

18 August 2016

Directors of Policy Submissions
UNSW Law Society
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KENSINGTON NSW 2052

Executive Director
Australian Law Reform Commission
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By upload: www.alrc.gov.au

Dear Executive Director,

**UNSW LAW SOCIETY SUBMISSION
INQUIRY INTO PROTECTING THE RIGHTS OF OLDER AUSTRALIANS FROM ABUSE**

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Australian Law Reform Commission's inquiry into protecting the rights of older Australians from abuse.

The UNSW Law Society is the peak representative body for all of the students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. We seek to develop UNSW Law students academically, professionally and personally.

As a Law School we pride ourselves on our record of contributing to social justice through the law. As young Australians, we are concerned with the treatment of older people in our community as there is a lacuna in the law which leaves them particularly vulnerable to abuse and exploitation across many areas of life. This is an issue that affects society as whole. Our submission offers the perspective of younger people which we hope will contribute to the expansiveness of the Inquiry and will translate into more democratic and effective laws and policies.

We celebrate a rich diversity of students with a multiplicity of aims, backgrounds and passions. The submission below reflects the varied perspectives of the students of the UNSW Law Society. It addresses the Questions 5, 6, 8, 13, 26, 27, 28, 42 and 45 of the Issues Paper.

In respect of Questions 5, 6 and 8 regarding social security, we submit that:

- it would be preferable to implement a strategy focused on elder abuse as distinct from family and domestic violence;
- nominee arrangements should be strengthened through conducting background checks of prospective nominees, regular reviews of the nominee's performance and stronger responses to abuse perpetrated by nominees; and

- the reasons against using income management as a safeguard against family violence also apply in the context of elder abuse and thus income management should not be used to safeguard older people against financial exploitation and neglect.

In respect of Question 13 regarding aged care, we submit that:

- the mandatory reporting requirements for ‘reportable assaults’ should be expanded to include suspected abuse of a non-sexual or non-sexual nature; and
- there appears to be no principled reason for exempting home-based or flexible care providers from mandatory reporting obligations.

In respect of Question 26 regarding financial institutions, we submit that:

- financial institutions, governments and community organisations should promote consumer education and public awareness of financial elder abuse;
- a review of industry standards, particularly the ABA *Code of Banking Practice* should be conducted; and
- a voluntary and self-regulated reporting scheme for financial elder abuse guided by government oversight should be considered.

In respect of Questions 27 and 28 regarding family agreements, we submit that:

- older people face many practical, social, cultural and legal barriers in protecting their rights when family agreements break down;
- written family agreements can be normalised and clarified through specific legislation; and
- families should be encouraged to record their agreements in writing through education campaigns, increased access to community legal services and cheap and specialised family dispute resolution forums.

In respect of Questions 42 and 45 regarding criminal law, we submit that:

- an offence specifically concerning elder abuse should not be created;
- the enforcement of existing laws should be enhanced by improving the training and investigatory powers of enforcement agencies tasked with protecting the elderly who are prone to abuse; and
- persons in contact with elders in a professional capacity – including aged care service providers and medical practitioners – should be compulsorily obliged to report suspected elder abuse.

Please do not hesitate to contact us should you require further information.

Yours faithfully,
UNSW LAW SOCIETY

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Social Security

Question 5 How does Centrelink identify and respond to people experiencing or at risk of experiencing elder abuse? What changes should be made to improve processes for identifying and responding to elder abuse?

A Existing Strategy

As noted in the Issue Paper,¹ Centrelink has implemented a Family and Domestic Violence Strategy ('Centrelink Strategy'), which defines family and domestic violence to include financial abuse, neglect and abuse in non-family relationships such as those involving carers.² This allows Centrelink to respond to elder abuse through the family and domestic violence framework.³

The Centrelink Strategy involves 'strategic themes' consisting of:

- ensuring accessibility of information about family and domestic violence;
- identifying those at risk by asking about their safety at identified interaction points;
- providing referrals and support; and
- training staff.⁴

It aims to provide information about elder abuse to clients and staff so as to facilitate and encourage people to make their own properly informed decisions about whether to disclose abuse to Centrelink. It responds by offering appropriate support such as providing Crisis Payments or referrals to social workers or external service providers.⁵

B Limitations of Strategy

On one hand, the Centrelink Strategy is appropriate because it retains respect for a person's autonomy and their right to self-determination by requiring self-disclosure of abuse. However, this is also a

¹ Australian Law Reform Commission, *Elder Abuse*, Issue Paper No 47 (2016) 19 [50].

² Department of Human Services (Cth), 'Family and Domestic Violence Strategy 2016–2019' (Strategy Paper, 2016) 3 <<https://www.humanservices.gov.au/corporate/publications-and-resources/family-and-domestic-violence-strategy-2016-2019>>.

³ Sarah Ellison et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (Law and Justice Foundation of New South Wales, 2004) 290–5.

⁴ Department of Human Services (Cth), 'Family and Domestic Violence Strategy 2016–2019' (Strategy Paper, 2016) 5–8 <<https://www.humanservices.gov.au/corporate/publications-and-resources/family-and-domestic-violence-strategy-2016-2019>>.

⁵ *Ibid* 6.

limitation of the Strategy, precisely because it relies on elderly people being willing to voluntarily disclose abuse committed against them. As such, a targeted strategy is needed to address barriers to disclosure of abuse faced by the elderly.

As noted by Justice Connect, these barriers can include:

- isolation and reliance on the perpetrator for care and companionship
- fear of institutionalism
- fear of family members being penalised or prosecuted
- desire to preserve family relationships
- shame
- blaming themselves or feeling responsible for perpetrator's actions
- fear of loss of independence
- poor health impacts on energy and motivation to manage emotional conflict and physical change ...⁶

Although the barriers to disclosing elder abuse could be addressed by making more explicit provisions for elder abuse in the existing Centrelink Strategy, it would be preferable to implement a strategy focused on elder abuse as distinct from family and domestic violence for a number of reasons. First, the family and domestic violence framework is focused on 'women as victims'.⁷ While gender remains an important aspect of elder abuse,⁸ it does not adequately account for other factors. Second, ageism is a dominant contributing factor of elder abuse⁹ which may not be as relevant to other forms of family and domestic violence. Third, a strategy targeting elder abuse would also promote greater awareness of the issue with clients, staff and the community. It is essential that the mode of communication and content of information is tailored to those suffering elder abuse, in order to encourage self-disclosure.

