

**Submission  
No 107**

## **INQUIRY INTO INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES**

**Organisation:** The Law Society of New South Wales

**Date received:** 15/02/2016

---



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: ElderCrim:GUel 1089243

15 February 2016

The Director  
General Purpose Standing Committee No. 2  
Legislative Council  
Parliament House  
Macquarie Street  
Sydney NSW 2000

By email: [gpsnco2@parliament.nsw.gov.au](mailto:gpsnco2@parliament.nsw.gov.au)

Dear Director,

**Inquiry into elder abuse in New South Wales**

Thank you for your email dated 16 September 2015 inviting comments from the Law Society of NSW.

The Law Society's submission is attached. It is divided into two parts. Part one deals with elder law issues, focusing in particular on practical measures designed to assist in safeguarding the elderly against financial abuse through the improper use of powers of attorney.

Part two of the submission deals with criminal law issues, and concerns the effectiveness of NSW laws and policies relating to the treatment of older persons in custody.

Finally, we note that the General Purpose Standing Committee No. 2 will be holding a consultation at the Law Society on 7 March 2015 with representatives of Aboriginal Elders groups.

Thank you once again for the opportunity to comment and for the willingness of the Senate Upper House Committee Secretariat to facilitate consultations. If your office has any questions, please contact \_\_\_\_\_ or by email to \_\_\_\_\_

Yours sincerely,

Gary Ulman  
**President**

## PART ONE – ELDER LAW

---

### 1. Terms of reference addressed

Part One responds in particular to points 7 and 9 of the Terms of Reference of the Inquiry, namely:

7. The effectiveness of NSW laws, policies, services and strategies, including the 2014 Interagency Policy Preventing and Responding to Abuse of Older People, in safeguarding older persons from abuse.
9. The consideration of new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse.

In this Part, the Law Society's submissions focus on financial abuse issues arising in legal practice, particularly for practitioners who specialise in elder law. The issues that arise in the practice of "elder law" include estate planning (including business succession); powers of attorney; guardianship; retirement accommodation; capacity (including dealing with dementia); and elder abuse.

This Part concentrates on practical measures designed to assist in safeguarding older people against financial abuse and in particular the improper use of powers of attorney.

### 2. Definition of financial abuse

There are a number of definitions of what constitutes financial abuse of older people. The World Health Organisation defines financial abuse of an older person as, "[t]he illegal or improper exploitation or use of funds or other resources of the older person".<sup>1</sup>

In Australia, the Queensland-based Elder Abuse Prevention Unit (EAPU) founded by UnitingCare defines financial abuse as, "[t]he illegal or improper use of a person's finances or property by another person with whom they have a relationship implying trust".<sup>2</sup>

CPA Australia lists the following examples, sourced from the Victorian Department of Human Services' lists of financial abuse of older people, pointing out that financial abuse is often combined with other forms of abuse and neglect.

- Taking, misusing or using, withholding knowledge about or permission in regard to money or property.
- Forging or forcing an older person's signature or misleading them about what they are signing, including blank withdrawal forms.
- Misusing ATM cards or credit cards or credit facilities.
- Cashing an older person's cheque without permission or authorisation or withholding portions of the cheque funds.
- Misappropriating funds from a pension.
- Using a Power of Attorney in a way contrary to the interests of the donor or for direct personal gain.
- Promising long-term care in exchange for money or property and not providing that care.
- Overcharging for or not delivering care giving services.

---

<sup>1</sup> World Health Organisation, *World Report on Violence and Health* (2002), 127.

<sup>2</sup> Uniting Care, Elder Abuse Prevention Unit, *Financial Abuse*, <<http://www.eapu.com.au/elder-abuse/financial-abuse.html>>.

