

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

**Name:** Mr Philip Johnson

**Date received:** 11/02/2016

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# **TOWARDS A ZERO TOLERANCE POLICY OF THE ABUSE OF OLDER PERSONS IN NSW**

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**PHILIP JOHNSON**

11 February 2016

The Chair

General Purpose Standing Committee No 2

NSW Legislative Council

Parliament House

Macquarie Street

Sydney NSW 2000

## **INQUIRY INTO ELDER ABUSE**

I am submitting the following work to the Inquiry which is based on, and includes extracts from my intellectual property: two yet-to-be-released publications:

1. My copyrighted electronically-published paper: *Abuse of Older Persons—Creating A Zero Tolerance Policy* (forthcoming at:
2. My forthcoming article in the *Retirement and Estate Planning Bulletin* published by LexisNexis.

This submission contains more than just descriptive material about the phenomenon of abuse. In light of the Inquiry's reference points, it includes practical suggestions to take away the incentive to exploit and abuse older persons, especially with regard to the misappropriation of assets and property. The suggestions support the building of healthy social capital that best reflect the public interest, and draw on important current legal principles used in corporate, civil, criminal, and succession law.

Copies of this paper were distributed to some third parties prior to lodgement to the Parliamentary Inquiry. I thank my external readers/reviewers who perused the manuscript prior to lodgement on the Parliamentary website. Consent is granted for the submission to be publicly accessible on the Parliamentary website.

Philip Johnson

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## PART ONE: ROOT PROBLEMS AND ROOT VALUES

In light of the careful research undertaken by many scholars, the evidence concerning the abuse of older persons warrants this stark observation:

“There has never been a more appalling time for older persons to be alive today and there has never been a more malicious and inhumane time to be an older Australian.”

**“THERE HAS NEVER BEEN A MORE APPALLING TIME FOR OLDER PERSONS TO BE ALIVE TODAY AND THERE HAS NEVER BEEN A MORE MALICIOUS AND INHUMANE TIME TO BE AN OLDER AUSTRALIAN.”**

The abuse of older persons is a social scourge that contradicts the widely-published rhetoric that “There has never been a more exciting time to be alive today and there has never been a more exciting time to be an Australian.”<sup>1</sup>

### 1 CATEGORIES OF ABUSE

Social commentators and bureaucrats generally sort the abuse of older persons into five categories: physical, psychological, social, financial and sexual. Some commentators also draw attention to the problem of self-abuse, or self-neglect, which occurs in conjunction with a decline in an individual’s physical and mental well-being.

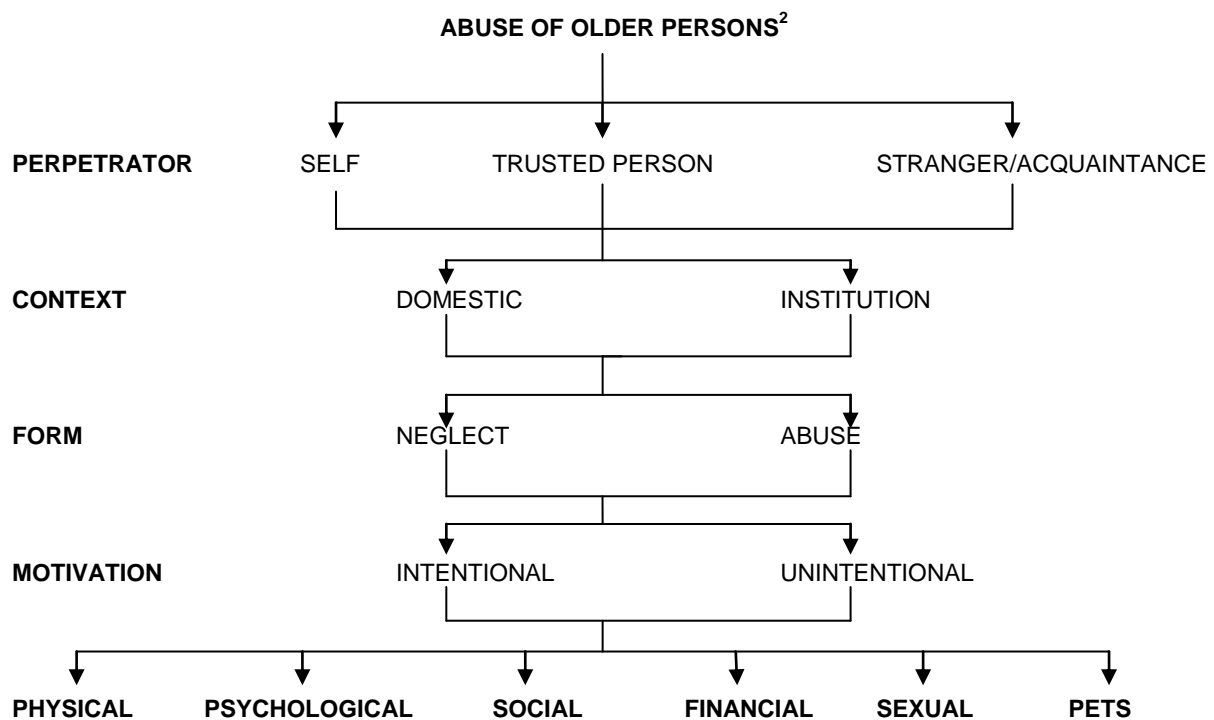
Most framers of public policy overlook a critical sixth category: coercive threats and actual violence perpetrated against an older person’s companion animals. It

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<sup>1</sup> Speech (15 September 2015) available at [www.malcolmturnbull.com.au/transcript-vote-on-the-liberal-party-leadership](http://www.malcolmturnbull.com.au/transcript-vote-on-the-liberal-party-leadership)

is employed as a tactic to compel the victim to accede to the perpetrator's demands.

A summary of the processes, context and categories are diagrammed as follows:



The above diagram attempts to give a holistic tabulation by adding in the abuse of companion animals owned by older persons. Those who abuse older persons sometimes use threats and actual violence on a companion pet to coerce an older person to comply and acquiesce to the demands of the bullying perpetrator. This form of abuse is not mentioned or acknowledged in the NSW Government's Interagency Policy, or in the NSW Government's twenty-nine page submission to the present Inquiry.<sup>3</sup>

<sup>2</sup> Diagram closely follows but also adds to that which appears in Georgia J. Anetzberger, "An Update on the Nature and Scope of Elder Abuse," *Generations* 36 (Fall 2012): 14.

<sup>3</sup> *Preventing and responding to abuse of older people: NSW interagency policy* (Family and Community Services, 2014); *NSW Government Submission to Inquiry on Elder Abuse in NSW* (Nov 2015).

The public interest in developing good policy to stamp out the abuse of animals has been steadily rising in Australia in recent years. The problem of the abuse of companion animals in connection to the abuse of older people needs to be incorporated into Government policy. It cannot be relegated to the margins as if the problem is already encompassed by the *Prevention of Cruelty to Animals Act (POCTA)* and merely requires intervention by the RSPCA NSW. The abuse of animals and violence against humans go hand-in-glove as recent research worldwide has made very plain.<sup>4</sup>

There is a social and monetary cost associated with the abuse of animals, and the wanton dumping of pets at animal shelters and pounds.

There is increasing public interest in stamping out such abuse and cruelty, as witnessed in public proposals for the establishment of an Office of Animal Welfare. It is suggested that those who abuse companion animals pay compensation to the older person whose pet has been abused. A victim's

**"Abusers frequently threaten or harm an animal as a method of harming a human victim, or as a method of establishing control, gaining revenge, or coercing compliance with a particular demand. The deep emotional bond that most individuals—especially those who are abused—share with their animals makes this a potent form of abuse; indeed, it is the depth of the relationship between human and animal that enables the relationship to be exploited as a method of harm and control in the first place."**

**Vivek Upadhy**, "The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization," *Emory Law Journal* 63 (2014): 1163-1164.

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<sup>4</sup> Start with Andrew Linzey Ed. *The Link between Animal Abuse and Human Violence* (Eastbourne UK; Portland, Oregon: Sussex Academic Press, 2009).



compensation fund could be held in trust and managed by the NSW Trustee and Guardian in cases where victimised owners, whose pets have been abused, are cognitively impaired affairs and have their affairs administered under a financial management order. It is therefore important to bring punitive measures to bear on those who abuse companion animals in conjunction with the abuse of older persons. Further remarks on this problem are noted towards the end of Part Three of this submission (section 15).

## 2 FINANCIAL ABUSE

The general consensus among researchers, irrespective of their theoretical and disciplinary biases, is that the maltreatment and exploitation of older people is a significant problem. Of all the types of abuse, it is financial abuse that is the highest form. The Council of the Ageing NSW briefly states on its website:

Elder abuse encompasses physical violence and neglect ... the most prevalent form of elder abuse is financial.<sup>5</sup>

In 1995, Philip Sijuwade observed in a cross-cultural study that “in financial abuse cases the motivating factor appears to be greed.”<sup>6</sup> In the past decade, journalists have recounted five stories of celebrities who have been the victims of maltreatment, all of which include financial abuse. In four cases the perpetrators were next-of-kin, while the fifth case involved a conspiracy of close associates and personal staff:

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<sup>5</sup> “COTA NSW continues to work to combat elder abuse,” at [www.cotansw.com.au/council-on-the-ageing-nsw-policy-elder-abuse](http://www.cotansw.com.au/council-on-the-ageing-nsw-policy-elder-abuse)

<sup>6</sup> Philip O. Sijuwade, “Cross-Cultural Perspectives on Elder Abuse as a Family Dilemma,” *Social Behaviour and Personality* 23 (1995): 249.

- Actor Mickey Rooney (1920-2014) [next-of-kin].<sup>7</sup>
- Actor Zsa Zsa Gabor (1917- ) [next-of-kin].<sup>8</sup>
- Chemist-founder of L'Oreal, Liliane Bettencourt (1922- ) [associates/personal staff].<sup>9</sup>
- Texas billionaire J. Howard Marshall (1905-1995) [next-of-kin; wife Anna Nicole Smith (1967-2007)].<sup>10</sup>
- New York socialite Brooke Astor (1902-2007) [next-of-kin].<sup>11</sup>

### 3 MAIN OFFENDERS ARE NEXT-OF-KIN

The perpetrators of abuse, who in the majority of cases are next-of-kin, take advantage of their victim's trust and dependency. Perpetrators wield power to subjugate and exploit their victims, particularly by misusing an enduring Power of Attorney to indulge in self-enrichment.

The *Wall Street Journal* declared in August 2006: “*Note to Retirees: Beware the Family.*”<sup>12</sup> US lawyer Jane Black remarked in 2008:

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<sup>7</sup> See Gary Baum and Scott Feinberg, “Tears and Terror: The Disturbing Final Years of Mickey Rooney,” *Hollywood Reporter*, 21 October 2015, available at [www.hollywoodreporter.com/features/mickey-rooneys-final-years-833325](http://www.hollywoodreporter.com/features/mickey-rooneys-final-years-833325).