⁶ Justice Connect Seniors Law, Submission No 19 to General Purpose Committee No 2, Parliament of NSW, *Inquiry into Elder Abuse in NSW*, November 2015, 15.

⁷ Sarah Ellison et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (Law and Justice Foundation of New South Wales, 2004) 291.

⁸ Melanie Joosten, Briony Dow and Jenny Blakey, 'Profile of Elder Abuse in Victoria: Analysis of Data about people Seeking Help from Seniors Rights Victoria' (Summary Report, Seniors Rights Victoria and the National Ageing Research Institute, June 2015) 27.

⁹ Justice Connect Seniors Law, Submission No 19 to General Purpose Committee No 2, Parliament of NSW, *Inquiry into Elder Abuse in NSW*, November 2015, 12.

Question 6 What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?

Appointing a nominee requires written consent of the principal.¹⁰ Where a person ‘is not capable, for example, due to an intellectual/physical constraint’ a nominee may be appointed on their ‘behalf’ if ‘the delegate is fully satisfied that the nominee is required and will act in the principal’s best interests’.¹¹ Safeguards currently exist that require ‘any question of the principal’s capacity to consent’ to be investigated and any decision that a principal is incapable must be supported by ‘sufficient evidence’.¹²

These measures offer protection regarding the validity of appointment of nominees to people that may have diminished decision-making capacity. However, there is a lack of safeguards once a nominee has been appointed as the person’s diminished capacity also reduces their ability to monitor the performance of their nominee and to alert Centrelink to any abuse by their nominee. Further, the perpetrator is likely to be the only other party with knowledge of the abuse, which makes it hard for authorities to uncover the abuse.¹³

Safeguards are required to provide ongoing processes for preventing, identifying and responding to abuse, especially when a nominee has been appointed for a person who could not give their consent. First, there should be greater scrutiny of the suitability of potential nominees by performing background checks on the person’s character and financial history.¹⁴ Second, there should be regular reviews of a nominee’s performance. Currently, payment nominees are required to keep records of expenditures of the principal’s payments¹⁵ which are reviewed when it is ‘deemed necessary’.¹⁶

Third, responses to abuse can be strengthened. Currently, the *Guide to Social Security Law* provides that allegations of misuse must be referred to social workers.¹⁷ Nominee arrangements may be suspended or revoked ‘where a delegate decides that a nominee appointment is not in the principal’s best interests’ or payments may be redirected.¹⁸ There could be more severe consequences for nominees who abuse their position such as liability for misused funds and additional penalties.

¹⁰ *Social Security (Administration) Act 1999* (Cth) s 123D.

¹¹ Department of Social Services, *Guide to Social Security Law* (at 19 September 2014) [8.5.1], [8.5.2].

¹² *Ibid.*

¹³ Sarah Ellison et al, *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (Law and Justice Foundation of New South Wales, 2004) 335.

¹⁴ Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Report No 117 (2011) 236 [9.50].

¹⁵ Department of Social Services, *Guide to Social Security Law* (at 21 March 2016) [8.5.3].

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

Question 8 What role is there for income management in providing protections or safeguards against elder abuse?

Income management could arguably be used to ensure payments to the elderly are being spent on their essential needs and cannot be misused by others, thereby offering a safeguard against financial exploitation and neglect. We posit that the reasons against using income management as a safeguard against family violence also apply in the context of elder abuse.

First, income management aims to modify the behaviour of those receiving welfare payments and is not designed as a safeguard against abuse per se. Income management ensures social security ‘payments cannot be spent on excluded items, comprising alcohol, tobacco, pornography or gambling goods and services ... [but] is available to be spent on necessities, including food, housing, utilities, clothing and medical care.’¹⁹ It aims to encourage disengaged youth, long-term welfare recipients and other ‘vulnerable’ people.²⁰

Second, as a safeguard for elder abuse, income management cannot be justified because of its significant interference with a person’s agency, especially where it is compulsorily imposed. The ARLC’s Family Violence Inquiry identified a number of reasons why income management is not ‘an appropriate response to improve the safety of victims of family violence’²¹ including its ‘disempowering effect’²² and the view that it penalises victims by changing their welfare payments.²³ Further, it fails to address ‘the complex needs for ... safety and protection’²⁴ facing victims while exacerbating safety concerns as ‘the perpetrator may blame the victim for being income managed’.²⁵

Similarly, those at risk of elder abuse require appropriate support,²⁶ not necessarily ‘help’ to manage money.²⁷ Better safeguards against elder abuse are required, rather than imposing additional burdens on victims.

¹⁹ Department of Social Services, *Guide to Social Security Law* (at 1 July 2015) [11.1.1].

²⁰ Department of Social Services, *Guide to Social Security Law* (at 1 July 2015) [11.1.1.30].

²¹ Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Report No 117 (2011) 256 [10.33].

²² *Ibid* 260 [10.49].

²³ *Ibid* 263 [10.59].

²⁴ *Ibid* 267 [10.1].

²⁵ *Ibid* 264 [10.67].

²⁶ *Ibid* 256 [10.34].

²⁷ Department of Human Services, *About Income Management* (15 March 2016) <<https://www.humanservices.gov.au/customer/enablers/about-income-management>>.

Aged Care

Question 13 What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

A Defining Elder Abuse

The first issue that arises in assessing evidence of elder abuse committed in aged care, both in residential and institutional settings, is defining elder abuse in such settings. One generally accepted definition of elder abuse is intentional or unintentional acts or omissions, which can be physical, psychological and financial in nature, that result in the ‘unnecessary suffering, injury or pain, the loss or violation of human rights, and a decreased quality of life for the older person’.²⁸ The World Health Organisation, influenced by the work of governments and international bodies, has broadened the definition to:

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. This type of violence constitutes a violation of human rights and includes physical, sexual, psychological, emotional, financial and material abuse; abandonment; neglect and serious loss of dignity and respect.²⁹

Such a broad definition places age and the experience of ageing at the forefront in identifying instances of elder abuse, and, as the South Australian Aged Rights Advocacy Service observes, covers a variety of practices beyond those regulated by the criminal law.³⁰

B Expanding the Definition of ‘Reportable Assaults’

In the Australian context, the aged care sector is regulated by the *Aged Care Act 1997* (Cth). The Act prescribes responsibilities to approved service providers in institutional, home and flexible care settings. It recognises elder abuse on principally two levels. The first is in residential care settings

²⁸ Rosalie Wolf, Lia Daichman and Gerry Bennett, ‘Abuse of the Elderly’ in Etienne G Krug et al (eds), *World Report on Violence and Health* (World Health Organisation, 2002) 123, 126, citing Margaret F Hudson, ‘Elder Mistreatment: A Taxonomy with Definitions by Delphy’ (1991) 3(2) *Journal of Elder Abuse & Neglect* 1.

