percent.⁷ No systemic study of prevalence rates has been conducted in Victoria. Research does however indicate that the years from 75 to 85 is the time when abuse is most likely to occur.⁸ Currently there are 337,403 people aged 75 years and above in Victoria. This number is expected to grow to 502,834 by 2021 an increase of 50% in fifteen years.⁹ Studies have shown that victims of elder physical abuse were mostly female, over 75 years of age and most were physically or cognitively impaired and living with their abuser. They were also physically, emotionally and or financially dependent upon their abuser¹⁰

It would appear that elder mistreatment and abuse is a recognized social problem of uncertain though probably increasing magnitude. The number of cases of elder abuse will undoubtedly increase over the next several decades as the population ages. A search of the literature on elder

⁷ Australian Society for Geriatric Medicine(2003) Elder Abuse, Position Statement No1 Bodied Webb, M. Horner, B. Davey, M. & Kingsley B.(2002) *Elder Abuse in Western Australian* , Western Australian Government Department for Community Development

⁸ Teaster, P (2002) *A Response to the Abuse of Vulnerable Adults: The 200 Survey of State Adults Protective Services*, National Centre on Elder Abuse, Washington

⁹ Vic Report on Elder Abuse p13.

¹⁰ Ibid;

abuse reveals little is known of the characteristics, causes, or consequences of elder abuse or about the effective means of prevention or management of elder abuse and in particular physical abuse within the family.

The knowledge base which informs policy and law reform concerning elder abuse has been found to be lacking as shown in a recent survey undertaken by the University Western Australia¹¹ which found that due to a range of complicated, interactive factors, no single source of data provides a comprehensive window into the nature and extent of elder abuse. Based on a range of international prevalence and incidence estimates for elder abuse victimization, an average prevalence rate for WA was calculated to be 4.6% (ranging between 3.1% and 6.0%). This translates to an estimate of approximately 12,500 victims of some form of elder abuse in WA for 2011. If a similar study was undertaken in Victoria it could be predicted that the findings would be comparable.

Causes of Elder Abuse

Whilst the causes of elder abuse are as diverse as the manifestations of the abuse itself, there are a number of methods which try to detect those most vulnerable to abusive situations and factors that may lead to abusive behavior. Studies have shown the important influences of dependency of the abused upon the abuser. In some cases this is due to some form of cognitive or physical impairment of the abused.¹²

Other research has been found that:

*In some families violence is considered a normal reaction to stress and may continue from generation to generation. In some cases the abuser was abused as a child by the person they are now abusing.*¹³

It should be noted that there are a number of factors that are more likely to result in an abusive situation including predisposing individual factors in the abuser, such as psychiatric illness or substance abuse and the existence of long term family conflict between the parties involved. Elder abuse can also be understood as a continuum of existing abuse where the abuse may continue into old age, or the abuser becomes the abused themselves due to their reliance upon the person they once abused.¹⁴ With the onset of disability and the intervention of community

¹¹ Clare, M. Black- Bundell, B. Clare, J. *Examination of the Extent of Elder Abuse in Western Australia*. Crime Research Centre. The University of Western Australia. (p27)

¹² Pamela Kinnear and Adam Graycar, "Abused Older People, Crime and Family Dynamics?" (1999) 113 Trends and Issues in Crime and Criminal Justice1,1-2

¹³ Susan Kurrie, Australian Society for Geriatric Medicine, Position Statement No 1 *Elder Abuse* (2003)3.

¹⁴ Ibid. 13

services, behavior which has long been concealed is now exposed and categorized as ‘elder abuse’

Legal Interventions: The Human Rights Approach v Protective Intrusion

The debate around mandatory reporting of elder abuse in Victoria and other Australian jurisdictions is centered on two related issues.¹⁵ The need to balance the right to autonomy of elderly people with their right to protection.

In December 1991, the United Nations adopted a set of United Nations Principles for Older Persons, recommending that all member governments incorporate the principals into their programs for older people. The Principles are based on the following Declaration on the Rights and Responsibilities of Older Persons.¹⁶ In the section of the document addressing dignity principal 17 states

“Older persons should be able to live in dignity and security and be free from exploitation and physical or mental abuse and be treated fairly regardless of age, gender, and racial or ethnic background.”

Members of the Elder Abuse Prevention Association as an organization were *“fighting for mandatory reporting by all aged care workers”*¹⁷ However the report of the Elder Abuse Prevention Project published in December 2005 did not recommend the introduction of mandatory reporting or the establishment of Adult Protective Services.¹⁸

There is currently little support for mandatory reporting in many of the State Jurisdictions. However the Commonwealth has introduced the Australian Compulsory reporting and protection requirements which commenced on 1 July 2007 following amendments to the *Aged Care Act 1997* (the Act).¹⁹ The compulsory reporting requirements apply to approved providers of residential aged care services who are required to report to the police and to the Department of Social Services incidents involving alleged or suspected reportable assaults. The report must be made within 24 hours of the allegation, or when the approved provider starts to suspect a reportable assault. A reportable assault is defined in the Act (section 63–1AA) as unlawful