<sup>8</sup> Danielle and Andy Mayoras, “The Tragedy of Francesca Hilton, daughter of Zsa Zsa Gabor and Hilton Founder,” *Forbes Magazine*, 13 January 2015, available at [www.forbes.com/sites/trilandheirs/2015/01/13/the-tragedy-of-francesca-hilton-daughter-of-zsa-zsa-gabor-and-hilton-founder](http://www.forbes.com/sites/trilandheirs/2015/01/13/the-tragedy-of-francesca-hilton-daughter-of-zsa-zsa-gabor-and-hilton-founder)

<sup>9</sup> Peter Mikelbank, “The Bettencourt Affair: 8 Found Guilty of Taking Advantage of the World's Richest Woman,” *People Magazine*, 28 May 2015, available at [www.people.com/article/liliane-bettencourt-8-guilty-taking-advantage-worlds-richest-woman](http://www.people.com/article/liliane-bettencourt-8-guilty-taking-advantage-worlds-richest-woman). Kerry R. Peck, “Lifestyles of the Rich and Famous: Infamous Cases of Financial Exploitation,” *Generations* 36 (2012): 30-31.

<sup>10</sup> Daniel Fisher, “The Oilman, The Playmate, and the Tangled Affairs of the Billionaire Marshall Family,” *Forbes Magazine*, 4 March 2013, available at [www.forbes.com/sites/danielfisher/2013/03/04/the-billionaire-the-playboy-bunny-and-the-tangled-affairs-of-the-marshall-family/](http://www.forbes.com/sites/danielfisher/2013/03/04/the-billionaire-the-playboy-bunny-and-the-tangled-affairs-of-the-marshall-family/).

<sup>11</sup> Serge F. Kovaleski, “Judge Orders Astor Legal Papers Turned Over for Tests on Writing,” *New York Times*, 26 September 2006, B5. *Good Morning America* (ABC broadcast on 27 July 2006).

It is not the unscrupulous financial expert, scam artist, or morally hollow caregiver who, statistically, appears to be the biggest threat—it is family. Children, grandchildren, siblings, nieces, and nephews are the people most likely to cheat the elderly.<sup>13</sup>

Four South Australian researchers observe:

Financial abuse of older people is a significant social problem that is likely to intensify as Australia's ageing population continues to rise exponentially over the next 20 years. It is the most common form of reported or suspected abuse older people (often accompanied by psychological abuse) and the older person's adult son(s) or daughter(s) are most likely to be the abusers. With the increasing complexity associated with financial management, this type of abuse is likely to increase.<sup>14</sup>

## **4 ROOT VALUE: SELFISHNESS**

There are root values at stake when considering the development of public policy that opposes the abuse of older persons. At the heart of the problem of the abuse of older persons is the problem of the human heart. The undeniable indicators worldwide are that self-centrism is the fulcrum that moves the abuser to harm others.

In the early 1990s Don Rowland, a demographer at the Australian National University, forecasted:

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<sup>12</sup> Jeff D. Opdyke, "Intimate Betrayal: When the Elderly Are Robbed by their Family Members," *Wall Street Journal*, 30 August 2006, D1.

<sup>13</sup> Jane A. Black, "The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population," *St. John's Law Review*, 82 (2008): 294.

<sup>14</sup> Dale Bagshaw, Sarah Wendt, Lana Zannettino, and Valerie Adams, "Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members," *Australian Social Work* 66 (2013): 87.

Abuse of the elderly by their carers is likely to become more prevalent ... Familism—the subordination of individual goals to those of the family—is now at its lowest ebb this century and the alternative philosophy of individualism, which is a key factor in low fertility and childlessness in Western societies, conflicts with expectations of self-sacrifice in caring for aged parents.<sup>15</sup>

Social and criminological research discloses that abusers think of themselves as occupying the central position in a relationship; that they deserve special privileges and entitlements to the exclusion of others; and are disinclined to place the interests of others at the centre.

#### **4.1 New Zealand Research**

The problem of self-centredness in connection with the abuse of older persons is noted in a New Zealand study. The study contained interviews with both caregiver groups and older persons who had been victims of abuse. This blunt comment was elicited from a caregiver focus group in Christchurch: “Society is very selfish.”<sup>16</sup> Another respondent in Auckland stated, “People are becoming more self-centred because of the economic situation, with both parents working and little time left over for the older generation.”<sup>17</sup>

#### **4.2 South Australian Research**

A comparative study of South Australian and Norwegian nurses, who work in community care facilities, yielded these observations concerning Australia:

In some cases of financial abuse, the participants understood the motive as obvious [i.e. the abuser self-enriches at the expense of the abused victim] ... Financial abuse of older clients in community care was a prominent issue amongst the Australian participants; its frequent mention might be a result of the recent increased attention from politicians and researchers about fraud,

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<sup>15</sup> D. T. Rowland, *Ageing in Australia* (Melbourne: Longman Cheshire, 1991), 199.

<sup>16</sup> Kathryn Peri, Janet Fanslow, Jennifer Hand, and John Parsons, “Keeping Older People Safe by Preventing Elder Abuse and Neglect,” *Social Policy Journal of New Zealand* 35 (2009): 164.

<sup>17</sup> Peri, Fanslow, Hand and Parsons, “Keeping Older People Safe,” 165.

undue influence and substitute decision-making legislation ... Another relevant factor might be that the Australian clients are charged more for the service than are the Norwegian clients and that financial abuse became visible when the client could not pay the fees or reduced the service.<sup>18</sup>

#### **4.3 Victorian Research**

A Monash University study on financial abuse, which was commissioned by the State Trustees of Victoria, noted:

Family members may be more likely to be perpetrators as they are in close proximity to the vulnerable person, have access to the money and other financial instruments such as cheque books, credit cards, automated teller machine passwords, and may have feelings of entitlement to the money, and believe that the funds they are improperly taking are simply advances on what they will inherit, or that their elderly relatives do not need the money. The factor of entitlement comes up many times in studies of why individuals took money from family members. It seems that the mere fact that people in the community have wills sets up an expectation that assets should and will be handed down to the next generation.<sup>19</sup>

This same study noted that “family greed” is a key “risk factor” and research discloses that “adult children, grandchildren and other relatives are the most likely perpetrators of financial abuse.”<sup>20</sup>

#### **4.4 Queensland Research**

Researchers in Queensland have likewise highlighted the problem of self-centredness. A study of eighty-one family members who assumed asset

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<sup>18</sup> Astrid Sandmoe, Marit Kirkevold, and Alison Ballantyne, “Challenges in handling elder abuse in community care. An exploratory study among nurses and care coordinators in Norway and Australia,” *Journal of Clinical Nursing* 20 (2011): 3358 and 3361.

<sup>19</sup> Peteris Darzins, Georgina Lowndes, Jo Wainer, Kei Owada, and Tijana Mihaljcic, “Financial abuse of elders: a review of the evidence” *Protecting Elders’ Assets Study* (Clayton, Victoria: Monash Institute of Health Services, Faculty of Medicine, Nursing and Health Sciences, 2009), 16.

<sup>20</sup> Darzins, Lowndes, Wainer, Owada, and Mihaljcic, “Financial abuse of elders,” 15.

management responsibility for the affairs of an older relative unveiled a self-centred sense of entitlement to the money or property of their older relative.<sup>21</sup>

#### **4.5 Australia-wide Research: Self-Entitlement**

Dale Bagshaw and three colleagues published their findings from a recent national survey on financial abuse across Australia. It revealed that service providers for older people identify one of the high risk factors is “a family member with a strong sense of entitlement to an older person’s property/possessions.”<sup>22</sup>

The study also established that the same risk factor was highlighted in the responses received from both older persons and intergenerational next-of-kin:

Both older people and adult sons and daughters described how their family members demonstrated a sense of entitlement in relation to older people’s finances, particularly after there was a change in the family’s circumstances, such as the death of an older person’s spouse, or an adult child having high financial commitments and an inability to meet them.<sup>23</sup>

Bagshaw and his colleagues observed that their findings were consistent with results obtained by other researchers in an earlier Australian study:

Our findings on the nature of the financial abuse experienced by the respondents are similar to those of Wilson et. al.’s descriptions of intentional financial abuse, which they defined as a desire by a carer or family member to use an older person’s assets for the benefit of others or themselves. They argued that such intentional abuse was linked to a range of attitudes to older people and their resources that suggested it was acceptable to misappropriate an older person’s assets, including notions that the older person’s assets would

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<sup>21</sup> Deborah Setterlund, Cheryl Tilse, Jill Wilson, Anne-Louise McCawley, and Linda Rosenman, “Understanding financial elder abuse in families: the potential of routine activities theory,” *Ageing and Society* 27 (2007): 599-614.

<sup>22</sup> Bagshaw, Wendt, Zannettino, and Adams, “Financial Abuse of Older People,” 99.

<sup>23</sup> Bagshaw, Wendt, Zannettino and Adams, “Financial Abuse of Older People,” 99.

eventually belong to them, that the older person no longer needed their assets, or would have wanted to have their assets used in this way; or that by providing assistance, the carer had “earned” the resource in question. They pointed out that such attitudes, when linked to a capacity to access the assets and the lack of any effective monitoring, can lead to financial abuse.<sup>24</sup>

Australian social research confirms that abusers are self-centred in their motives and attitudes, and have no moral qualms or social conscience about misappropriating an older relative’s property.

The New Zealand study mentioned earlier pointed to respondents’ comments about abusers being self-centred. As regards motives, the researchers noted that one strong factor is the prospect of inheriting:

Rural families with potentially large inheritances work with legal systems to remove legal titles from the older person ... beliefs about the inter-generational transfer of money and property can lead to financial abuse, and ideas about loyalty to family members can get translated into silence about such abuse: “Some [family members] have the idea that ‘my parents’ money is ‘their own.’”<sup>25</sup>

#### **4.6 Europe and USA**

European sociologists Thomas Goergen and Marie Beaulieu have likewise noted that “greed and striving for financial gain at the expense of another person can be considered to be the typical motives for financially exploiting older persons.”<sup>26</sup>

Jean Sherman from the University of Miami addressed a conference in Orlando, Florida in 2010:

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<sup>24</sup> Bagshaw, Wendt, Zannettino and Adams, “Financial Abuse of Older People,” 99-100.

<sup>25</sup> Peri, Fanslow, Hand and Parsons, “Keeping Older People Safe,” 165. Brackets are in the original article.

<sup>26</sup> Thomas Goergen and Marie Beaulieu, “Criminological Theory and Elder Abuse Research—Fruitful Relationship or Worlds Apart?” *Ageing International*, 35 (2010):191.

