



ELDER ABUSE AND CRIMINAL LAW

#EmpowerOlderPeople



ABOUT SENIORS RIGHTS VICTORIA

Established in 2008, Seniors Rights Victoria is the key state-wide service dedicated to stopping elder abuse. It is a program of Council on The Ageing Victoria (COTA) and supported by the Victorian Government. Operating under the principle of empowering older people, Seniors Rights Victoria provides information, support, advice, casework and education to help prevent and respond to elder abuse and safeguard older peoples' rights, dignity and independence. Services include a helpline, specialist legal services, short-term support and advocacy for individuals, and professional and community education. Seniors Rights Victoria draws on 10 years of practice to inform elder abuse policy development and law reform, and works to raise awareness of elder abuse.

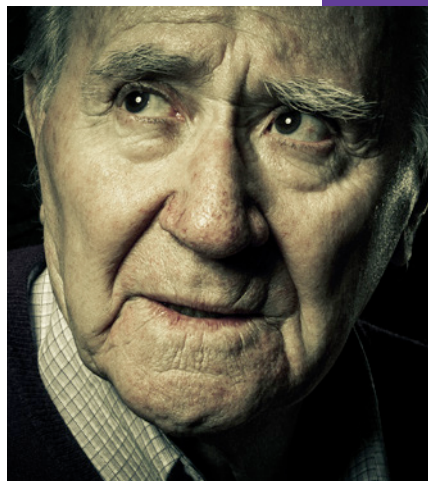
ELDER ABUSE AND CRIMINAL LAW

Seniors Rights Victoria sometimes receives queries from family members of older people, lawyers and service providers about whether there should be specialised criminal offences for 'elder abuse.' This discussion paper aims to explore the laws already in place to prevent elder abuse, whether there should be a specific crime of elder abuse and the potential effect of such laws. Seniors Rights Victoria's position, drawn from available evidence and our casework experience, is that we have sufficient laws in place to address elder abuse, but these laws lack effective implementation.

WHAT MIGHT AN ELDER ABUSE LAW LOOK LIKE?

Any elder abuse offence would have to capture the different types of conduct encompassed by the term 'elder abuse.' As elder abuse constitutes 'any act which causes harm to an older person and is carried out by someone they know and trust such as a family member or friend,' a wide range of actions can be considered elder abuse. The abuse may be physical, social, financial, psychological or sexual. Failing to act in the context of mistreatment or neglect of older people can also be considered elder abuse.

In most situations in the criminal law when deciding whether a crime has been committed, the focus is on the act or omission of the perpetrator, rather than the circumstances of the victim. Notable exemptions include crimes against children where the victim's age is integral. Making different laws depending on the circumstance of the victim can be difficult, particularly if the onus is then on the victim to prove their status under the law. With respect to elder abuse, creating laws specific to a certain age group can be seen as ageist and encouraging of negative stereotypes





that posit all older people as vulnerable and in need of special care. However, American jurisdictions such as California¹ Florida,² Nevada,³ and Missouri,⁴ do have specific criminal code provisions which criminalise acts based on the age of the older person collectively known as ‘elder abuse.’

Other jurisdictions have addressed the issue by broadening the criteria for victimhood, for example, creating special considerations where the person being abused is above 19 and has a specific vulnerability or impairment.⁵ This could be relevant to older people with cognitive impairment or specific care needs, without being related to their age.

WHAT LAWS ALREADY EXIST IN VICTORIA RELEVANT TO ELDER ABUSE?

Many of the actions that would be criminalised under a specific offence for elder abuse are already crimes in Victoria. Under the *Crimes Act, 1958*, conduct endangering life, negligently causing serious injury,⁶ intentionally causing injury, assault, sexual assault, theft, and fraud, for example, are already crimes. There are also offences under the *Summary Offences Act, 1966*, such as unlawful assault.⁷ These offences, like all criminal offences, require that the prosecution meet a high threshold of proof, i.e. proof beyond reasonable doubt. Historically, when cases of elder abuse are investigated by the police using these

general, existing offences, the prosecution either decides not to run the case because of the difficulty in meeting the standard of proof, or there are low conviction rates. These issues are discussed in the sections below.

