



7 February 2018

Ms Lauren Mesiti
Select Committee into Elder Abuse
Parliament House, 4 Harvest Terrace
West Perth WA 6005

Dear Ms Mesiti,

Re Submission to Select Committee into Elder Abuse – Inquiry into Elder Abuse

Thank you for the opportunity to make a submission to the Inquiry into Elder Abuse. I appreciate you providing me with some extra time to make the submission. As a result, I have been unable to make the contribution I was hoping to provide to you. Having said that, I am more than happy to appear before the Committee and speak to any of the suggestions I make in this submission. I have also provided a list of my current and published research that may be of interest to the Committee.

I am a Professor in the Curtin Law School. I am the Director of the Consumer and Small Business Law Discipline and have introduced and coordinate the elder law program. My research focuses on elder law, particularly elder financial abuse, housing issues, wills and estates and access to justice for older people. I am a foundation member (with Professor Wendy Lacey and Ms Lise Barry) of the Australian Research Network on Law and Ageing (ARNLA) and in August 2017, I was appointed to the Law Reform Commission of Western Australia.

In my view, the law in Western Australia is inadequate in its response to elder abuse. This is not a criticism of Western Australia per se, this is a problem throughout Australia. In my observation, governments remain unable to adequately grasp the issue. There is still a feeling that elder abuse involves a family/domestic situation and there is a reluctance to get involved. This is a serious problem, in my view, particularly - but not exclusively - in relation to the enforcement of the criminal law.

Criminal Law

Although it is not a popular view in some quarters, I believe that the generic provisions of the Criminal Code are not working in relation to addressing elder abuse. Although physical and financial abuse can theoretically be addressed by the existing provisions, the fact it the provisions are rarely used. I would suggest specific provisions be inserted in the Criminal Code to address elder abuse. **I have recently written a short article on this issue and will forward it to you in a separate email.**

Civil Law

Equity and trusts

There are several ways in which equity and trusts may be relevant to elder abuse issues:

- Equitable doctrines can recognise rights where there is no remedy available under the common law. Although a valid contract may have been entered into at law, equity may recognise that the conduct of one of the parties offends conscience.

Unconscionable conduct: A transaction may be set aside where one party has entered into an agreement with a person who is suffering from a special disadvantage and the first person knowingly takes advantage of that disadvantage.¹

Undue influence: Similarly, where an agreement is entered into and there has been undue influence by one party over the other may be grounds to vitiate the transaction. There are recognized categories of undue influence or undue influence may be found due to the circumstances of particular cases. While there is a presumption that a parent has undue influence over a child, even an adult child, the opposite is not the case.²

- Where a person has made a contribution of money or property to a second person but is not recognized as the legal owner, equity may – depending on the facts of the case – impose a resulting trust or a constructive trust in favour of the person who made the contribution to the extent of that contribution.³
- Where a person has relied on a representation made by a second person another, that representation is not honored and the first person experiences detriment as a result. In these circumstances, the second person may be estopped from avoiding the promise.⁴

The presumption of advancement

The presumption of advancement means that the law assumes that money or property provided to a child, even an adult child, by a parent is intended to be of benefit to that child i.e. to 'advance' their welfare and is presumed by the courts to be a gift.⁵ This can be problematic in an elder abuse scenario where property has changed hands. The presumption of advancement will suggest that the older person may have intended it to be a gift when in fact, it was not.⁶

Case study: assets for care arrangements

In an assets for care arrangement, an older person's family (usually an adult child) receives a financial benefit in exchange for a promise to provide accommodation for, and in some cases care of, the older person as he or she ages.⁷ These arrangements may include the adult child moving in with the older person; a gift of the older person's home to the child; the purchase of a new home to accommodate a larger household; renovations to an existing home; the construction of an ancillary dwelling (granny flat) where the older person simply occupies a room in an existing house. The common denominator is that the older person has made a financial contribution in exchange for accommodation and care for life.⁸ The number of these largely unregulated transactions has increased and, to date, there is a paucity of analysis of the legal ramifications and appropriate responses when these type of arrangements fail.⁹ Such an agreement may be in the form of the contract but in the vast majority of cases, is not reduced to writing leading to disputes as to the nature, scope and content of any arrangement.¹⁰

A dispute involving a family accommodation arrangement can potentially raise an array of legal issues potentially involving contract law, family law, land law and equity and trusts law. At present, an older party wishing to commence an action to recover property in a failed asset for care arrangement would need to pursue an equitable cause of action, which is in turn dictated by the particular circumstances giving rise to the dispute. The available equitable actions are:

- resulting trust;
- undue influence;
- unconscionable conduct;
- remedial constructive trusts; and

¹ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 474 (Deane J); *Blomley v Ryan* (1956) 99 CLR 362; *Johnson v Smith* [2010] NSWCA 306.

² See generally Burns (2002).

³ This is a complex area that is beyond the scope of this report. For an overview see *inter alia* *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ); *Allen v Snyder* [1977] 2 NSWLR 685, 689-90; *Muschinski v Dodds* (1985) 160 CLR 583, 589-90 (Gibbs CJ), 612-614 (Deane J); Barkehall-Thomas (2008).