The motivation of the abuser is primarily about power and control ... The current economic climate hastens these situations. Perpetrators feel entitled.<sup>27</sup>

Bryan Kemp and Laura Mosqueda remark that in cases of financial abuse:

Common business or personal ethics are not followed ... The alleged perpetrator does not give consideration to the effect of the transaction on others, including the victim, other family members, beneficiaries, or the public welfare system.<sup>28</sup>

The absence of any worthwhile personal and social ethic on the part of an abuser, which is coupled with an amoral disregard for the consequences, is a clear sign of the root problem of self-centredness.

#### **4.7 Carer Stress is NOT the root cause**

The foundational root cause of the abuse of older persons *is not the stress experienced by care-givers* (*contra* the view that the “complex causes” of abuse includes “carer stress”).<sup>29</sup> Even allowing for the reality that some relationships present difficulties which may include varying levels of stressful experiences, the heart of the problem of abuse is not the experience of stress. Carer stress or impatience is not a morally acceptable excuse to justify neglect, physical abuse, psychological abuse and financial exploitation of an older person.

Bonnie Brandl and Jane Raymond observe that early studies did concentrate on carer stress as the main explanatory factor for abuse. However this perspective has lost credence in the face of mounting evidence:

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<sup>27</sup> Sherman’s remarks at the conference are reported in Sheehan, “Elder Abuse: Zero Tolerance,” 40.

<sup>28</sup> Bryan J. Kemp and Laura A. Mosqueda, “Elder Financial Abuse: An Evaluation Framework and Supporting Evidence,” *Journal of the American Geriatrics Society* 53 (2005): 1125.

<sup>29</sup> John Chesterman, “Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies,” *Australian Social Work* 68 (2015): 3.



Seeing caregiver stress as a primary cause of abuse has unintended and detrimental consequences that affect the efforts to end this widespread problem.<sup>30</sup>

Brandl and Raymond made this clear-cut observation in 2012. However, the fact that carer-stress was not the major cause was acknowledged twenty years ago when in 1995 Philip Sijuwade observed:

Even with evidence to the contrary, the tendency in the early years was to regard the stress of caring for dependent family members as the leading cause of elder abuse and neglect. This view was particularly attractive to politicians, the media and the public. It was easier to blame the victim than to challenge societal and family customs that allowed the mistreatment to occur.<sup>31</sup>

#### **4.8 Selfishness Impacts on the Public Purse**

There is more than enough cross-cultural evidence to demonstrate that self-centredness is the root principle that shapes the actions of those who abuse older persons in a myriad of ways.

The diagram below summarises the root motives that set in motion a destructive course of behaviour:

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<sup>30</sup> Bonnie Brandl and Jane A. Raymond, “Policy Implications of Recognizing that Caregiver Stress Is *Not* the Primary Cause of Elder Abuse,” *Generations* 36 (Fall 2012): 32.

<sup>31</sup> Sijuwade, “Cross-Cultural Perspectives on Elder Abuse,” 248-249.



In order to effectively counter the abuse of older persons, there is a profound need to look at the problem holistically. A policy that has as its foundational principle the autonomous self is very prone to actually reinforcing the older person's social isolation. An over emphasis on ensuring that there is maximum freedom to choose but which lacks correlative duties and social constraints, may end up denying the older person's civil rights and simultaneously foster socially destructive behaviour.

For example, in the absence of legally enforceable punitive measures and social constraints, a policy may encourage autonomous individuals who believe that they are entitled to their relative's assets to exercise "freedom of choice" to self-enrich, and to disregard everyone else.

A holistic approach begins with the place and solidarity of the individual in community. A shift to the individual in community grounds policy in a framework that should ensure what is beneficial to one member of society also adds to the unity and cohesion of the entire society.

A good public policy will intentionally aim to sustain positive relationships that (a) support the individual's solidarity with the community and (b) also nurture the cohesiveness of society.

The individual older person who is a victim of abuse undeniably suffers the most from the unprincipled and unethical actions of their abuser.

However, the horizons for harm spread far and wide. What is harmful to one member of society is harmful to all: "the bell tolls for thee". The impact of abuse is not limited to the immediate generation but its cumulative effect may ripple through time that shapes the circumstances for future unborn generations.

The following diagram (next page) illustrates the negative rippling effects of abuse at both the **micro** and **macro** levels of life.

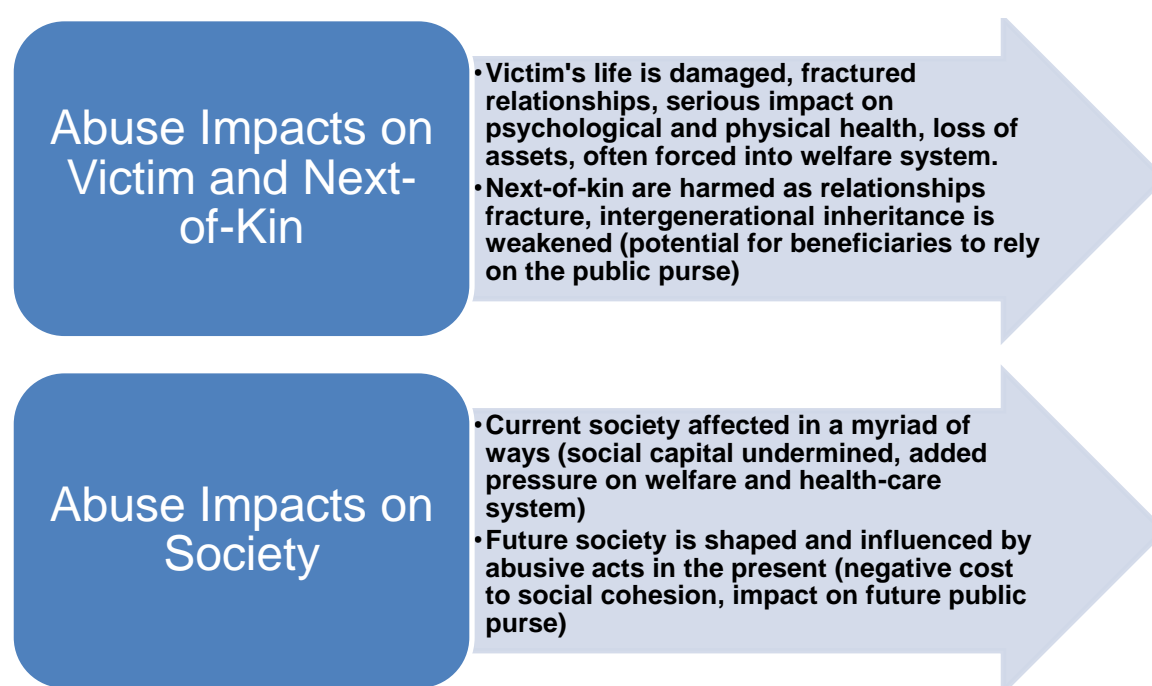
The **micro level** refers to the direct effects of abuse upon the victim, and the victim's immediate family. Abuse involves fracturing the close inter-personal relationships of the family unit, and where financial abuse occurs the victim is exposed to great risk due to the misappropriation of assets. The loss of assets impacts on the victim's needs to financially sustain the remainder of their lifespan. It has the further consequence

**"No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee."**

**John Donne**

**"Meditation XVII," in *Devotions upon Emergent Occasions*, [1624] ed. John Sparrow (Cambridge UK: University Press, 1923), 98. Also available at [www.online-literature.com/donne/409/](http://www.online-literature.com/donne/409/)**

of diminishing the transfer of the victim's assets after death to the victim's beneficiaries (usually next-of-kin).



Financial abuse adds pressure to the social welfare and health care systems. The long term effect is that as the victim's heirs do not inherit from an intact estate they are at risk of missing out on the potential extra boost to their financial security and self-sufficiency in retirement.

At the **macro level**, the increasing number of cases of abuse has a collective impact on the rest of society. This negative impact is felt not only in the present but also extends horizontally into the long term future. Abuse is deviant anti-social behaviour. It erodes social cohesion and unity by promoting a pattern of behaviour to self-enrich by exploiting the vulnerable that others will imitate. Abuse undermines good social capital by exposing people to risk, and adds to the burden on the public purse. The corrosive effects place immediate pressure on both the welfare and health-care systems.

What is often not appreciated is that there are also long range effects particularly in the cumulative effect caused by many people engaging in self-enrichment. The future is shaped by the actions in the present. Abuse that is

spread throughout the present community sets up things for the recurrence of abuse in the future. Abusers model a pattern of deviant behaviour of self-enrichment that prompts others to perpetuate. It is a destructive habit that ensures future social cohesion is weakened, and the impact on the public purse has long term consequences.

Kemp and Mosqueda reported in 2005 that in the USA:

In a recent national study of elder financial abuse, it accounted for about 20% of all substantiated elder abuse perpetrated by others (after excluding self-neglect). It is also estimated that, for every known case of elder financial abuse, four to five go unreported. Rates may even be higher than this. One study estimated that about 33% of one million cases of elder abuse were financial.<sup>32</sup>

In 2012, Kerry Peck noted the following with reference to the USA:

According to the *Selling to Seniors* monthly marketing report, people ages 50 and older control 77 percent of all financial assets in the United States. Therefore it is no surprise that financial exploitation continues to be the most reported type of elder abuse across the nation. The MetLife Mature Market Institute published a study (MMI 2009) on financial exploitation of older adults in the United States; the study concluded that while only one in five cases of financial exploitation is actually reported, a conservative estimate of the personal cost to victims was \$2.6 billion annually.<sup>33</sup>

One thing that is lacking in Australia is a comprehensive nation-wide actuarial-style report on the cost to the public purse of the financial exploitation of older persons. Queensland's Elder Abuse Prevention Unit (EAPU) reported:

The 2007/2008 annual report of the EAPU shows that over \$14 million was reported to the Elder Abuse Prevention Unit (EAPU) as being exploited from

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<sup>32</sup> Kemp and Mosqueda, "Elder Financial Abuse," 1123.

<sup>33</sup> Kerry R. Peck, "Lifestyles of the Rich and Famous: Infamous Cases of Financial Exploitation," *Generations* 36 (Fall 2012): 30.

Queensland's seniors for that financial year. However the EAPU estimates that \$97 million is a more realistic figure.<sup>34</sup>

If the estimate for Queensland is close to the mark, then the figure would necessarily be greater in more populous states such as NSW. In the judgment of Alzheimer's Australia the conservative estimate for financial abuse is around 5% of the population aged over 65 years.<sup>35</sup> The Royal Commission into Family Violence was informed that in the state of Victoria the sum of \$57 million was reported lost in the year 2013-2014 through the misuse of Powers of Attorney.<sup>36</sup>

#### **4.9 Victims, Abusers and Community**

A holistic policy will not just aim to ostracise abusers as socially deviant selfish actors but it will also promote justice for the abused. A holistic policy begins with the individual as a member of the community because in our psyches we are hardwired for socially interdependent relationships. The sound governance of society requires initiatives that assist in strengthening the community, and particularly social networks that foster healthy relationships. It also warrants the introduction of measures that will substantially reduce the incidence of abuse.