¹⁵ For and example of a mandatory reporting requirement, see House of Representative Standing Committee on Legal and Constitutional Affairs. Parliament of Australia, *Older People and the Law* (2007) [2.80] (“House of Representatives Report”)

¹⁶ United Nations General Assembly 74th plenary meeting 16th December 1991 [46/91] *“Implementation of the International Plan of Action on Aging and related activities”*

¹⁷ Age 11th April 2006

¹⁸ Office of Senior Victorians , Department of Victorian Communities, *Strengthening Victoria’s Response to Elder Abuse: Report of the Elder Abuse Prevention Project* December 2005

¹⁹ Australian Government; Department of Social Services and Aged Care. *“Compulsory Reporting Guidelines for Approved Providers of Residential Care”* 5 June 2015

sexual contact with a resident of an aged care home; or unreasonable use of force on a resident of an aged care home. This definition captures assaults ranging from deliberate and violent physical attacks on residents to the use of physical force on a resident. The definition of reportable assaults used in the Act has as its objective providing a simple, readily understood and accepted definition. It also aims to avoid the difficulties of applying legalistic definitions that vary widely throughout Australia. The application of this compulsory reporting requirement is limited to providing protection to recipients of residential care only and leaves exposed to abuse vulnerable older people living in the community.

An argument put forward against mandatory reporting is that it is an inappropriate and ineffective tool to use to provide safety and protection to older people as it is said to impinge upon the autonomy of the older adult by denying them the right to decide when they will engage the protection or assistance they require²⁰ Its is also argued that unless the older person is under a Guardianship Order, it is inappropriate to make decisions about what might be in the person's 'best interest'.

However it is also well argued that policy makers, service providers and those interested in law reform should not be deterred from establishing appropriate methods of identifying those at risk and conducting effective and timely assessment of the situation. It is acknowledged that undertaking any form of intervention requires a balance of vigilance, creativity and collaboration with older people.²¹ We see that care must be taken in adopting a 'protective' model when dealing with cases of elder abuse as this often takes place around a very complex range of relationships and is inclusive of a wide range of abuse.

Whether criminal sanctions and the language of criminality are appropriate in the elder law context is the subject of much discussion. There are two conceptual approaches to the problem – family violence and appropriate care. The family violence model seeks to incorporate elder abuse into the existing legal approach to the issue of family violence that typifies some familial relationships. Here the behavior of the perpetrator of the violence is criminalized as a means of ensuring the victims safety.²² The 'care perspective' of elder abuse views the issue as one where older people are in need of protection from the inappropriate treatment of those responsible for their wellbeing. The focus here is on providing the correct standard of care as opposed to focusing on how the standard required has been breached.²³

²⁰ *Ibid* . 19 p27

²¹ Marianne James and Adam Graycar; Preventing *Crime Against Older Australians* (2000) 32 Research and Public Policy Series 1 xi.

²² *Ibid*

²³ Crips et al; *Abuse of Older people : Issues for Lawyers* (2002) 1 Elder Law Review 14

Legislative Reform

The question of legal remedies available to older people are currently unsatisfactory and often the discussion about legal reform gets misdirected towards the loss of autonomy and dignity of the older individual when proposed legal remedies are put forward. The self-determination and maintenance of dignity of the older person is a 'first practice' principle, which is, practiced rigorously by the majority of individuals working with older people. There has been considerable dissatisfaction with the legal process but it can also be argued to date it has not been tested in relation to offering protections to older people.

Younger women seeking to take out a Family Violence Order (FVO) against a violent partner are more able and willing to seek the assistance of the legal system. Older people for a range of complex and debilitating reasons will not seek to take out a FVO against a family member who is a perpetrator of abuse; it therefore rests with others to intervene. The *Family Violence Protection Act 2008* (The Act) under Section 45 identifies who can apply for a family violence intervention order. The Act states that a FVO may be made where the affected family member is an adult, any other person with the written consent of the affected member; or, if the affected family member has a guardian, the guardian or any other person with the leave of the court. This then allows for others to make the application on behalf of the older people.

Under section 75 of the Act there is the power for the police to make a final order if the affected family member has not consented to the application or the making of an order. These orders can include in the final order a condition prohibiting the offender from committing violence against the protected person. This section could be broadened to allow for individuals other than police to be involved in the application to the court for a 'welfare checks' and the making of a limited order to focus on the the controlling of the abusive behaviour .For example the abuser may be ordered to attend for anger management.

The Police have developed guidelines that outline when they should be involved in a family violence situation and in particular when the situation is seen as an emergency which, is defined as an immediate risk of physical harm or serious damage to property. As well as intervening in an emergency response, police can apply on the older person's behalf for an FVO to protect the person from further abuse. Victoria Police family violence advisors; family violence liaison officers and family violence management officers can offer advice. In situations requiring police intervention, it is preferable that the older person agree to the police being called. People may have different responses to police interventions and so it is advisable to ensure that local police are adequately briefed on the nature of the elder abuse situation before conducting a welfare check.

