Keeping Violence in View

Identifying Key Themes at the Intersection of Alternative Decision-Making and Family Violence

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Organisation Summary

Monash Law is one of Australia's leading law schools, and the country's largest. It was founded in 1964, and from its earliest years has sought to ally excellence in teaching and research with a strong emphasis on the practical impacts of the law on the community.

Monash Law established Australia's first Clinical Legal Education Program in 1975, operating from the Springvale Legal Service, now the South-East Monash Legal Service. Monash Law Clinics was established in 1978 and is now the centrepiece of the Monash Clinical Program. These legal services owe their existence to the passion and innovation of Monash University law students and academics, who identified and sought to redress the imbalances in access to legal advice and assistance to members of the community.

Since its inception, the mission of MLC has been the provision of accessible and comprehensive legal information and assistance as well as community legal education to disadvantaged members of the community. MLC provides members of the community with the means, which may otherwise be unavailable to them, to become informed about their legal rights and how to enforce them. MLC now operates from two sites – at Clayton and the Melbourne CBD – and provides a broad range of legal services with a strong focus on community law and family law. MLC also has an international focus, working on issues related to abolition of the death penalty, modern slavery, international human rights and international economic law.

For more information about Monash Law Clinics and the Monash Clinical Legal Education Program, please visit: https://www.monash.edu/law/home/cle/clinics.

Glossary

Term		Definition
Family violence		"[V]iolence between intimate partners but also to violence perpetrated by parents (and guardians) against children, between other family members* and in family-like settings" (Commonwealth of Australia (Department of Social Services) *National Plan to End Violence Against Women and Children* (2022) p 37)
Elder abuse		"A single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person" (from World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002))
Coercive control		[S]omeone's use of a pattern of abusive behaviours against another person over time, with the effect of establishing and maintaining power and dominance over them (Commonwealth of Australia (Department of Social Services) *National Plan to End Violence Against Women and Children* (2022) p 37)
Systems abuse		Abuse of processes that may be used by perpetrators in the course of family violence related proceedings to reassert their power and control over the victim (from the Attorney-General's Department (Commonwealth) and Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (June 2023))
Alternative decision-making	**Substituted decision-making**	Where someone makes decisions on behalf of another when that person is deemed to not have decision-making capacity
	Supported decision-making	Where someone assists or supports another to make decisions, such as a supportive person attending medical appointments in order to communicate a person's concerns
	Advance decision-making	Documents or appointments which allow a person to make substituted decisions when the principal no longer has capacity or has passed away, such as an advance care directive or a will
Guardianship		An order by VCAT to give a person (a 'guardian') power to make decisions on another's behalf (the 'represented person'), given when the represented person loses decision-making capacity and VCAT believes appointment of a guardian will promote their personal and social well-being (from Legal Aid Victoria)
Administration		An order made by VCAT authorising a person to manage and administer finances on behalf of a another, given when the represented person does not have decision-making capacity
Enduring power of attorney		A legal document which allows a person to appoint another person to make decisions about personal or financial matters, or both (from Office of the Public Advocate)
Medical treatment decision-maker		A person who has legal authority, through appointment, to make medical decisions on behalf of another person (from Office of the Public Advocate)

*The definition of 'family member' provided under s 8 *Family Violence Protection Act 2008* (Vic), and the relevant factors outlined under sub-s (3), is the definition we have adopted in this Report. This includes past or current spouses and domestic partners, intimate personal relationships, relatives, children who regularly or have previously resided with the person on a regular basis, and children of present or previous intimate relationships.

Introduction

Background

Our shared understanding of family violence, with the assistance of major inquiries and policy reform, is becoming increasingly nuanced. In aid of developing this knowledge further, in this report, we seek to better understand the intersection between family violence, and supportive or substituted decision-making (otherwise termed 'alternative decision-making' in this report). Supportive and substitutive decision-making jurisdictions are tasked with the formalisation of complex relationship dynamics, often between family members, and often for vulnerable members of the community. In doing so, decision-makers such as the Victorian Civil and Administrative Tribunal are required to consider the practicality, and perhaps more importantly, the safety, of appointing an alternative decision-maker for vulnerable persons. However, anecdotally, we have seen the Tribunal be used as a forum for the exertion of power over vulnerable family members. These anecdotal observations formed the basis for our inquiry in this report: what are the key issues which lie in the intersection between alternative decision-making mechanisms, and family violence?

Exploitation and Abuse in Advance Planning

In 2022, the Australian Institute of Family Studies published their findings from the National Elder Abuse Prevalence Study, which was the first of its kind in Australia.[1] The Study found that appointment of enduring powers of attorney reduced the incidence of elder abuse in Australian populations;[2] however, it contains notable limitations. In particular, older persons self-reporting a feeling of safety as a result of enduring appointments may not reflect true protection from dynamics of control or abuse. Additionally, persons with a positive experience of entering into voluntary appointments may have been more inclined to share their experiences. In practice, there remains a risk of family violence, such as through coercive control, systems or abuse, or direct exploitation of these appointments. This may occur at the point of their inception (often recognised legally as undue influence), or their performance (such as misuse of the powers conferred to substituted decision-makers).

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[1] Lixia Qu et al, *National Elder Abuse Prevalence Study* (Final Report, Australian Institute of Family Studies July 2021) 24, 36, 100.

[2] Australian Institute of Family Studies, 'Elder Abuse in Australia: Wills, Powers of Attorney, and Family Agreements' (Research Snapshot, August 2022) 3.

In substituted decision-making contexts, family violence can occur in the following ways (though this is not an exhaustive list): an adult child undermining or questioning their parents' decision-making capacity and influencing medical or legal appointments to prevent their parent from making decisions on their own behalf, a family member intimidating or preventing a person from attending appointments, or forcibly requiring a represented person to do or agree to particular arrangements, such as residing in assisted living, without their consent, as well as harassing or intimidating a family member to make those decisions or agree to those particular arrangements. Additionally, people may feel pressure to enter into family agreements where assets are traded for care. These circumstances may be distinct from the better-known 'elder financial abuse'.[3] Elder financial abuse is commonly defined as a family member appointed with enduring powers of attorney intentionally misusing their powers for personal gain.

According to the Australian Institute of Family Studies, the intersecting jurisdictions and frameworks which affect the ageing population are highly complex, as well as the number of professionals who may come into contact with individuals experiencing elder abuse or family violence.[4] In addition, professionals will have differing understandings of elder abuse and family violence, and may or may not have the time, knowledge, or skills to raise concerns about inappropriate conduct towards an older person.

Analyses of legal precedent have demonstrated an ability and willingness on the part of the Courts to identify potential indicators of coercive influence in testamentary and substitutive decision-making appointments.[5] Browne cites a number of cases, across Australia, New Zealand, and the United Kingdom, wherein the person using violence held an active role in the creation of the victim-survivor's will.[6] However, where the principles of undue influence or unconscionable conduct are not available,

[3] Nola M Ries, 'When Powers of Attorney Go Wrong: Preventing Financial Abuse of Older People by Enduring Attorneys' [2018] *Precedent* (Sydney, NSW) 9, 11; Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (19 March 2019) 24.
[4] Rae Kaspiew et al, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report, 2015) 1, describing the intersecting roles of national and State and Territory governments, local governments, and other agencies.
[5] Darryl Browne, 'Avoiding Elder Financial Abuse: Safeguards Solicitors Should Have in Place' [2018] *Law Society of NSW Journal* 79, 260–61 nns 75–77; Kelly Purser et al, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2020) 12 *Elder Law Review* 1, 28–29.
[6] Darryl Browne, 'Best Practice to Prevent Elder Financial Abuse' (2020) 48 *Australian Bar Review* 249, 253 nn 28; citing *Edwards v Edwards* [2007] EWHC 1119 (Ch); *Nicholson v Knaggs* [2009] VSC 64; *Brown v Wade* [2010] WASC 367; *Petrovski v Nasev; Estate of Janakievska* [2011] NSWSC 1275; *Schrader v Schrader* [2013] EWHC 466 (Ch); *Brown v Guss* [2014] VSC 251.

such as when a matter is heard in an administrative Tribunal, rather than a court of equity,[7] there may also be fewer tools available to decision-makers in acknowledging the impact of unequal power in long-term relationships.[8] Less is known, or acknowledged, about the ways in which appointments of supportive or substituted decision-makers, either voluntarily or involuntarily, can occur within long-standing patterns of abusive or coercive behaviours within family units.

Coercive Control

Several international legislatures have criminalised coercive control, as well as the Tasmanian and New South Wales State Parliaments.[9] The definition of 'family violence' under the Victorian legislative regimes includes 'behaviour … [that] is coercive',[10] and the term has been utilised in family violence literature for nearly five decades.[11] However, the concept of 'coercive control' is characterised by a lack of definitional consensus, and a paucity of robust, consistent institutional responses.[12] Australia's National Research Organisation for Women's Safety ('ANROWS') in 2021 defined coercive control as 'a course of conduct aimed at dominating and controlling another'.[13] Importantly, both ANROWS and Parliament of Victoria have acknowledged the profound and lasting impact of that domination and control, namely, that a person's 'autonomy, liberty … [personhood] … [and agency',[14] and, as we propose in this report, their capacity, is eroded over the course of their relationship with the perpetrator of coercive control. This approach encapsulates Stark's model of coercive control as a 'liberty crime'.[15]

[7] See generally Purser et al (n 5).
[8] See below ***Statutory Landscape***.
[9] Caley Otter et al, 'What is Coercive Control?' (Research Paper, Parliament of Victoria, 6 April 2022) 6; citing New South Wales Government, 'Coercive Control' (Discussion Paper, 2020) 20; *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW).
[10] *Family Violence Protection Act 2008* (Vic) s 5(1)(a)(v).
[11] Otter et al (n 9) 3.
[12] See, however, The Attorney-General's Department (Commonwealth) and Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (June 2023) <https://dfvbenchbook.aija.org.au/>, 37-8. Whether coercive control should be criminalised is an issue which falls outside the scope of this report.
[13] Australia's National Research Organisation for Women's Safety, 'Defining and Responding to Coercive Control: Policy Brief' (ANROWS Insights, January 2021) 1.
[14] Ibid 1–2; Otter et al (n 9) 3; both citing Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).
[15] Heather Nancarrow, 'Domestic Violence Law: When Good Intentions Go Awry' in Ramona Vijeyarasa (ed), *International Women's Rights Law and Gender Equality* (1st ed, Routledge 2021) 44–45; citing Stark (n 14).

Identifying or defining coercive control in terms of the originating behaviours underestimates the impact of those behaviours in the long-term.[16] Instead, the 'social entrapment' brought about by coercive and controlling behaviours is better understood as the 'restrictions placed on … autonomy and agency by … abusive and controlling behaviours and by broader systemic patterns of harm'.[17] In 1999, James Ptacek developed the elements of the 'social entrapment' model of coercive control,[18] and it is now said to comprise three dimensions:[19]

(1) The personal impact – described by Tolmie and colleagues as 'social isolation, fear, and coercion'[20] brought about by the person using violence in the life of the victim-survivor;
(2) The 'indifference'[21] exhibited by institutions, such as the justice, law enforcement, or health sectors, to the victim-survivor's experience; and
(3) The 'exacerbation' of the victim-survivor's experience by 'structural inequities associated with gender, class, race, and disability'.[22]

We endeavour to explore these elements, either explicitly or implicitly, throughout this report.

Experiences of Older People and People with Disabilities

The third element of the social entrapment model requires us to consider how systemic inequity exacerbates experiences of coercive control.[23] The Royal Commission into Family Violence, published in 2016, acknowledged that older people 'experience … intimate partner violence … violence perpetrated by adult children or other family members … or violence at the hands of a carer'.[24] The

[16] 'It is not just the behaviour but the instrumental effect of the behaviour that has to be understood': Julia Tolmie et al, 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence' [2018] *New Zealand Law Review* 181, 186.
[17] Julia Tolmie et al, 'Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework' (2024) 30 *Violence Against Women* 54, 55; citing Michelle L Toews and Autumn M Bermea, '"I Was Naive in Thinking, 'I Divorced This Man, He Is Out of My Life'": A Qualitative Exploration of Post-Separation Power and Control Tactics Experienced by Women' (2017) 32 *Journal of Interpersonal Violence* 2166.
[18] James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (The Northeastern Series on Gender, Crime, and Law, Northeastern University Press 1999) 10; cited at Tolmie et al (n 16) 185.
[19] Tolmie et al (n 16) 185; citing Family Violence Death Review Committee, 'Fourth Annual Report: January 2013 to December 2013' (2014) 80.
[20] Tolmie et al (n 16) 185.
[21] Ibid.
[22] Ibid; Family Violence Death Review Committee (n 19) 80; describing the third element as 'the ways that men's coercive control can be aggravated by structural inequalities of gender, class and racism': Ptacek (n 18) 10.
[23] See, eg, Tolmie et al (n 16) 197–201.
[24] State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations* (Summary Report, March 2016) 33.