The community must play a helpful participatory role in reducing abuse. However, the root source of the problem (self-centredness) obliges the government to exercise its duty of care by establishing legal restraints and deterrents, and fostering social constraints, that target abusers even before they act.

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<sup>34</sup> Les Jackson, *The Cost of Elder Abuse in Queensland: Who Pays and How Much* (Brisbane: Elder Abuse Prevention Unit, 2009), 3.

<sup>35</sup> See the discussion on financial abuse at <https://nsw.fightdementia.org.au/sites/default/files/20140618-NSW-Pub-DiscussionPaperFinancialAbuse.pdf>

<sup>36</sup> See [www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/New-powers-of-attorney-laws-to-improve-protections](http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/New-powers-of-attorney-laws-to-improve-protections)

By opting for the autonomous individual as the starting point, there is an immediate weakness built-in to the process of policy formation. The inherent weakness is rooted in these beliefs:

- Any interference in cases of abuse may be construed as the government intruding on the individual's right to choose (the "nanny state").
- Cases of abuse are deemed to be a private quarrel between individual family members ("sort out your differences in a civil action in court").
- The supply of advisory information functions as a post-interventionist "solution" i.e. action may only be spurred on after the abuse has been committed.
- A view that interprets the concept of human rights as being centred in the individual's will to choose and the individual's claims to demand or waiver those rights. In effect, a right is regarded as a legally protected choice.

To regard intervention in cases of abuse as resembling the "nanny state" involves a colossal trivialising of the problem. The law already stipulates that nobody is allowed to carry out acts of assault, theft or fraud. It is unlawful and unacceptable behaviour no matter what is the victim's age or gender. Society simply does not tolerate anyone assaulting another person and misappropriating their assets. Presumably, to follow the logic of unbridled libertarianism to its extreme, the state should not intervene in any sort of criminal enterprise because it entails interfering with someone's freedom of choice to steal, assault, or kill.

The evidence of social research is quite clear: an older person who has cognitive capacity may nevertheless feel strongly dependent on their abuser and fear reprisals. Their abuser exerts quasi-totalitarian control over the victim's circumstances. The victim's rights and freedom of choice are curtailed and denied. In cases of severe cognitive impairment the problem is exacerbated because the victim's capacity to make decisions is often poor. The cognitive

function and capacity to make decisions does deteriorate in the latter stages of health problems such as dementia.

The presupposition that “the state cannot interfere” in family matters turns into an absurd excuse to justify doing next-to-nothing. This is not tolerated when a child is abused or when women are victims of domestic abuse. It is odd then that there is a present-day reluctance to act when older persons are abused, which is entirely inconsistent with the societal revulsion at child abuse and domestic abuse. An abuser of older persons cannot receive any special exemptions from legal penalties on the grounds that their victim happens to be next-of-kin and that the abuse was a “private matter.”

The thinking that interprets human rights as legally protected choices and claims is very muddy that lacks clarity because it fails to provide an adequate definition and ultimate justification for the protection of rights. The empirical case from human history is that altruism and valuing freedom co-exists with human motives and actions to deceive kill or subjugate others. One weakness is that if rights merely reflect an individual’s will and choice then, since human choices, preferences and motives are quite variable, it becomes exceedingly difficult to determine that there any universal rights that require proper legal protection.

Furthermore, children and the cognitively impaired do have rights that are recognised in law (e.g. right to life, right to own property, right to inheritance) but they are unable to exercise any power to demand or waiver these rights. This fact undermines the claim that rights are to be construed as an exercise of the individual’s will and preferences: that rights are all about the individual’s choices and claims. Instead, the proper way to approach the definition and justification of rights is to understand that rights are titles which involve relationships. Rights require recognition and protection and apply to all persons



even when they lack the capacity to make claims or exercise the ability to choose.<sup>37</sup>

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<sup>37</sup> Alan R. White, *Rights* (Oxford: Clarendon, 1984). John Warwick Montgomery, *Human Rights and Human Dignity* (Grand Rapids: Zondervan, 1986).

## PART TWO: CURRENT LIMITATIONS

There are times when governments need to take an active role in leading society, rather than taking the predictable route of following after it. The forging of policy that attempts to “catch-up” is often characterised by being piece-meal in nature. It usually drains the public purse with large expenditure in order to achieve social parity.

A prudent policy would foresee problems and trends, and have measures already in place to ward off some trends, while also being in a state of preparedness with sufficient personnel, funds and infrastructure to respond to problems that emerge.

Public policy may be prone to piece-meal or *ad hoc* attempts to deal with problems which avoid grappling with fundamental principles. It is a challenge for policy-makers to be critically aware of their own values which they may bring to the task of grappling with the abuse of older people. It is important to consider the values we bring to policy decision-making, and to be willing to subject those values to critical review.

The need for critical reflection on values is essential for the government and the public sector. It is necessary when pragmatic decisions based on financial balance-sheets take precedence over the value of the lives of other people.

The public will justifiably view with deep suspicion any position paper, policy document, or government report on abuse that are filled with catch-phrases or slogans of “concern” and that merely contain descriptive lists of “strategies” and “achievements.” The public at large is also unimpressed by press releases that indulge in answering Dorothy Dix questions and that are replete with self-congratulatory rhetoric.

## 5 TOWARDS ZERO TOLERANCE

It is surprising to discover that Australia's "Premier State" of NSW is lagging far behind the policy trends in both South Australia and the United States of America.<sup>38</sup> The US Elder Justice movement and its associated Elder Justice Act pave the way for something similar in NSW. It is also lagging behind the state of Victoria which revised its *Power of Attorney Act 2014* to tighten up loopholes.

Instead of being the first state, or the leading state, NSW seems to be very backward in its public policy concerning the abuse of older people. Current policy approaches lack any vigorous commitment to rid NSW of the abuse of older persons.

The rationale for zero tolerance is straightforward: abuse entails treating older persons as non-persons which denudes their dignity. There can never be any justification for maltreating older people. There can never be any self-justifying excuse by an abuser. Not even an appeal to "I am suffering from carer-stress" can be construed as "extenuating circumstances" for an abuser to weasel their way out of facing up to their unethical actions and their self-centred motives.

This is the blunt point: ***under no circumstances should any older person be subjected to abuse.***

In some quadrants of society, the moral criticism of the abuse of older persons seems to be ahead of the moral horizons in bureaucracy. This is apparent in the "neighbour principle" in the law of negligence (discussed in section 9.2). A

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<sup>38</sup> Office for the Ageing, *Our Actions to Prevent the Abuse of Older South Australians* (Adelaide: Department for Families and Communities, South Australia, 2007). Patricia Sheehan, "Elder Abuse: Zero Tolerance," *Long-Term Living* 60 (June 2011): 40-41. Robert B. Blancato, "Elder Abuse and the Elder Justice Movement," *Generations* 36 (2012): 9-11. Kathleen M. Quinn and William F. Benson, "The States' Elder Abuse Victim Services: A System Still In Search of Support," *Generations* 36 (2012): 66-72.

dividing line must be drawn between individual freedom to exercise unrestrained choice on one side, and, on the other side, society's crucial need for some restraint on individuals that is supported by state legislation.

One way in which both public policy and public perceptions could be reshaped is to classify, condemn, and place in the foreground of social discourses, abuse of older persons as “socially deviant” or “anti-social” behaviour. Individuals who choose to abuse and exploit older persons must be compelled to face the consequences of their actions. They are selfish violators of human trust, their life-values are aberrant, and their behaviour is socially deviant.

The notion of socially deviant behaviour is part of the stock-in-trade of sociologists:

Elder abuse may be conceived as deviant behaviour. Deviance is a term rooted in sociology, referring to behaviour or activity that breaks social norms and violates shared standards. Thus, deviance includes and at the same time goes beyond the meaning of crime by not being tied to the violation of criminal laws but including informal social rules and conventions, ethical standards, organizational rules, and laws (other than those laid down in the criminal code). Such a perspective may be useful for analysing elder abuse phenomena. Elder abuse clearly comprises criminal acts (like several physical assault, rape, fraud, theft, threat, or neglect causing death) but most definitions of elder abuse and most scientific measures applied to it include behaviours violating norms of social conduct but not necessarily criminal laws (like yelling at a person or holding somebody up to ridicule).<sup>39</sup>

United community opposition might be galvanised, and greater vigilance could be fostered, if “abuse” is classified as socially deviant behaviour that is ostracised and rejected. The rejection of the abuse of older persons needs to be

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<sup>39</sup> Goergen and Beaulieu, “Criminological Theory and Elder Abuse Research,” 186.

in society's consciousness in the same way that there is zero tolerance for terrorists and paedophiles.

### **5.1 Justice for Seniors as a category of Law**

Some aspects of the abuse of older persons are covered in scattered pieces of existing legislation related to assault, fraud, theft and undue influence. However, there is no single piece of legislation that identifies abuse in a fashion that is analogous to the US Elder Justice Act.

In other words, there is a profound and urgent need to develop a fresh category of law: a piece of legislation dedicated to Justice for Senior Citizens and the Prevention of Abuse of Senior Citizens. What is needed is an anti-abuse piece of legislation, and appropriate amendments to some existing laws, such as those concerning Power of Attorney and the Forfeiture Rule, to specifically refer to the category of "abuse."

## **6 SOCIAL CAPITAL**

The emphasis on the individual in community should translate into producing great social capital that yields a positive impact on society. Social capital refers to the cohesion, mutual sympathy, and goodwill that build up in a community through the actions of individuals, social networks, voluntary institutions, and those institutions (whether private or public) that make a positive contribution to social welfare. Social capital is something experienced by an individual, social group or collective. It may create a buffer for individuals when facing adverse life experiences. Social capital is not synonymous with the ownership of material goods.<sup>40</sup>

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<sup>40</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000). R. M. Silverman, *Community-Based Organizations:*

In the US context, Kathleen Eilers, Paula Lucey and Stephanie Stein remarked in 2007:

The new gold standard is to assist the elderly to age in community. Being in a community is the pathway to creating social capital. The Aday model points out that social capital and social networks improved the health outcomes for vulnerable populations and decreased the risk of illness.<sup>41</sup>

The observations of Eilers, Lucey and Stein were primarily centred in the idea of creating communities within institutions such as aged care facilities. Their observations are that fostering good social capital through positive face-to-face relationships and direct care actually reduces depression and improves health.

Their observations receive further support from a Mexican longitudinal study of older persons aged 65-74 in poor rural states. The researchers in Mexico observed an improvement to the health of older persons that is directly linked to activities undertaken to enhance face-to-face inter-personal relationships. Policy-makers, researchers and bureaucrats have “underestimated” the positive effect of social capital in lessening depressive symptoms among older people.<sup>42</sup>

If positive steps were taken to foster good social capital for older persons, there would be an improvement to health and a reduction in anxieties and depression. This in turn would have a positive flow-on effect on the already strained health-care and welfare systems. For good social capital to flourish the public sector has to be an active contributor in significant ways. In order for that to occur, the public sector must be properly resourced and not under-staffed and under-

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*The Intersection of Social Capital and Local Context in Contemporary Urban Society* (Detroit: Wayne State University Press, 2004).