- Failing to provide reasonable consideration for the transfer of real estate or the acquisition of joint property.
- Negligently mishandling assets including misuse by a caregiver.
- Managing, without permission or legal authority, the finances of a competent older person.
- Getting an older person to become a guarantor without them having sufficient knowledge to make an informed decision.
- Pressuring an older person to take out a loan or a product which is not for their benefit – for example a shared equity loan or a reverse mortgage to pay for a relative's debts or expenses.
- Predatory lending – unnecessary (no identified need) or unaffordable lending to a vulnerable older person which will cause a detriment or potential detriment to them and a gain to the lender.
- Scams – telephone, door to door or internet.<sup>3</sup>

The comments below focus primarily on the aspect of financial abuse that relates to using a power of attorney in a way that is contrary to the interests of the donor or for direct personal gain by the attorney. A report by Alzheimer's Australia notes:

Our research suggests that a considerable proportion of financial abuse of people with dementia is perpetrated by people appointed as an attorney under an Enduring Power of Attorney (EPOA).<sup>4</sup>

The Law Society is, of course, aware that financial abuse often occurs in circumstances where a power of attorney is not involved. In such cases it is necessary to prove that the person giving the financial benefit lacked the necessary legal capacity to do so. This is usually very difficult to prove. Transactions involving the use of powers of attorney which benefit the attorney but not the donor have similar onus of proof difficulties where it is argued that the donor did not authorise the transaction. It is in this context, the Law Society has considered whether there are practical measures that may assist to prevent financial abuse. This issue is particularly acute given the impact of an ageing population and the increasing number of Australians living with dementia.

### **3. Ageing population and dementia**

The *Intergenerational Report 2015* highlights the economic impact of an ageing population, and the need to make progressive changes now to be ready for a greater proportion of older Australians living in our communities. The number of Australians aged over 65 years is expected to more than double by 2055. Female life expectancy at birth is also projected to increase from 93.6 years in 2015 to 96.6 years in 2055. Australian male life expectancy at birth in 2055 is expected to increase to 95.1 years, up from 91.5 years for males born in 2015.<sup>5</sup>

As Australia's population ages, dementia rates too are expected to significantly increase. By 2020, about 400,000 Australians are expected to be living with dementia.<sup>6</sup> By 2050, close to 900,000 people across the country are forecast to be living with dementia.

In March 2015, the Australian Bureau of Statistics revealed that dementia had become the second leading cause of death in the nation, second only to heart disease.<sup>7</sup>

<sup>3</sup> CPA Australia, *Financial abuse of older people*, <<http://www.cpaustralia.com.au/financialabuse.html>>.

<sup>4</sup> Alzheimer's Australia, 'Preventing Financial Abuse of People with Dementia', Discussion Paper #10, June 2014, 6.

<sup>5</sup> Commonwealth of Australia (2015), *Intergenerational Report 2015*, Overview, 8.

<sup>6</sup> Alzheimer's Australia, 'Creating dementia-friendly communities: A toolkit'.

Older people who lose mental capacity will increasingly rely on substitute decision making tools for their personal health and financial decisions. In the case of financial decisions, the relevant tool is an enduring power of attorney.

#### **4. Powers of Attorney Act 1998 (Qld) - section 87**

The Law Society suggests that it may be worthwhile incorporating a provision to the effect of section 87 of the *Powers of Attorney Act 1998* (Qld) into the *Powers of Attorney Act 2003* (NSW) ("NSW Act"). There is currently no equivalent provision in the NSW Act. Section 87 provides as follows:

Presumption of undue influence

The fact that a transaction is between a principal and 1 or more of the following—

- (a) an attorney under an enduring power of attorney or advance health directive;
- (b) a relation, business associate or close friend of the attorney;

gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence.

Such a provision addresses the onus of proof difficulties referred to above, by creating a rebuttable presumption that where the attorney effects a transaction that benefits the attorney or a relation, business associate or close associate of the attorney<sup>8</sup>, there is a presumption of undue influence which the attorney must rebut.

The Law Society notes that in Queensland this statutory provision has led to findings of undue influence in relation to inter vivos transactions, because the attorney has been unable to rebut the presumption. See, for examples, *Gillespie v Gillespie & Ors* [2012] QDC 212.

#### **5. Recommendation in notes on the prescribed Enduring Power of Attorney form**

Some research suggests that much financial abuse is perpetrated within families or by someone known to the victim such as a friend, carer or neighbour.<sup>9</sup> The Law Society suggests that consideration be given to including a recommendation in the background information on the prescribed form for an enduring power of attorney<sup>10</sup> that two attorneys be appointed to act jointly (except where a professional is appointed as attorney). In some circumstances, this can prove a safeguard against one family member appropriating the assets of the elder person for their own benefit.