Commission found that entrenched views in the community of older peoples' reduced capabilities, dependency on others, and perceived 'lack' of contribution to society prevents our understanding of the full impact of violence against this demographic.[25] The same stigmatic attitudes may be said to exacerbate violence perpetrated against people with disabilities.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability found that 'across all age groups, a greater proportion of people with disability experience violence than people without disability'.[26] Of the people with disability who know the perpetrator of violence against them, 22% experienced violence perpetrated by a family member, and 19% experienced violence by a current intimate partner.[27] Additionally, in its own words, the Office of the Public Advocate is responsible for the investigation of a 'staggering'[28] number of allegations of abuse or neglect of persons with disabilities – a total of 426 in 2022-23.[29] As a demographic, women with disabilities are profoundly impacted by family violence, and as acknowledged by the Royal Commission into Family Violence, family violence may be a 'direct cause of disabilities' in some women.[30]

Despite an awareness on the part of legislators and researchers of the intersection between family violence and disability, limitations in research capabilities (such as cost, alternative data collection methods, and time required to recruit 'hard-to-reach'[31] cohorts) contribute to the knowledge gap between the experiences of disabled and non-disabled older persons in situations of family violence.[32] Further, in 2018, Bedson and colleagues articulated a concern that the 'overuse of guardianship' appointments, alternatively termed involuntary substituted decision-making appointments, may contribute to increased rates of elder abuse (and, by implication, family violence) in cohorts with a

[25] Ibid 34.
[26] Government of Australia, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023) vol 3 p 5.
[27] Ibid vol 3 p 9.
[28] Office of the Public Advocate, 'OPA Annual Report 2022-2023' (1 November 2023) <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/648-opa-annual-report-2022-2023> accessed 25 January 2024.
[29] This figure represents the number of issues which were received by OPA via their advice service. Office of the Public Advocate, '2023 Annual Report: Safeguarding the Rights and Interests of People with Disability' (November 2023) 19.
[30] State of Victoria (n 24) 36.
[31] Lois Bedson et al, 'The Prevalence of Elder Abuse among Adult Guardianship Clients' (2018) 18 Macquarie Law Journal 15, 16.
[32] 'To date [in 2018], only one national elder abuse prevalence study [in Spain] has included older people with a cognitive impairment': Bedson et al (n 31); citing Isabel Iborra Marmolejo, 'Elder Abuse in the Family in Spain' (Research Report, 2008).

disability.[33] Thus, use of alternative decision-making mechanisms, such as enduring powers of attorney or guardianship, as a solution to reduced capacity in older individuals, individuals with a disability, or other vulnerable cohorts, may serve to exacerbate cycles of violence already present in their lives.

Research Questions

In order to conduct this research, and in acknowledgement of our evolving understanding of the intersection between family violence and substituted decision-making, we adopted an inductive approach to this research. We commenced with discussion of specific instances or experiences and expanded our inquiries to broader themes.

Research Questions	
In what circumstances could, or do, family violence and alternative decision-making intersect?	
Source of Findings	**Research Sub-Questions**
Arising from *focus groups*	What is the level of awareness of the intersection between family violence and alternative decision-making among service providers?
	How do service providers navigate client matters where family violence and alternative decision-making intersect?
Arising from analysis of *Tribunal decisions*	Based on publicly available information, to what extent does the Tribunal acknowledge, or account for, family violence in alternative decision-making matters?

[33] Bedson et al (n 31) 16–17.

Research Approach

Data Collection and Analysis

VCAT Decisions

Published VCAT decisions from 1 January 2021 to 31 December 2022 were collected from Austlii. Matters involving statutory alternative decision-making mechanisms, such as enduring powers of attorney, guardianship and administration orders, and medical treatment decision-making were reviewed by two independent research assistants, using a questionnaire which focussed on three key themes: conduct by parties to the proceedings, evidence presented to (and used by) the Tribunal, and outcomes imposed by the Tribunal (see ***Appendix C***). A quantitative case analysis of the decisions was not conducted for this report. Given the relatively low proportion of published decisions compared to unpublished decisions, and the criteria for publication (see below ***Limitations***), any quantitative findings would not have been generalisable.

This process was not intended to offer definitive findings as to the Tribunal's handling of matters impacted by family violence; indeed, family violence was not explicitly stated to have occurred in the vast majority of the published decisions which were reviewed. We adopt a similar approach as that used by Bedson and colleagues in a case file review of the Office of the Public Advocate – that is, where factual circumstances described in available data could give rise to a 'reasonable suspicion' of family violence,[34] we have included the decision in our considerations. However, we do not make claims as to whether this abuse has been substantiated, or could be substantiated, or whether there is sufficient evidence to establish family violence in a formal legal setting.[35] Given we did not undertake a quantitative analysis, this work is also not intended to act as a prevalence study for family violence in the Guardianship List. Further work, including the collection of qualitative data through interviews with VCAT Members and organisations such as the Office of the Public Advocate, would assist in the development of knowledge in this area. We are acutely aware that family dynamics are complex, and often informed by several factors which will not be presented in a tribunal hearing or published decision. As such, we sought to understand the ways in which, when faced with concerning or potentially harmful

[34] Bedson et al (n 31) 24.
[35] Ibid 24 nn 49.

family dynamics, the Tribunal responds to these dynamics, within the scope of its statutory powers, and the extent to which family violence is discussed in Reasons for Decisions published by the Tribunal.

Unstructured Interviews

Between September 2023 and March 2024, we conducted unstructured single- and multi-person interviews (n=6) with service providers in the community health (n=8) and hospital settings (n=1). ***Appendix A*** outlines the initial questions explored in the interviews, with the necessary caveat that the interviews were not structured according to question. The interviews were transcribed using external software, for which consent was obtained from participants, de-identified by a researcher, and imported into NVivo. A thematic analysis was conducted using NVivo. An initial, open categorisation of statements from participants was conducted. A second, finer analysis was undertaken in order to clarify and articulate the key themes arising from our discussions. Later interviews were coded according to this latter framework, with emergent themes being introduced to the analysis where necessary.

We adopted an explorative approach to the qualitative analysis of this data. We were not seeking to develop a specific theory from our analysis; rather, we sought to understand the varied facets of the issue, and the intersection between dynamics of violence and substituted or supportive decision-making, and to identify gaps in our knowledge. It is significant to note that the lead author has received funding for future research into the dynamics of caregiving and family violence in 2024 and 2025, and for that reason, themes strongly associated with caregiving have not been explored extensively in this report.

Research Ethics

Ethical approval to conduct interviews of service professionals was granted by the Monash University Human Research Ethics Committee ('MUHREC') on 5 May 2023 (Reference ID: 37324). Ethical approval to conduct interviews of cohealth Community Health Service health and allied health professionals was given by the cohealth Health Ethics Advisory Group on 14 June 2023 (REDCap Record ID: 5).

Key ethical considerations in this project included: the need for fully informed consent to the use of information obtained regarding professional expertise and experiences, compliance with individual organisational policies and ethical codes of conduct, and conducting the research in a trauma-informed,

holistic manner. In particular, the topics discussed in unstructured interviews were intended to challenge service providers preconceptions of their patient-clients' experiences with family violence and systems abuse, and we acknowledged through the participant recruitment documentation that the process of critical reflection can be confronting to research participants.

Limitations

1. Research Resources

Conclusions reached regarding the potential presence of family violence, where not explicitly stated on the facts, are assumptions based on the relationship dynamics and behaviours described within the decision. VCAT publishes decisions where written reasons have been requested.[36] Additionally, where VCAT determines that a matter is of public interest or is otherwise 'high profile', the Tribunal may publish a written decision through the Australian Legal Information Institute ('Austlii'). As such, our research is limited by the scope of publicly available information relating to Guardianship List hearings. The 2021-22 Annual Report tabled by VCAT to State Parliament lists a total of 12,848 cases lodged in the Guardianship List in the preceding year ending 30 June 2022.[37] By contrast, published decisions available through Austlii from that same year total 34. Additionally, even if we did have access to unpublished decisions, many matters under the Guardianship List are resolved or withdrawn prior to a formal hearing. There is a vast discrepancy between publicly available data, and the reality of the everyday experiences of parties and workload of the Tribunal.

2. Self-Exclusion from Participation

A significant challenge in recruiting participants to this research was self-exclusion from participation due to a perceived lack of knowledge or insight, or a misunderstanding of the legal expertise required to contribute to our discussions. Our expectations of recruitment were based upon anecdotal and inter-professional discussions conducted in the context of health justice partnerships; however, we found that once we sought to recruit organisations or participants outside that specific context, participants and organisations primarily situated in the guardianship and legal jurisdictions were less likely to

[36] See, for the process of providing written reasons for decision by decision-makers and the Tribunal: Victorian Civil and Administrative Tribunal Act 1998 (Vic) ss 45-47.
[37] Victorian Civil and Administrative Tribunal, *2021-22 Annual Report* (15 September 2022) <https://www.vcat.vic.gov.au/news/2022-23-annual-report-tabled-parliament> 34.

indicate their interest in participation. In Victoria, the family violence and substituted decision-making jurisdictions are legally distinct, and as such, legal practitioners may not perceive themselves as having the requisite experience or expertise in both areas of law and may have elected not to participate for that reason. Further, understanding of family violence and its intersection with the law and legal decision-making does not form part of compulsory curricula in Australian universities or practical legal training courses.[38] What has been termed 'domestic violence lawyering', or lawyering which accounts for and addresses the impact of family violence both within and outside legal structures,[39] is not necessarily integrated with other practice areas. In particular, legal practitioners in typical estate planning and alternative decision-making jurisdictions may not have a sufficient understanding of the various forms of family violence and its impacts on clients or their families.[40] However, anecdotally, we believe the inverse is not true. Participants working in family violence settings had a demonstrable understanding of the guardianship jurisdiction and its impact on clients, and particularly the ways in which family violence may impact processes.

3. Participant Bias

Recall bias may occur where participants have difficulty recollecting their experience or are inadvertently directed to provide particular answers in the data collection process. The form and prevalence of family violence in complex family dynamics means that service providers may not be aware of its existence or effect in the lives of their clients (for example, coercive control may not be discussed by their client, or the service provider may not identify that continued applications to the Tribunal by a family member may constitute systems abuse). As such, where we ask questions regarding family violence and provide illustrative scenarios to participants, their recollection may be biased by these sample scenarios, and they may recall facts relevant to their professional experience which were different to reality. However, the risk of memory degradation or false recollection is very low, given all participants are currently working in the community health and hospital sectors. Further,

[38] Jane Wangmann et al, 'What is "Good" Domestic Violence Lawyering?: Views from Specialist Legal Services in Australia' (2023) 37 *International Journal of Law, Policy and the Family*, 3.
[39] Paraphrasing ibid 4.
[40] Ibid 5 nn 22; citing Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report, 5 March 2019) [13.71], [13.73]; Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever* (Final Report, 2015) 14; Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Research Report, 2014) 114; 'Women's Experiences of Surviving Family Violence and Accessing the Magistrates' Court in Geelong, Victoria' (Research Report, 2013) 30.

several of the participants we spoke with work in specialised family violence settings, as such, it is unlikely they would have felt obliged or pressured to discount their own expertise.

Acquiescence bias occurs where participants are placed in a position to attribute greater weight to the information and insight offered by researchers in interviews, or 'agree' with the researchers – this may be a product of unequal informational power in an interview dynamic. Because participants were being recruited by virtue of their interactions with patient-clients, rather than their experience of assisting patient-clients with specific experiences, they may 'acquiesce' or falsely attribute significance to professional experiences by virtue of their participation in this research. The same factors outlined above in relation to recall bias would be protective against acquiescence bias.

Where they identified that they had not experienced or observed these scenarios, greater focus was placed on their professional opinion and understanding of themes explored generally through this research, such that the relevance of their insight was reframed. Part of our inquires focussed on circumstances in which violence was rendered invisible to service providers. As such, where participants flagged a lack of knowledge to the researchers during interviews, this was noted and explored as an essential element of our inquiries.

4. Researcher Bias

Confirmation bias occurs when researchers prioritise findings which support their initial hypothesis or assumptions. Alternatively, researchers may intentionally omit findings which are not favourable to their overall research aim. Qualitative analysis via NVivo (that is, using the program's 'coding' capability) can involve the use of initial assumptions as to the themes which may arise from the data obtained from interviews. The nature of the questions were such that they highlighted or prioritised the discussion of instances of systems abuse or other forms of family violence in substituted decision-making contexts. Additionally, because our analysis of the VCAT decisions involved drawing inferences from scenarios provided to the Tribunal by the relevant parties, summarised by a Tribunal Member, rather than identifying explicit mentions of family violence, there may be confirmation bias on our part through the active 'seeking out' of circumstances that amount to family violence. We attempted to mitigate confirmation bias attaching to analysis of the VCAT decisions by conducting two separate analyses by independent research assistants (see ***Appendix B*** for exclusion criteria for the informal VCAT

decision review). Further, our research findings pertaining to VCAT decisions are descriptive, and are intended to identify further areas of research or practice development in this intersection.

Key Inquiries

Several inquiries concerning family violence and the experiences of older people and people with disabilities have been conducted in Australia over the last decade. The Royal Commission into Family Violence, tabled to Victorian Parliament in 2016, was established in order to address profound concerns as to the growing issue of family violence in the community, and the challenges facing generalist and specialist support services, and correction services, in addressing these concerns. Specifically, the Commission was to 'inquire into and report on how Victoria's response to family violence can be improved by providing practical recommendations to stop family violence'.[41]

Amongst the 227 recommendations made by the Commission, several concerned the needs of older people and people with disabilities, two demographics likely to come into contact with Victoria's supportive and substitutive decision-making regime. Significantly, the Commission recommended particularised funding to specialist bodies in order to provide 'appropriate services to older Victorians … and people with disabilities who experience family violence', as well as 'build[ing] partnerships … to enable [effective responses] to the needs of people in these communities'.[42] Recommendations 153-5 pertained specifically to the needs of older Victorians experiencing family violence, and recommendations 170-9 pertained specifically to the needs of people with disabilities experiencing family violence. Notably, for our purposes, the Commission recommended further research into the 'prevalence of acquired brain injury among family violence victim[-survivors] and perpetrators',[43] acknowledging a correlational link between family violence and disability, and by extension, impacted capacity.

In 2017, the Australian Law Reform Commission tabled their *Elder Abuse – A National Legal Response* Final Report ('ALRC Elder Abuse Report') to the Federal Government. The ALRC Elder Abuse Report contained 43 recommendations. The first set of recommendations was to develop and implement a National Plan to Combat Elder Abuse.[44] This culminated in the publication of the *National Plan to Respond to the Abuse of Older Australians 2019-23* by the Council of Attorneys-General, which contained five key priorities in the strengthening of service responses to various forms of elder abuse.