<sup>41</sup> M. Kathleen Eilers, Paula Lucey, and Stephanie Sue Stein, “Promoting Social Capital for the Elderly,” *Nursing Economic\$* 25 (September-October 2007): 5.

<sup>42</sup> Ietza Bojorquez-Chapela, Betty Soledad Manrique-Espinoza, Silvia Mejía-Arango, Martha M. Téllez-Rojo Solís, and Aarón Salinas-Rodríguez, “Effect of social capital and personal autonomy on the incidence of depressive symptoms in the elderly: Evidence from a longitudinal study in Mexico,” *Aging and Mental Health* 16 (2012): 469.

funded. The need for good social capital for older persons far outweighs the demands that the city of Sydney's stadiums must be upgraded to suit the vested and sectional commercial interests of sponsors of sports codes.

### **6.1 Positive Social Capital Produced By NSW Trustee and Guardian**

An illustration of social capital that benefits older persons, and society-at-large, is found in the operations of the NSW Trustee and Guardian, which came into existence on 1 July 2009 via a legislative merger of the Office of the Protective Commissioner and Public Trustee NSW. This organisation has carriage of matters that include these beneficial services:

- The financial management of protected estates under court or tribunal order.
- Deceased estates where NSW Trustee and Guardian is appointed as an executor of a Will, or as an administrator of an intestate, or as a continuing trustee.
- Trustee of victims compensation awards, trusts for infants and so forth.
- Acting as an attorney under appointment via a Power of Attorney.

The former NSW Attorney-General the Hon. Greg Smith remarked on 5 March 2014:

Unfortunately, older people sometimes become victims of financial abuse, and often the perpetrators are the people closest to them. NSW Trustee and Guardian is a professional body with years of experience helping reduce the risk of costly investment mistakes. It also provides a Power of Attorney service as an alternative to friends and family members taking on the role.<sup>43</sup>

In his capacity as the Attorney-General, Smith gave a fine endorsement of the services provided by the NSW Trustee and Guardian. The NSW Trustee and Guardian, which reports to the Attorney-General, has a vital and integral role in producing good social capital that flows specifically to the people, particularly

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<sup>43</sup> "Protect Yourself Against Elder Financial Abuse," available at <https://www.nsw.liberal.org.au/news/state-news/protect-yourself-against-elder-financial-abuse>

older clients, whom they serve. Smith praised the efforts of the employees in NSW Trustee and Guardian to care for victims of abuse in March 2014.

NSW Trustee and Guardian's good social capital is found in undertaking the difficult, and sometimes thankless, tasks associated with caring for clients. NSW Trustee and Guardian stands in the social chasm where many vulnerable persons would otherwise languish and be exploited by selfish individuals. The services delivered by NSW Trustee and Guardian do result in important savings to society-at-large which are not measured in the economic metrics of its financial statements.

NSW Trustee and Guardian's heritage is one of producing good social capital by serving:

- (a) Those who appoint it under a Power of Attorney to maintain their assets, and in the subsequent administration of the deceased estate;
- (b) Those whose affairs are entrusted to the Trustee via financial management orders from a Court/Tribunal.

It helps protect clients from potential exploitation, and in some instances administers matters for individuals whose lives have been shattered by financial abuse.

Older persons need to experience the richness of social unity by living in relationship to the community where the threat of abuse is absent. Unfortunately, the long range prospects are that abuse will be perpetuated, and that it will increase commensurate with persistent bureaucratic intermeddling in the resources (both human and financial) of the agencies and departments that have been established to serve older persons.



## 6.2 Decaying Social Capital

The good social capital that has traditionally benefitted older persons is being slowly eroded by public and corporate discourses that are:

- (a) Hopelessly dominated by technological utopias;
- (b) Committed to a twenty-first century jazzed-up version of economic rationalism.

The technological structures within culture bring some undoubted benefits but they are partly offset by problems that may be ignored or deliberately side-stepped. A common feature of discourses about a technological utopia is that there is a dialect “spoken” and shared among those committed to it. To an outsider the discourse carries a covert message that requires decoding or translating into the vernacular. Once that covert narrative is decoded then the public is better placed to understand that the value of “efficiency” is used to subordinate everything else. A covert narrative promoting technological determinism favours the “logic” of digital technology outweighing, or even excluding, other important dimensions from the process of decision-making.

The covert narrative is framed by an exaggerated and distorted emphasis on predictability, calculability, control, uniformity, and integration. A mechanistic technique is repeatedly applied to reorganise all facets of government into conformity with the surface appearance of “efficiency.” All appearance of change that is generated by “the technique” remains fundamentally illusory. Under the guise of creating better services and more consumer choices, an illusory doctrine of progress is promoted.

The reductionist value of efficiency is used administratively to coerce people (clients and employees) to become units that function inside a mono-dimensional technique-driven system. One inherent weakness in the technological enterprise lies in over-estimating digital technology: that it

ensures the efficient delivery of services to all citizens, and especially to older persons.<sup>44</sup>

### 6.3 Ritzer's Thesis

Another limitation for NSW's society concerns the emphasis on creating centripetal systems (processes and forces that drive things increasingly into the centre) that shape the public sector in relationship to older persons. Centripetal systems operate under the banner of efficiency but tend to contain in-built limitations and weaknesses that do not produce the desired outcome.

The reliance on digital technology to deliver services is characterised by an increasing tendency toward centralisation and control. The emphasis on centralising processes and claims of maximum efficiency at the lowest cost mirrors what the sociologist George Ritzer called the McDonaldization of society.<sup>45</sup> Ritzer uses the assembly-line process of the McDonald's fast-food outlets to describe the dehumanizing and destructive effects of social rationalisation. He identified four main characteristics to the McDonaldization process of centralisation: efficiency, calculability, predictability and control.

In Ritzer's analysis the net effect of centralisation is that human values and creativity are squeezed into a dehumanizing "iron cage." Employees are socialised via training into operating with a particular *modus operandi* that is claimed to be the most efficient way of achieving outcomes (irrespective of whether it really is or not). Thus employees follow pre-packaged procedures and operate in a system of dehumanising structures with repetitive tasks that do not require creative skill.

The emphasis on order, systematization, routine, consistency and methodical operation can provide a sense of familiarity and security. However, an over-

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<sup>44</sup> Refer to Ross Gittins, "Weak public service, weak policy," *Sydney Morning Herald*, 7 December 2015, 26.

<sup>45</sup> George Ritzer, *The McDonaldization of Society* (Thousand Oaks: Pine Forge Press, 1993); Ritzer, *The McDonaldization Thesis* (Thousand Oaks: SAGE, 1998).

emphasis on routine in an organisation can stifle creativity, innovation and experimentation. It can lead to oversights and structural inefficiency as the one-size-suits-all mentality prevails. In general, bureaucrats who champion notions of predictability, calculability and control are already temperamentally inclined in their personality-type to organise their life and work in that manner. Instead of recognising diversity in personality-types and being inclusive, the systems marginalise those who seem to be non-conformists.

The problem of power and control becomes the subtext of a McDonaldized style of governance. The measurement of performance by statistics becomes a means to an end in exerting control over work-place processes. Often there is little or no critical reflection on the contexts in which the statistics have been gathered and so the interpretation of the data becomes skewed.

The McDonaldized way of thinking leads to an over-confidence about the capacity of Information Technology to deliver better services or to improve work processes. The McDonaldized style that fosters the creation and maintenance of centripetal systems contributes to the marginalising of senior citizens who are expected to order their lives around using digital technology. Centripetal systems directly impact on the capacity of the public sector to take effective action on behalf of senior citizens who have been abused.

The public sector's response to cases of the abuse of senior citizens are hampered by a lack of human and financial resources, which in turn are dictated by budget allocations and policy decisions to outsource problems to the private sector. The McDonaldized style constrains the public sector to act with any appreciable depth against the abuse of older persons because its operations are subordinated to overriding processes of efficiency, calculability, predictability and control.

## 7 LIMITS TO TECHNOLOGY

A major fault-line is found in the mono-dimensional idea that problems are best resolved by distributing information via digital technology. Faith in technology has been embraced as the primary strategy to cover all service delivery problems (and by extension solving the abuse of older persons). Information is of little use to someone whose cognitive capacities are severely impaired and who sadly does not have an empathic supporter or carer to act on their behalf.

When challenges to this “faith” arise, such as presenting evidence that highlights inherent weaknesses and limitations in technology, the response is of a closed-mind. Apologists for the “faith” patrol the boundaries of a shared reality about technology. Their rhetorical task is to fend off rejected beliefs that impinge on, or tears at, the fabric of a dogmatically shared reality.

Those who deny the “magic” of technology as the panacea are rhetorically ostracised as if they are cult-like heretics. A fundamentalist-like belief in the proverbial “*deus ex machina*” (God out of a machine), which is impervious to critical scrutiny, is the stuff one expects from characters in George Orwell’s novel *1984*, and Aldous Huxley’s *Brave New World*.

A foundational problem is making the autonomous individual the starting point for creating policy, strategies and measures. It probably seems self-evident to policy-framers that individuals should have maximum freedom to choose how they want to live. The political slogan “more freedom, less government” is a reflection of the popular view that the individual is, and should be, autonomous.

**“I don’t ever want to play the part, of a statistic on a government chart.”**

The Police

“Invisible Sun” 1981  
track 10 *The Police*  
*Greatest Hits* (A & M  
Records).

In the Australian context John Chesterman of the Office of the Public Advocate (Victoria) remarks:

Australian elder abuse policies routinely discuss *empowerment* or the right to *self-determination*, and they incorporate community education initiatives as a key strategic goal.<sup>46</sup>

It is very noble to emphasise civil freedom and individual choice. However, the greater the emphasis on individual autonomy in a policy, strategy or measure, the more we are symbolically reinforcing social isolation. *The reality is that social interdependence highlights that there are practical limits to autonomy.*

The last half of the twentieth century witnessed an aged stratification in western society, with each generation demarcated by age brackets endorsed by the moguls of marketing and advertising. This social stratification involves processes whereby older persons are segregated either symbolically or literally. Rich Ling observes:

Age based segregation is characteristic of modern society. Age segregation in terms of living situation and in terms of our expectations of others is common. This, in addition to semiconstant career mobility, means that older persons who are not in the workforce often live away from other persons in their families.<sup>47</sup>

The individual who is figuratively or literally isolated from the community is very much at risk of being maltreated, exploited and abused by persons they trust or depend upon.

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<sup>46</sup> John Chesterman, "Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies," *Australian Social Work* 68 (2015): 3. Emphasis is Chesterman's.

<sup>47</sup> Rich Ling, "Should We Be Concerned That the Elderly Don't Text?" *The Information Society* 24 (2008): 334.