⁴ *Giumelli v Giumelli* (1998) 196 CLR 101; *Delaforce v Simpson Cook* [2010] NSWCA 84; Barkehall-Thomas (2008).

⁵ Glister (2011)

⁶ *Nelson v Nelson* (1995) 184 CLR 538.

⁷ Webb (25 February 2016)

⁸ *Doris* in some cases when the time comes when medical care is required and a residential facility is more appropriate.

⁹ Herd (2002); Joosten, Dow & Blakey (2015); Somes & Webb (2016)

¹⁰ And, even where the agreement appears to have been made in writing, the situation may become problematic: *Cirillo v Manieri & Anor* [2013] VSC 399; *Manieri v Cirillo* [2014] VSCA 227. CRICOS Provider Code 00301J (WA), 02637B (NSW)

- equitable estoppel.¹¹

For instance, a transaction entered into pursuant to undue influence or the unconscionable conduct of the defendant, may be set aside by the court. Although these doctrines provide a degree of protection to vulnerable individuals against exploitation, the onus still remains upon the older party to commence the action and prove the elements of the equitable claim. 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.

Any contribution to property must be towards the purchase price, or costs necessarily incurred in the acquisition of the property. In these cases, the older party would need to look to other equitable causes of action, such as claiming the arrangement gave rise to a constructive trust, or claiming relief based on the principles of estoppel. Recovery of property via equitable action is rarely undertaken.

The process is fraught with risk. As the ALRC notes at 6.47:

Accordingly, there are a range of potential legal actions available to an older person who has suffered financial loss on the breakdown of a family agreement and their success will depend on the extent to which the facts of the particular situation can meet the required tests in law and equity. The fact that the older person has suffered significant financial loss may not be sufficient of itself. An older person has to weigh up the strength of their case in the context of unwritten agreements and conduct that may be evidence of a range of intentions. This assessment must be made with an understanding of the considerable costs of equity litigation.

The proceedings must commence in the Supreme Court depending on the value of the property involved. Such proceedings are expensive, time consuming and stressful, and it is unlikely an older party has either the financial or emotional resources to commence proceedings.

The ALRC Final Report does not recommend meddling with existing equitable doctrine, preferring to recommend that the state and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.¹² Having said this, the issue should be revisited and, in my view, examined in a Western Australian context.

Property law

Western Australia utilises the Torrens System of land registration. In summary, a registered proprietor enjoys indefeasible title over land, subject only to some limited exceptions. Even if an older person contributes towards the purchase price or towards capital improvement to the property, he or she is rarely on the title. Similarly, if an older person is persuaded to enter into a guarantee or mortgage on behalf of, for example, an adult child, the registered instrument would mean that if the adult child defaulted, the assets of the older person may be jeopardized. Property law principles do not protect an older party's position and lack safeguards for older people who do not have a registered interest in the land and there is little opportunity to protect any equitable interest.¹³ I have recently discussed this issue in an article with Teresa Somes. (2017 22 Canterbury Law Review 120)

Access to justice considerations

Ideally, education and other preventative strategies will assist in reducing instances of elder abuse. The issue will not disappear, of course, and therefore it is essential that older people experiencing abuse have real accessibility to the justice system.

Impediments to accessing the justice system

Older people experiencing abuse may encounter difficulties with, or a reluctance to, access legal assistance. In the first place, there may be a physical, personal, economic or social inability to take action or make a report. For example, a person with diminished capacity may not recognise circumstances of abuse or be unable to make a report without assistance. In other cases there may be a reluctance to report or commence proceedings against a family member as a result of love, loyalty, fear or embarrassment. Even if an older person proceeds with a complaint, there can be impediments through the vagaries of the legal process and the cost (in terms of finances, time and emotional energy) of legal proceedings. Procedural and evidential issues can also be problematic.

¹¹ ALRC Final Report 6.31

¹² Recommendation 6.1

¹³ For example, an older person may have a caveatable interest but the caveat can be challenged and can expire.

Utilising tribunals to address elder abuse issue

One of the pivotal issues for older people who do negotiate the court system is that, in many cases, the matter must proceed in a superior court. For example, in the case of assets for care arrangements, or other matters requiring equitable relief, the matter must be commenced in the District or Supreme Courts. Tribunals are well suited to dealing with older people and disputes between older people and their families.

As Carroll and Smith note¹⁴:

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.