[41] State of Victoria, *Royal Commission into Family Violence* (Final Report, March 2016) vol I, 1.
[42] State of Victoria (n 24) 83.
[43] Ibid 91.
[44] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report, 31 May 2017) 9.

These priorities were: enhancing understanding of elder abuse, improving community awareness of elder abuse and access to information, strengthening service responses, planning for future decision-making, and strengthening safeguards for older Australians. The second set of recommendations of the ALRC Elder Abuse Report concerned changes to the aged care industry, such as to introduce a 'serious incident response scheme' for aged care facilities, with an independent oversight body, and to regulate and safeguard against restrictive practices in residential aged care settings.[45] The Aged Care Quality and Safety Commission launched the Serious Incident Response Scheme on 1 April 2021 in order to 'reduce abuse and neglect among people receiving aged care' by providing guidance to aged care providers regarding proper management and reporting of incidents.[46]

The third set of recommendations arising from the ALRC Elder Abuse Report concern enduring appointments. Publication of the Australian Law Reform Commission *Elder Abuse – A National Legal Response* Report strongly coincided with the implementation of a new statutory regime in the area of substituted decision-making (see below ***Statutory Landscape***). The Commission recommended, among other matters, that witnessing requirements be enhanced, restrictions be placed on who may be an attorney, and clearly delineate between decisions which are within the purview of an enduring power appointee, and those which are not. The ***Guardianship and Administration Act 2019*** **(Vic)** ('**GA Act**') incorporated these recommendations to an extent (see below ***Statutory Landscape***). The ALRC Elder Abuse Report also recommended the signing of an undertaking by guardians and administrators,[47] as well as the development of best practice guidelines for Tribunals to support and ensure the participation of represented persons in proceedings. In order to effectuate this latter recommendation,[48] the Australian Guardianship and Administration Council published practice guidelines for Australian Tribunals in 2019.[49] Amongst other matters, the Guidelines indicate transparency and candour in notice requirements, pre-hearing procedures, and procedural matters will assist in maximising participation.[50] For the purposes of this report, Guidelines 13 and 19 address

[45] Ibid 10–12.
[46] Aged Care Quality and Safety Commission, 'The Serious Incident Response Scheme' (Webpage, Australian Government, 2021) <https://www.agedcarequality.gov.au/providers/serious-incident-response-scheme>.
[47] Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (n 44) 82 [3.102], 321-26 [10.15]-[10.31].
[48] Ibid 15.
[49] See Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings: Guidelines for Australian Tribunals* (Final Report, June 2019).
[50] Ibid 4–5.

issues of vulnerability which may render the process of determination, or participants in the matter, susceptible to systems abuse or other forms of family violence –

- **Guideline 13** recommends a principal or represented person be accompanied by a support person, unless the Tribunal determines that the proposed support person is acting, or is likely to act, contrary to the person's interest;[51] and
- **Guideline 19** states that reviews of existing orders should only be determined once the Tribunal has made reasonable attempts to obtain the views of the principal or represented person and, importantly, that up-to-date medical information regarding the person's decision-making capacity and current circumstances have been obtained.[52]

Other sets of recommendations included those pertaining to family agreements, superannuation, wills, banking, and social security.[53] Finally, the Commission recommended the enactment of 'adult safeguarding laws', which included the introduction of a statutory duty to make inquiries in circumstances where an agency has reasonable grounds to believe an adult is at-risk – this is taken to include adults with care needs, who are being abused or neglected, or are at risk of abuse or neglect, and who are unable to protect themselves from abuse or neglect as a result of their care needs.[54] In 2022, the Office of the Public Advocate published their *Line of Sight: Refocussing Victoria's adult safeguarding laws and practices* Report. The Report identified that adults who are 'experiencing abuse … that does not meet a criminal threshold' are at particular risk of 'falling into the cracks' of service provision, particularly in regard to safeguarding against further abuse.[55]

The Royal Commission into Family Violence also found the 'safety of victim[-survivors] is undermined by inadequate methods for sharing information … about perpetrator risk'.[56] In order to address this concern, the Commission recommended implementation of an information-sharing scheme between service providers, and changes to the existing risk assessment framework, which was initially

[51] Ibid 5.
[52] Ibid 6.
[53] Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (n 44) 203–303.
[54] Ibid 15–16, 375–412.
[55] Office of the Public Advocate, *Line of Sight: Refocussing Victoria's Adult Safeguarding Laws and Practices* (Final Report, August 2022) 9.
[56] State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations* (n 24) 6.

introduced in 2007.[57] The previous framework was comprised of three Practice Guides. The first was intended for use by 'professionals working in mainstream settings … who encounter people they think might be victims of family violence'.[58] The second was for professionals 'who work with victims of family violence but for whom responses to family violence are not their primary business'.[59] The third, and final, practice guide 'assist[ed] specialist family violence professionals' with 'advanced skills in engaging clients around family violence matters, as well as in detailed safety planning and case management'.[60]

The Victorian Government introduced the new Family Violence Information Sharing Scheme through insertion of Part 5A to the existing ***Family Violence Protection Act 2008*** **(Vic)**. Under the Act, prescribed information sharing entities are permitted to share information pertinent to the assessment or management of family violence risk. The obligations of organisations responsible for risk assessment differ from those of information-sharing entitles to the extent that they operate under different purviews – for example, a risk assessment agency is permitted to share information about an alleged perpetrator, whereas an information sharing entity is not.[61] Where this impacts the sharing of health information, such as information governed by the ***Health Records Act 2001*** **(Vic)**, or more general information governed by the ***Data Protection Act 2014*** **(Vic)**, the Office of the Victorian Information Commissioner has stated that the privacy principles contained therein have 'modified application'.[62] Only information which is relevant to the management or assessment of family violence risk may be shared, given consent is not required by the alleged perpetrator or perpetrator to share the information.[63] In May 2023, a five-year legislative review of the Scheme identified persistent issues with the Act's implementation. These included, briefly, the framework's 'clarity', 'effectiveness', its real-world impact on victim-survivors, the effectiveness of the 'Central Information Point', which is a report which

[57] Department of Human Services, 'Family Violence: Risk Assessment and Risk Management Framework and Practice Guides 1-3' (April 2012) 15; cited in State of Victoria (n 41) vol 1, 65; citing Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria* (Final Report, 2005).
[58] Department of Human Services (n 57) 15; State of Victoria (n 41) vol 1, 102.
[59] Ibid.
[60] Ibid.
[61] Family Safe Victoria, 'Family Violence Information Sharing Guidelines: Guidance for Information Sharing Entities' (April 2021) 41.
[62] Office of the Victorian Information Commissioner, 'Resource for Organisations: Family Violence Information Sharing Scheme and Privacy' (Webpage, January 2019) <https://ovic.vic.gov.au/privacy/resources-for-organisations/family-violence-information-sharing-scheme-and-privacy/>.
[63] Family Safe Victoria (n 61) 7.

consolidates information regarding a perpetrator, and clarity of the legal provisions regarding the Multi-Agency Risk Assessment and Management Framework and its effectiveness.[64]

In 2022, the Federal Government's Department of Social Services published the *National Plan to End Violence Against Women and Children*, a two-part Action Plan which works toward supporting efforts 'prevention, early intervention, response, and recovery and healing'[65] from family violence over a ten-year period. The most recent National Plan builds upon the previous 2010-2022 Plan, which unfortunately saw 'intimate partner prevalence … [remain] consistent' and 'an increase in sexual violence' during its period of implementation.[66]

In September 2023, the Royal Commission into Abuse, Violence, Neglect and Exploitation of People with Disability ('Royal Commission into Disability') was tabled in Federal Government. The Report adopts a broad definition of the term 'violence' which includes coercive control, and an acknowledgement that violence occurs in any setting, including 'family or domestic relationships'.[67] The Commission, from data obtained by the Australian Bureau of Statistics, found that 'people with disability … are subjected to higher rates of interpersonal violence and abuse than people with disability'.[68] The Commission recommended reformulation of existing supportive and substituted decision-making mechanisms, and orientation of relevant Acts' principles and titles to the issue of 'decision-making', so as to centre the role and agency of the represented person. Additionally, the Commission recommended movement away from the term 'capacity' and instead adoption of the term 'decision-making ability'.[69] For the purposes of this report, we maintain the language of 'capacity', given its use in legal, medical, and allied health contexts, and to ensure clarity when discussing existing statutory provisions.

Most recently, in February 2024, the Victorian Government commenced implementation of the Health Information Sharing Scheme through the ***Health Legislation Amendment (Information Sharing) Act***

[64] Summarised at ibid 1–4.
[65] Commonwealth of Australia (Department of Social Services), *National Plan to End Violence against Women and Children 2022-2032* (17 October 2022) 19.
[66] Ibid 22.
[67] Government of Australia (n 26) vol 3, 1-2.
[68] Ibid 86 [3.3]; citing Australian Bureau of Statistics, 'Personal Safety, Australia: Statistics for family, domestic, sexual violence, physical assault, partner emotional abuse, child abuse, sexual harassment, stalking and safety 2016' (Data Release, 8 November 2017).
[69] Government of Australia (n 26) vol 6, 160-3.

***2023* (Vic)**. Doing so 'establish[es] a centralised electronic system … enabl[ing] public hospitals and other health services to share specified patient health information for the purpose of providing medical treatment to patients'.[70] While further research is required to establish the use of the Scheme in identifying and assessing risk for family violence, if indicators of family violence are flagged in a person's medical records, this may be a mode of communicating risk between treating practitioners. However, where information contained within medical records could be relevant to identification of or risk management for family violence, access by perpetrators to those records must be considered as a risk factor.

[70] *Health Legislation Amendment (Information Sharing) Act 2023* (Vic) s 1(a)(i).

Statutory Landscape

In 2017, the Victorian Parliament inserted Part 5A of the ***Family Violence Protection Act 2008*** **(Vic)**. Part 5A governs the Family Violence Information Sharing Scheme ('FVISS'), which permits the sharing of information for 'family violence assessment purposes' as well as 'family violence protection purposes', both defined under the Act. Under the Act, where an information sharing entity 'reasonably believes that there is a risk that [a] person may commit family violence', that person is a 'person of concern'.[71] The Act operates under the following key principles: collaboration between services in order to coordinate services, precedence of the right to be safe from family violence over the right to privacy, collection, use and disclosure of information only where necessary to assess or manage risk, or hold perpetrators to account, promotion of the right to self-determination, cultural sensitivity, and consideration of familial and community connections in the collection, use, and disclosure of information of a person who identifies as Aboriginal or Torres Strait Islander, and respect for a person's cultural, sexual, and gender identity, and religious faith.[72] Further, in the assessment of risk of family violence and protection of children, the Act encourages promotion of the agency of children and other at-risk family members, collection of information in a way which plans for safety of at-risk family members, as well as the preservation of positive relationships within families.[73] According to the Victorian Government, the sharing of information in accordance with these principles has two key outcomes: to keep perpetrators 'in view and accountable', and to 'promote the safety of victim-survivors of family violence'.[74]

The ***Guardianship and Administration Act 2019*** **(Vic) ('GA Act')** repealed the preceding ***Guardianship and Administration Act 1986*** **(Vic)**[75] in order to provide a more flexible, humanised approach to capacity assessment – with the particular intention of preventing premature or unnecessary appointment of substituted decision-makers.[76] The primary object of the **GA Act** is to

[71] *Family Violence Protection Act 2008* (Vic) s 144B.
[72] Ibid s 144J(2).
[73] Ibid s 144J(3).
[74] State Government of Victoria, *Family Violence Information Sharing Scheme* (4 November 2022); see also *Family Violence Protection Act 2008* (Vic) s 144J.
[75] *Guardianship and Administration Act 2019* (Vic) s 1(b) ('*Guardianship and Administration Act*').
[76] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 61 (Jill Hennessy) <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2018-12-19.pdf> ('*Guardianship and Administration Act 2019* (Vic) Second Reading Speech')

promote the 'human rights and dignity of persons with a disability' in line with international human rights instruments.[77]

The **GA Act**, broadly, governs proceedings occurring under the Guardianship List of VCAT, particularly the appointment, amendment, revocation, or review of guardianship, supportive guardianship, administration, or supportive administration orders.[78] Guardianship or administration orders are made where a person is deemed to lack sufficient decision-making capacity to manage their own personal or financial affairs.[79] A 'supportive' order does not allow substituted decision-making. It is necessary to note that guardianship or administration appointments are not made or initiated by the represented person, they are made where VCAT deems them to be necessary (otherwise termed 'involuntary appointments'). By contrast, the below-mentioned Acts govern voluntary appointments of substituted decision-making powers by the person whose decision-making shall be substituted (the 'principal'). The Office of the Public Advocate advises against the imposition of guardianship orders except where they are absolutely necessary, and further recommends the implementation of a 'funded, supportive guardianship program' which would offer a less restrictive alternative, particularly for individuals who are isolated from social networks which would otherwise support or enhance their decision-making capacity.[80]

The ***Powers of Attorney Act 2014*** **(Vic) ('POA Act')**, the enactment of which sought to consolidate laws surrounding powers of attorney, the meaning and assessment of capacity surrounding matters relating to enduring and supportive powers of attorney,[81] and introducing 'supportive attorneys'.[82] Powers of attorney may relate to personal, financial, or other specific matters.[83] The **POA Act** introduced stricter requirements for witnessing appointments and revocations of enduring powers of attorney, intended to protect against abuses of power.[84] 'Supportive attorneys', like supportive

[77] *Guardianship and Administration Act* (n 75) s 7(1)-(2).
[78] Ibid ss 30, 87.
[79] Assessed according to ibid s 5.
[80] Office of the Public Advocate, *2023 Annual Report: Safeguarding the rights and interests of people with disability* (n 29) 5.
[81] Determined according to *Powers of Attorney Act 2014* (Vic) s 4 ('*Powers of Attorney Act*').
[82] Ibid s 1.
[83] Ibid s 22.
[84] Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2393 (Robert Clark) < https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2014/Assembly_Daily_Extract_Thursday_26_June_2014_from_Book_9.pdf> ('*Powers of Attorney Act 2014* (Vic) Second Reading Speech').