---

<sup>7</sup> Australian Bureau of Statistics (2015) '3303.0-Causes of death, Australia, 2013', 31 March 2015.

<sup>8</sup> See *Powers of Attorney Act 1998* (Qld) Sch 3 (definition of 'relation' and 'close friend').

<sup>9</sup> Alzheimer's Australia, 'Preventing Financial Abuse of People with Dementia', Discussion Paper #10, June 2014, 6.

<sup>10</sup> See Form 2 – Enduring Power of Attorney, Schedule 2 to the *Powers of Attorney Regulation 2011* (NSW).

## 6. House of Representatives Standing Committee Inquiry Recommendations

The Law Society considered the recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its Report - *"Older people and the law"*<sup>11</sup> ("Standing Committee's Report"). The Law Society supports the recommendations set out in Appendix A. The Government response to these recommendations is also provided at Appendix A.

A recent report on the policies and practices of financial institutions around decision making, supported implementation of all the recommendations in the Standing Committee's Report.<sup>12</sup> It was envisaged that implementation of the recommendations would assist in providing greater security for both financial institutions and consumers. It was noted that to date, however, the majority of the recommendations have not been acted upon.<sup>13</sup>

The Law Society suggests priority be given to the implementation of Recommendation 5 which provides:

Recommendation 5 - national, industry-wide protocols for reporting alleged financial abuse and develop national industry wide protocols

The Committee recommends that the Australian Government work in cooperation with the banking and financial sector to develop national, industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions. The experience of Canada in this area should be drawn on in developing such protocols.

Law Society members are aware of some work that has been done in this area since 2007, such as the development of the Capacity Toolkit, published on the NSW Department of Justice website.

However, the Law Society is concerned that this remains an area where older people are particularly vulnerable to financial exploitation and suggests that this area be given high priority in the development of reform recommendations. The lending by banks or other financial institutions to the holders of powers of attorney remains extremely vexed.

## 7. Register of enduring powers of attorney

The Law Society does not support recommendation 20 of the Standing Committee's Report. That recommendation proposed the development and implementation of a national register of enduring powers of attorney.<sup>14</sup>

This recommendation does appear, however, to have some traction with other stakeholders<sup>15</sup>. Alzheimer's Australia, for example, has recommended that the NSW Law

---

<sup>11</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Report, *'Older people and the law'*, 2007, 20 September 2007.

<sup>12</sup> Sue Field, Lara Matkovic and Sangita Bhatia, 'The Policies and Practices of Financial Institutions Around Substitute Decision Making', Final Report, The NHMRC Partnership Centre on Dealing with Cognitive and Related Functional Decline in Older People, p 35, part 7: <<http://sydney.edu.au/medicine/cdpc/documents/about/final-report-policies-practices-of-financial-institutions.pdf>>.

<sup>13</sup> *Ibid*, 10.

<sup>14</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Report, *'Older people and the law'*, 99.

<sup>15</sup> See, for example, note 11, 35.

Reform Commission examine the feasibility of a NSW register of enduring powers of attorney:

A register would enable solicitors to make enquiries of the attorney if it was suspected that the principal was being neglected. It would also allow any person who wished to lodge an application to review the appointment of a power of attorney on the basis of neglect and breach of their obligations to do a search of the register to identify who to lodge the application against in the Guardianship Division of NCAT. Powers of attorney are registered in other jurisdictions including England, Wales and Singapore.<sup>16</sup>

While a register may have the benefits envisaged in identifying persons holding powers of attorney, the Law Society is not persuaded that this, in itself, would operate in any practical or effective way to prevent, or affect, the incidence of elder abuse.

