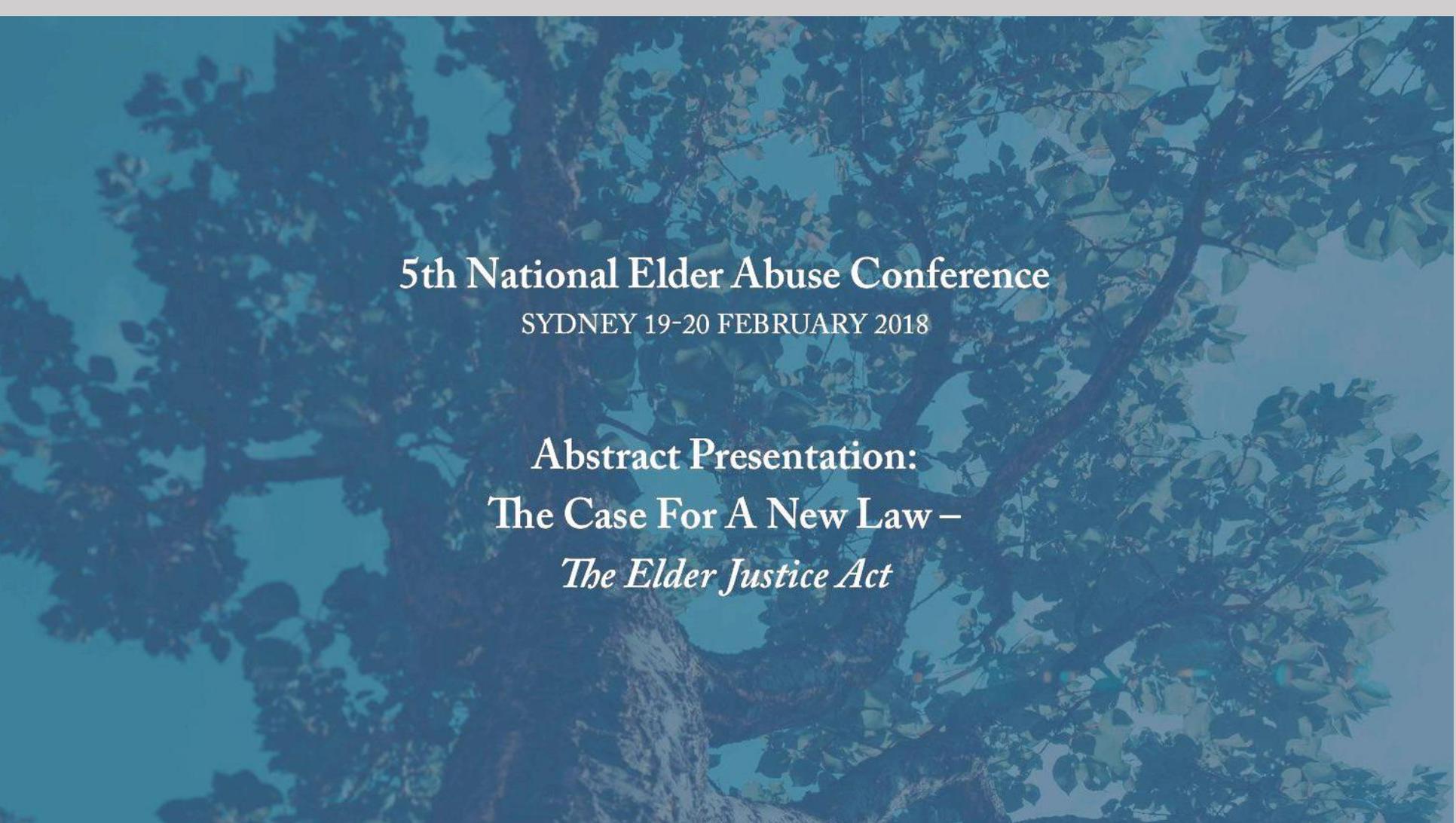




Elderlaw

The Legal Firm



5th National Elder Abuse Conference

SYDNEY 19-20 FEBRUARY 2018

Abstract Presentation:
The Case For A New Law –
The Elder Justice Act



This is a network of first responders and referrers.

There is a gap in the action and remedies which are available to the 'first responders'

- *There is no obvious pathway to follow for people concerned for the welfare of an elder who may be the subject of abuse.*
- *it is common for these agencies /organisations to refer around the circle to others.*



Where the pathway to a remedy exists –

- *it is likely to be ineffective or very expensive for recovering money or restoring the status quo,*
- *difficult to get Police to prosecute –especially in cases of financial abuse*
- *for many types of abuse it is soon realised that ready and accessible remedies do not presently exist*
- *there is no procedure to compel an alleged offender of abuse to attend conferencing for conciliation mediation or arbitration except in criminal matters*

Fill the gap in elder abuse responses with an Elder Justice Law

Even allowing for all of the ALRC recommendations to be implemented there will remain gaps into which victims of elder abuse will continue to fall.

- We need a coherent and 'stand alone' statute adopted by States and Territories in a cooperative legislation scheme.
- That will provide a focal point for the victim, their family, community and government support.
- It will include remedial and restorative justice measures which are affordable for the victim and mandatory for the perpetrator.

Until we criminalise elder abuse in many of its forms, to address the just claims of our vulnerable elders, we cannot restore financial loss or achieve justice and positive rehabilitation for harm and injury without significant legal risk and expense, let alone resolve the residual anguish within the family.

The Main Parts Of The Law

- Who will the law protect?