²⁹ World Health Organisation, ‘Elder Abuse’ (Fact Sheet No 357, October 2015) <<http://www.who.int/mediacentre/factsheets/fs357/en/>>; Rosalie Wolf, Lia Daichman and Gerry Bennett, ‘Abuse of the Elderly’ in Etienne G Krug et al, *World Report on Violence and Health* (World Health Organisation, 2002) 123, 126–7.

³⁰ Aged Rights Advocacy Service, *Residential Care: Preventing Elder Abuse: Definition* (2016) <http://www.sa.agedrights.asn.au/residential_care/preventing_elder_abuse/definition>.

explicitly through ‘reportable assaults’ in section 63-1AA. The second is through a list of obligations owed by aged care providers.³¹

Reportable assaults are defined in the Act as:

unlawful sexual contact, unreasonable use of force, or assault specified in the Accountability Principles and constituting an offence against a law of the Commonwealth or a State or Territory, that is inflicted on a person when:

- (a) the person is receiving residential care in respect of which the provider is approved; and
- (b) either:
 - (i) subsidy is payable for provision of the care to the person; or
 - (ii) the person is approved under Part 2.3 as the recipient of that type of residential care.³²

1 *Including Abuse of a Non-sexual or Non-physical Nature*

Section 63-1AA only makes reporting a mandatory requirement for instances of abuse of a serious sexual or physical nature.³³ As stated earlier, globally accepted definitions of elder abuse recognise that it includes a host of practices which are detrimental to recipients of aged care. This includes financial abuse, differential treatment, wilful or unintentional neglect, poor practice, bullying and psychological abuse. We submit that the mandatory reporting obligation should be extended to the broader range of serious abuses of a non-sexual or non-physical nature.

2 *Including Abuse in Non-residential Settings*

Secondly section 63-1AA deals with instances of assault in residential care. This effectively means that aged care providers in home based or flexible care settings are not subject to the mandatory reporting requirements. This is concerning as it drastically reduces the accountability of an entire subset of staff members, volunteers or key personnel of aged care providers that do not fall within residential care. We submit that there appears to be no principled reason for exempting home-based or flexible care providers from mandatory reporting obligations.

³¹ See *Aged Care Act 1997* (Cth) ch 4.

³² *Aged Care Act 1997* (Cth) s 63-1AA(9).

³³ While s 63-1AA(9) also includes assaults specified in the *Accountability Principles 2014* (Cth), the *Principles* do not currently broaden the definition by including a list of additional forms of assault.

Financial Institutions

Question 26 What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

A What Is Financial Elder Abuse?

There is no clear standard to follow in defining financial elder abuse.

The World Health Organisation defines financial elder abuse as ‘the illegal or improper exploitation or use of funds or other resources of the older person’.³⁴

The recent NSW Parliamentary Inquiry into Elder Abuse refined the definition of financial elder abuse as ‘the illegal use, improper use or mismanagement of an older person’s money, financial resources, property or assets without the person’s knowledge or consent’.³⁵ Under this approach, elder financial abuse may be broadly divided into two categories:³⁶

- 1 Theft or fraud (specifically fraudulent transfer of title and mortgage registration, and abuse of enduring power of attorney); and,
- 2 Loss of dwelling (specifically loans, guarantees and mortgages; gifts of assets including transfer of property, and granny flat arrangements).

For the purposes of this submission, we will adopt the latter definition of financial elder abuse.

Existing protective mechanisms or agencies relating to financial elder abuse in Australia are deficient; there is no specific legislation for dealing with the issue on either the State or Federal level³⁷ and the level of policy attention has been long overdue.

³⁴ Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence – Protecting Elders’ Assets Study* (Monash Institute of Health Services Research – Faculty of Medicine, Nursing and Health Sciences, 2009) 4–5, quoting Rosalie Wolf, Lia Daichman and Gerry Bennett, ‘Abuse of the Elderly’ in Etienne G Krug et al (eds), *World Report on Violence and Health* (World Health Organisation, 2002) 123, 127.

³⁵ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 77 [6.1].

³⁶ Legal Aid NSW, Submission No 49 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 17 November 2015, 4.

³⁷ Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence – Protecting Elders’ Assets Study* (Monash Institute of Health Services Research – Faculty of Medicine, Nursing and Health Sciences, 2009) 18.

The absence of a national approach to managing financial elder abuse has resulted in various State and Territory protocols and guidelines on the issue of elder abuse generally with varying degrees of focus on financial abuse.³⁸

Challenges posed by this issue are three-fold:³⁹

- 1 Inadequacy of responsible lending provisions (inconsistent implementation, non-consideration of social or medical circumstances);
- 2 Increased risk of exposure to unconscionable conduct (inherent social and psychological pressures particularly in commercial contexts); and,
- 3 Victims' reluctance to report cases of abuse, primarily due to associated psychological burdens of doing so⁴⁰ compounded by the statistically high representation of under-reporting of financial abuse with 66% of financial abuse cases involving victim's children as perpetrators.⁴¹

B Reform Options

Five reform options with respect to financial elder abuse have been proposed or implemented around the world:⁴²

- 1 Education and public awareness campaigns, including training for various professional groups that have contact with older people;
- 2 Community-based multidisciplinary teams that can investigate and manage financial elder abuse;
- 3 Management of older people's financial affairs by independent workers (daily money managers);
- 4 Legislative reform of enduring powers of attorney; and,
- 5 Institutional reporting of suspected instances of financial elder abuse.

The significant role that financial institutions can play in addressing financial elder abuse is clearly evident and implementation of measures relating to financial institutions has been regarded as

³⁸ Ibid 24.

³⁹ Redfern Legal Centre, Submission No 65 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 23 November 2015, 8–9.

⁴⁰ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 82 [6.12]–[6.14].

⁴¹ Redfern Legal Centre, Submission No 65 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 23 November 2015, 8.