## 8. National approach

The Law Society supports a national approach to elder abuse issues. This approach is also supported by the Age Discrimination Commissioner, Susan Ryan.<sup>17</sup>

The comments made in a literature review on the topic of financial abuse of elders by Monash University in 2009 remain compelling today:

The lack of a national government-led initiative for tackling the issue of financial elder abuse in the Australian community resulted in the development of a variety of protocols and guidelines regarding the prevention of elder abuse in general, with various degrees of focus on financial abuse specifically. Reports from a multitude of taskforces and alliances and interest groups across the various states have been written almost in parallel drawing on limited government and privately funded financial resources aiming to assist with this causes (Office of Senior Victorians, 2007b, Carers NSW, 2006, Setterlund 2001). A nationwide systemic approach to the issue, with a strategic government funding plan, supported by the private sector, would be a more efficient way of investigating the issue and testing different prevention and intervention strategies.

In response to growing community concerns, in 2006 the Australian Commonwealth Government funded the House of Representatives, Standing Committee on Legal and Constitutional Affairs to conduct a national inquiry into "Older People and the Law"...

What is urgently required is the implementation of these recommendations and high quality research to assess their effectiveness for preventing or managing cases of financial abuse.<sup>18</sup>

---

<sup>16</sup> Alzheimer's Australia, 'Preventing Financial Abuse of People with Dementia', Discussion Paper #10, June 2014, 19.

<sup>17</sup> Judith Ireland, 'Age discrimination commissioner Susan Ryan urges national plan against elder abuse', *The Sydney Morning Herald*, online, 13 October 2015 <<http://www.smh.com.au/federal-politics/political-news/age-discrimination-commissioner-susan-ryan-urges-national-plan-against-elder-abuse-20151012-gk6u6b.html>>.

<sup>18</sup> G Lowndes, P Darzins, J Wainer, K Oeada, and T Mihaljcic, (2009) "Financial abuse of elders: a review of the evidence, *Protecting Elder's Assets Study*, Melbourne Monash University, 24, 25.

## **9. Conclusion**

The Law Society supports the implementation of the specific measures mentioned in this submission as an immediate step to address the issue of financial abuse of older people.

In the longer term, further research is required to explore the nature of the financial abuse of older people, to quantify the size of the problem and to help to guide interventions, which will then need to be evaluated. This evaluation will assist to establish the most effective strategies. Optimal protection of older people against financial abuse is likely to require multi-disciplinary and coordinated approaches. The Law Society supports a national approach to these issues.



## Appendix A

### House of Representatives Standing Committee on Legal and Constitutional Affairs-“Older people and the law”

The Law Society supports the following recommendations:

#### **Recommendation 5- national, industry-wide protocols for reporting alleged financial abuse and develop national industry wide protocols**

The Committee recommends that the Australian Government work in cooperation with the banking and financial sector to develop national, industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions. The experience of Canada in this area should be drawn on in developing such protocols.

Government Response: Accepted in principle.<sup>19</sup>

#### **Recommendation 10- mandate that guarantors be advised regularly of the progress with the loans**

The Committee recommends that the Treasurer, in conjunction with his state and territory counterparts, initiates discussions with credit providers to mandate that guarantors be advised regularly of the progress with the loans they have provided surety for, and notified should any default occur. Such guarantees should not be enforceable if this advice has not been provided.

Government Response: Not accepted.<sup>20</sup>

#### **Recommendation 16- implement uniform legislation for powers of attorney**

The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of uniform, legislation on powers of attorney across states and, territories.

Government Response: Accepted in principle.<sup>21</sup>

#### **Recommendation 17- mutual recognition**

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General monitor the implementation of mutual recognition provisions in power of attorney legislation and encourage members to amend legislation where appropriate to maximise the portability of the instrument, prior to the implementation of uniform legislation.

Government Response: Partially accepted.<sup>22</sup>

---

<sup>19</sup> Commonwealth, Response to House of Representatives Standing Committee on Legal and Constitutional Affairs, ‘Older people and the law’, (2009), 3.

<sup>20</sup> Ibid, 6.

<sup>21</sup> Ibid, 14.

<sup>22</sup> Ibid, 14.

### **Recommendation 18- education strategies**

The Committee recommends that, the Australian Government propose that the Standing Committee of Attorneys-General develop:

- A campaign to promote awareness of powers of attorney and, their advantages for older people;
- An information strategy to better inform principals of the implications of making a power of attorney, and attorneys of their responsibilities to principals; and
- A scheme to enable all powers of attorney to be prepared with the advice of a solicitor.