guardians and administrators, are not permitted to make substituted decisions on behalf of the person by whom the powers have been appointed, the principal.[85] Instead, their appointment is intended to augment the decision-making process by the principal through powers conferred under the Act. These powers include the ability to 'access, collect or obtain' relevant personal information about the principal,[86] communicate information or a supported decision,[87] and give effect to a decision by a principal, other than a 'significant financial transaction'.[88]

The ***Medical Treatment Planning and Decisions Act 2016*** **(Vic) ('MTPD Act')** regulates advance care directives, the appointment, amendment, or revocation of medical treatment decision-makers, and support persons in medical treatment decision-making.[89] Advance care directives may be 'instructional' or 'values-based' and must be considered even where they do not meet formal requirements under the Act.[90]

Medical treatment decision-makers may be appointed under the Act or may be deemed where a medical treatment decision-maker is required to consent for a person without capacity.[91] The latter is intended to provide certainty where a person has not appointed a medical treatment decision-maker, and ensure that candidates have maintained a 'close and continuing relationship' and are thus best placed to represent the person's interests and wishes.[92] Whether consideration of informal medical treatment decision-maker appointments occurs in everyday practice is less certain. The Act provides for a decision-making process to be adopted by substituted decision-makers.[93] Support persons appointed under the Act are permitted to support the principal in the making, communication, or effectuation of decisions, as well as representing their interests in decision-making processes.[94] The

[85] *Powers of Attorney Act 2014* (Vic) Second Reading Speech (n 84) 2394.
[86] *Powers of Attorney Act* (n 81) s 87.
[87] Ibid s 88.
[88] Ibid s 89.
[89] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 1 ('*Medical Treatment Planning and Decisions Act*'). Additionally, the Act concerns medical research procedures under Part 5; however, this shall not be discussed in this report.
[90] Ibid at s 6, 12. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2016, 3496 (Jill Hennessy) <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2016/Assembly_Daily_Extract_Wednesday_14_September_2016_from_Book_12.pdf> (*'Medical Treatment Planning and Decisions Act 2016* (Vic) Second Reading Speech').
[91] Ibid at ss 26, 55.
[92] *Medical Treatment Planning and Decisions Act 2016* (Vic) Second Reading Speech (n 90) 3497.
[93] *Medical Treatment Planning and Decisions Act* (n 89) s 61.
[94] Ibid ss 31-32.

MTPD Act represents an attempt to legislate a 'paradigm shift from paternalistic decision-making' to a more humanised, patient-centred approach.[95]

The coordinated implementation of the ***Guardianship and Administration Act 2019* (Vic)**, the ***Medical Treatment Planning and Decisions 2016* (Vic)** and ***Power of Attorney Act 2014* (Vic)**, along with the ***Mental Health Act 2014* (Vic)**, clarifies and aligns statutory conceptions of capacity, modes of assessing capacity,[96] and the 'rights, responsibilities and functions in relation to substituted decision-making' more generally.[97] Enshrining supportive decision-making in legislation, such as in the Victorian legislation,[98] is consistent with the 'flexible' or 'situation-dependent' capacity approach found under the new Acts. The new Victorian regime codifies the 'representative decision'[99] approach, which seeks to align a final outcome as closely as possible to the decision that would be made by the represented person, as opposed to the previous 'best interests' approach, which reaches a final outcome by reference to what it is presumed is best for the represented person, without reference to their wishes. In other words, under a 'representative approach', a substituted decision-maker must 'stand in the shoes' of a represented person. This would necessarily require discussions with the represented person in order to ascertain their wishes. This requirement could be profoundly impacted by dynamics of abuse and control in relationships.

The 'representative' approach, now established in law, most closely achieves the human rights objectives of the ***Convention on the Rights of People with Disabilities***,[100] compared to other Australian jurisdictions.[101] These objectives include promotion of full and equal enjoyment of human rights and freedoms of persons with disabilities, equal recognition before the law (including in relation

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[95] *Medical Treatment Planning and Decisions Act 2016* (Vic) Second Reading Speech (n 90) 3495.
[96] *Guardianship and Administration Act* (n 75) s 5; *Medical Treatment Planning and Decisions Act* (n 89) s 4; *Powers of Attorney Act* (n 81) s 4.
[97] *Guardianship and Administration Act 2019* (Vic) Second Reading Speech (n 75) 60. *Guardianship and Administration Act* (n 75) s 31: consideration must instead be given to the factors enumerated under the statute.
[98] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Supported Decision-Making and Guardianship: Roundtable' (Proposals for reform, 3 June 2022) 36–37.
[99] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report, 24 November 2014) 12–13.
[100] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*'). See also, *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8 ('Recognition and equality before the law'), 10 ('Right to protection from torture and cruel, inhumane or degrading treatment'), 18 ('Right to take part in public life').
[101] Bedson et al (n 31) 19.

to capacity, and ensuring that appropriate supports are provided), and freedom from violence, abuse, and exploitation.[102] It also reflects recommendations made by the Australian Law Reform Commission in its *Equality, Capacity, and Disability* Report, tabled in November 2014, aimed at interrogating the extent to which Commonwealth laws aided or impinged upon the exercise of legal capacity by people with disabilities.[103] Both the *CRPD* and ALRC *Equality, Capacity and Disability* Report emphasise the role of 'autonomy and independence'[104] in decision-making by and on behalf of people with reduced decision-making capacity.

The statutory reforms also sought to clarify processes around appointments and decision-making. For example, the **MTPD Act** is intended to provide a robust decision-making process for medical matters, with 'considerations and safeguards' specific to healthcare contexts; by contrast, the **POA Act** is concerned with appointment of decision-makers for personal and financial matters.[105] Additionally, the statutory regime which is currently in place is intended to reduce 'uncertainty and confusion' surrounding options for supportive and substituted decision-making mechanisms available to persons with reduced decision-making capacity.[106] While the ***Voluntary Assisted Dying Act 2019*** **(Vic)** manifests a form of advance planning in the Victorian statutory regime, it does not specifically relate to a form of substituted decision-making. As such, it falls outside the scope of this report.

In this report, 'decision-makers' are Members of VCAT determining matters heard under the Guardianship List of VCAT's Human Rights Division.[107] The Guardianship List hears matters regarding the following, under the Acts which have been outlined above:[108] appointment, or the reassessment of appointments, of guardians, administrators, supportive guardians, and supportive administrators, advice to guardians,[109] administrators,[110] interested persons in the estate of represented persons,

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[102] *CRPD* (n 101) arts 1, 12, 16; summarised at Carmelle Peisah, 'Capacity Assessment' in Helen Chiu and Kenneth Shulman (eds), *Mental Health and Illness of the Elderly* (Mental Health and Illness Worldwide, Springer Singapore 2016) 3–4.
[103] This particular recommendation pertained to both Commonwealth and State and Territory laws: Australian Law Reform Commission, *Equality, Capacity and Disability* (n 99) 11–13.
[104] Ibid 24 [1.5].
[105] *Medical Treatment Planning and Decisions Act 2016* (Vic) Second Reading Speech (n 90) 3497, 3499.
[106] *Powers of Attorney Act 2014* (Vic) Second Reading Speech (n 84) 2392.
[107] '... includes an order, direction, consent, advice and approval': *Guardianship and Administration Act* (n 75) s 3 (definition of 'determination').
[108] Victorian Civil and Administrative Tribunal, 'Guardianship List - General Procedures' (Practice Note, 1 April 2020) 5 [5].
[109] *Guardianship and Administration Act* (n 75) s 44.
[110] Ibid s 64.

supportive guardians or administrators,[111] general, enduring, or supportive attorneys,[112] or medical treatment decision-makers or health practitioners,[113] and medical treatment and special medical procedures for persons without capacity,[114] orders regarding enduring and supportive powers of attorney,[115] rehearing of cases decided under the **GA Act**, the **POA Act**,[116] and the **MPTD Act**, and orders made under the **MTPD Act**.

[111] Ibid s 97.
[112] *Powers of Attorney Act* (n 81) s 121.
[113] *Medical Treatment Planning and Decisions Act* (n 89) ss 70, 83.
[114] *Guardianship and Administration Act* (n 75) ss 145-6.
[115] *Powers of Attorney Act* (n 81) s 116.
[116] Ibid dvs 4-5.

Key Themes

Here, we discuss the major themes which arose from our interviews with participants, alongside observations arising from our informal case review of Victorian Civil and Administrative Tribunal decisions. Participants denoted as 'C' are community-based service providers, and participants denoted as 'H' are hospital-based service providers. This will provide further context to their commentary.

1. *Capacity*

Despite recent changes to legal regimes governing capacity and capacity assessment, family violence impacts a person's capacity, and assessment of their capacity, in ways which require further understanding on the part of researchers, service providers, and legal decision-makers.

Assessing capacity. The **GA Act** requires that a person understand information relevant to a decision and its effect, retain that information, use, and weigh information in the making of a decision, and communicate the decision and their views, in order for them to be deemed to have decision-making capacity.[117] A finding of capacity (or non-capacity) is, more often than not, central to the determinations made by the Tribunal under its Guardianship List, given capacity is necessary for the making of valid substituted and supportive decision-making appointments. Under the new statutory regime, a person is presumed to have capacity unless there is 'evidence to the contrary'.[118] The Act acknowledges that capacity may exist for some decisions, but not others, capacity may be temporarily affected, and may require 'practicable and appropriate support'[119] – these factors demonstrate that decision-making capacity is measurable on a spectrum, rather than existing in a capacity-incapacity binary.

According to Carmelle Peisah, '"good" capacity assessment can support legal capacity'.[120] The coordinated statutory definition of capacity includes an acknowledgement that someone may have decision-making capacity in relation to particular matters only, that capacity may be temporary, 'unwise' decisions are not indicative of decisional *in*capacity, and 'practicable and appropriate support' may be

[117] *Guardianship and Administration Act* (n 75) s 5.
[118] *Powers of Attorney Act* (n 81) s 4(2); *Medical Treatment Planning and Decisions Act* (n 90) s 4(2); *Guardianship and Administration Act* (n 75) s 5(2).
[119] *Guardianship and Administration Act* (n 75) s 5(4).
[120] Peisah (n 102) 1. Peisah is quoted in the context of legal capacity to provide instructions; however, the same sentiment can apply to decision-making capacity in the substituted decision-making jurisdiction.

necessary to optimise a person's decision-making capacity.[121] Entitling persons to make 'unwise' decisions maintains their 'dignity of risk'.[122] However, decisions which are 'relatively consistent or stable' are generally supportive of a finding of capacity.[123] Poor hearing, and cultural and linguistic diversity were discussed with C1 as specific factors which may be mischaracterised as impeded capacity if they are not accounted for by the assessor.

Concerns raised by H1 regarding the medicalisation of particular conditions, such as dementia, calls into question whether a strengths-based model which commences with a presumption of capacity is, in reality, common in practice. For example, where a person is diagnosed with a neurodegenerative condition such as dementia, presumptions regarding their capacity may prevent an assessor from conducting a full, contextualised assessment. Specifically, it 'raises a problem because … there's already an assumption that someone does not have capacity',[124] and risks the assessor viewing the represented person through a deficit, rather than a strengths-based, lens.[125] Conducting assessments in the context of providing a report to VCAT may cause the assessment to be done through a deficit-lens. It is also significant to note that capacity assessments, where capacity is raised as an issue by a family member rather than a treating practitioner or service provider, may be conducted in the context of 'expecting to find incapacity'. C1 described one such experience, where she was asked to consider the capacity of a client, and the referring practitioner asked the question of whether the client had 'incapacity', rather than 'capacity'.[126]

The same may be said for capacity reports provided to VCAT – the context in which capacity has been raised as an issue must be carefully considered by the assessor. The Tribunal relies on the evidence of medical practitioners in determining whether a person had, or has, capacity.[127] H1 expressed concern regarding the quality of the medical assessments completed for VCAT proceedings: '… the medical reports can be pretty poor … this is because generally speaking in medicine, we've not got a

[121] See, eg, *Guardianship and Administration Act* (n 75) s 5(4)(a)-(e).
[122] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Supported Decision-Making and Guardianship: Roundtable* (Summary Report, 3 June 2022) 16.
[123] Peisah (n 102) 5.
[124] Unstructured Interview with Community Health Service Provider C1 (Cate Banks and Abi Embleton, Teleconference, 18 October 2023) ('C1 Interview').
[125] Ibid.
[126] Ibid.
[127] See, eg, *LDB (Guardianship)* [2021] VCAT 796, [3], [18]-[22] ('*LDB*'); *JZK (Guardianship)* [2021] VCAT 1219, [30]-[34], [55]-[61] ('*JZK*'); *OKR (Guardianship) [*2021] VCAT 873, [4], [35] ('*OKR*').

good understanding of disability … we'll just scratch down the disease and then say they've got a cognitive impairment without much finessing'.[128] H1 stated that specialties such as psychiatry, geriatrics, or neurology, may be able to provide 'finesse' in the assessment of cognitive capacity; however, it is often general practitioners who have a longstanding relationship with their patient, and may be able to speak to the socio-cultural aspects of their capacity.[129] However, without access to copies of the reports prepared, and more detailed discussions with other hospital-based and community service providers experienced in providing medical reports to VCAT, we cannot reach more concrete conclusions as to the nature, quality, and utility of medical reports in Tribunal proceedings under the Guardianship List.