⁴² Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence – Protecting Elders' Assets Study* (Monash Institute of Health Services Research – Faculty of Medicine, Nursing and Health Sciences, 2009) 6–7, 27.

relevant.⁴³ Banks have a role in protecting the financial assets of the elderly and vulnerable community members. However, a study of bank staff surveys in Australia indicate reluctance to become involved in family financial disputes even with suspicions of financial abuse due to the difficulty of ascertaining sufficient evidence.⁴⁴

This Issue Paper has identified potential roles for financial institutions with respect to financial elder abuse as at least involving raising awareness of the issue, and detecting and reporting of possible instances of abuse.⁴⁵

C Recent NSW Parliamentary Inquiry into Elder Abuse

The NSW Parliament has recently conducted an Inquiry into Elder Abuse. The recommendations and submissions put forward by various stakeholders made in that Inquiry are relevant for consideration for present purposes.

In summary, financial institutions were called upon to:

- Improve staff awareness of potential for abuse and indicators prompting them to question appropriateness of certain transactions⁴⁶ through mandatory staff training for identification of suspicious transactions;⁴⁷
- Address reluctance by the banking industry to engage with research and consultation-based online tools developed by Capacity Australia despite a 2007 call by the Banking and Financial Services Ombudsman for development of national protocols and training programs for financial service providers;⁴⁸
- Encourage banking and financial services institutions to actively provide consumer education on financial abuse;⁴⁹

⁴³ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 103.

⁴⁴ Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence – Protecting Elders’ Assets Study* (Monash Institute of Health Services Research – Faculty of Medicine, Nursing and Health Sciences, 2009) 19.

⁴⁵ Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (15 June 2016) 29 [105]–[106].

⁴⁶ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 114 [7.37].

⁴⁷ Ibid 114 [7.40], 116 [7.45]; Redfern Legal Centre, Submission No 65 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 23 November 2015, 10.

⁴⁸ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 116–17 [7.46]; Capacity Australia, Submission No 81 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 27 January 2016, 15–16.

⁴⁹ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 116 [7.45].

- Review ABA guidelines to increase adherence to responsible lending and implementation at bank branches, and mandatory training for banks to identify early signs of financial exploitation;⁵⁰ and,
- Develop national industry-wide protocols for reporting allegations of abuse.⁵¹

Although supportive of recommendations, the Australian Bankers' Association ('ABA') raised the challenges banks face with respect to addressing financial elder abuse. Banks are limited in reporting potential instances of financial elder abuse due to concerns surrounding privacy laws, anti-discrimination laws (surrounding age as a discriminatory criterion), difficulty in identification and ascertainment of abuse (in distinguishing legitimate and exploitative transactions), and detrimental effects on third parties acting in good faith and the best interests of the older person.⁵²

C Recommendations

We propose three recommendations with respect to the role of financial institutions in addressing financial elder abuse:

- 1 promoting and facilitating consumer education and public awareness of financial elder abuse;
- 2 reviewing and improving industry standards, particularly the *ABA Code of Banking Practice*; and,
- 3 implementing a voluntary and self-regulated reporting scheme for financial elder abuse guided by government oversight.

1 *Promoting Consumer Education and Public Awareness*

Education and public awareness campaigns are one of the most frequently recommended strategies for the prevention and management of financial elder abuse. These provide information on the nature and impact of financial abuse, who to contact to report suspected cases of abuse, and methods of preventative practices.⁵³ Such schemes may also have a potential to induce a cultural change surrounding the topic.

⁵⁰ Redfern Legal Centre, Submission No 65 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 23 November 2015, 8.

⁵¹ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 114 [7.40].

⁵² Ibid 115 [7.42]; Australian Bankers' Association, Submission No 113 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 7 March 2016, 2.

⁵³ Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence – Protecting Elders' Assets Study* (Monash Institute of Health Services Research – Faculty of Medicine, Nursing and Health Sciences, 2009) 28.

At present, Legal Aid NSW has produced several informational brochures and hosted sessions with seniors and community workers on the topic of elder financial abuse to raise awareness of this problematic social issue.⁵⁴

The NSW Parliamentary Inquiry into Elder Abuse called for the NSW Government fund NSW Elder Abuse Helpline and Resource Unit to conduct information sessions with financial institutions to raise awareness of financial elder abuse and promote online training tools for staff.⁵⁵ In submissions to that Inquiry, the ABA has suggested that consumer education through consumer fact sheets, and cross-institutional research and awareness-raising should be one of the means of addressing financial abuse as a community problem.⁵⁶

We are of the opinion that these recommendations should be adopted on a national level.

Additionally, the involvement of financial institutions in promoting consumer education and public awareness of financial elder abuse may tie in with the Financial Systems Inquiry's Recommendation 23 (Facilitation of innovative disclosure) which called for the removal of regulatory limits to innovative product disclosure and communication with consumers, such as use of online communication tools, new media, self-assessment tools and videos.⁵⁷ The Government has agreed to Recommendation 23 pending legislative action upon completion of ASIC and the industry's efforts to promote innovative product disclosure in 2017.⁵⁸

2 *Strengthening Industry Standards: Staff Training and Development Programs*

The banking industry has developed the following guidelines on financial abuse generally – 'Protecting vulnerable customers from potential financial abuse', and 'Responding to requests from a power of attorney or court-appointed administrator'.⁵⁹ Additionally, the ABA has submitted that several banking product and services solutions (including joint accounts, authorised third party access,

⁵⁴ Legal Aid NSW, Submission No 49 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 17 November 2015, 17.

⁵⁵ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 119 [7.54]–[7.55].

⁵⁶ Australian Bankers' Association, Submission No 113 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 7 March 2016, 4.

⁵⁷ Financial System Inquiry, Commonwealth Treasury, *Financial System Inquiry Final Report* (28 November 2014) 213.

⁵⁸ Commonwealth Treasury, *Improving Australia's Financial System – Government response to the Financial System Inquiry* (20 October 2015) 19.

⁵⁹ Australian Bankers' Association, Submission No 113 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 7 March 2016, 2; Australian Bankers' Association, 'Protecting Vulnerable Customers from Potential Financial Abuse' (Industry Guideline, December 2014); Australian Bankers' Association, 'Responding to Requests from a Power of Attorney or Court-Appointed Administrator' (Industry Guideline, December 2014).

and customised account services for increased accessibility), and formal arrangements (including formal substituted and supported decision-making arrangements) may assist in protecting the interests of the elderly.⁶⁰

However, current frameworks are inadequate; industry guidelines ‘[are] not mandatory, [have] no legal force and [make] no binding obligations on individual banks’.⁶¹ The Law Society of NSW supports the House of Representatives Standing Committee on Legal and Constitutional Affairs’ report, ‘Older People and the Law’ in potentially implementing a national, industry-wide set of protocols for reporting alleged financial abuse and banking staff training program.⁶²

We are of the opinion that these recommendations should be adopted on a national level.