The Elder Justice Law is intended to protect the rights of vulnerable elders

- Offences – *with elder abuse examples*
- Other important support provisions: Civil remedies, restorative justice, sentencing options

The Main Parts Of The Law

A person might be said to be a “vulnerable elder” if they-

- Are over 65, or with leave of the court or Tribunal, over 55 years and, in either case,
- have a physical, mental, psychological or psychiatric disability
- to the extent that the person is wholly or partially unable to:
 - Defend themselves against physical, mental, emotional or psychological abuse;
 - Defend themselves against exploitation;
 - Understand the nature and effect of their decisions which have been called into question;
 - Make decisions freely and voluntarily;
 - Communicate decisions;
 - Report abuse;
 - Be reasonably mobile in their freedom of personal movement;
 - is frail in body or mind or have a short life expectancy, or
 - make judgments or decisions in their own interests is impaired

Defining disability for the Elder Justice Law

A “disability” may include –

- Impaired cognitive capacity;
- Dependence upon the offender or an associate of the offender including emotional, financial and psychological dependence;
- A position of power or authority over the victim by the offender
- Social isolation;
- Any other matter the Court considers which contributes to the vulnerability of the victim/ elder

The Main Parts Of The Law

Offences – *with elder abuse examples*

- Aggravated undue Influence [*loans, guarantees, accommodation agreements, making wills*]
- Aggravated breach of fiduciary duty [*enduring powers of attorney*]
- Aggravated unlawful restraint of an elder [*carers, aged care or other dependence*]
- Aggravated battery of an elder person [*treatment incl. medications without consent*]
- Aggravated assault of an elder person [*by persons in whom there is trust or dependence*]
- Aggravated neglect of an elder [*where there is harm or injury and dependence*]
- Aggravated elder abuse [*a new general offence*]

The Main Parts Of The Law

Some important support provisions

Civil remedies, restorative justice, sentencing options

- Alternate sentencing options to a custodial sentence
- Dispute resolution service [through diversion, civil remedies and conferencing]
- Family agreement register [providing a defence to some offences like undue influence and breach of duty]
- protection of persons who provide information to authorities.

example – offences:

Aggravated Elder Abuse

Aggravated Elder Abuse

The elements of the offence could include:

- (i) Repeated or persistent emotional, verbal or physical abuse by a carer or other person upon whom the vulnerable elder is dependent and
- (ii) whose conduct is causing or may potentially cause serious harm, and
- (iii) where the perpetrator knows or ought to know of the harm suffered by the elder.
- (iv) Defence could include
- (v) a generalised 'reasonable excuse' or
- (vi) That the elder has reasonably available means to avoid or terminate the harm themselves [for example requiring the offender to leave a home; requiring an offender to undertake to not approach the victim]

Penalties should include 2 years imprisonment and fines

Who wants elder abuse laws to be clarified?



- those who want action on their complaints but cannot afford it
- those who need remedies and restoration of their health/money/property
- those who want to restore the dignity of the family by resolving disputed issues

How will it work?

The proposed procedure will include:

- report of abuse to social, community, health or legal professional, adult safeguarding agencies [see Safeguarding adults at risk, ALRC Report 131, recommendation [14]] or other elder abuse stakeholder
- referral to police or public advocate or Adult Safeguarding Agency for investigation
- police interview witnesses and consider prosecution
- consideration is given to protection of the vulnerable elder
- at the discretion of the police - informal diversion conferencing for all relevant parties and stakeholders [optional] convened by a conciliator - an authorised delegate of police or public advocate [all parties bound by confidentiality] and if there is no agreed outcome, then

How will it work? [2]

- issue of Notice to alleged offender to attend Court, or
- If the elder or their representative requests, the procedure for a civil remedy and civil orders may be sought
- without prejudice to the criminal proceedings which may follow, time for the prosecution is suspended
- Local Court or the Civil & Administrative Tribunal will have the jurisdiction to hear the claim or complaint and
- upon proof of breach of the offence to the civil standard
- may make civil law orders for restitution, recovery of money, and expenses for restoration of the health and welfare of the elder.

How will it work? [3]

If the elder as complainant seeks to continue with the criminal process [when the civil claim is completed by orders or without the civil claim being commenced:

- at the direction of the Police Prosecutor or the Court or, upon application by the accused offender by consent of the elder, conferencing procedure following generally along the lines described in the Young Offenders Act 1997 [NSW] with all necessary context and process altered as required [in drafting the Elder Justice Law] to address the cases of elder abuse which may arise under the proposed Elder Justice law
- in the event of failure of the conferencing process - appearance in Court and hearing of the charge/s
- Local Courts to have jurisdiction in criminal proceedings– upon conviction - penalties not to exceed 2 years imprisonment; court to have power to order reparations and recovery of property and money
- also the intervention programs sentencing options [CPA, chapter 7, part 4] will be available with appropriate programs supported by State government, community and other purpose specific organisations and professionals

Who will it help?



- “vulnerable elders” who have suffered abuse
- family members who are involved in the conflict resulting from abuse but need help to deal with the perpetrator
- community support organisations, first responders and referrers who will be able to
 - refer cases down a clear process pathway offering family support,
 - Assist in access restorative Justice,
 - Assist to access remedies for recovery of property and
 - focus in appropriate cases on conciliation and restoration of family relationships

JUST TAKE AWAY THESE IDEAS-

**RESTITUTION
REPARATIONS
REMEDIAL ORDERS
RESTORATIVE JUSTICE
RECONCILIATION**

Thank you!

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for elders through law.

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