### 7.1 Herding the masses into Technological Utopia

It is very important for older persons to be informed of (a) their rights and (b) the supportive services that they may access (**e.g. item 6 of the Inquiry’s terms of reference**).

However, the offer of information, and the delivery of services, tends to be premised on regarding older persons as a homogeneous social mass. At best, the barest nuances seems to be (a) a distinction between “active” and “inactive” older persons, followed by (b) those older persons for whom English is not their first or vernacular language.

So much reliance is placed on delivering services to older persons via digital communications devices. This occurs in several ways such as:

- Directing customers to access information and services from a departmental website, and making contact via e-mail services, rather than over the counter in an office.
- Establishing central call-centres using 1300 phone numbers as a means of (a) diverting the public from a face-to-face encounter and (b) preventing phone calls being made to a local office.
- Redirecting access to a network of Service Centres NSW where the emphasis is on processing matters from computer terminals.
- Creating phone applications that may be downloaded to a mobile phone.

There is much emphasis placed on how positive these systems are for customers: they are convenient to access and use and they improve service efficiency. Subtle pressure is applied that requires a degree of customer conformity particularly with the use of call-centres and websites. The technology is designed in a fashion that herd people through a process that is sometimes dubbed “the customer’s journey.” However, the inherent weaknesses

and the limitations of over-relying on this form of technology are rarely reflected on.

## **7.2. Queensland Youth and Mobile Technology**

A Queensland-based qualitative study of youth aged between sixteen and twenty-four ascertained that “mobile phones were used to enhance feelings of belonging” and that “group norms influenced mobile phone behaviour indicating that social identity processes are related to mobile phone use.”<sup>48</sup>

In contrast to the abovementioned study of youth, older persons already possess a well-established social identity. Older persons have managed to forge an identity without the need for digital technology to create or reinforce it.

The impression that social isolation is overcome by using social media and digital gadgets, and that via this technology feelings of belonging are enhanced, may be doubted. Consider Lifeline’s recent observation concerning the 2015 record number of people (especially younger individuals) in crisis who contacted them for help. Heavy users of digital technology and social media are ostensibly “connected” to others via Short Message Service (SMS) texting, mobile phone calls, and the Internet but paradoxically, as Lifeline observes, they do not feel at all happy but rather feel isolated, experience deep sadness, depression, anxiety, and some feel suicidal.<sup>49</sup>

## **7.3 Social Isolation**

There is a genuine concern that older persons are experiencing social isolation, which potentially increases their risk of experiencing abuse. It is often in private domestic contexts (or behind closed doors in institutional care facilities) where

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<sup>48</sup> Shari P. Walsh, Katherine M. White, and Ross McD. Young, “The Phone Connection: A Qualitative Exploration of How Belongingness and Social Identification Relate to Mobile Phone Use Amongst Australian Youth,” *Journal of Community and Applied Social Psychology* 19 (2009): 225.

<sup>49</sup> Megan Levy, “Facebook, Twitter drive record number of calls to Lifeline crisis support,” *Sydney Morning Herald* available at [www.smh.com.au/national/facebook-twitter-drive-record-number-of-calls-to-lifeline-crisis-support-20160112-gm4p6n.html](http://www.smh.com.au/national/facebook-twitter-drive-record-number-of-calls-to-lifeline-crisis-support-20160112-gm4p6n.html)

the abuser sets the boundaries in which the victim is permitted to act. The abuser wields enormous power by exerting control of the environment in which their victims live. Victims are often living in a relationship of strong dependency where their principal helper also happens to be their abuser. A combination of social isolation, depression, and fear of the abuser are reasons that are sometimes put forward to account for the under-reporting of cases of abuse.<sup>50</sup>

If abusers behaved brutally before the public gaze, then they would be ostracised as deviants. The fact that abuse occurs out of the public gaze is tacitly admitted when the topic of older persons experiencing isolation and loneliness is discussed.

A general social observation is that older persons, especially those above the age of seventy-five, do not seem to be major users of Information and Communication Technology (ICT): i.e., mobile phones, tablets, and laptop and desktop computers. Roberto Martinez-Pecino and his Spanish colleagues remark that when individuals, especially older aged persons, do not use, or infrequently use, ICT they lose the opportunities for social interaction:

When individuals make little or no use of technology this can lead to their social exclusion, and to the loss of opportunities for social inclusion and participation. This can be one of the consequences of the so-called *digital divide*, which is defined as inequalities regarding access, intensity, and nature of ICT use. Old age is frequently associated with the digital divide.<sup>51</sup>

One very simplistic claim is that if older persons were taught how to use ICT gadgets, and encouraged to use them, then they would not feel isolated and lonely, and they could self-report incidents of abuse. The assumption standing

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<sup>50</sup> Kemp and Mosqueda, "Elder Financial Abuse," 1124.

<sup>51</sup> Roberto Martinez-Pecino, María J. Lera, and Magdalena Martinez-Pecino, "Active Seniors and Mobile Phone Interaction," *Social Behaviour and Personality* 40 (2012): 876. Italics are in the original article.



behind this claim is that older persons, including Baby Boomers who are entering retirement, are partly to blame because they are “technology-laggards.”<sup>52</sup>

The over-arching problem with that opinion is that it is out of touch with the lived reality of older persons. People who were born during the first three-quarters of the twentieth century are quite accustomed to technological change. My twin aunts who are aged ninety-seven have witnessed the shift from steam engines and the horse-drawn cart to jumbo jets, lunar landings, and space shuttles. They likewise witnessed the shift from the gramophone disc player to DVD machines, and grew up with the radio and landline telephone. The pace and rate of technological change that they have witnessed since 1918 is just as profound as that associated with new ICT devices manufactured since the mid-1990s.

Moreover, there is a cohort of Baby Boomers who have retired from the workforce since 2001, and whose workplace experiences necessarily involved utilising ICT devices. It is therefore worth noting what social scientific surveys have uncovered in examining the benefits and motivations of using mobile phones among older people. The portrait is complex and defies the simplistic stereotyping of older persons.

#### **7.4 Spanish Study**

One small study, conducted in Seville (Spain), interviewed one hundred sixty-five older persons all of whom were participating in a University of the Third Age programme. The results indicated that 95.8% owned a mobile phone, and 53.8% had received their first mobile phone as a gift. The average length of experience in owning/using mobile phones was 9.9 years, and the average number of times for upgrading the phone to a newer model was 3. It was

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<sup>52</sup> Elisabeth McLeod, “The Use (and Disuse) of Mobile Phones by Baby Boomers,” *International Journal of Emerging Technologies and Society* 7 (2009): 30.

established that the “most common use of mobile phones for the group was keeping in touch with relatives.”<sup>53</sup>

The Spanish study yielded these observations from the researchers:

The participants did not use mobile persons to meet new people, nor did they feel better when they were with others because they had a high quality mobile, nor did they believe it was easier to express themselves via mobile phone than by speaking face-to-face. They believed they could live without a mobile phone but that there were benefits to having a mobile phone in cases of emergencies, for security, and because it helped them preserve friendships with others and feel more free and independent.

Thus, according to our findings, mobile phones do not have a social function expansion for active seniors as they do not use them to relate to new people, nor do they believe it is easier to express some things via mobile phone than by speaking face-to-face.<sup>54</sup>

This study had limitations:

- It involved a very narrow sample which is not to be taken as representative of the wider Spanish population of older persons.
- It was conducted among a group of older persons attending a continuing education course who had a certain socio-economic status.

At best the study suggests that even among a group of modestly affluent educated older persons that mobile phones are used in a restricted manner.

My aunts live together in their own villa, lead active social lives, and are not in need of weekly home-visits from a community nurse. They do not own or use mobile phones, tablets, laptops or desktops computers. Mention the word

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<sup>53</sup> Martinez-Pecino, Lera, and Martinez-Pecino, “Active Seniors and Mobile Phone Interaction,” 877.

<sup>54</sup> Martinez-Pecino, Lera, and Martinez-Pecino, “Active Seniors and Mobile Phone Interaction,” 878.

“tablet” and they will immediately associate it with a bottle of pills, and not a portable flat touch-screen device. My aunts are not “techno-phobes” but clearly see no relevance in owning ICT gadgets in order to live happily and healthily. The robust nature of their health shows that happiness comes without needing ICT devices to obtain some form of personal significance and social status. My aunts are not socially isolated or at risk of being financially abused by next-of-kin. If they were threatened with abuse they have sufficient fortitude and tenacity to use a landline telephone to call for assistance.

The basic point is that older persons use landline telephones, and are very accustomed to conversations on the phone or face-to-face as the most meaningful form of communication. Not all older persons suffer from “status anxiety” or have the desperate need to have vicarious relationships through a mobile phone. If an older person already has access to a landline telephone, then owning a mobile phone does not realistically increase their opportunity or chances to call the Police or anyone else for help if they are being abused. In fact, in domestic settings where an abuser lives with the victim, any communication device can be confiscated, controlled, or the service can be cut off.

The versatile nature of ICT gadgets is touted as socially convenient and commercially beneficial because we are offered freedom of choice to access information, communicate, conduct transactions, and be entertained. The major advocates for ICT convey the vision that we are all connected through these devices and we are united through digital channels of information and communication. Of course the social reality in Australia and worldwide is different: not everyone owns a mobile phone, tablet, laptop, or has the financial and technological access to an Internet Service Provider.

The pervasiveness of ICT has entailed reorganising social interaction, human relationships, and institutions (corporate and government) so that our behaviour must conform to the use of these devices. It has extended to social absurdities such as the lauding of a phone application that homeless persons may download to find out which homeless shelters are close by! It is difficult to believe that the majority of homeless persons are all so “high-tech” that they can simultaneously sleep on park benches or in bus stop shelters and recharge a mobile phone overnight while sleeping rough!<sup>55</sup>

The use of ICT is so woven into habitual daily routines—sending and checking for messages, updating social media profiles, taking photos, checking date/time, shopping, downloading TV shows and movies—that both heavy-users and average-users of these gadgets take it for granted that it is “normal” to behave this way. It is ironic that few have pondered the possibility that the excessive reliance on ICT devices may contribute to loneliness, introversion and self-absorption particularly as Narcissus contemplates his digital reflection in selfie photos posted on Instagram and Facebook.

A superficial view that is widely held is that ICT gadgets are “neutral” tools that simply make various aspects of life more “fun”, easy communication more “convenient”, and the delivery of consumer services more “efficient.” This view allows people to adopt ICT with much excitement as new menus and applications are continually added into the latest manufactured devices.