A model jurisdiction that such a proposed scheme may be based upon may be the US State of Washington where financial institutions are required to provide staff training on financial exploitation.⁶³

The implementation of such a scheme may also further the operation of clause 7 of the ABA’s *Code of Banking Practice* to recognise and address accessibility issues for older persons and customers with a disability to transaction services.⁶⁴ Reform in this area also aligns with recommendations made by the Financial Systems Inquiry, namely, Recommendations 24 (to raise industry standards and build confidence and trust in the financial system),⁶⁵ and 25 (to raise the competency of financial advice providers through training and certification).⁶⁶

- Recommendation 24 involved a standards development aspect which was directed towards reports of poor standards of conduct and professionalism in the provision of financial services.⁶⁷ Although broadly agreed to by the Government,⁶⁸ a different approach with respect to retail life insurance has been undertaken. This approach followed the industry’s proposed

⁶⁰ Australian Bankers’ Association, Submission No 113 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 7 March 2016, 2–3.

⁶¹ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (24 June 2016) 116 [7.45].

⁶² Law Society of NSW, Submission No 107 to General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales*, 15 February 2016, 5 (pagination added) pt 1, s 6.

⁶³ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2013) 35; Wash Rev Code § 74.34.220 (2015).

⁶⁴ Australian Bankers’ Association, *Code of Banking Practice 2013*, cl 7.

⁶⁵ Financial System Inquiry, Commonwealth Treasury, *Financial System Inquiry Final Report* (November 2014) 217–20.

⁶⁶ *Ibid* 222.

⁶⁷ *Ibid* 218.

⁶⁸ Commonwealth Treasury, *Improving Australia’s Financial System – Government Response to the Financial System Inquiry* (20 October 2015) 20.

reforms as announced in 2015⁶⁹ and made pursuant to ASIC's 2014 report into retail life insurance.⁷⁰ These reforms will be the subject of a government review in 2018.

- Recommendation 25 involved ongoing professional development – including technical and relationship skills, and compliance and ethical requirements.⁷¹ It has been agreed to and to be addressed in pending legislative action in raising professional standards of financial advisers recently closed for consultation.⁷² Educational courses on financial elder abuse may be incorporated into continuing professional development scheme to be implemented under the proposed bill.

3 *Institutional Reporting of Financial Elder Abuse*

In Australia, neither statute nor policy guidelines (namely, the ABA's *Code of Banking Practice*) require financial institutions to report suspected financial abuse.⁷³

The ABA has suggested that financial institutions are legally constrained or limited in their ability to report suspicions of financial abuse. Concerns raised include duties of agency, appointed decision-making, privacy, discrimination, confidentiality, defamation, and absence of institutional reporting frameworks.⁷⁴ Nonetheless, the ABA has been supportive for a nationally consistent approach to elder abuse.⁷⁵

Thus, if institutional reporting of financial elder abuse were to be adopted, two further considerations should be made:

- 1 Should such reporting be mandatory or voluntary?
- 2 Furthermore, should such reporting be supported by industry self-regulation or government enforcement?

(a) *Should Reporting Be Mandatory or Voluntary?*

⁶⁹ Commonwealth Treasury, 'Industry Reform Proposal on Retail Life Insurance Welcomed' (Media Release, 25 June 2015) <<http://jaf.ministers.treasury.gov.au/media-release/032-2015/>>.

⁷⁰ Australian Securities and Investment Commission, *Review of Retail Life Insurance Advice*, Report No 413 (2014).

⁷¹ Financial System Inquiry, Commonwealth Treasury, *Financial System Inquiry Final Report* (28 November 2014) 224.

⁷² Commonwealth Treasury, *Improving Australia's Financial System – Government Response to the Financial System Inquiry* (20 October 2015) 21; Commonwealth Treasury, 'Raising professional standards of financial advisers' (Consultation Notice, 3 December 2015) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Raising-professional-standards-of-financial-advisers>>.

⁷³ Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (15 June 2016) 30 [108].

⁷⁴ *Ibid* 30 [109]–[111].

⁷⁵ *Ibid* 30–1 [112].

With respect to the first consideration, mandatory reporting has not been endorsed in the Australian context. Key concerns include the difficulty in establishing the requisite evidence of abuse, absence of empirical support for the effectiveness of such a measure, and would have a potentially negligible impact and diverting resources away from addressing the issue, may enforce ageist stereotypes of older people.⁷⁶

In overseas jurisdictions, matters of suspected financial exploitation and abuse are predominantly reported on a voluntary basis. This is the case in:

- US State of Washington where reports are made to police;⁷⁷
- Canadian provinces of British Columbia, to the Public Guardian and Trustee,⁷⁸ and Nova Scotia, to the Office of the Public Trustee where the allegations relate to a client of the referee,⁷⁹ and,
- England,⁸⁰ and Scotland by local councils making independent inquiries and investigations,⁸¹ to the Office of the Public Guardian.

Domestically, similar governmental entities investigate referred complaints or allegations under State guardianship legislation:

- Victoria and Western Australia, with the Office of the Public Advocate;⁸² and,
- Queensland, with a similar officer known as the Adult Guardian.⁸³

We are of the opinion that the institutional reporting of financial elder abuse should be made on a voluntary basis.

⁷⁶ Peteris Darzins et al, *Financial Abuse of Elders: A Review of the Evidence – Protecting Elders’ Assets Study* (Monash Institute of Health Services Research – Faculty of Medicine, Nursing and Health Sciences, 2009) 31.

⁷⁷ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2013) 34–5.

⁷⁸ Mark Crofton, ‘To Investigate Guardianship Laws, Policy and Education in Order to Prevent and Prosecute Elder Financial Abuse’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2011) 27–8.

⁷⁹ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2013) 44–5.

⁸⁰ Mark Crofton, ‘To Investigate Guardianship Laws, Policy and Education in Order to Prevent and Prosecute Elder Financial Abuse’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2011) 28.

⁸¹ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2013) 47–8.

⁸² Ibid 72; *Guardianship and Administration Act 1986* (Vic) s 16(1)(h); *Guardianship and Administration Act 1990* (WA) s 97(1)(c).