Elder abuse is a form of family violence, so can also be considered under the *Family Violence Protection Act*, which includes specific enforcement powers for police and criteria for issuing family violence intervention orders.⁸ These provisions are not specific to older people, but are for anyone experiencing family violence. However, unlike the crimes noted above, the family violence intervention orders are civil orders. The magistrate making the order does not require proof beyond reasonable doubt, but can use a lower standard of proof - that it must be established on a balance of probabilities that the perpetrator of the abuse has committed family violence against the older person and is likely to continue to do so or do so again.⁹ Family violence is broadly defined as physically, sexually, emotionally, psychologically or economically abusive, threatening, coercive or in “any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.”¹⁰ If an intervention order is breached, the perpetrator can be charged with a criminal offence.

In Victoria, in addition to the more traditional criminal offences of theft or fraud, there is a specific offence under the *Powers of Attorney Act, 2014* to not dishonestly obtain an enduring power of attorney or a revocation or use the enduring power of attorney to obtain financial advantage for the attorney or another person.¹¹

For more information see the [Seniors Rights Victoria](#) discussion paper [Elder Abuse and Family Violence](#)

Courts may also take into account the age and circumstances of the victim of a crime in sentencing an offender who has been found guilty of committing elder abuse and to, potentially, impose a harsher sentence because of the vulnerability of the older person victim.¹² This should be particularly emphasised where the persons’ circumstances such as advanced age, disability and/or dependence on others for assistance with activities of daily life result in an inability of that person to protect themselves.

SHOULD THERE BE AN ELDER ABUSE LAW?

Some stakeholders, including lawyers, service providers and family members of older people experiencing abuse, believe that specifically criminalising elder abuse would enforce a better response to the victimisation of older people. For example, that the creation of such offences would result in better results and better pathways through the criminal justice system for older people, and that it would act as a deterrent and increase awareness of the issues of elder abuse.¹³

WHY DOES SENIORS RIGHTS VICTORIA BELIEVE AN ELDER ABUSE LAW IS UNNECESSARY?

As noted above, there are currently several laws which criminalise conduct considered to be elder abuse. Adding another law which encompasses all these laws would not assure increased prosecution and increase complications in an already complex system.

In fact, creating an independent criminal offence of elder abuse may minimise the gravity of the abuse. For example, the offence of elder abuse may not attract the same penalty as the criminal act itself, such as fraud or theft. Elder abuse should not be divorced from the crimes which constitute elder abuse.

Furthermore, having a specific offence related to elder abuse may harm older people. Having such laws is discriminatory. It can perpetuate ageism by mandating that older people need specific protection just because of their age rather than on vulnerabilities such as social isolation, linguistic ability, disability or cognitive ability which feature across age.



IF WE HAVE ALL THESE LAWS, WHY IS ELDER ABUSE NOT PROSECUTED?

Seniors Rights Victoria has found the prosecution of criminal offences that would be considered elder abuse is difficult for a number of different reasons.

Some reasons relate to the experience of the older adult themselves. Many callers to our service recognise that the conduct that they are experiencing is a crime, however, they often do not want to report the abuse to the police, particularly when the perpetrator of the abuse is a close family member or friend. Having a specific offence relating to elder abuse will not assist in alleviating the concern of some older people about their trusted person being charged with a crime.

Another reason elder abuse is often not prosecuted relates to the lack of recognition of elder abuse by police. In the past, stakeholders have indicated that “police did not always respond appropriately to ‘low level’ abuse, including neglect or financial abuse; and that ageist perception of older persons could affect police dealings...”¹⁴ Financial abuse cases were predominantly seen to be civil matters by the police because elder abuse was considered in the same context as financial issues in husband and wife relationships. The difficulty then often falls on the older person to gather the evidence to run a civil dispute, which often would require commencing proceedings to obtain more information. Therefore, the criminal laws that exist such as theft or fraud were not used to prosecute these perpetrators.