Government Response: Partially accepted.<sup>23</sup>

### **Recommendation 22- education for financial institutions**

The Committee recommends that the Australian Government, propose that the Standing Committee of Attorneys-General develop and implement a campaign to raise awareness of the purpose and intentions of enduring powers of attorney in financial institutions.

Government Response: Partially accepted.<sup>24</sup>

### **Recommendation 29- improve access to legal representation at guardianship hearings**

The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General conducts a review into the legal needs of older people appearing before guardianship boards and tribunals and consider options for improving their access to legal representation at hearings.

Government Response: Accepted in principle.<sup>25</sup>

### **Recommendation 35**

The Committee recommends that, the state and territory Law Societies continue to develop and foster expertise in elder law, including encouraging elder law as a practice speciality.

Government Response: Accepted in principle.<sup>26</sup>

### **Recommendation 38- increased funding to community legal centres**

The Committee recommends that the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.

Government Response: Noted.<sup>27</sup>

---

<sup>23</sup> Ibid, 15.

<sup>24</sup> Ibid, 17.

<sup>25</sup> Ibid, 20.

<sup>26</sup> Ibid, 24.

<sup>27</sup> Ibid, 25.

## PART TWO – CRIMINAL LAW

---

### 1. Terms of reference addressed

This part responds in particular to point 7 of the Terms of Reference of the Inquiry, namely:

The effectiveness of NSW laws, policies, services and strategies, including the 2014 Interagency Policy Preventing and Responding to Abuse of Older People, in safeguarding older persons from abuse.

### 2. A broad definition of elder abuse

According to the NSW 2014 Interagency Policy Preventing and Responding to Abuse of Older People ("Interagency Policy"):

Abuse of older people is any behaviour that causes physical, psychological, financial or social harm to an older person.

The abuse can occur within any relationship where there is an expectation of trust between the older person who has experienced abuse and the abuser. Abuse may involve a single act, repeated behaviour or a lack of appropriate action<sup>28</sup>.

The Interagency Policy also outlines a definition of neglect:

The failure of a carer or responsible person to provide the necessities of life to an older person. Necessities of life are usually considered to be adequate food, shelter, clothing, medical or dental care. Neglect may also involve the refusal to permit others to provide appropriate care for an older person<sup>29</sup>.

Section 5.1 of the Interagency Policy also refers to the responsibilities of NSW Government agencies:

All workers employed in NSW Government agencies have a responsibility to respond to abuse of older people in our community. In addition, there are specific roles for agencies that provide specialist care or support for older people...<sup>30</sup>

In view of the definition of neglect and articulation of the responsibilities of NSW Government agencies, the Law Society submits that Corrective Services NSW and the Justice Health and Forensic Mental Health Network owe the same duty to those under their remit as the government agencies specifically listed in the Interagency Policy; for example, NSW Police, NSW Health, hospitals and mental health services.

---

<sup>28</sup> New South Wales Government, *Interagency Protocol for Responding to Abuse of Older People* (2007), 5 <<https://www.adhc.nsw.gov.au/data/assets/file/0011/228386/InteragencyProtocol1.pdf>>.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, 20.

### 3. Summary

A summary of the Law Society's views set out in this part is as follows:

- The Law Society is concerned about the effectiveness of NSW laws and policies relating to the treatment of older persons in custody.
- The Law Society acknowledges that older inmates present significant additional demands on resources which are already under severe strain as a result of inmate population increases and budget constraints.
- The Law Society is particularly concerned about the lack of specialist healthcare available to elderly inmates. The Law Society recommends that Corrective Services NSW and the Justice Health and Forensic Mental Health Network review their policies in relation to the treatment of older prisoners, to ensure access to appropriate facilities and healthcare.
- In order to alleviate pressure on the corrections system, the Law Society submits it may be appropriate to review the ways in which the justice system could provide better access to specialist healthcare within the community for older offenders. The Law Society suggests investigating the following:
  1. the creation of a special category of offender for sentencing purposes;
  2. a review of the circumstances in which 'early' or 'compassionate' release may be utilised; and
  3. a review of accommodation options available on release.