⁸³ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Fellowship Report, Winston Churchill Memorial Trust of Australia, 2013) 73; *Guardianship and Administration Act 2000* (Qld) s 180.

(b) *Should Reporting Be Supported by Self-Regulation or Government Intervention?*

The self-regulatory nature of the ABA's *Code of Banking Practice* remains relevant for at least four factors –the *Code* (1) is more extensive than legislation in certain areas of coverage, (2) informs legislative obligations, (3) mutually influences development of legislative standards, and (4) promotes consistency in industry practice.⁸⁴

As an industry code, members determine to which standards they are prepared to commit. Although effective self-regulation may require a government willing to actively command the enforcement of standards, a co-regulatory approach of facilitating further improvements under the Code is likely more successful than a blanket regulatory threat.⁸⁵

As such, we recommend that institutional reporting of financial elder abuse be primarily supported by reformed industry self-regulation backed by governmental oversight.

⁸⁴ Nicola Howell, 'Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?' (2015) 38 *University of New South Wales Law Journal* 544, 547.

⁸⁵ *Ibid* 583–4.

Family Agreements

Question 27 What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

A Defining Family Agreements

Family agreements are typically arrangements whereby an older person transfers their property (usually their home) or other assets of value to a family member who, in return, provides long-term care and support.⁸⁶

The Issues Paper extends the scope of ‘family agreements’ to be synonymous with an ‘assets for care’ arrangement, an independent or private care agreement, a personal services contract, and/or a lifetime care contract.⁸⁷ These other terms show that such agreements are not strictly confined to ‘family’, and can instead include an understanding between an older person and a trusted person such as a friend or elderly caretaker.

Due to the informal and private nature of these arrangements, family agreements are usually formed orally and without any legal advice.⁸⁸ Though most family agreements are undertaken with good intentions from the outset they often fail to address expectations or other relevant issues and are inclined to break down.⁸⁹

B Barriers Seniors Face When Family Agreements Break Down

For some seniors, family agreements are desirable as it allows them the opportunity to continue living in the family home safely, with someone taking care of them. However, if the relationship between the senior and caregiver breaks down then seniors are at risk of losing their homes or they may ‘continue to live in caregiving relationships that have become unhappy or even abusive’.⁹⁰

There is evidence that older people cannot adequately safeguard their property interests and wellbeing when family agreements break down because of their aversion to engaging with the legal system.

⁸⁶ Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (2016) 31 [113].

⁸⁷ *Ibid* 31 [113].

⁸⁸ *Ibid* 31 [114].

⁸⁹ Margaret Isabel Hall, ‘Care for Life: Private Care Agreements between Older Adults and Friends or Family Members’ (2003) 2 *Elder Law Review* 1.

⁹⁰ *Ibid* 1.

Firstly, the considerable financial cost of obtaining legal assistance deters older people from accessing the legal system.⁹¹ Once a family agreement breaks down, seniors may have already transferred their largest assets to the carer and be forced to spend their money on alternative accommodation arrangements,⁹² leaving little left over to spend on legal assistance.

Sociocultural factors also play a part in dissuading seniors from seeking to protect their interests through the legal system. Older people wish to preserve family relations because ‘conflict with family also takes an emotional toll’, with seniors often feeling a strong sense of shame about a breakdown in family ties.⁹³ Seniors may avoid turning to the legal system to protect their interests as they do not want to air their private family grievances in such ‘a public manner’.⁹⁴

As a way to protect the older person’s interest, Hall suggests that a ‘family conference’ be conducted before the family agreement takes place.⁹⁵ At this family conference, the older person’s lawyer attends and assists in drafting and explaining to all parties a contract setting out the terms of care and asset exchange.⁹⁶ Following this all parties are advised to seek independent legal advice. At a second conference, the agreement is signed by and distributed to all parties.⁹⁷

Although families should be encouraged to discuss and record their agreements, this style of family conference is not practical to the majority of people. First, it does not address informal and private nature of family agreements to overcome the common reluctance to seek external advice. Second, the involvement of the older person’s lawyer early in the process may be seen as unduly confrontational and may undermine family trust. Third, like litigation, family conferences may be cost prohibitive, though not as expensive as litigation. Finally, conducting a family conference in this manner seems inappropriate because it treats families like individuals engaged in a commercial transaction, when in actuality there may be a senior’s wellbeing that is at stake.

There may be cases where courts will apply equitable principles to protect the rights of elderly people even where a formal agreement does not exist.⁹⁸ However, these principles narrowly focused on the

⁹¹ Rosslyn Monro, ‘Family Agreements: All with the Best of Intentions’ (2002) 27 *Alternative Law Journal* 68, 71.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Margaret Isabel Hall, ‘The Care Agreement: Transfer of Property in Exchange for the Promise of Care and Support’ (2002) 21 *Estates, Trusts & Pensions Journal* 209, 271–2.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Rosslyn Monro, ‘Family Agreements: All with the Best of Intentions’ (2002) 27(2) *Alternative Law Journal* 68, 70.

parties' legal issues and do not take into account the wider social context of the family breakdown. Furthermore, they may not apply in all cases, and where they do apply, such remedies may be inadequate.

The case of *Callaghan v Callaghan*⁹⁹ involved a 77-year-old father who purchased a house for his adult daughter to live in, with the title held in the daughter's name, for the purpose of reducing stamp duty. The father agreed to live in a flat at the rear of the house.¹⁰⁰ Their relationship broke down after the father formed a new relationship with a woman who would later become his wife.¹⁰¹ The father went on a holiday and during this time, the daughter made arrangements to sell the house.¹⁰² Justice Perry stated in orbiter, that the presumption of advancement would apply even if that child could independently support themselves.¹⁰³ Ultimately, it was found to be the father's actual known intention to give the house to his daughter. However, the father had a life interest in the flat, and was entitled to recover the value of this life interest from the proceeds of the sale.¹⁰⁴

In *Morris v Morris*,¹⁰⁵ the plaintiff, a 69-year-old father, sold his home after the death of his wife and moved into his son's family house.¹⁰⁶ The father put the proceeds from the sale of his house towards the construction of a second story to his son's house.¹⁰⁷ Unfortunately, the father was forced to move out of the house because his son's marriage broke down.¹⁰⁸ Justice McLelland held that the father's expectation at the time of making the investment was that he would live in the house indefinitely, and it would be unconscionable for the son to keep the benefit of his father's investment.¹⁰⁹ As such, the father was granted an equitable charge over the property to secure the amount of money he spent on extending the property.¹¹⁰

As these cases demonstrate, that equity may afford some protections for the interests of older people, however, this is purely dependent on the facts of each case fitting within equitable frameworks, such as unconscionability and detrimental reliance. Notably too, in both cases, the elderly party was awarded a monetary remedy and their legal interest in the property was not protected.