Further, and understandably, medical reports 'are often done in a hurry'.[130] The completing practitioner may not have the time to complete a nuanced assessment of a patient's capacity and may rely on taking collateral histories. The 'influence' potentially exerted by a family member was acknowledged in Tribunal decisions, along with the compounding impact of cognitive impairment on capacity assessments.[131] Collateral histories form an important aspect in assessing the changes which have occurred in a person's disease-state,[132] and ultimately, in their capacity. However, the nature of collateral histories is such that they typically rely on family members to provide additional information to the assessing clinician. If we accept that a family member is able to exert influence on a person's capacity, there is perhaps no greater influence than distorting a capacity assessment through the giving of a false or exaggerated collateral history (see below ***Colluding with perpetrators***). The medical report questionnaire currently provided by VCAT to medical practitioners may offer an avenue of risk assessment in this regard, by asking practitioners to identify whether the proposed represented person is 'usually accompanied' by another person.[133]

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[128] Unstructured Interview with Hospital-Based Healthcare Provider H1 (Cate Banks and Abi Embleton, Teleconference, 15 March 2024) ('H1 Interview').
[129] See, eg, *YSA (Guardianship*) [2021] VCAT 1043, [32] ('*YSA*').
[130] H1 Interview (n 128).
[131] *OKW (Guardianship)* [2021] VCAT 298, [31] ('*OKW*').
[132] See, eg, in the context of young-onset dementia Samantha M Loi et al, 'Young-onset Dementia Diagnosis, Management and Care: A Narrative Review' (2023) 218 *Medical Journal of Australia* 182, 184; adapting Mary O'Malley et al, 'International Consensus on Quality Indicators for Comprehensive Assessment of Dementia in Young Adults Using a Modified E-DELPHI Approach' (2020) 35 *International Journal of Geriatric Psychiatry* 1309.
[133] 'Medical report template', Victorian Civil and Administrative Tribunal (Accessed 29 May 2024) <https://www.vcat.vic.gov.au/documents/forms/medical-report-template>.

Impact of family violence on capacity. Our conversations with service providers highlighted a key concern, which was that the long-term impact of family violence, particularly on a person's capacity, is poorly understood in practice.[134] Many service providers in these interviews discussed professional experiences wherein a client had a 'capacity issue' for which family violence was a direct contributor. The 'cumulative'[135] effect of controlling behaviours may be to 'silen[ce]' the voices of victim-survivors such that they cannot express their wishes in a way that is received effectively by service providers or decision-makers. In this way, according to a submission made to the Royal Commission:

> '[Victim-survivors] are so incapacitated by the violence that has been inflicted upon then that they are paralysed when giving instructions and are unable to share their narrative. It is like dealing with a person [who] has been tortured or brainwashed, their capacity to function at that point is just so compromised'[136]

The same may be said legal and decision-making capacity.

Represented persons are often reliant, or at least repose a significant amount of trust, in others for the facilitation of their day-to-day activities. If we understand coercive control to cause a 'narrow[ing of] the victim[-survivor's] sphere of autonomy so that [their] life choices become *constrained* by [the perpetrator's] will',[137] then in substituted decision-making contexts, where a person's capacity is already deemed to be vulnerable, the 'narrowing' of their autonomy may be facilitated by formal appointments and systemic responses. Represented persons may be more susceptible to coercion or controlling behaviours, not only due to their personal characteristics, but because substituted and supportive decision-making structural frameworks facilitates the exertion of power by perpetrators.[138]

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[134] However, there is a significant body of research and literature which acknowledges the connection between interpersonal violence and trauma, such as the impact of family violence on trauma responses. See, for a seminal text, Bessel van der Kolk, *The Body Keeps the Score* (Penguin Books, 2014).

[135] Stark (n 14) 94; citing Liz Kelly, *Surviving Sexual Violence* (Polity Press, 1987); both references cited in Tolmie et al (n 16) 191.

[136] Caroline Marita Anne Counsel, Submission to the Royal Commission of Family Violence (5 August 2015) 23 [99] <http://rcfv.archive.royalcommission.vic.gov.au/MediaLibraries/RCFamilyViolence/Statements/WIT-0107-001-0001-Counsel-15_1.pdf>.

[137] Tolmie et al (n 16) 192 (Emphasis not in original).

[138] Referencing the 'social power' model of coercive control: Kimberly A Crossman and Jennifer L Hardesty, 'Placing Coercive Control at the Center: What Are the Processes of Coercive Control and What Makes Control Coercive?' (2018) 8 *Psychology of Violence* 196, 197; 'The nature and seriousness of guardian or financial administrator appointments can go unrecognised': Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (n 44) 321 [10.16].

Appointments of enduring powers of attorney, guardianship, or medical treatment decision-making, necessarily increase a person's 'access' to information which could otherwise be used to 'select and implement the most effective power strategies'.[139] This, coupled with the legitimacy afforded to those in positions of power over represented persons (see below ***Impact of service providers***), means we must be particularly sensitive to dynamics of control and coercion in these proceedings.

Though we believe independent assessment is a protective factor against the influence of family members, we must acknowledge the challenge associated with ascertaining a person's true wishes where they have been overborne for an extended period of time. For example, the Tribunal in *SSX* identified an instance where the represented person expressed an opinion in the presence of an adult child, presumably to draw a contextual link between the person's circumstance and their articulated wishes.[140] In *SXZ* the represented person articulated their wills and preferences while 'reading from a notebook' which was deemed by the Tribunal as 'considerable evidence of coaching' by the person's son, who wished to be appointed as guardian.[141] The Tribunal received an affidavit articulating this as an example of 'coercive control'.[142] The presiding member in *OKW* stated that 'even had [they] been able to speak with [the proposed represented person] face to face and without interruptions' … '[the member] was not satisfied that [the] statement was unaffected by the influence of [the son]'.[143] The member similarly observed that the person's son consistently interrupted the proposed represented person during proceedings.[144] However, allowing represented person's to articulate their wills and preferences remains a vital element of the decision-making process, typified by the adoption of the 'representative approach' in the new statutory regime, and must be done despite any difficulties.[145] Appointing joint guardians for a limited period of time may be interpreted as a protective measure against future control.[146]

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[139] Crossman and Hardesty (n 138) 197; citing Stark (n 14).
[140] *SSX (Guardianship)* [2021] VCAT 491, [19] ('*SSX*').
[141] *SXZ (Guardianship*) [2022] VCAT 703, [34], [39] ('*SXZ*'); see also, '[b]ecause the [equivalent Wills and Preferences] worksheet came from one "camp" of the family, I did not give it a great deal of weight': *ZFN (Guardianship)* [2022] VCAT 262, [19].
[142] *SZX* (n 141) [34].
[143] *OKW* (n 131) [30].
[144] Ibid [29].
[145] See, especially, *YSA* (n 129) [22]-[23], [40].
[146] Ibid [43].

A further issue is the cognisance of the Tribunal and decision-makers to the impact of family violence on capacity. In *PXL*, the Tribunal found a person lacked capacity on two bases – the first, was medical evidence of a cognitive inability to make significant decisions, and the second, was the person's 'vulnerability to undue influence and exploitation'.[147] If a person's vulnerability is exacerbated by cycles of violence and control, when their capacity is assessed, they may be more likely to be found to lack capacity, not because of independent cognitive changes, but because of the impact of their experiences of violence. C2, when speaking about the difficulties of identifying a person using violence in the context of complex service provision (see below ***Colluding with perpetrators***), observed that '[their] clients often have been part of [those] webs for so long, that their voice is just silent'.[148] lack Rather than considering that the capacity of the represented person was affected by the influence of their family member, the presiding member in *OKW* considered that the Tribunal could not fully ascertain their wills and preferences.[149] Therefore, the Tribunal's conclusion as to capacity was independent from the Tribunal's evaluation of external influences over decision-making by the proposed represented person.[150]

Without an educative framework that accounts for the psycho-social and economic factors which may increase a person's vulnerability, both to family violence, and to the social entrapment associated with coercive control, service providers and decision-makers may lack the requisite knowledge and skills to '[derive meaning] from these factors [in a potentially harmful relationship]'.[151] The standardised approach offered by the Family Violence Multi-Agency Risk Assessment and Management Framework ('MARAM') was identified by C1 as a tool for ensuring '[all practitioners are] on the same page' (see below ***Formal information-sharing***).[152]

[147] *PXL (Guardianship)* [2021] VCAT 124, [59] ('*PXL*').
[148] Unstructured Interview with Community Health Service Providers C2 and C5 (Cate Banks and Abi Embleton, Teleconference, 11 October 2023) C2.
[149] *OKW* (n 131) [30].
[150] Ibid [31].
[151] 'How one conceptualizes intimate partner violence (IPV) influences what is seen when looking at situations involving IPV. It affects what is considered relevant or irrelevant in making sense of what is happening and the meanings derived from factors deemed "relevant."': Tolmie et al (n 17) 54; paraphrasing Tolmie et al (n 16) 183.
[152] C1 Interview (n 124).

2. *Barriers to receiving help*

There are both internal and external obstacles experienced by victim-survivors of family violence in receiving help, which may be exacerbated by poor awareness of abusive dynamics, and long-standing patterns of control. In some settings, family members may not be aware that a person is receiving family violence support. Additionally, otherwise protective measures (such as intervention orders) may be alienating for victim-survivors, in circumstances where they do not wish to sever familial relationships.

Distinguishing between violent relationships and conflictual relationships. A 2018 prevalence study completed through review of Office of the Public Advocate files identified that 'psychological and emotional abuse' was the second most prevalent form of abuse experienced by older guardianship clients between 2013-14 and 2016-17. However, potential under-reporting was attributed to variations in individual understanding of forms of violence, or misunderstandings of the level at which 'mistreatment becomes … abuse'.[153] Tolmie, Smith, and Wilson similarly argue that 'how one conceptualises [abuse] influences what is seen when looking at situations involving [abuse]'.[154] Differing thresholds of assessment, and subsequent variance in reporting or recording abusive dynamics, highlights the need for ongoing education and training, such as that recommended by the Royal Commission into Family Violence.

The decision of *JZK* demonstrates the challenge experienced by decision-makers in distinguishing between violent, or harmful, relationships, and relationships which are conflictual. The represented person's sister sought revocation of the appointment of medical treatment decision-maker and enduring power of attorney, competing applications by the represented person's sister and partner for appointment of a family member as administrator, and an additional, conflicting, application for the appointment of State Trustee as administrator by the represented person's partner.[155] While both the represented person and his domestic partner made assertions that they wished for their relationship to continue, friends and family members stated the relationship 'was not good' and had 'deteriorated', and that the represented person had previously made statements that 'he didn't feel safe'.[156] The reasoning

[153] Bedson et al (n 31) 26–27.
[154] Tolmie et al (n 17) 54.
[155] *JZK* (n 127) [4]-[7].
[156] Ibid [47]-[51].

provided by the represented person's sister ('the sister') for bringing an application was largely due to her concern that the 'relationship ... was not good' and that there were mutually expressed desires to leave the relationship. This was alternatively described by the represented person as the 'ebb and flow' of relationships.[157] Contradictory evidence was advanced by another friend of the couple that they 'loved each other' and 'showed genuine concern'. This friend's evidence was preferred due to 'her regular contact and observations' of their partnership.[158] The Tribunal was of the position that its obligation to honour the wishes and preferences of the represented person, as enshrined in the newly enacted legislation, took precedence over any concerns for 'best wishes' or the quality of relationships.[159] Elsewhere, it has been emphasised that 'the wishes of the principal must be respected and given practical effect'.[160] While conflict is inevitable in relationships, it is necessary to identify harmful or abusive dynamics (even where it is not identified by the victim-survivor themselves) so that they may have opportunities for education or support, if desired.

In another decision, the Tribunal described 'significant family conflicts', which 'concern[ed the represented person's] treating team, together with [their] health'.[161] In that decision, the Tribunal appointed an independent entity in order to address the 'unworkable' 'conflict between siblings'.[162] Conflation of the terms 'conflict(ual)' and 'abusive' when describing family dynamics may fail to do justice to represented persons' experiences of family violence. For example, while the Tribunal quoted hospital records which noted '"extreme levels of disagreement" between the family and hospital staff',[163] it could be queried, in familial relationships characterised by such a significant level of conflict, whether dynamics of violence, or control, should be mandatorily investigated further (such as by the Office of the Public Advocate) in order to ascertain the impact, if any, they may have on the proposed represented person's feelings of safety or agency in the proceedings. This is particularly true in matters

[157] Ibid [48].
[158] Ibid [51].
[159] Ibid [52].
[160] *SAY (Guardianship)* [2021] VCAT 508, [28] ('*SAY*').
[161] *PXL* (n 147) [8].
[162] Ibid [69]-[71].
[163] *OKW* (n 131) [3].

where the applicant has demonstrated 'combative and threatening' behaviour in the past,[164] or during proceedings.[165]

The Tribunal has, however, acknowledged the impact of long-term 'intense hostility and disagreement' on the wellbeing of represented persons, specifically in the context of disruption to care arrangements.[166] The Tribunal in *SSX* drew a connection between 'inconsistent support' and its impact on existing 'deficits in decision-making … because of … disabilities',[167] as well as the ways in which a person's decision-making may be influenced by family members.[168] In *WLH* the Tribunal cites 'health professionals' evidence … that there is conflict between family members and details that WLH is vulnerable in the context of those disputes'.[169] The Tribunal is also clearly aware of the impact of protracted hostility on a person's decision-making capacity or expressed wills and preferences; for example, by seeking to appease multiple family members simultaneously in order to avoid future conflict, which may result in visible distress and confusion.[170] For example, in *VEM* the assessing clinical neuropsychologist for the represented person 'noted that VEM was anxious and distressed to the point where her performance on assessment may have been affected'.[171]

Although the **GA Act** considers and allows for a degree of disagreement between family members before considering that this may impact their appointment as guardian or administrator,[172] there are times where 'intense hostility and disagreement' will preclude safe appointment of a family member. The Tribunal decisions also demonstrate cognisance to this distinction and a readiness to consider independent appointments where these would be more protective,[173] as well as temporary

[164] Ibid [35].
[165] *FST (Guardianship)* [2021] VCAT 1208, [8].
[166] *SSX* (n 140) [27].
[167] Ibid.
[168] 'I am not satisfied that any of the recorded expressions of his will and preferences represents an enduring or genuine will and preference but is rather the result of whomever has had sufficient access to influence what he says': Ibid [40]-[41].
[169] *WLH (Guardianship)* [2022] VCAT 802, [9].
[170] 'SSX has given different answers to questions about his will and preference depending upon whose company he is in': *SSX* (n 140) [37] which may be erroneously interpreted as impeded capacity in other circumstances. see also *NCX (Guardianship)* [2021] VCAT 544, [13]-[14] ('*NCX*'); '[t]here is ample, uncontradicted evidence which I accept that NCX does not like conflict, and seeks to please, placate or walk away': ibid [84].
[171] *VEM (Guardianship)* [2021] VCAT 1272, [21].
[172] *Guardianship and Administration Act* (n 75) s 32(5)(a)-(b).
[173] See, eg, *UXM (Guardianship)* [2022] VCAT 818, [45].

appointments to address urgent risks,[174] while acknowledging the benefit of circumstance changes.[175] For example, in *LWW* the Tribunal received evidence that a represented person's daughter had prevented access by other family members, and that the represented person experienced 'increasing fear of [her daughter's] "tantrums"'.[176] Further, the represented person requested that her granddaughter not 'bring … flowers, cards or photos as [her daughter] would find them and get angry'.[177] Restricted access was an issue corroborated by 'two nurses at the facility where LWW previously lived' and a 'longstanding and close friend'.[178] However, despite the Tribunal finding that the attorney daughter had previously restricted access, and that the represented person had been influenced by her daughter's adverse views, little was stated about the represented person's feelings of 'fear', and the represented person's daughter was appointed as administrator.[179] As a protective measure, and in the absence of an alternative guardian with whom LWW had a relationship,[180] an independent guardian was appointed.[181] However, the represented person's daughter's continued involvement as an alternative decision-maker belies the protectiveness of this order.