In respect of assets for care arrangements, the ALRC recommends that that 'state and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.¹⁵ The recommendation does not extend to family businesses and farms which are, in the ALRC's view, better suited to formal adjudication through the courts.¹⁶

Implementation of the recommendation would see tribunals given jurisdiction over disputes where an older person's principal place of residence is involved in an assets for care arrangement.¹⁷ The ALRC note that:

although assets for care are but one piece of the elder abuse mosaic, consideration could also be given to extending jurisdiction in other areas involving elder abuse. Obviously this would involve a consideration of appropriate categories of matter, the sum of any monetary limit and how such developments would impact on jurisdiction more broadly.¹⁸

Elder mediation

In my view, there should be an enhanced role for mediation and conciliation services in response to elder abuse. For example, mediation could be—except in cases where it would be in the circumstances inappropriate—an essential first step in matters raised and a condition precedent to any elder abuse matter brought to the Tribunal as discussed above.¹⁹ In Queensland, the Attorney General's Dispute Resolution Branch established a Supported Elder Mediation Project. Unfortunately, the project has been discontinued due to funding restraints.²⁰

Thank you again for the extension.

Kind regards

¹⁴ Carroll & Smith (2010)

¹⁵ Recommendation 6-1, [6.48], [6.51].

¹⁶ [6.51]

¹⁷ [6.48]

¹⁸ A discussion of such issues is beyond the scope of this report.

¹⁹ This was also suggested by National Legal Aid (2016, p. 19) in its submission to the ALRC Inquiry.

²⁰ Queensland Government (2016)

Academic research relevant to Elder Abuse

Eileen Webb, Amity James and Helen Hodgson, **Strategies to enhance housing security for WA's older renters**, Bankwest Curtin Economics Centre, February 2017

Eileen Webb, Amity James and Steven Rowley, **Older Australians and the housing aspirations gap**, Australian Housing and Urban Research Institute (AHURI) Inquiry 2017, March 2017

Eileen Webb, Paul Flatau, Richard Heaney et al, **Social Impact Investing and Housing Policy** (Australian Housing and Urban Research Institute (AHURI) Inquiry 2016B (Completed November 2017))

RESEARCH GRANTS (Completed)

Eileen Webb, Barbara Blundell, Joe Clare, Emily Moir and Mike Clare, **Review into the characteristics of elder abuse in Queensland** A research project on behalf of Department of Communities, Child Safety and Disability Services (Qld), completed September 2017 awaiting release by the Queensland Government.

Professor Wendy Lacey, Dr Susannah Sage-Jacobsen and Eileen Webb, **Single ageing women and housing security: A pilot project in the cities of Unley and Salisbury**, Office for the Ageing, SA Department of Health 2015

Externally led WUN (University of Sydney), **Global initiative promoting meaningful engagement of persons ageing in supported living environments**, Worldwide Universities Network, 2014 <http://wun.ac.uk/wun/research/view/global-initiative-promoting-meaningful-engagement-of-persons-ageing-in-supported-living-environments>.

Eileen Webb, **Security of tenure for the ageing population in Western Australia– Does the current housing legislation in WA support Seniors on-going housing needs?** 2014 Lotteries WA

Eileen Webb, Wendy Lacey, Kenny Annand, **Seniors downsizing on their own terms: overcoming planning, legal and policy impediments to the creation of alternative retirement communities** 2015 Australian Seniors Productive Ageing Grant

BOOK CHAPTERS

Forthcoming

Teresa Somes and Eileen Webb, **Elder Financial Abuse in Australia** in S,Field (ed) Elder Law in Australia, (forthcoming January 2018)

Published

Teresa Somes and Eileen Webb, **What role for the law in regulating older peoples' property and financial arrangements with adult children?** The case of family accommodation arrangements' in in Reubner, Do and Taylor (eds) International Perspectives on the Rights of Older Persons, Vanderplas Publishing, 2015.

ARTICLES IN REFEREED LAW JOURNALS

Accepted for publication

Eileen Webb and Liam Elphick, **Yesterday Once More: Discrimination and LGBTI+ Seniors** 2017 Monash University Law Review

Published

Eileen Webb and Teresa Somes, **What role for real property law in combatting elder abuse through Assets for Care Arrangements?** 2017 22 Canterbury Law Review 120

Eileen Webb, **Papering over the void – Could (or should) consumer law be used as a response to elder abuse?** (2016) 24(2) Competition and Consumer Law Journal 10

Teresa Somes and Eileen Webb **Close to home: Legal dilemmas surrounding family care and accommodation arrangements** (2015) 33(2) Law in Context 24

Ben Travia and Eileen Webb **Housing vulnerability and homelessness in an ageing Australia: Australian law's neglect of security of tenure for older women** (2015) 33(2) Law in Context 52

The Conversation

Social impact investment can help retirees get the housing and care they need (April 19, 2017)

5 of 6

Eager homebuyers still falling victim to shadowy rent-to-buy deals (October 6, 2016)

Explainer: What is elder abuse and why do we need an inquiry into it? (25 February 2016)

Suitable affordable housing is the key to our population ageing well (19 March 2015)

Building funds cut even as older women swell ranks of homeless (1 May 2014)

Affordable Housing is a problem for older Australians too (1 May 2014)

Close to home: Financial hazards for older people in family accommodation arrangements (11 August 2013)

The mistreatment of older people: Is it time to legislate against abuse? (7 June 2013)

Oxford Human Rights Hub

Older homeless women in Australia – <http://ohrh.law.ox.ac.uk/older-homeless-women-in-australia-2/>