⁹⁹ (1995) 64 SASR 396.

¹⁰⁰ Ibid 398 (Perry J).

¹⁰¹ Ibid 400

¹⁰² Ibid 401.

¹⁰³ Ibid 406.

¹⁰⁴ Ibid 407.

¹⁰⁵ [1982] 1 NSWLR 61.

¹⁰⁶ Ibid 63 (McLelland J).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 64.

¹¹⁰ Ibid.

Question 28 What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

A Current Regulatory Frame of Family Agreements

Family agreements are governed by the common law and equity as there is no specific Commonwealth, State or Territory legislation applicable.¹¹¹ The lack of existing protective mechanisms means that the current regulatory state of affairs for family agreements is inadequate in protecting older people.

B Reform Options

Family agreements which involve the exchange of assets for ongoing care should be afforded greater legitimacy and protection by having the arrangements transparently documented.¹¹²

Older people do not consider documenting family agreements as necessary because of the trust they place in their family members and carers. However, this ‘cultural aversion’ to documenting personal relationships has changed. For example, written financial agreements between spouse (sometimes referred to as prenuptial agreements),¹¹³ have legislative support which assists with normalising written family agreements.¹¹⁴

Just as financial agreements have been increasingly normalised by legislative backing, written family agreements should also be normalised by specific legislation which includes a standard form agreement for assets of care arrangements.

Further, many voices in the legal community have urged that awareness should be raised to educate parties to a family agreement about the importance of documenting the arrangement.¹¹⁵ Information regarding the benefits of family agreements could be transmitted when interacting with Centrelink or other services.

¹¹¹ Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (2016) 31 [115].

¹¹² Louise Kyle, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 1; Brian Herd, ‘The Family Agreement – A Collision between Love and the Law?’ (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 26.

¹¹³ *Family Law Act 1975* (Cth) pt VIIIA.

¹¹⁴ Brian Herd, ‘The Family Agreement – A Collision between Love and the Law?’ (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 23.

¹¹⁵ See, eg, Caxton Legal Centre, Submission No 112 to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law*, 20 February 2007, 26.

Governments should also provide more community legal services for families to reduce the costs and the confrontational nature of formalising family agreements. In particular, specialist community legal centres, such as the Senior Rights Service in NSW, can help in drafting and reviewing family agreements to ensure that the older person is adequately protected.

Likewise, increasing the access to cheap, family dispute resolution services is needed. Currently, cheap, specialised resolution forums, such as the Family Law Services' Family Dispute Resolution, are only available to divorcing couples.¹¹⁶ A similar government funded alternative dispute resolution should be provided for family agreements so that when an asset for care arrangement breaks down, families can avoid litigation and come to a mutual agreement.

C Summary of Reform Options

In summary, we recommend that:

- To encourage documentation, parties to a family agreement should be educated on the importance of putting the arrangement in writing.
- Normalising the documentation of family agreements by including standard form family agreements in legislation.
- A government funded dispute resolution service for older people to access when family agreements break down to avoid costly, lengthy and often ugly, litigation.

¹¹⁶ Family Relationships Online, *Family Dispute Resolution* (1 July 2011) <<http://www.familyrelationships.gov.au/services/familylawservices/fdr/pages/default.aspx>>.

Criminal Law

Question 42 In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

Considering that between two and five per cent of elderly people in Australia are abused,¹¹⁷ it is vital that the current laws are reviewed to prevent elder abuse, and prosecute acts that do occur. To maintain the dignity and autonomy of older persons, a paternalistic approach should be avoided.¹¹⁸ Further, given that elder abuse may constitute many different actions against an older person, drafting such a law would be difficult. Accordingly, we posit that the preferred normative approach would be to strengthen existing laws by enhancing the protection and investigation mechanisms available to authorities to prosecute suspected elder abuse according to existing laws.

A Practice across Jurisdictions

Internationally, a number of jurisdictions incriminate elder abuse. For example, the *Revised Code of Washington* has a specific definition for ‘vulnerable adult’, which has been defined broadly to include adults who are disabled or are receiving services from individual providers.¹¹⁹ Commonly however, elder abuse is simply accounted for via the jurisdiction’s Criminal Code, as is the case in Canada.¹²⁰

At a national level, elder abuse in Australia is currently best prevented via the *Age Discrimination Act 2004* (Cth), and its associated establishment of the Age Discrimination Commissioner in 2011.¹²¹ While the *Aged Care Act 1997* (Cth) and *Home and Community Care Act 1985* (Cth) also provide some protection, this is limited to persons who access such services.¹²² This has resulted in a greater onus on the states and territories of Australia to enact legislation.

¹¹⁷ Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 Sydney Law Review 99, 100.

¹¹⁸ Ibid 104.

¹¹⁹ Wash Rev Code § 74.34.020(21) (2015); see also John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Report, Winston Churchill Memorial Trust of Australia, 30 July 2013) 28.

¹²⁰ Department of Justice (Canada), ‘Legal Definitions of Elder Abuse and Neglect’ (Corporate Publications, 24 March 2015) ch 2, app A <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/toc-tdm.html>>.

¹²¹ *Age Discrimination Act 2004* (Cth) pt 6A, as inserted by *Age Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) sch 2 cl 3; see also Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 Sydney Law Review 99, 120.

¹²² Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 Sydney Law Review 99, 102.

Some Australian states have created guidelines and strategies to complement local state laws, such as Victoria's *With Respect to Age – 2009* guidelines and South Australia's *Strategy to Safeguard the Rights of Older South Australians 2014–2021*, which have created six and seven categories of abuse respectively.¹²³ However, these do not create criminal offences, instead serving as guides for carers, service providers and the community that aim to prevent abuse.¹²⁴

B Options for Reform

1 *Enhanced Enforcement*

Since 80 per cent of perpetrators are family members,¹²⁵ it is recommended that domestic violence legislation should be strengthened. The word 'family member' has been defined broadly in section 8 of the *Family Violence Protection Act 2008* (Vic) to include people the person potentially being abused regards 'as being like a family member', such that it captures carers of the elderly person as well. This approach could be implemented on a national level.