Our discussion with C4 highlighted that changes which occur with loss of, or a reduction in, a family member's capacity, and associated reliance on others for support during those times, can 'exacerbate'[182] existing conflicts in family units. Periods of intense conflict, particularly in 'time[s] where there's a lot of decision-making that's evoked', such as decisions to enter care or appoint alternative decision-makers,[183] creates environments wherein efforts to influence decision-making may be disguised as genuine attempts to assist a vulnerable family member. Ries describes these changes as 'major life transitions' which can constitute 'stressors … [which] lead to abuse situations when supports … are inadequate',[184] and these transitions were identified as a key area of risk for experiencing

[174] *YSA* (n 129) [44].
[175] *PCP (Guardianship)* [2022] VCAT 364, [3]-[5], [38]-[39] ('*PCP*').
[176] *LWW (Guardianship)* [2022] VCAT 221, [20] ('*LWW*').
[177] Ibid [21].
[178] Ibid [23]-[24].
[179] Ibid [36]-[42], [54]-[55].
[180] *Guardianship and Administration Act* (n 75) s 32(3).
[181] *LWW* (n 176) [49]-[51].
[182] Unstructured Interview with Community Health Service Provider C4 (Cate Banks and Abi Embleton, Teleconference, 27 September 2023).
[183] Ibid.
[184] Ries (n 3) 10.

violence by the Royal Commission into Disability.[185] For example, in *ZFN*, prior to an instance of 'duress' leading to the signing of an enduring power of attorney document, and subsequent 'trauma', a represented person was 'living in her own home, with support'; however, following the incident, she transitioned to 'liv[ing] with her son … [because she] did not feel safe'.[186] The Tribunal did not speak to the family violence *per se*, but did note that the family violence intervention order empowered the Tribunal to make decisions regarding contact with the represented person. In this decision, the Tribunal found that an independent guardian was required to act as an intermediary for facilitating access,[187] essentially appointing a person to act protectively in instances of family violence. This is an example of the Tribunal utilising its statutory powers in order to mediate otherwise abusive or unsafe dynamics.

Fear or risk of further victimisation. Re-victimisation can take many forms for victim-survivors of family violence, particularly where they have intersecting vulnerabilities. During our conversation with C2 and C5, C5 stated that 'clients won't push against their unsafe guardians … [because] once you start looking at the system's options, your life can become very unstable very quickly'. This aligns closely with the first element of Tolmie's social entrapment model of coercive control (see above ***Introduction***). Navigating systems, as a result of family violence, is not as simple as accessing a service and receiving support. Often, the complexity of peoples' lives and needs results in non-engagement with assistive services, or the belief that services cannot provide the help they need. C4 similarly noted that 'layers of marginalisation' can impact the way people 'talk about and relate to their experiences of violence', and patterns of disappointment or 'repercussions' for individuals engaging with systems, such as the Court system, may prevent them from disclosing family violence. See below ***Coercive control*** for further discussion of the ways in which violence can undermine a person's perception of their pathways to safety.

[185] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Proposals for reform' (n 98) 44.
[186] *ZFN (Guardianship)* [2021] VCAT 138, [17]-[20] ('*ZFN* (2021)').
[187] Ibid [51]-[52].

3. *Impact of service providers*

Service providers' knowledge of family violence dynamics is highly relevant to achieving safe outcomes for victim-survivors, particularly where victim-survivors have compounding vulnerabilities such as reduced decision-making capacity. A lack of knowledge on the part of service providers can contribute to cycles of violence perpetrated against vulnerable persons.

Identifying 'safe' liaisons. C2 expressed concerns regarding the identification of a 'safe' person with whom services may liaise for the purposes of providing support to a client. Often, informal reliance on these individuals, without adequate risk assessment, lends a 'false sense of legitimacy' to their role in a client's life, and exacerbates dynamics of control or coercion in familial relationships (see below ***Colluding with perpetrator***). We observed similar issues in published Tribunal decisions. In one particular matter, the Tribunal observed a person behaving in a manner which 'self-assumed' the of guardianship, despite the person not having been appointed as guardian.[188] In another, the daughter of the represented person claimed to be the person's 'registered primary carer'; however, during assessment by the Office of the Public Advocate, the represented person 'disputed this claim … and [stated] that [the daughter] and her husband had come to live with her uninvited and had to be forcibly removed'.[189] Informal caregiving arrangements, or habitual involvement in a represented person's medical affairs even following revocation of an appointment, may create an environment in which a person is informally 'permitted' to exert control over another's decision-making.[190]

Informal caregiving and supportive arrangements are common in families, and where they are not associated with controlling or coercive behaviours, can have a profoundly positive impact on the wellbeing of family members who may have reduced ability to engage in their usual day-to-day activities. However, when combined with behaviours such as isolation from service providers or social circles, encroaching on individuals' privacy, or independent engagement with services,[191] a self-assumed informal guardian may contribute to harmful dynamics, and ultimately undermine the self-integrity of a person. In extreme circumstances, family members may interfere with formal processes,

[188] *NCX* (n 170) [90].
[189] *VWA (Guardianship)* [2021] VCAT 193, [30].
[190] Ibid [11].
[191] *NCX* (n 170) [90].

such as capacity assessment for the Tribunal.[192] Similarly, the Tribunal identified in *IEX* that a represented person was placed at 'immediate risk of harm' through the actions of a self-assumed medical treatment decision-maker, specifically by causing long-term practitioners to withdraw their services, 'causing confusion amongst caring staff by seeking to give medical treatment instructions', and 'threatening' legal action.[193] This strongly correlates with the findings of the Australian Institute of Family Studies regarding the ways in which formal appointments may be protective, by clarifying decision-making entitlements and ensuring the represented person's wishes are, at least, articulated and accessible to staff members.[194]

Even when a guardian is formally appointed, so-called 'protective' appointments may be used as an 'instrument of coercion'.[195] Family members may seek to restrict a proposed represented person's liberty or agency beyond what is 'necessary' to provide care; for example, in *NCX*, the proposed represented person's stepfather, along with his former solicitor, argued that NCX was 'severely disabled, and that it was necessary for him to have a guardian who could control his behaviour, and who would need to be intensely involved' … and that any appointment would need to be 'vetted and approved by them'.[196] Such measures would constitute a profound reduction in NCX's independence. The Tribunal disagreed with the stepfather's proposition,[197] stating that he demonstrated an 'uncompromising view that he knows what is best … a refusal to listen to, or engage, or work with those, including NCX himself, who have a contrary view, or who do not let him dictate the terms on which he seeks to engage'.[198] It does not seem too great a step to characterise this behaviour as

[192] *SSX* (n 140) [6].
[193] *IEX (Guardianship)* [2022] VCAT 1000, [11]-[12].
[194] Cf. *TDQ (Guardianship)* [2021] VCAT 1259, [59] ('*TDQ*'): 'I note the information in the form, but it also appears that it was completed with the assistance of another person, so I cannot be satisfied that it is a true reflection of TDQ's will and preferences'.
[195] Joseph Naimo, 'Abuse and Misuse of Substitute Decision-Making (SDMg) Powers: Guardianship and Administration Law and Associated Governance Institutions in the Spotlight' in Adrian Walsh and Sandy Boucher (eds), *Research in Ethical Issues in Organizations* (Emerald Publishing Limited 2022) 76–77. Naimo makes this statement in the context of 'plenary guardianship' under the *Guardianship and Administration Act 1990* (WA), an appointment which is no longer available under the Victorian regime. However, the powers granted to a guardian under the Victorian regime are broad-ranging, and thus, the same risk of exploitation and coercion exists.
[196] *NCX* (n 170) [37].
[197] Ibid [113]-[114].
[198] Ibid [67].

coercive and controlling, but absent such labelling, the Tribunal exercised its protective jurisdiction to the extent necessary to prevent this person from being subject to excessively restrictive orders.

Colluding with perpetrators. A prominent theme which arose from our discussions with participants, was the potential for service providers to inadvertently collude with perpetrators of family violence, particularly in instances of coercive control. The dynamics of relationships between service providers, clients, and their support systems, created an environment wherein service providers could include unsafe persons in conversations about a client's care, because the unsafe person was, in fact, the 'person [who was] proximal'.[199]

Challenges associated with the 'identification of safe liaisons' (see above ***Identifying 'safe' liaisons***) contribute to potential issues of collusion with perpetrators by service providers. H1, a hospital-based service provider, considered that, generally, hospital staff will 'respond to the person [who] is proximal and most articulate'. In their particular area of practice, they are driven by a 'philosophy … [of a] collaborative approach to solve problems'. Therefore, according to H1, adopting a 'positive frame of reference' and family inclusion was necessary to their practice and their interactions with patients. However, in the context of our research, particularly with the background of what was discussed elsewhere with other service providers, we can see that adopting a 'positive frame of reference' may mean practitioners are inadvertently including family members who may be engaging in violent or coercive behaviours outside of the hospital room. We considered that the provision of care in these circumstances, and the inclusion of potentially abusive family members in care, was a double-edged sword – the aim of hospital-based practitioners providing care to older persons is to return them home, and in many circumstances, returning home may be contingent on the participation of family members. 'Overbearing' or 'coercive' family members may well be viewed as 'responsible, supportive, and caring' in a busy, high-stress hospital environment.[200]

Alternatively, collusion may occur where a service provider is not connected with a victim-survivor and is instead primarily responsible for service provision to the person using violence. C1 described an

[199] H1 Interview (n 128).
[200] Ibid.

instance where she received an informal information-sharing request from another service provider about her client. While C1 did not have any intention of sharing any information, given it was inappropriate and unnecessary, further discussion identified that the client of the requesting provider was a perpetrator of violence against C1's client, and was attempting to obtain information through alternative avenues. At the conclusion of her conversation, '[C1] knew this [client] was a person using violence, [the other service provider] didn't, and [C1] wasn't going to disclose that'. C1 described this interaction as 'frightening' because information-sharing protocols precluded C1 from explaining the situation to the other service provider, but it was clear that the service provider had become enmeshed in the perpetrator's narrative. A similar challenges arises for lawyers working in alternative decision-making spaces, particularly where they are working closely with represented persons and their family members – for example, the Tribunal in *NCX* received reports that the represented person 'wanted an independent lawyer, as he felt [his former lawyer] didn't listen to him, instead doing what [his stepfather] wanted him to do'.[201] While we are not necessarily arguing this amounts to family violence, it well demonstrates how family members may become enmeshed in professional service dynamics, and receiving instruction from represented persons may require additional safeguards.

4. *Information-sharing*

Information-sharing is a crucial tool for assessing and managing risk in family violence. When used correctly and optimally, it contributes to knowledge-building in service providers. Disconnect between sectors still poses a risk to safety for victim-survivors of family violence.

Formal information-sharing. The topic of information-sharing permeated our discussions with service providers, even where it was not mentioned directly. It is clear that the service landscape has been significantly changed by the introduction of the Family Violence Information Sharing Scheme ('FVISS'), and its associated risk-assessment framework, the Multi-Agency Risk Assessment and Management Framework ('MARAM').

C1's experience of the formal family violence information-sharing channels was not defined by issues of misuse, but issues of misunderstanding. For example, the training provided by the Department of

[201] *NCX* (n 170) [10].