It must be noted that the police are now making efforts to change these attitudes and respond to elder abuse. For example, Victoria Police now has specialised staff as part of their Family Violence Command and Priority Communities Division to address elder abuse and elder abuse education is beginning to feature in their training at various levels. In the interim, until these practices filter to every level of policing, knowledge of elder abuse will vary across the police department within regions or areas of policing.

Where elder abuse is not recognised as such by the police, this can lead to problems for the older person. Seniors Rights Victoria provides the experience of Maria and Carl below:

Maria and Carl are in their early seventies and have four adult children. Their youngest son Michael has a 20-year history of drug abuse which began when he was in his late teens.

Maria suspected that Michael was using ice. Michael's behaviour had become unpredictable and he was prone to sudden outbursts of rage. Michael didn't sleep or shower and appeared to be constantly in a state of agitation. Michael moved back home with Maria and Carl about six years ago. The arrangement was supposed to be temporary, just until Michael got back on his feet, however Michael refused to leave.

Maria and Carl asked Michael to leave and moved his belongings to the shed, but he began living out of the shed. Maria and Carl were frightened of Michael. Michael began demanding money from his parents, sometimes yelling and screaming at them to open the door to let him inside. Police were called on numerous occasions, by Maria and by concerned neighbours. When the police attended they did not issue a Family Violence safety notice. They instead called the Crisis Assessment and Treatment team to take Michael to hospital for psychiatric assessment. However, Michael was released the next day as he did not meet the criteria under the Mental Health Act Vic 2014 for admission as an involuntary patient. Police told Maria it was up to her to take any further action.

After Maria and Carl sought assistance from Seniors Rights Victoria, a lawyer from our service contacted police concerned about the serious threat to Maria and Carl's safety and wellbeing and the necessity for urgent intervention. Police arranged an urgent meeting with Maria and made an application on Maria's behalf for a family violence intervention order that afternoon. The Order was served on Michael that evening and police removed Michael from his parents' home.

In this case, the police did not recognise Michael's behaviour as family violence and made it Maria's responsibility to defend herself against her son. Ultimately, the police required some prompting from Seniors Rights Victoria in order to act, and when they did, Maria and Carl were able to return to their home safely.



Another issue may arise where police may decide not to investigate crimes where they consider that the situation does not meet the high burden of proof required in criminal cases. In the past, older people have at times been regarded as unreliable witnesses due to the possibility of cognitive decline, regardless of whether they exhibit any impairment. These attitudes have been changing over time. Another reason police can be reluctant to prosecute, particularly financial abuse cases, is the difficulty of proving that the perpetrator had no legal entitlement to the money when accounts are jointly held by the victim and perpetrator.

Having a specific offence of elder abuse will likely not assist in any of the above circumstances where the low prosecution rate is linked to a reluctance to report, a lack of awareness of the issues, difficulty in obtaining proof and an uninformed police response.

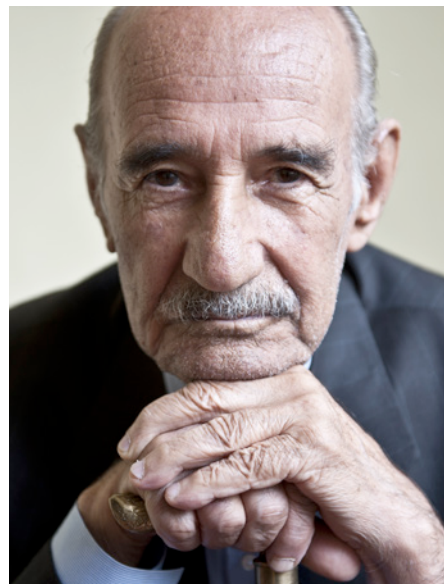
WHAT CAN BE DONE TO ASSIST IN IMPLEMENTING ALREADY EXISTING LAWS?