### 4. The ageing prison population

The number of prisoners in adult corrective services custody throughout Australia is steadily rising having increased by 7% from 33,789 prisoners at 30 June, 2014 to 36,134 at 30 June, 2015<sup>31</sup>.

In addition to this increase in overall prisoner numbers, the Law Society notes that, in line with Australia's general population, Australia's prison population is ageing. The number of prisoners over 50 years of age ("older prisoners") is increasing. According to Corrective Services NSW's Inmate Census, as of 2014 there were 10,578 prisoners in full-time custody in NSW. Of this total, 1,383, or approximately 13 percent, were older prisoners<sup>32</sup>.

The NSW Bureau of Crime Statistics and Research in a 2015 NSW prison population forecast predicted that, if relevant influences remain unchanged, NSW will have 12,191 prisoners by March 2017. By June 2036, if age-specific rates of imprisonment remain constant, they expect the NSW prison population to rise to 12,500, if age-specific rates of imprisonment rise in a manner commensurate with trends observed over the past decade, they predict the prison population should reach 15,600 and if age-specific imprisonment rates rise according to the trends observed since 1982, the prison population may reach 17,600<sup>33</sup>.

---

<sup>31</sup> Australian Bureau of Statistics, *Prisoners in Australia 2015, Key Findings* <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

<sup>32</sup> Corrective Services NSW, *NSW Inmate Census 2014: Summary of Characteristics*, 3 <<http://www.correctiveservices.justice.nsw.gov.au/Documents/SP42-NSW-Inmate-Census-2014.pdf>>.

<sup>33</sup> NSW Bureau of Crime Statistics and Research, *The 2015 NSW prison population forecast* (April 2015) 1 <<http://www.bocsar.nsw.gov.au/Documents/BB/BB105.pdf>>.

The Australian Institute of Criminology's ('AIC') *Older Prisoners report* commented on the changing numbers and proportions of older prisoners in Australian prisons. In 2010, inmates over the age of 50 comprised 11.2 percent of the Australian prison population. This contrasts with the situation in the year 2000, when only 8.3 percent of prisoners were aged 50 years and over. In terms of raw prisoner numbers, this equates to approximately 1,500 additional older inmates, an increase of 84 percent across Australian prisons over the past decade<sup>34</sup>.

This substantial increase poses a number of challenges for those in charge of correctional facilities in terms of the provision of sufficient facilities to accommodate offenders, as well as mental, social and physical health and healthcare issues for the inmates themselves.

## 5. Strain on healthcare services

As noted by the Inspector of Custodial Services ("the Inspector"), in a recent report entitled *Old and inside – Managing aged offenders in custody*<sup>35</sup>:

Aged inmates present significant additional demands on resources which are already under severe strain as a result of inmate population increases and budget constraints. They have higher chronic and complex health needs than the younger population. In addition, they have reduced daily functioning and a sense of helplessness and boredom. Those whose mobility is compromised require a setting that is alien to most prison architecture, which is premised on accommodating young men. Fear dominates the lives of many aged inmates. These stressors accelerate the aging process of these inmates<sup>36</sup>.

In addition to the obvious strain on resources, the Law Society is particularly concerned about the lack of specialist healthcare available to inmates. In his report, the Inspector notes that 'there are a number of specialists working with Corrective Services NSW to cater for the needs of the aged population, however, current levels of service provision do not meet demand for aged-care services, including optometry, podiatry, aged-care psychiatry and geriatrician services....<sup>37</sup>' and that as a result older prisoners who are frail and infirm may struggle to meet their most basic personal activities such as carrying their meals and washing themselves.

The Law Society further notes the Inspector's conclusion that 'the growth in the inmate population has placed increased pressure on the health system, which results in the health needs of inmates frequently not being met'<sup>38</sup>.