Health and Human Services is not mandatory for organisations engaging in the Scheme. It is 'left up to each organisation to determine what they do and how they do it'.[202] However, where FVISS and MARAM protocols are understood by practitioners, it creates a cohesive approach to risk assessment and management. In particular, she stated that the protocols are able to be integrated into practices which pre-dated the Scheme, such as informal secondary consultations.[203] C2 and C5 generally agreed with these statements, with the caveat that collusive practices may arise where practitioners, particularly those outside of organisations with strict implementation of information-sharing protocols, are 'pulled into webs' constructed by persons using violence (see above ***Colluding with perpetrators***). Inconsistency between sectors was also raised as an issue associated with information-sharing, possibly due to established concerns regarding patient/client privacy.[204]

Additionally, C5 highlighted MARAM's use, not only as a 'risk assessment or a form of information-sharing requests', but a 'broader platform … that talk[s] about the intersectionality of risk for people … [such as] risk associated with disability and mental health and capacity'.[205] However, the relatively narrow sub-set of organisations which are funded as risk assessment entities, and are therefore permitted to request information for the purposes of assessing risk of family violence, may bely the use of MARAM as an intersectional guide for assessing risk. Organisations which are risk assessment entities under the Scheme include state-funded specialist family violence services, Risk Assessment and Management Panel members ('RAMP'), state-funded sexual assault services, Victims of Crime assistance programs, and services such as the Orange Door.[206] An additional issue that was raised in relation to the restricted categories of risk-assessment entities was that the legal profession is not included, nor is the Victorian Civil and Administrative Tribunal.[207] It is unclear whether the Office of the Public Advocate is a risk-assessment or information-sharing entity under the Act, according to a search conducted on the Victorian Government's Information-Sharing Entity database. Given the Tribunal utilises the Office of the Public Advocate as an information-gathering entity, failing to prescribe them

[202] C2 and C5 Interview (n 148).
[203] C1 Interview (n 124).
[204] C2 and C5 Interview (n 148).
[205] Ibid C5.
[206] Victorian Alcohol and Drug Association, 'Information-Sharing Entities & Risk-Assessment Entities', *Family Violence Resources* (Web Page, No Date) < https://www.vaada.org.au/information-sharing-entities-risk-assessment-entities/> Accessed 22 April 2024.
[207] *Family Violence Protection Act 2008* (Vic) s 144I.

as an information-sharing entity for the purpose of preventing family violence is a matter of significant concern.

The 5-year legislative review of the Scheme found that some practitioners believed the Court should be involved in the making of information-sharing requests, and recommended clarification of the Court's role as an independent body in the Ministerial Guidelines.[208] While this exclusion is intended to ostensibly maintain the independence of the Courts and the legal profession,[209] C5 took the view that their exclusion had 'become a reason not to engage with [risk assessment and management] skills'.

When we look at the benefits of the Scheme, such as consistency in approaches to information-sharing (despite definitional issues raised by the five-year legislative review of the Scheme),[210] shared language surrounding risk, and robust training protocols, these would greatly benefit the work of legal professionals and decision-makers in the alternative decision-making jurisdictions. Further, authorities responsible for assisting the Tribunal in reaching decisions regarding appointment and appropriateness of guardians, such as the Office of the Public Advocate, would benefit from adopting a framework consistent with other service providers. In particular, 'safe' appointments would be best achieved through the robust risk assessment and safety checking mechanisms offered through the FVISS and MARAM frameworks. Further work is required to ascertain the extent to which legal professionals and adjacent professionals, such as family violence liaison officers embedded in the Tribunal, are cognisant of the MARAM Framework, the role of information-sharing, and the intersectional knowledge it carries across sectors.

[208] Family Violence Reform Implementation Monitor, *Legislative Review of Family Violence Information Sharing and Risk Management: Reviewing the Effectiveness of Parts 5A and 11 of the* Family Violence Protection Act 2008 *(Vic)* (Final Report, May 2023) 21.
[209] Explanatory Memorandum, Family Violence Protection Amendment (Information Sharing) Bill 2017 (Vic) 9; quoted at Family Violence Reform Implementation Monitor (n 208) 20.
[210] See, eg, Family Violence Reform Implementation Monitor (n 208) 16–18.

5. *Understanding varying forms of DFV*

Simply labelling a pattern of behaviour as a specific form of violence may fail to do justice to the overall impact of the perpetrator's actions and may result in poor identification of patterns of control and abuse. In particular, systems abuse in the Tribunal requires further research to understand its varied manifestations.

Identifying forms of family violence. At times the Tribunal limited its findings to specific questions of law or fact, rather than addressing behaviours suggestive of or consistent with family violence or coercive control. For example, in *XXH*[211] the Tribunal elected not to find whether breaches of the **POA Act** were 'intentional or deliberate', instead limiting its findings to whether a conflict transaction had occurred.[212] The Tribunal in *PXL* identified that current attorneys were likely to fail to comply with their obligations under statute,[213] 'nor would they promote PXL's personal and social wellbeing'.[214] In *TDQ* allegations of 'aggressive behaviour [and] deceit' were stated to 'not address the issues [namely whether] there [were] grounds for revoking the enduring power of attorney and [whether there were] any conflict transactions'.[215]

Limiting conclusions to specific questions in spite of evidence of family violence or other harmful behaviours may fail to do justice to the whole factual matrix surrounding a relationship.[216] For example, when discussing 'elder financial abuse' we may tend to focus on the 'control of assets' as a key factor in a perpetrator's abuse or coercion.[217] However, in situations of prolonged family violence, adopting a singular view as to why someone may be subjected to abusive dynamics is an inadequate approach. For some perpetrators of violence, mis-managing a person's assets is a marker of a wider 'web' of control. The Tribunal's approach to finding breaches of the **POA Act** occurred in *EIB* demonstrates the narrow scope of findings available – though the transactions are described as 'wicked' and 'concerted … attempts to secure the assets of a vulnerable person', it is clear the presiding member is restricted

[211] *XXH (Guardianship)* [2022] VCAT 1410 ('*XXH*'); 'it is not my role to speculate as to the psychological motivations of the administrators': *QCP (Guardianship)* [2021] VCAT 1398, [20].
[212] *XXH* (n 211) [42]-[43].
[213] *PXL* (n 147) [65].
[214] Ibid [68].
[215] *TDQ* (n 194) [31].
[216] See, eg, *QGL (Guardianship)* [2021] VCAT 196, [54]-[56] wherein the Tribunal did not address allegations ('*QGL*').
[217] Purser et al (n 5) 2; citing Kelly Purser et al, 'Alleged Financial Abuse of Those under an Enduring Power of Attorney: An Exploratory Study' (2018) 48 *The British Journal of Social Work* 887; see also *EIB (Guardianship)* [2022] VCAT 609, [46] ('*EIB*').

to determining whether, statutorily, breaches have occurred, rather than whether these transactions constitute coercion, or abuse.[218] However, excepting financial loss, the real-world emotional and psychological impact of these transactions is not addressed by merely answering questions required under the statute. This is not the fault of the Tribunal; rather, it highlights the thick context often attaching to alternative decision-making matters,[219] which may not be addressed by the existing statutory regime.

For example, in *QGL* there was evidence advanced that there was an intervention order between the represented person, the attorney, and the attorney's siblings (the represented person's children), as well as evidence from the represented person's former partner that the attorney had attempted to induce her to forge the represented person's signature.[220] However, the Tribunal limited its inquiries to a conflict of interest which arose from a loan taken out by the attorney, which was yet to be repaid,[221] despite different representations being made to the represented person by the attorney that they were being repaid.[222] The attorney's response to the allegations was that there was a 'conspiracy' between his siblings, their wives, and the represented person's former partner, to 'get back at him'.[223] The wishes of the represented person changed between September 2020 and February 2021,[224] a change which may be innocuous, but which potentially required further assessment independent of the attorney. The evidence does not *only* support a finding of conflict between the attorney's interests and the interests of the represented person but may also support a finding that the attorney is not an appropriate person to hold that position for reasons related to elder abuse. The reframing of elder financial abuse as *only* entrance into a conflict transaction fails to account for the relational harm and impact on the wellbeing of the represented person subject to that conflicted transaction. In another decision, the represented person was referred to an elder abuse advocate; however, this was not explicitly discussed in the findings of the presiding member.[225]

[218] *EIB* (n 217) [50]-[52].
[219] See, eg, *TDQ* (n 194) [31]-[39].
[220] *QGL* (n 216) [9], [34], [36], [39].
[221] Ibid [26]-[27].
[222] Ibid [55]-[57].
[223] Ibid [37], [39].
[224] Ibid [42].
[225] *NKT (Guardianship)* [2022] VCAT 362, [9], [31]-[36].

In *GKM* the Tribunal heard specific evidence of the relationship between the deceased represented person and the appointed attorney – specifically, that there had been 'emotional and physical abuse' from the attorney to the represented person.[226] Concerningly, one of the applicant sons described the represented person's experience as '[a] tiny bit of abuse', which was further described as 'a black eye on one occasion' and 'bruises up her arms' on another.[227] Further evidence demonstrates that the same applicant son saw the attorney 'had his arm against her neck and was pushing her into … cupboards'.[228] There is little discussion of the nature of the relationship and the allegations made of violence in the remainder of the published decision. While their relationship may not have been relevant to the immediate matters to be dealt with in the proceedings, if the allegations were true, the fact of an attorney actively perpetrating physical violence against the represented person raises significant concerns as to the safety and appropriateness of the appointment, and whether, had the survivor been alive, the Tribunal was (or should have been) empowered under statute to revoke the appointment on that basis.[229] The Tribunal's ability to consider family violence intervention orders is demonstrated in *QWM*, wherein a guardianship appointment was challenged on the basis of '[financial] abuse' and the applicant alleged the appointed guardian had misused their powers in order to obtain a family violence intervention order.[230] Additionally, the applicant was a protected person under an intervention order brought by the police against the appointed guardian.[231] Other parties to the proceedings alleged that the applicant had 'financially abused' the represented person.[232] As such, the Tribunal was required to consider the relevance and impact of these various allegations and circumstances. The member noted that being subject to an intervention order does not automatically preclude a person from being appointed as a guardian, provided they demonstrate capacity to act in accordance to their obligations under the Act.[233] Following assessment of the appointed guardian's decision-making process and ability to act in accordance with the represented person's will and preferences, an intervention order protecting another family member was not deemed a barrier to appropriate performance of the

[226] *GKM (Guardianship)* [2022] VCAT 243, [42]-[46] ('*GKM*').
[227] Ibid [71]-[72].
[228] Ibid [74].
[229] See also, *YSA* (n 129).
[230] *QWM (Guardianship)* [2021] VCAT 650, [8] ('*QWM*').
[231] Ibid [25].
[232] Ibid [27].
[233] Ibid [43]-[47].

guardianship role.[234] In *SXZ* the Tribunal was required to consider an intervention order listing both the represented person and their daughter as protected persons, with the represented person's self-described 'carer' (who was also managing SXZ's finances in an 'informal capacity'[235]) listed as respondent.[236] The order protecting SXZ was revoked on the basis that 'she had not consented … and [the other protected person] lacked authority to make an application on her behalf'.[237] While family violence intervention orders may not preclude appointment of a family member to a position of authority, their presence may alert the Tribunal to conflictual, and potentially harmful, dynamics within family units, and may prompt presiding members to consider the impact of those dynamics on the proposed represented person.

We observed the Tribunal's readiness to identify and articulate the experience of potential victim-survivors of family violence in alternative decision-making settings. For example, the represented person in *ZFN* 'reported [they] signed the document under duress and was unhappy about it and now afraid of [their] sons'.[238] In *PCP* the Tribunal acknowledged allegations of abuse and the likelihood that the represented person would 'be at risk of serious harm' should they return to their marital home.[239] However, the alleged perpetrator of family violence was permitted to attend teleconference proceedings in the presence of the represented person.[240] Further information is required to draw conclusions as to the safety concerns attaching to an alleged perpetrator being permitted to attend a hearing regarding alternative decision-making appointments; however, on its face, this does not seem appropriate.

Coercive control.

> Being free of the abuse … is deeper than being free of physical abuse – it is being free to *be a person who makes [their] own choices* in the everyday minutiae of life.[241]

[234] Ibid [48].
[235] *SZX* (n 145) [22].
[236] Ibid [6].
[237] Ibid [8].
[238] *ZFN* (2021) (n 186) [17].
[239] *PCP* (n 175) [13].
[240] Ibid [3], [8].
[241] Tolmie et al (n 16) 192. Emphasis in original.

C1 identified the challenge of 'getting to' conversations of change, such as leaving harmful relationships, where there is a history of coercive control (see above ***Barriers to receiving help***). Another allied health service provider attributed these challenges to forms of abuse which are 'nebulous and subtle and harder to pinpoint'.[242] Prolonged undermining of a person's agency, and their trust in their own personhood, is a significant barrier to addressing harmful relationships. It is relevant to note that 'leaving the relationship' or separation are not necessarily the most appropriate responses for victim-survivors of family violence.[243] Between 2011 and 2015, the Coroner's Court reported '38 adult family violence related homicide victims who were current or former intimate partners of the homicide offender'.[244] The majority of those victims (57.9%, n=19) were either separated, or intending to separate, from the person who perpetrated homicide.[245]

The certainty of a relationship, even where it is impacted by violence or control may, for some, be a less frightening prospect than the uncertainty which accompanies leaving a relationship, particularly where they have been reliant on a partner for care, financial or social security, and where there are other persons, such as children, involved.[246] In these situations, we must specifically interrogate the behaviours which have been perpetrated, and the impact of those behaviours on the victim-survivor's self-belief and self-determination.[247] Family violence assessment and response must not only consider the potential impact of the perpetrated behaviour on a victim-survivor, but the *particular* impact on the *'particular'*[248] person who is accessing the service or justice response.[249] For example, a person may

[242] C2 and C5 Interview (n 148) C5.
[243] 'For many primary victims separation is also not an option': Tolmie et al (n 16) 192.
[244] Coroners Court of Victoria, *Victorian Systemic Review of Family Violence Deaths Report 2011-2015* (Final Report, 2020) 13.
[245] Ibid.
[246] Unstructured Interview with Community Health Service Providers C5, C6, and C7 (Cate Banks and Abi Embleton, Teleconference, 1 November 2023) C6; Crossman and Hardesty (n 142) 202, with one participant quoted as saying: '... the fear of not having that man with you and not knowing where he is and not knowing what he's doing is worse than when he is with you. At least if he's with me ... then at least I'm prepared'. Crossman and colleagues were discussing coercive control in the specific context of intimate partner violence; however, we consider it relevant to instances of family violence occurring outside the intimate partner paradigm, that is, elder abuse, or violence against children.
[247] 'Because the practical configurations of entrapment show up differently in each victim's life, careful inquiry into the particular facts of each case ... is required: What are the coercive and controlling behaviours employed by the predominant aggressor and how have these specifically limited the primary victim's ability to be self-determining over time?': Tolmie et al (n 16) 185.
[248] Ibid 186.
[249] 'Another problem relates to how a court is to determine whether particular behaviour committed by a particular respondent/perpetrator has been coercive or controlling to the particular applicant/victim in a particular fact situation': Renata Alexander, 'Family Violence in Parenting Cases in Australia Under The *Family Law Act 1975* (Cth): The Journey

have experienced financial insecurity over the course of their life and may view their financial future after leaving a relationship, particularly if they have been isolated or discouraged from attaining employment during their time in the relationship, as intolerably uncertain. In non-intimate-partner violence, 'leaving' may look like estrangement from other family members, or losing communities of support, both of which may also be intolerable. A case review completed by Purser and colleagues in 2020 identifies a similar issue in family relationships characterised by a high degree of dependence on a substituted or supportive decision-maker. 'Fear of losing … care and assistance'[250] may prevent an older person experiencing family violence, particularly by a substituted or supportive decision-maker, from seeking help.