In Victoria an integrated family violence system has been established which comprises specialist family violence services, legal and statutory services and mainstream services.²⁴ There are many different ways that victims of family violence can enter the family violence support system either through direct contact with specialist family violence services or through the justice system.

The policy outlined above was introduced to establish multiple entry points which, it was hoped would maximise the chances that people can access the services they need. This relies on a coordinated approach, where professional assess and respond to people in a timely, effective, efficient and co-ordinated way.

Case study

██████████ 86 year old woman came to the legal service with a community nurse who was concerned that ██████████ was being discharged from hospital to an unsafe living situation involving a daughter who has moved in with her. ██████████ was very unhappy with the situation and had been placed back into the community but not her own home and was not able to receive the support and health care she needed. Her other daughter applied to the court for Family Violence Protection Order to contain a condition that the resident daughter be asked to vacate the property so that ██████████ could return home.

The order was granted but the response from the court was surprising in that they questioned why the ██████████ wanted to return to her own home as she was not reliant on life support.

Many community service workers are not aware of the legal protections offered under the Act when dealing with older people or appear to be reluctant to use them. Where they have been used it has been to require an abusive child to leave the residence of the older person, whilst this may make the older person safe from abuse it may also remove the feeling of safety that comes with having others in the house and loss of financial support.

It is clear that there are justice dimensions –both criminal and civil- in respect of elder abuse. It is also clear that there are the barriers to delivery of legal services to the elder members of the community because of physical and financial inaccessibility, social isolation, technological barriers and inappropriate appointment times, lack of free or low cost legal services²⁵

²⁴ Victorian Department of Human Services; Family Violence : Risk Management Framework and Practice Guide 1-3: Edition 2nd April 2012.p7

In determining appropriate justice system responses it is important to analyze and respond to the characteristics of older person's engagement with the law and legal systems. The growing percentage of older people in our community makes it imperative for the justice system to find new ways to meet the needs of older persons in Victoria. Older people experience high levels of disengagement and social exclusion. This is apparent in particular in relation to legal matters where older people often display a sense of powerlessness and lack of willingness to engage.

*“older people receive information about services through word of mouth, from service providers local papers and newsletters” and further “ that they are more likely to access services that are provided in the community when associated with well known community organizations such as Senior Citizens”*²⁶

It should also be noted that local community legal centers are ideally located to build relationships with aged care service providers to enable effective identification of elder abuse and to take action that offers more acceptable responses. Older people may not self-identify that they have legal rights. Often when older people are seeking assistance the presenting issue is not their only issue (legal and non-legal) that requires attention and more importantly rarely do they reveal abuse.

Much of the discussion around strategies for addressing elder abuse focuses on the challenges confronting professionals in dealing with the elderly. When attempting to assist the abused and neglected elderly, the response needs to center on the preservation of and respect for the autonomy of the older person. The Strengthening Victoria report highlights the rights of older persons to determine their own course of action²⁷

It would appear that when community legal services develop partnerships with service providers on a local level they are able to be more effective in identifying and responding to elder abuse. Whilst supporting the model of intervention in elder abuse cases based on ‘ an empowerment model of prevention’²⁸ many elderly are unable to and as stated before unwilling to ‘be empowered’ and will not co-operate with the care worker who has identified the abuse and on occasions denying the problem exists in spite the evidence of obvious facial bruising. District nurses, when faced with returning an elderly person to what they have assessed as an abusive situation have been forced to remove the elderly person from the home and place them in an aged care facility resulting in loss of independence to the older person. The above example highlights the need for aged care workers to be the empowered to enable some form of effective intervention.

²⁶ Monroe, R, above #16

²⁷ Victorian Law Foundation South Port Community Legal Service. *Legal Needs of the Third Age*.13 December 2007

In considering the development of policy and seeking legislative remedies, to ignore the competent elder's right to autonomy and self respect is ageist and may constitute a violation of the civil rights of the older person. However failure to intervene in a situation of elder abuse where there is a serious risk of physical harm to the individual, loss of dignity, self respect and independence is often the result. Attempting to balance the need for autonomy with the need to protect an older individual from abuse, neglect and self-neglect is at the core of any systemic remedies developed to address the problem of elder abuse in the community.

The St Kilda Community Legal Service recommends that;

- legal services experienced in matters of family violence work together with key stakeholders to develop protocols to further strengthen the ability of community workers, the police and the courts to deal more effectively with the overlooked abuse of older people in the community,
- the key stakeholders strengthen established network to ensure effective response to elder abuse in a manner appropriate to the case at hand inclusive of social and cultural issues.
- elder abuse be identified as a hidden form of family violence and included in existing family violence policy and program guidelines,
- research is undertaken to identify the prevalence of elder abuse in the community
- community legal services currently operating Family Violence Intervention Court programs be acknowledged as being ideally located to expand their services to build relationships with aged community services and thus deal with elder physical abuse on a local level.

This submission was prepared by Ms Jenifer Lee on behalf of the St Kilda Community Legal Service as a lawyer experienced in the area of elder law. Acknowledgement is given to other staff of the legal service who have provided editorial support in the preparation of the submission.