At a deeper level, using ICT reflects underlying philosophies about both technology and culture that are being applied to an understanding of personhood and to the organising of social institutions. Today’s society is not technological primarily due to the existence of digital gadgets and the Internet. *It is*

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<sup>55</sup> <http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-finds-much-to-love-as-technology-tackles-homelessness-20160129-gmguzb.html>;  
<http://www.heraldsun.com.au/news/victoria/askizzy-app-connects-the-homeless-to-food-shelter-and-health-services/news-story/bfae67275552be421af4dd54bfd575a6>

*technological because of a commitment to pursuing techniques of efficiency that intrudes into every aspect of human endeavour.*

Everyone is expected to reorient their lives around using ICT devices. Pressure to use ICT comes in different forms:

- Family and friends who are already using ICT gadgets urge non-users to “join in,” and such invitations may be reinforced when gadgets become gifts. This constitutes gentle coercion to conform and to participate.
- The commercial sector and government sector reshape the delivery of information, and access to aspects of service, to the use of ICT gadgets or other new technologies (e.g. Automated Teller Machines, Opal cards for public transport, etc). This constitutes a nearly compulsory form of coercion.

Failure to conform leads to exclusion and isolation. The assumption that technology will help overcome isolation and loneliness is a reflex response to the fact that older persons are not major users of computers and smartphones. What is absent is any prior critical reflection about the mono-dimensional nature of technology: it is used in a manner that subordinates human nature, relationships, and social institutions to the dictates of being digitally connected.

The imposition of the technology requires human conformity to the processes. It flattens and stifles human personalities by reducing all activity into a one-size-fits-all approach. This irritates people as they sense that they are experiencing the technological equivalent of wearing a strait-jacket. Instead of enhancing “the journey of the customer’s experience” or “enriching inter-personal relationships” the technological constraint prompts frustration and annoyance. People resent being treated in processes akin to the robotic assembly line that manufactures a motor vehicle.

The problem of social isolation has predictably prompted a technological response. The technological response, however, is a superficial band-aid

solution to the deep-rooted problems of self-centredness, greed, devaluing older people, and the loneliness experienced by older persons as their life-partner and peers die. Indeed it is unrealistic to suggest that loneliness will dissipate by relying on the Internet and mobile phone devices. Instead of alleviating the symptoms of social isolation, the technology that is touted as the panacea merely ends up aggravating the deep sense of feeling isolated.

Dutch researchers conducted a controlled study of isolated older people and the disabled using the Internet as a social lifeline. The researchers point out that one form of relationship that may be absent cannot be simplistically replaced by others in the digital arena:

Social loneliness is related to deficient social integration, a lack of contact with whom one shares certain common traits, such as friends. Emotional loneliness occurs when someone misses a close, intimate relationship with one person, usually a partner. The distinction clearly shows which types of relationships are lacking. It also shows that the purpose served by one type of relationship cannot be simply replaced by those of another type of relationship.<sup>56</sup>

## **7.5 Tech Savvy Seniors**

One current strategy is about helping older persons learn how to use digital devices:

The NSW Ageing Strategy includes a range of initiatives that help make sure people can remain connected with their community as they grow older ... The Tech Savvy Seniors' program, which helps older people become more confident with using smart phones, tablets, computers, and social media. Training is free or low cost and is delivered at libraries, community colleges and residential living facilities.<sup>57</sup>

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<sup>56</sup> T. Fokkema and K. Knipscheer, "Escape loneliness by going digital: A quantitative and qualitative evaluation of a Dutch experiment in using ECT to overcome loneliness among older adults," *Aging and Mental Health* 11 (2007): 497.

<sup>57</sup> *NSW Government Submission to Inquiry on Elder Abuse in NSW*, 29.

There is general merit in teaching older people the basic skills in operating digital gadgets. However, the great weakness on the part of policy-makers is to over-estimate (a) the capacity of technology and (b) social behaviour.

It is easy to narrowly measure a programme's "effectiveness" by inviting users who finish the course to complete an online survey. Informal surveys may be designed to yield predetermined results, namely steering respondents to press a tab button that ensures praiseworthy feedback. Statements like the following hypothetical ones may elicit high praise:

- "The course instructor was very helpful;"
- "My use of the Internet has improved;"
- "I now feel more confident using a smartphone/tablet;"
- "I believe that I will be able to stay in touch with friends and family;"
- "I would recommend this course to others." <sup>58</sup>

However, a narrow menu of questions can easily predetermine what survey results one wants irrespective of other critical factors that might yield a different picture.

A general observation is that the passage quoted above merely summarises a strategy. It is not supported by any comprehensive social-scientific evidence to demonstrate that this programme actually:

- Overcomes the older person's experience of social isolation;
- Better enables victims to self-report incidents of abuse.

The passage implies that since Tech Savvy Seniors is available to the public that (a) It must necessarily be an effective measure; and (b) that it must be producing a positive outcome in bridging the social isolation of older persons.

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<sup>58</sup> I believe, based on my own experience, that this is precisely the case at NSW Service Centres when customers are invited to supply feedback to five or six superficial statements on a touch-screen terminal about their "experience."

## 7.6 Problem of Over-Simplification

A grave mistake is to over-simplify the issue of bridging social isolation via technology. First, the mass of older persons do not necessarily enrol in community college courses. In other words, not every active older person is enrolling in the Tech Savvy programme.

When it comes to computer usage, persons who were educated before the Internet became part of school-life, are generally speaking self-taught users of ICT devices. It is misleading to assume that those who *do* use the local library, and those who take courses in community colleges, feel the need to use computers in the same way as younger generations.

Public-use of computers in the local library, and in Internet cafes, may indeed be used to surf the Internet, send emails, and access social media accounts. However, access to terminals in public libraries is highly competitive, time-limited, and usually requires advance pre-bookings a day beforehand.

Older persons who are regular users of a local library may be familiar in using the library's digitised catalogue. However, older persons are also accustomed to talking to a librarian. Similarly, not all older persons who enrol in community colleges *necessarily* feel the need to learn how to use computers.

## 7.7 Devices may be Peripheral to Life

The simplistic assumption is that older persons will enhance their independence and lifestyle if they are given the opportunity to learn how to use digital devices. This assumption may be challenged in light of careful social research into the attitudes of older persons concerning new technological gadgets.

Not all older persons possess, let alone use, ICT gadgets. Rich Ling is an American academic in communication studies at the University of Michigan, and is also co-employed in Norway by a mobile telephone company. He observes:



While there are clear advantages to the use of mobile communication, it is not always the case that elderly persons greet the use of mobile phones with open arms. They can see it as an annoying addition to their daily lives.<sup>59</sup>

He illustrates the point from the perspective of “Reidun” a Norwegian lady who was given a mobile phone as a gift on her seventy-fifth birthday. She stated in an interview:

I have been opposed to mobile telephones because I think there have been far too many of them but on my 75<sup>th</sup> birthday, my children and grandchildren gave one to me even though I wasn’t so excited about it. I didn’t know what I was going to use it for.<sup>60</sup>

She acknowledged that it could be a security device but also stated that she receives so few calls and only spasmodically switches on the phone. Ling then offers this expert observation:

It is obvious from Reidun’s comments that she has, at best, a hesitant relationship to the device. On the one hand, she acknowledges it as a security link. However, she does not seem to have the same passion for the device as do many teens. It is clear that she has constructed a life wherein mobile communication does not have a place and indeed this is worthy of praise. While teens display perhaps a dependency on the device to keep track of “buckets” of friends, Reidun has a lifestyle where she does not have this dependency. Where in some ways teens live through the telephone, Reidun can do without. The difference is glaring ... she seems to be comfortable in a lifestyle where the device has only a peripheral role in her otherwise orderly situation, there is little chance that she will become an active mobile phone user and the phone will remain a peripheral object in her life.<sup>61</sup>

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<sup>59</sup> Ling, “Should We Be Concerned That the Elderly Don’t Text?” 337-338.

<sup>60</sup> Ling, “Should We Be Concerned That the Elderly Don’t Text?” 338.

<sup>61</sup> Ling, “Should We Be Concerned That the Elderly Don’t Text?” 338.

A 2010 study of eight hundred and fifty-eight older persons in a large rural region of South Australia yielded these responses to survey statements from those over the age of eighty:

- “New technology is changing too fast for me to keep up” 37.5%
- “New technologies are too complex for me to use” 44.6%
- “I am too old to learn about new technologies” 61.1%
- “New technologies make it easy to stay in touch with family and friends” 15.4%
- “New technologies are too expensive for me” 29.5%
- “I would use new technologies if they were easier to use” 23.9%
- “New technologies are very useful to me” 9.5%
- “I can see no use for new technologies in my life” 43.9%
- “I would use new technologies more if I had more advice and support” 14.7%
- “I use new technologies to make life easier” 8.8%
- “I would use new technologies more if I had opportunities for training.” 13.0%
- “I would use new technologies more if my family and friends used them.” 1.4%<sup>62</sup>

The above survey results of persons aged over eighty in rural South Australia show that the majority:

- Do not regard digital communications devices as particularly relevant to their lifestyle.
- Do not regard such devices as making their lives better.
- Would not seek opportunities to be trained in how to use such devices.

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<sup>62</sup> Helen Feist, Kelly Parker, Natasha Howard, and Graeme Hugo, “New Technologies: Their Potential Role in Linking Rural Older People to Community,” *International Journal of Emerging Technologies and Society* 8 (2010): 77.

The figures are not particularly spectacular for the age brackets 55-64 and 65-79 years of age. In response to the question “I would use new technologies more if I had opportunities for training” the results were: aged 55-64, 26.8% agreed; aged 65-79, 26.1% agreed. The combined total percentage for all three age brackets for this training opportunity statement was only 21.8%.

In other words, the great majority of older persons (78.2%) who were surveyed in rural South Australia would not increase their use of these devices if there was a training course. The researchers noted:

Comfort levels with new technologies may be an indication of current use but of equal importance are attitudes to new technologies as these provide some understanding of the potential for future adoption. In addition to survey questions about comfort levels with various forms of technology, study participants were asked about their attitudes to new technologies such as mobile phones, computers and the Internet. Given the relatively low levels of comfort with new technologies, it was expected that participants may not have positive attitudes towards new technologies by age.<sup>63</sup>

The survey results indicate that only 15.4% of those over eighty agree that the technology makes it easier to stay in touch with family and friends. Only 1.4% agreed with the sentiment that they would use technology more frequently if their family and friends used these devices. Similarly, of those aged 65-79 only 35.8% agreed that the technology makes it easy to keep in touch. The expectation that social isolation is bridged by the technology is not supported by the responses of these rurally-based South Australians.

This statistical data points in the opposite direction to the over-simplified expectation that (a) life will improve for older persons in using the technology,

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<sup>63</sup> Feist, Parker, Howard, and Hugo, “New Technologies: Their Potential Role in Linking Rural Older People to Community,” 76-77.

and (b) that social isolation is reduced after enrolling in the Tech Savvy Seniors programme.

It must be honestly admitted that the programme will not make much difference to people who have dementia. They are most vulnerable to being abused and due to their cognitive impairment they are the least likely persons to use ICT devices to call for help.