The Law Society is concerned that with isolation, disability and deteriorating health, there remains a risk that depression and dementia may also advance largely undetected among older prisoners. Naturally it can be difficult for Corrective Services staff without specialist training to distinguish between the effects of old age and symptoms of psychological disorders and/or may not have the resource capability to devote sufficient time to dealing with these issues. The Law Society is concerned this may result in a lack of suitable and appropriate facilities and care being provided to vulnerable individuals

---

<sup>34</sup> NSW Parliamentary Research Service, *Older Prisoners: trends and challenges* (October 2015) 4 <[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/Olderprisoners/\\$File/Older+prisoners+-+trends+and+challenges.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/Olderprisoners/$File/Older+prisoners+-+trends+and+challenges.pdf)>.

<sup>35</sup> NSW Inspector of Custodial Services, *Old and Inside: Managing aged offenders in custody* (September 2015) <<http://www.custodialinspector.justice.nsw.gov.au/Documents/Old%20and%20inside%20Managing%20Oaged%20offenders%20in%20custody.pdf>>.

<sup>36</sup> *Ibid*, 5.

<sup>37</sup> *Ibid*, 11.

<sup>38</sup> *Ibid*, 50.

and from a practical perspective, exacerbates the difficult position faced by the corrections staff left to deal with them.

The Law Society considers that unless targeted action is taken, the cumulative effect of the current growth in the older prison population will result in overcrowded, under resourced prisons without appropriate facilities which may end up being described as 'dysfunctional nursing homes'<sup>39</sup>. Provision must be made to assist vulnerable, elderly individuals with access to basic facilities, healthcare and assistance, to ensure their needs are being appropriately met.

Where adequate medical or dental care is not being provided to older people in custody, this could amount to a lack of appropriate action and could constitute "neglect" (as defined in the Interagency Policy). This is particularly concerning when the agency with responsibility for these individuals, and who effectively retains a 'specialist role in responding to such abuse', is potentially responsible for the instances of neglect.

In light of the above, the Law Society recommends that Corrective Services NSW and the Justice Health and Forensic Mental Health Network review their policies in relation to the treatment of older prisoners, to ensure access to appropriate specialist facilities and healthcare. This is likely to become an urgent priority given the ageing prison population.

## **6. Alternative options**

In order to alleviate pressure on the correctional system the Law Society submits that it may also be appropriate to review the ways in which the justice system or the NSW Government could provide better access to specialist healthcare within the community for older offenders.

The Law Society suggests investigation of the following:

1. the creation of a special category of offender for sentencing purposes;
2. a review of the circumstances in which 'early' or 'compassionate' release may be utilised; and
3. a review of accommodation options available on release.

### **6.1 Sentencing category**

Age is currently a subjective matter which may be taken into account in sentencing<sup>40</sup>. There is a statutory basis for taking age into account as a mitigating factor at sentence under s 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999*, where "the offender was not fully aware of the consequences of his or her actions" because of the offender's age. Section 16A(2)(m) of the *Crimes Act 1914* (Cth) also requires the court to take age into account for Commonwealth offenders. However, as in the case of other subjective considerations, the court must nevertheless impose a sentence which reflects the objective seriousness of the offence<sup>41</sup>.

The Law Society further notes the following points which may be also taken into account as a result of caselaw<sup>42</sup>:

---

<sup>39</sup> Andrew Katzen, 'Should we be sending the elderly to prison?', *New Statesman (online)*, 27 January 2015 <<http://www.newstatesman.com/politics/2015/01/should-we-be-sending-elderly-prison>>.

<sup>40</sup> Judicial Commission of New South Wales, *Subjective matters taken into account, Age [10-430]* <[http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective\\_matters.html#d5e15525](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective_matters.html#d5e15525)>.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

- Advanced age may affect the type or length of penalty to be imposed, and may be relevant in combination with other factors at sentence such as health. Age and health are 'relevant to the length of any sentence but usually of themselves would not lead to a gaol sentence not being imposed if it were otherwise warranted'<sup>43</sup>.
- The extent of any mitigation that results from advanced age will depend on the circumstances of the case, including the offender's life expectancy and any treatment needed<sup>44</sup>.
- A court cannot overlook that each year of a sentence of imprisonment may represent a substantial proportion of the life left of an offender<sup>45</sup>. On the other hand, a life sentence may be the appropriate sentence where a person of advanced age commits very serious crimes<sup>46</sup>. An appropriate balance has to be maintained between the criminality of the conduct in question and any damage to health or shortening of life<sup>47</sup>.
- The sentence may unavoidably extend for all or most of the offender's life expectancy in order to reflect the objective seriousness of the offence<sup>48</sup>.
- Adherence to the principle of proportionality may have the practical effect of imposing a "de facto" life sentence on a person of advanced age<sup>49</sup>.
- It simply is not the law that it never can be appropriate to impose a minimum term which will have the effect, because of the advanced age of the offender, that he will spend the whole of his remaining life in custody<sup>50</sup>. However, a sentence should not be "crushing" in the sense that it "connotes the destruction of any reasonable expectation of useful life after release".<sup>51</sup>

