

Episode 18 Summary

Episode name: The Basics of Elder Law

Guest(s): Adeline Schiralli

What area(s) of law does this episode consider?

Elder law, specifically aged care, retirement villages, estate planning, capacity and elder abuse.

This episode touches on both The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disabilities and The Royal Commission into Aged Care Quality and Safety – specifically in regard to the findings concerning elder abuse.

Why is this topic relevant?

The average age of Australia's population is getting older. According to the Australian Department of Health in the 2018 financial year, over 1.3 million older Australians received some form of aged care and of this amount, 241,723 older Australians received permanent residential aged care. With an ageing population comes an increased focus on and an increased need for elder law, an emerging area of legal practise that requires both a depth and breadth of knowledge of many different areas of the law, from estate planning, to property, to superannuation, to tax.

What legislation is considered in this episode?

Commonwealth:

- Aged Care Amendment (Security and Protection) Act 2007
- Social Security Act 1991
- Assistance for Carers Legislation Amendment Act 1999
- National Health Act 1953
- Aged Care Act 1997
- Superannuation Industry (Supervision) Act 1993

NSW:

- Powers of Attorney Act 2003
- Succession Act 2006
- Probate and Administration Act 1898
- Retirement Villages Act 1999

What are the main points?

Retirement villages and aged care facilities are governed differently: there are differences in accommodation fees and the services provided. Both are regulated and often include lengthy contracts that set out the users rights and obligations.

Aged care facilities are heavily regulated: residents agreements are governed under division 59 of the *Aged Care Act* and also Division 4 of the *User Rights Principles 2014*, both governed by the Commonwealth.

Retirement villages: have different ownership structures: where the purchaser doesn't

always acquire a proprietary right when 'buying-in' but rather a contractual right. It can take the form of a leasehold interest or licence.

Retirement villages are governed by the Retirement Villages Act 1999: which sets out the rights and obligations of residents and operators of retirement villages in New South Wales. This Act also establishes mechanisms for the resolution of disputes between residents and operators of retirement villages. The legislation is administered by the Minister for Fair Trading and disputes are managed by The Department of Fair Trading.

Advanced care directive: is often referred to as 'a living will' – it is an oral or written statement that sets out the healthcare treatments a person would like to have or refuse, should he or she be in a position where they are seriously ill or injured and unable to make or communicate decisions about care and treatment.

In regard to guardianship, the NSW Civil and Administrative Tribunal has the power to:

1. appoint a guardian under the Guardianship Act 1987;
2. appoint a financial manager to make financial and legal decisions on behalf of someone who has a decision making disability;
3. provide consent to medical and dental treatment for patients who cannot provide consent;
4. review an enduring power of attorney and make orders under the Powers of Attorney Act 2003, in addition to making declarations varying or revoking an enduring power of attorney.

NCAT receives applications, not only concerning the elderly, but for people of all ages where there is an issue of capacity.

The Royal Commission into Aged Care Quality and Safety: was established on 8 October 2018; the terms of reference focus on incidences of physical, emotional, financial and chemical abuse, as well as incidences of elder abuse in residential aged care occurring as a result of exploitation by family and friends. Last year the Royal Commission's Interim Report revealed that 40% of submissions were related to a claim of neglect, and almost a quarter (22%) reported incidences of emotional abuse.

The NSW Ageing and Disability Commission: was established in July 2019 with the role of "*better protect[ing] older people and adults with disability from abuse, neglect and exploitation from someone they know living in their home or community.*" Their submission to the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability published in March 2020, found that children were the perpetrators of abuse in more than 15% of cases, and spouses counted for 14%. In addition, the most commonly purported types of abuse were psychological at 25.9%, with financial, neglect and physical abuse all sitting at around 20% each.

What are the practical takeaways?

Capacity is an important consideration: in both ensuring that a client has the ability to understand and provide instructions, but also deciding the nature of accommodation that an elderly person needs.

Aged care costs are regulated: and can be divided into 4 main categories and are highly regulated:

- accommodation costs;
- daily care fees;
- means tested care fee;
- extra services fee.

Factoring in any deposit to the Estate plan: under the *Aged Care Act* the refundable accommodation deposit in a retirement village comes back to the estate. It can't be paid out to a third party, even if that third party is the party that contributed to that deposit. For example, if one of five children agrees to pay the accommodation deposit then on exit the deposit is refunded to the estate, not that person. This can be addressed in estate planning documents to account back to the deposit provider.

Greater protections relating to the use of enduring powers of attorney: has been recommended by The Law Council of Australia in its recently published article titled 'Aged Care Quality and Safety'. This article emphasises how protections relating to the use of enduring powers of attorney should be given greater focus, in particular establishing a national registrar to mitigate financial abuse against the elderly. This reflects the view found in the Australian Law Reform Commission's discussion paper on elder abuse, published March 2017, which focused largely on the risk of elder abuse with enduring powers of attorney and enduring guardianships and the need for a national approach and registrar.

Elder abuse is alarming: The Australian Institute of Family Studies estimates that between 2% and 14% of older Australians experience elder abuse in any given year, with the prevalence of neglect possibly higher. Evidence suggests that most elder abuse is intra-familial and intergenerational, with mothers most often being the subject of abuse from their children.

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disabilities: found that 43% of all of the people who reported cases to the Commission were staff members who witnessed or observed behaviours and signs of abuse.

[Show notes](#)

[Advance Care Directives - NSW Parliamentary Research Service, May 2004](#)

[The Royal Commission into Aged Care Quality and Safety – Interim report](#)

[The Law Council of Australia 'Aged Care Quality and Safety' 29 July 2020](#)

[Law Council of Australia 'Elder Abuse Discussion Paper', 6 March 2017](#)