Seniors Rights Victoria suggests that rather than creating another law specific to elder abuse, efforts would be better expended to improve the present justice system.

During the investigation process, improvements could be made through:

- Mandatory training for all police officers in recognising the signs of elder abuse and to dispel ageist assumptions.¹⁵
- Using all evidentiary tools to overcome concerns about cognitive decline or unwilling witnesses, such as allowing older people to testify by video conference to mitigate the stress of a courtroom setting, exceptions to hearsay rules,¹⁶ (which would allow others to testify to what the older person told them at the time or trialling the use of police body camera footage for use as evidence).¹⁷
- The continued involvement of specialist units who are experts in elder abuse.
- Better collection and interpretation of forensic evidence to aid in proving elder abuse before courts.

Prosecutors continue to require additional training in recognising and prosecuting elder abuse. This whole of prosecution system approach to training may be of additional benefit in cases of criminal neglect. For example, Cynthia Thoresen, a 88-year old woman from Queensland had been found in her excrement with a broken leg unattended for weeks, screaming in pain which the paramedics would consider “10 out of 10.” It was determined that there was insufficient evidence to support a successful prosecution for criminal neglect against her carer¹⁸ although the medical evidence appeared to overwhelmingly support such a charge.



Seniors Rights Victoria has also heard from several clients that the process of going to court on any matter is one of the worst experiences of their lives. These clients are often re-traumatised by the court process. The following recommendations would likely assist older people in court during the prosecution of an offence:

- Training for courts (registrars, magistrates and judges) regarding the nuances of elder abuse and the use of intervention orders in the context of elder abuse.¹⁹
- Ensure that there appropriate accommodations in the courtroom to assist older persons with disabilities.²⁰
- Effective case management where an older person's capacity is at issue (to expedite the proceedings and appoint counsel for the older person at the earliest possible stage of the proceedings).²¹
- The potential for alternatives to the adversarial criminal justice system such as restorative justice models. This was one of the recommendations of the Royal Commission into Family Violence.²²
- Providing all victims with appropriate support to provide testimony, with specific attention paid to assisting victims with diminished capacity, including alternative mechanisms for the presentation of evidence or using informal surroundings.²³
- Judge-convened multidisciplinary users groups including defence counsel and prosecution, victim support workers, geriatricians and service providers to brainstorm solutions to address systemic issues.²⁴

CONCLUSION

Overall, Seniors Rights Victoria's experience does not suggest that a creation of a specific offence for elder abuse would assist in prosecuting elder abuse or lead to better outcomes for the older person. Existing laws criminalising abuse apply regardless of the age of the victim. Rather, continuing improvements of the police service, the system of prosecutions and court responses would help more victims of elder abuse receive the justice that they deserve.

USEFUL RESOURCES

If you or someone you know is experiencing elder abuse, contact the Seniors Rights Victoria free and confidential helpline on 1300 368 821. If you are in immediate danger, contact emergency services on 000.

<u>Seniors Rights Victoria</u>	1300 368 821
<u>Safe Steps Family Violence Response Centre</u>	1800 015 188
<u>Men's Referral Service</u>	1300 766 491
<u>Victims of Crime Helpline</u>	1800 819 817

For information on elder abuse

- Seniors Rights Victoria website accessed at seniorsrights.org.au
- With Respect to Age (2009) State of Victoria, Department of Human Services accessed at <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/with-respect-to-age-2009>
- Elder Abuse: Understanding issues, frameworks and responses (2016) Australian Institute of Family Studies accessed at <https://aifs.gov.au/publications/elder-abuse>
- The Victorian Government delivers online elder abuse prevention professional education, which can be accessed at elderabuseprevention.e3learning.com.au