The Law Society considers that the creation of a specific sentencing policy relating to older offenders may provide useful guidance as to interpretation of the above case law.

Judicial discretion is integral to the administration of justice, and wherever possible the judiciary should be provided with innovative and progressive options to allow them to administer a sentence which is appropriate and proportionate to the offence committed.

In the face of an increasing aged prison population, the Law Society notes it may be beneficial to explore a range of alternative sentencing options, specifically targeted towards older offenders. This would allow judicial discretion to be preserved, justice to be served and yet reflect an in-depth understanding of the practical ramifications of the impact on the correctional system of older inmates who require specialist care.

## 6.2 Early or compassionate release

The Law Society also recommends a review of the use of early or compassionate release mechanisms, in order to consider the extent to which they could be applied to older offenders.

<sup>43</sup> *R v Sopher* (1993) 70 A Crim R 570 at 573.

<sup>44</sup> *Ibid.*

<sup>45</sup> *R v Hunter* (1984) 36 SASR 101 at 104.

<sup>46</sup> *R v Walsh* [2009] NSWSC 764 at 43.

<sup>47</sup> *R v Sopher* (1993) 70 A Crim R 570 at 573.

<sup>48</sup> *Goebel-McGregor v R* [2006] NSWCCA 390 at 128.

<sup>49</sup> *Barton v R* [2009] NSWCCA 164 at 22.

<sup>50</sup> *R v Holyoak* (1995) 82 A Crim R 507 per Allen J.

<sup>51</sup> *R v Yates* (1984) 13 A Crim R 319 at 326; [1985] VR 41 at 48.

The *Crimes (Administration of Sentences) Act 1999* provides discretionary power, under s 160, to the State Parole Authority to release inmates before the expiry of the sentence or non-parole period 'if the offender is dying' or because of 'exceptional extenuating circumstances'.

Regarding the application of early or compassionate release in relation to older offenders, the AIC noted the following in a 2011 research paper:

Although research has demonstrated a reduced risk of reoffending among older prisoners, there remains reluctance from both government and prison administrators to consider early release options and promote the use of community corrections as an alternative to imprisonment for offenders who pose a low risk to the public<sup>52</sup>.

One obvious argument for 'early' or 'compassionate release' or medical/geriatric parole is the reduction in costs of providing medical care in prison....<sup>53</sup>

### 6.3 Accommodation options

Opponents of the application of early or compassionate release to medical/geriatric parole have pointed out that these same costs may simply be shifted or borne by a different government sector (such as health or aged care)<sup>54</sup>. However, the Law Society highlights section 5 of this part above, which details that appropriate levels of specialist care are simply not available within a prison environment and that in these circumstances, a transfer to sectors able to provide such care in some circumstances is both appropriate and necessary.

The Law Society acknowledges that in determining release, risk should remain the determining factor. However for low risk, older offenders with complex medical needs, release into specialist medical care with certain restrictions could provide a long term workable solution.

## 7. Conclusion

The Law Society submits that the solutions detailed above could result in substantial benefits: to the health of the individual; in discharging the duty of care owed to individuals by the correctional system; and, to correctional officers who may be struggling to deal with the complex healthcare needs of older offenders. They may also have the advantage of relieving budgetary pressure upon the correctional system as a whole.

---

<sup>52</sup> Australian Institute of Criminology, *Trends & issues in crime and criminal justice no.426, Older prisoners – a challenge for Australian corrections*, (August 2011), 6 (full citations not included) <[http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi426.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi426.pdf)>.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.