Systems abuse. The Tribunal decision review identified several instances wherein unsubstantiated applications were brought before the Tribunal.[251] One decision involved the bringing of multiple applications by family members to appoint a guardian, and counterapplications to dismiss (and to re-hear the dismissal) guardianship for the represented person, appointment of an auditor and an order for costs for the audit. The 'complexity' of the applications which had been brought before the Tribunal led to confusion regarding the 'background to the matter, and ... what applications were in fact before the Tribunal and what documents had been filed'.[252] Oral evidence for re-applications was 'substantially the same',[253] suggesting the fresh applications were unsubstantiated. Additionally, one family member made an allegation of abduction of the represented person, despite being unaware of the represented person's wishes, and 'family estrangement' between them.[254] The same family member made a claim of 'coercive control' by the current attorney, against the represented person. The making of such an allegation suggests one of several options:

So Far – Where Are We Now and Are We There Yet?' (2015) 29 *International Journal of Law, Policy and the Family* 313, 324.

[250] Purser et al (n 5) 14; describing the fact scenario in *Western v Male* [2011] SASC 75.

[251] *BEZ (Guardianship)* [2021] VCAT 1543 ('*BEZ*'); *JZK* (n 127); *NVX (Guardianship)* [2021] VCAT 586 ('*NVX*'); *OKR* (n 127); *QGL* (n 216); *QWM* (n 243); *UVJ (Guardianship)* [2021] VCAT 404; *LPS (Guardianship)* [2022] VCAT 1370; *REX (Guardianship)* [2022] VCAT 396; *VNH (Guardianship)* [2022] VCAT 379; *VQV (Guardianship)* [2022] VCAT 1369.

[252] *BEZ* (n 251) [2].

[253] Ibid [36].

[254] Ibid [41].

1) There was a genuine concern on the part of the alleger, based on an understanding of the meaning of 'coercive control', in which case the lack of evidence presented to the Tribunal may be explained by the general difficulty in gathering and presenting evidence of family violence, particularly coercive control (this seems unlikely, given the estrangement between the alleger and the represented person);
2) The alleger misunderstood the meaning of the term 'coercive control' but harboured a genuine belief that the represented person was at risk of harm (this also seems unlikely, given the estrangement between the alleger and the represented person); or
3) The alleger misused an allegation of coercive control in order to undermine the validity of the appointment to guardian, and the relationship between the guardian and the represented person. This latter possibility could constitute systems abuse.

The Tribunal's response to unsubstantiated claims was generally limited to the dismissal of applications for lack of evidence.[255] Where the lack of evidence was not central to the final decision (e.g. did not address the validity of an appointment, but rather related to a tangential finding such as the propriety of appointing a particular person), the Tribunal is able to (and did) factor this into its decision-making.[256] While it does not address the harm to wellbeing caused by the bringing of unsubstantiated claims in an attempt to exert control over the represented person, dismissing applications for lack of evidence does go some way towards undermining the power of the person using violence in these matters. We must query whether it is incumbent upon the Tribunal to ensure family violence is flagged as a concern, or forms part of the Office of the Public Advocate's enquiries when producing a report for the Tribunal, where unsubstantiated, or frequent, allegations are made. However, at this early stage, it is difficult to assess the feasibility of this approach.

[255] *NVX* (n 251) [68]-[72].
[256] *OKR* (n 127) [37].

Discussion and Conclusion

What is the level of awareness of the intersection between family violence and substituted decision-making among service providers?

Community health service providers and specialised family violence practitioners who participated in our research interviews had experience providing support services to victim-survivors of family violence specifically perpetrated through alternative decision-making mechanisms; however, they did not generally have experience with progressing matters to formal proceedings. In the future, more targeted recruitment strategies would allow us to develop a participant pool who can speak more closely to this intersection. However, when the elements of the intersection were broken down into discrete constituent parts (such as reduced capacity, webs of coercion, or dynamics of control) community service providers demonstrated significant insight into the experiences of victim-survivors and the roles played by service providers in intervening in cycles of violence.

Our discussion with a hospital-based service provider demonstrated that the siloing of roles in a hospital setting meant that family violence was not necessarily visible to all members of a care team, and if it was, it would be 'relegated' to social work or other allied health providers. In addition, there was no specific admission procedure that queried whether a patient had experienced family violence, or whether there was a family violence intervention order in place. The specific 'care goals' of hospital-based services may be incongruent with the provision of support services for family violence – H1 identified that where a family violence intervention order, for example, is not relevant to the specific health concern which prompted an admission, the hospital care team may not know of its existence. Additionally, alternative decision-making may not be deemed relevant except in extreme circumstances, such as where a person is unconscious or severely incapacitated. However, we know that alternative decision-making affects care in far broader ways.

Understanding family violence in alternative decision-making settings through discrete factors, rather than as a whole issue, speaks to our main concern arising from this report – the dots do not appear to have fully connected yet, in terms of sectors' depth of knowledge of family violence in alternative decision-making jurisdictions. For example, in the Royal Commission into Family Violence, there was acknowledgement of the role played by family violence in reduced capacity, specifically in the context

of acquired brain injury. Our discussions with community health service providers included acknowledgement of capacity reduction in the context of family violence as a result of long-standing patterns of coercion, control, and infiltration of support networks by perpetrators of violence, not solely physical violence. Awareness of the intersectionality of family violence was supported by the MARAM Framework and formal information-sharing pathways.

How do service providers navigate client matters where family violence and substituted decision-making intersect?

Service providers navigate client matters involving family violence in varied ways. One particular feature of our discussions was that some approaches taken by service providers directly conflicted with others, based on individual assessment of risk, as well as the context in which services were provided. For example, 'family-centred therapy' was discussed as a specific approach. In one circumstance, where family violence may have arisen, but services were provided in the context of general counselling, 'family-centred therapy' was highlighted as a useful mode of including family in a person's care, in a way which respected the client's boundaries. However, when raising 'family-centred therapy' with specialised family violence providers, the conversation immediately turned to managing risk, and including a perpetrator in that manner was intolerably unsafe, in the opinion of the service providers. When we consider the context of family violence in alternative decision-making, particularly that people may have significant reliance on perpetrators, or that older victim-survivors may wish to preserve relationships with family members who have exhibited patterns of behaviour which were controlling or coercive, considering alternative modes of practice which accommodate particular relationship dynamics is important. However, there is a significant challenge presented by the identification of safe family members, and the avoidance of collusion with perpetrators. At this stage, we are unsure of the optimal ways of reconciling these two competing aims of service provision. Better understanding the intersection between alternative decision-making contexts and family violence will assist in the development of service strategies that promote risk, as well as preserving relationships which are identified as important by victim-survivors.

Based on publicly available information, to what extent does the Tribunal acknowledge, or account for, family violence in alternative decision-making matters?

At times, the Tribunal refrained from making appointments which would further exacerbate conflictual family relationships – for example, in *QGL* (described above under ***Coercive control***) the appointment of a relative to an administrator position, based on past experience, '[created] a real risk of adversely affecting QGL's relationships with her sons, and her daughters in law, and her former daughter in law'.[257] This was an example of the Tribunal acknowledging violence, or at least conflictual relationships, in its decision-making. Decisions such as *QGL* are illustrative of the Tribunal's ability to identify and assess risk in alternative decision-making contexts, even where they are not explicitly directed to answer these questions by parties. However, further research is required to understand the actual decision-making which occurs in practice, and the materials which are available to the Tribunal. Research conducted over the long-term, with access to non-published decisions, would greatly assist in this regard. More specifically, more is required to understand the internal decision-making resources which are available to the Tribunal would assist us in better understanding the attitudes and priorities influencing final outcomes. Anecdotally, concern for the welfare or safety of a represented person does not have the same reciprocity in Tribunal matters as may be found in community health or other service provision settings – for example, when providing support in a family violence setting in the community, this is done through prisms of safety and risk management. While that may be true in the Tribunal, based on publicly available decisions, the primary focus appears to be the adjudication of specific questions which are raised under statute, and the time limit and limitation on engagement in Tribunal matters may mean that decision-makers are not given full opportunities to assess risk in a way which is appropriate and most likely to promote safety. Lack of explicit articulation of family violence risk under statute, in regard to matters heard under the Guardianship List, may greatly limit the Tribunal's ability to engage in risk assessment, management, and harm prevention in its decision-making. Aside from raising a direct concern to the relevant member, represented, or proposed represented persons under the Guardianship List are not afforded the opportunity to liaise with family violence support staff embedded within the Tribunal – under statute, this is only available in tenancy matters. While we observed in *PCP* that a family violence support worker was permitted to attend alongside the

[257] *QGL* (n 216) [60].

represented person during a teleconference, it is unclear whether this worker was affiliated with the Tribunal.

In what circumstances could, or do, family violence and substituted decision-making intersect?

A key issue lying at the intersection of family violence and alternative decision-making is that substitutive and supportive appointments already create risk for undermining the exercise of agency for vulnerable persons, and as such, dynamics of control may be exacerbated in these systems. Assessment frameworks which promote and augment decision-making capacity for older persons and persons with disabilities are protective against further cycles of control. However, where violent or controlling relationships are characterised by reliance, such as an older person relying on an adult child's assistance in attending medical appointments, this creates a further opportunity to embed external dynamics of abuse into service settings. Our discussions with participants indicate that the safety of frontline services may be compromised by service providers becoming enmeshed in narratives of 'helplessness' engendered by perpetrators of control and violence. Alternatively, narratives of care may be co-opted by perpetrators in order to justify their excessive involvement in service provision to a victim-survivor. This latter issue will be explored further in later works by the authors.

Our informal review of VCAT decisions indicates that family violence intersects with substituted decision-making in several ways, most particularly through the commencement of unsubstantiated matters through the Court, or the misuse of existing powers and appointments. However, current limitations (or gaps) in the Tribunal's abilities to address dynamics of violence or control in its matters, such as through information-gathering and -sharing, will continue to compound issues faced by victim-survivors interacting with the substitutive and supportive decision-making jurisdiction. We acknowledge that the Tribunal is not empowered under statute to make findings of family violence; however, at several stages of the decision-making process, the Tribunal is required to balance the interests of a potentially vulnerable person against the influences and interests of those in their circle. As such, the Tribunal is required to assess the likelihood of a person complying with wishes, respecting differences, and maintaining interests of proposed represented persons. Dynamics of abuse and control will be, and are, acutely relevant to such considerations.

Appendices

Appendix A: Focus Group Question Guide

Initial Questions for All Participants

General questions regarding how long they knew the person beforehand, describing the professional relationship, describing the services that they provide

Questions for Healthcare and Social Service Professionals

What are the social (or medical or legal) circumstances in which you typically observe people experiencing family violence or abuses of decision-making powers? Can you describe some common scenarios?

Have you ever had concerns about whether a guardian or substituted decision-maker is misusing their power? In what circumstances (e.g. personal, financial, medical)?

Have you encountered clients who you believed were experiencing domestic or family violence? How did you know that?

What information-sharing protocols, if any and to your best knowledge, are in place to communicate with other professionals responsible for providing services to your patients? Is your organisation an entity recognised by the FVISS?

Have you, in the course of your practice, dealt with supportive or substituted decision-makers for medical decisions? Have you observed any supportive decision-makers acting in a way which was overbearing, or which you felt did not reflect the needs of your patient?

Appendix B: Inclusion Criteria for Tribunal Decisions

Decisions which did not relate to 'substituted decision-making' were excluded from analysis – that is, where they did not concern the following:

1. Commencement, validity, amendment, or revocation of –
    a. Enduring powers of attorney;
    b. Guardianship orders;
    c. Administration order;
    d. Medical treatment decision-maker appointments;
    e. Advance care directives; and

2. Challenges to the above; or
3. Related applications, such as applications to summarily dismiss matters regarding the above.

Appendix C: Analysis Framework for Tribunal Decisions

The following questions formed the analysis for the VCAT decisions:

Introductory matters

Did this matter relate to substituted decision-making? How?

Who brought the application?

What were the questions to be answered in this decision? What were the relevant provisions?

Was family violence apparent based on the facts available?

What was the nature of the relationship between the Subject Person and the agent and/or other party to the proceeding?

Nature of the conduct surrounding or attaching to the application.

Based on your answer above, could family violence have been present?

Was the family violence raised or expressly discussed? Did it factor into decision-making?

Nature of evidence used by the Tribunal

What evidence was used in this proceeding?

Was there contradictory information advanced? Which was preferred? In your opinion, is there any indication as to why?

Was there an assertion as to capacity? What evidence was given?

Intersection with substituted decision-making

If identified, did the perpetrator of family violence use substituted decision-making mechanisms to further family violence?

Did the measures or outcomes imposed by the Tribunal address the family violence?

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