ENDNOTES

- 1 California *Penal Code*, Section 368,
- 2 *2008 Florida Statutes*, XLVI crimes, c. 825.012
- 3 *Nevada Revised Statutes*, section 200.5091
- 4 *Revisor of Statutes*, Missouri, [section 565.184](#)
- 5 US Department of Justice, Elder Justice Financial Exploitation Statutes, online: <https://www.justice.gov/elderjustice/prosecutors/statutes>

- 6 *Crimes Act 1958 (Vic)*, s. 24, in Victoria, this is based on a legal duty to provide the necessities of life, so the duty of care must first be established: *Nydam v.R.* [1977] VR 430, *R. v. Shields* [1981] VR 717, failure to provide necessities of life for a person who cannot remove themselves from the charge (Section 262 of the WA Criminal Code)
- 7 *Summary Offences Act, 1966, (Vic)*, ss. 23 and 24.
- 8 *Family Violence Protection Act 2008 (Vic)*, No. 52 of 2008
- 9 *Ibid.*
- 10 *Ibid.*, s. 5
- 11 *Powers of Attorney Act 2014 (Vic)*, s. 135, s. 136 has similar offenses for supportive attorney appointments
- 12 See *Sentencing Act 1991 (Vic)*, s. 5(2)(da); *Victorian Sentencing Manual*, 9.14.4.2, online: <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#5367.htm>; David Lewis, ABC News, (11 December 2016), "Elder abuse inquiry calls for power of attorney changes to stop children ripping parents off," online: <http://www.abc.net.au/news/2016-12-11/elder-abuse-inquiry-calls-for-law-changes/8106528>, (e.g. Indiana, Connecticut)
- 13 Australian Law Reform Commission, "Elder Abuse – A National Legal Response", *ALRC Report* 131, 13.6 pg. 364
- 14 *Ibid.*, pg. 370.
- 15 Florida Department of Law Enforcement, Mandatory Online Training, Elder Abuse Investigations, online: <https://www.fdle.state.fl.us/cms/FCJEI/Online-Training/Elder-Abuse-Investigations.aspx>
- 16 *Criminal Procedure Act 2009 (Vic)*.
- 17 This form of evidence has been very useful in prosecutions of domestic violence in the Northern Territory. See Skynews, "NT police body cameras to be used as evidence", (11 July 2017), online: <http://www.skynews.com.au/news/national/nt/2017/07/11/nt-police-body-cameras-to-be-used-as-evidence.html>
- 18 Office of the State Coroner, Inquest into the death of Cynthia Thoresen (22 May 2013), online: http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/184117/cif-thoresen-c-20130522.pdf
- 19 American Bar Association, "Recommended Guidelines for State Courts handling Cases involving Elder Abuse", online: <http://www.eldersandcourts.org/~media/Microsites/Files/cec/ABA%20Recommended%20Guidelines%20for%20State%20Courts%20Handling%20EA%20Cases.ashx>
- 20 Based on the Eleazer Courtroom at Stetson University. "Center for Elders and the Courts, "The Role of the Courts", online: <http://www.eldersandcourts.org/Aging/The-Role-of-the-Courts.aspx>.
- 21 *Ibid.*
- 22 Royal Commission into Family Violence (Victoria), Recommendation 128, online: <http://www.rcfv.com.au/Report-Recommendations>
- 23 National Centre for State Courts, (2012) "Prosecuting Elder Abuse Cases: Basic Tools and Strategies", online: <http://www.eldersandcourts.org/~media/Microsites/Files/cec/Prosecution%20Guide.ashx>, These are not yet in use in Victoria.
- 24 Marie-Therese Connolly JD (2010) Where Elder Abuse and the Justice System Collide: Police Power, Parens Patriae, and 12 Recommendations, *Journal of Elder Abuse & Neglect*, 22:1-2, 37-93 at 50.



Seniors Rights Victoria

 1300 368 821

 info@seniorsrights.org.au

 Level 4, 533 Little Lonsdale Street,
Melbourne, VIC 3000

 www.seniorsrights.org.au

A service of:



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