Further, police training relating to the investigation and prosecution of elder abuse cases should be improved, and the investigative powers of statutory agencies such as state public advocates should be increased. This would enable the investigation of situations of concern when a crime may likely have been committed, and subsequent prosecution appropriate.¹²⁶

Alternatively, an independent government agency which solely manages inquiries and complaints regarding (suspected) elder abuse may be considered. The added benefit of maintaining independence from the police may encourage victims to overcome the reluctance to involve the criminal law in 'private' situations and report their abuse. Such an approach has been adopted in Washington, where the Adult Protection Service receives all complaints of abuse and refers the elderly to appropriate services.¹²⁷

¹²³ Aged Care Branch, Department of Human Services (Vic), *With Respect to Age – 2009* (2009) 12–16; Department for Health and Ageing (SA), *Strategy to Safeguard the Rights of Older South Australians 2014–2021* (2014) 7. The Victorian Guidelines include six categories of physical abuse, sexual abuse, financial abuse, psychological abuse, social abuse and neglect. The South Australian Strategy has adopted the same six, but also added a seventh: 'chemical abuse'.

¹²⁴ See Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 126.

¹²⁵ *Ibid* 100.

¹²⁶ John Chesterman, 'Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults' (Report, Winston Churchill Memorial Trust of Australia, 30 July 2013) 78, 80–1.

¹²⁷ *Ibid* 30.

2 Comprehensive Offence Provisions

While we submit that a comprehensive ‘elder abuse’ offence is not appropriate, should this course be taken, an approach similar to that existing in various American states could be adopted. For example, in states such as California and New Jersey,¹²⁸ offences exist for carers placing elderly people in situations of neglect or potential injury.¹²⁹ Such a scheme could be supplemented by an ‘Abuse Registry’, as exists in Washington, so that perpetrators cannot work in care settings.¹³⁰

Question 45 Who should be required to report suspected elder abuse, in what circumstances, and to whom?

A International Approaches to Reporting

Due to the hesitancy of victims of elder abuse to involve the police, particularly in family matters, it is advisable to create a non-police contact point to report situations of concern, as occurs in Washington and Nova Scotia.¹³¹ An independent agency with investigatory powers would centralise reporting and aid in the prevention of abuse.¹³² Such an authority would also refer particularly serious abuses to the police for further investigation and to decide if criminal prosecutions are appropriate.

Alternatively, placing this duty of investigation upon local councils, as in Scotland,¹³³ would be equally effective – this could have the benefit of each council being restricted to looking into suspected elder abuse within their locality, thus ensuring the convenient and efficient management of such inquiries. Key is ensuring that cases such as that of Jorge Chambe Coloma, who was discovered a year after his death, do not reoccur for failure of investigation and early reporting.¹³⁴

¹²⁸ See, eg, Cal Pen Code § 368 (West, 2016); NJ Stat Ann §52:27D-407 (West, 2012).

¹²⁹ See also National Research Council (US) Panel to Review Risk and Prevalence of Elder Abuse and Neglect, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (National Academies Press, 2003) app B.

¹³⁰ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Report, Winston Churchill Memorial Trust of Australia, 30 July 2013) 30.

¹³¹ *Ibid* 84.

¹³² Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 *Sydney Law Review* 99, 127.

¹³³ *Adult Support and Protection (Scotland) Act 2007* (Scot) s 4.

¹³⁴ Jordan Baker, ‘Man’s Lonely Death: Signs Were Missed’, *The Sydney Morning Herald* (online), 11 January 2008 <<http://www.smh.com.au/news/national/mans-lonely-death-signs-were-missed/2008/01/10/1199554832946.html>>; see also Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 *Sydney Law Review* 99, 111.

In regards to reporting, in jurisdictions such as Nova Scotia, any Canadian in that province can report situations of concern,¹³⁵ with a ‘failure to report’ offence codified in the *Adult Protection Act*.¹³⁶ In Australia, most states similarly have telephone hotlines and referral services to handle reporting of elder abuse.¹³⁷ Examples include the NSW Elder Abuse Helpline and Resource Unit,¹³⁸ and Queensland’s Elder Abuse Prevention Unit.¹³⁹ While national laws in Australia require (specific) adults, such as aged care providers, to report suspected abuse,¹⁴⁰ the obligations differ in each state. There is currently no general obligation on *all* Australian residents to notify or report suspected, or known, elder abuse. This disposition should be maintained because a compulsory obligation to report suspected abuse on all people would be too onerous and practically difficult to enforce.

Instead, we recommend the adoption of a mixed mandatory and permissive reporting framework. In America, states such as Washington have a mixed system of mandatory and permissive reporting for those with reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited or neglected.¹⁴¹ This system is commendable, as it places an obligation on those people who work closely with elderly people, such as social workers, aged care providers and medical examiners,¹⁴² without making it an offence for an ordinary citizen to fail to report suspected abuse.

B Recommendations for Reform

We recommend that persons in contact with older people in a professional capacity, such as social workers, aged care providers, and medical practitioners should be compulsorily obliged to report suspected elder abuse to an independent government agency. The wider community in general should be educated and encouraged to also report cases of suspected abuse or neglect. Mindful of this recommendation, protections should exist for those bona fide reporters who incorrectly or mistakenly, report suspected elder abuse.

¹³⁵ John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Report, Winston Churchill Memorial Trust of Australia, 30 July 2013) 42.

¹³⁶ *Adult Protection Act*, RSC 1989, c 2, ss 5, 16.

¹³⁷ Mike Clare, Barbara Black Blundell and Joseph Clare, ‘Examination of the Extent of Elder Abuse in Western Australia’ (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 18–22 <http://www.law.uwa.edu.au/__data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf>.

¹³⁸ See NSW Elder Abuse Helpline & Resource Unit, *About Us* <<http://elderabusehelpline.com.au/about>>.

¹³⁹ See Elder Abuse Prevention Unit (Qld), *About the Elder Abuse Prevention Unit* (19 November 2015) <<http://www.eapu.com.au/about>>.

¹⁴⁰ See, eg, *Aged Care Act 1997* (Cth) s 63-1AA.

¹⁴¹ Wash Rev Code § 74.34.035 (2015); John Chesterman, ‘Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults’ (Report, Winston Churchill Memorial Trust of Australia, 30 July 2013) 28.

¹⁴² Wash Rev Code § 74.34.020(13) (2015).