### 7.8 Older Persons Culture

What must not be overlooked is the existence of cultural practices among older persons concerning *both their use and non-use of this technology*. The previously mentioned research on rural South Australians noted that older persons are not reluctant to use technological devices, and have reasonable comfort levels using microwave ovens, digital TV sets, CD players, DVD players, etc. In other words, older persons are not technophobes. Nevertheless, there is less comfort about car satellite navigation, and using online or telephone banking services to conduct transactions.<sup>64</sup>

What is not properly understood is that older persons have no need to reorient their lives, as younger generations do, around the constant use of ICT devices. The University of Adelaide scholars who studied older rural South Australians observed:

New technologies rarely completely replace current ways of doing things or interacting with others. Most adoptions of new technologies are ‘grafted’ onto existing uses ... new forms of technology usually complement the old ones. Texting, emails and on-line chatting have not replaced talking to people on the telephone and Voice over Internet Protocol (VoIP) or video-conferencing have not replaced face-to-face meetings ... new technologies offer older people the

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<sup>64</sup> Feist, Parker, Howard, and Hugo, “New Technologies: Their Potential Role in Linking Rural Older People to Community,” 75.

opportunities to strengthen existing social ties, not substituting for face-to-face communications.<sup>65</sup>

While technology may “offer older persons the opportunities to strengthen existing social ties” this does not equate to older persons constantly checking phones for text messages, social media updates, or relying on these devices to conduct their personal business affairs.

There are many younger persons who are employed in strategic positions in the public and private sectors whose personal routines of life are governed by reliance on ICT devices. When life experiences are narrowly defined or based upon ICT devices, it may be difficult to fully appreciate that not everyone wishes to organise large parts of their life around the use of these devices.

### **7.9 Celebrities who live happily without a Mobile Phone**

According to the Australian Bureau of Statistics the population is currently just over twenty-three million. In 2011 it was ascertained that out of the total population, eighty percent owned mobile phones. Altogether it was established that Australians possess more than thirty million mobile phones: which equates to four phones for every three persons.<sup>66</sup> Although there are more mobile phones than citizens, *twenty per cent of the population neither owns nor uses a mobile phone.*

This is not an age-segregated stereotype where people mostly aged over eighty years stubbornly refuse to use new technology. A young celebrity who does not own/use a mobile phone is Kele Okereke the lead singer of the British indie-

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<sup>65</sup> Feist, Parker, Howard, and Hugo, “New Technologies: Their Potential Role in Linking Rural Older People to Community,” 70.

<sup>66</sup> Refer to *Communications report 2011-12*, Australian Communications and Media Authority, 14, available at [http://www.acma.gov.au/webwr/assets/main/lib550049/comms\\_report\\_2011-12.pdf](http://www.acma.gov.au/webwr/assets/main/lib550049/comms_report_2011-12.pdf); Josh Luger, “The Massive Australian Mobile Explosion Explained,” *Business Insider* (July 9, 2013) available at: <http://www.businessinsider.com.au/the-massive-australian-mobile-explosion-explained-2013-7>.

rock band Bloc Party that toured Australia in January 2016. Australian celebrities who intentionally refuse to own a mobile phone include the newspaper columnist, author, and former Rugby Union International star Peter Fitzsimons, ABC science journalist Robin Williams, and social etiquette authority June Dally-Watkins. Not everyone finds it fun or necessary to submit their autonomy to the dictates of living moment-by-moment by digitally communicated messages.

Rich Ling points out that people make decisions about whether they want their life to be governed by the use of a mobile phone:

Do we, of our own accord, formulate a decision to purchase a particular artifact, and in particular an artifact that is designed to mediate communication? Alternatively, is our decision informed by our interactions with others and the demands they make on us? We can determine, to some degree, the potential role a mobile phone will play in our lives. We can decide to what degree we will explore its possibilities and we can try to align it with our life situation. Our ability to do this will come from our perceived needs and desires.<sup>67</sup>

According to the Australian Communications and Media Authority (ACMA), twin surveys conducted by Roy Morgan Research and by ACMA revealed from their samples in 2013:

- 68% of those surveyed own both a landline telephone and mobile phone.
- 1.3 million Australians (7%) rely exclusively on a landline telephone.
- 48% of Australians aged over 80 years only possess a landline telephone.
- 30% of Australians aged 75-79 only possess a landline telephone.
- 23% of Australians aged 70-74 only possess a landline telephone.
- 13% of Australians aged 65-69 only possess a landline telephone.

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<sup>67</sup> Ling, “Should We Be Concerned That the Elderly Don’t Text?” 336-337.

- 7% of Australians aged 55-64 only possess a landline telephone.<sup>68</sup>

### 7.10 Mobile phones are NOT User-Friendly

In 2011, South Korean researchers ascertained that with reference to Smartphones that “the utilization rate decreases with age and the elderly make up only 11% of smartphone users ... the elderly have considerably lower access to smartphones than other age groups.”<sup>69</sup>

In February 2015, Ollie Campbell, who is a young designer of technological devices, pointed out that the majority of “tech workers are really young” and that most mobile gadgets are “designed for young people.”<sup>70</sup> Campbell acknowledges that the gadgets are not user-friendly for older people. He notes that starting from around the age of forty the lens of our eyes begins to harden into a condition called presbyopia. He remarks that presbyopia “is a normal part of ageing that makes it increasingly difficult to read text that is small and close.”

Rich Ling’s observations reinforce those of Campbell:

It is often commented the mobile telephones are not designed with elderly persons in mind. The screens are small, the keys are difficult to manipulate, and the software often demands familiarity with personal computer (PC)-like “tree structures”. The real focus of the mobile industry is telephones designed for younger users ... Design of mobile phones is an issue of some currency. Elderly

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<sup>68</sup> “Older Australians resist cutting the cord,” ACMA 21 July 2014, available at [www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Older-Australians-resist-cutting-the-cord](http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Older-Australians-resist-cutting-the-cord)

<sup>69</sup> Hwan Hwangbo, Sol Hee Yoon, Beom Suk Jin, Young Suk Han, and Yong Gu Ji, “A Study of Pointing Performance of Elderly Users on Smartphones,” *International Journal of Human-Computer Interaction* 29 (2013):604.

<sup>70</sup> Olli Campbell, “Designing for the Elderly: Ways Older People Use Digital Technology Differently,” *Smashing Magazine* (5 February 2015), available at <http://www.smashingmagazine.com/2015/02/designing-digital-technology-for-the-elderly/>

people often do not have the same visual acuity, audio sensitivity, and motor functions as do younger users.<sup>71</sup>

The sustained and prolonged use of the small mobile phone screen, and also of computer screens, does have negative health impacts on maintaining optimum eyesight. It will probably be identified as a major contributing factor to the onset of myopia in people aged less than forty years.<sup>72</sup> The irony then is that if governments over-emphasise using ICT devices they are encouraging people to develop habits that will have long-term health consequences for eyesight and mental well-being that will create more burdens and costs in the future for an already strained health-care system.

## **8 ELDER ABUSE HELPLINE**

The abuse of older people occurs on a wide social canvas. It is a mistake to view abuse as something that is sealed off from wider societal trends. A dangerous tendency is to have a microscopic focus on the “efficient” delivery of services to older persons to the exclusion of all else. The abuse of older persons must be situated within the general context of what is happening in our culture that weakens relationships, reinforces self-centredness, and undermines social cohesion.

### **8.1 Social Dislocation and Abuse**

Domestic violence is a serious problem and our social shame for 2015 in Australia was marked by at least one murder per week of a woman. It is usually noted that the abuse of older persons often occurs in domestic settings. We also

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<sup>71</sup> Ling, “Should We Be Concerned That the Elderly Don’t Text?” 336.

<sup>72</sup> Mark Rosenfield, Shadika Jahan, Kiara Nunez and Kahei Chan, “Cognitive demand, digital screen and blink rate,” *Computers in Human Behaviour* 51 (2015): 403-406. Nancy Groves, “Computer users develop signs, symptoms of dry eye blinking less frequently,” *Ophthalmology Times* 30 (2005): 28. Montgomery Vickers, “Cell Phones? Let’s Put Them on Hold,” *Review of Optometry* 139 (2002): 25.



have widely reported acts of child abuse in domestic and institutional settings. Widespread drug addiction and binge drinking of alcohol among youth has prompted the law enforcement response of early “closing times” imposed on nightclubs and hotels. Youth suicide is likewise a serious reflection on the bankruptcy of the lifestyle-based philosophy that the meaning of life and self-esteem is measured by how much you possess.

Further social dislocation is experienced by more than one hundred thousand people around Australia who are homeless, and are kept on society’s margins by violence, poverty and by public housing problems. Cruelty toward non-human creatures also ensues, and the public gaze is obscured from witnessing it.

The abuse of older people both contributes to, and it is also a reflection of, a deep dislocation in Australian society. The government response to the problem is interwoven with competing social forces of push-and-pull—e.g. the technological centralising of government services, which prompts the counter-response of people to pull away from the depersonalising effects of such centralisation.

The wider problems listed above are disturbing indicators of a deep malaise within Australian society that contradicts the superficial back-slapping image of a happy-go-lucky prosperous nation. Australian society’s cohesion is presently cascading into self-centred disunity, and it is marked by deep individual and social squabbles. Instead of good social capital producing peace, the lived social reality is marred by undercurrents of violence and tension. The combined and simultaneous effect of these problems is that they bear witness to social erosion.

Older people are devalued in their humanity by those who regard them as a burden and a nuisance. The expression “inheritance impatience” is now used as

a euphemistic or weasel word to refer to greed.<sup>73</sup> Those who are impatient with older persons today never reflect that eventually they may be treated in like manner by those younger than themselves.

These attitudes concerning older persons are socially corrosive, and if they continue to flourish then the problem of abuse will increase over time. The cost to society will be far greater than what an actuary may calculate concerning the public purse. Social cohesion and unity will be sacrificed on the altar of selfishness and greed.

A critical defect in the process of policy-formation is to give a tacit, passing reference to the point but to leave the matter undeveloped. For example, this passage appears verbatim in two separate policy documents:

While abuse of older people can be understood in terms of the types of abuse experienced, there is also the need to look at the broader social context in which abuse occurs.<sup>74</sup>

The exact word-for-word duplication of this passage from the Interagency Policy document (2014) in the submission of November 2015 is somewhat troubling. It conveys the impression that subordinate officers have been obliged to swiftly prepare a composition under a looming deadline, and here and there the content consists of a cut-and-paste of pre-existing material.

The above quoted passage in the 2014 Interagency Policy merely goes on to speak about the risk of social isolation. However, there is no integrated or holistic approach to describing, let alone tackling, the abuse of older people against the backdrop of a broad “social context.”

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<sup>73</sup> Kirsty Needham, “Inheritance impatience causing families to rob granny for school fees, renovations,” *Sun-Herald* 22 November 2015, available at [www.smh.com.au](http://www.smh.com.au)

<sup>74</sup> *Preventing and responding to abuse of older people: NSW interagency policy* (Family and Community Services, 2014), 6; and, *NSW Government Submission to Inquiry on Elder Abuse in NSW*, (Nov 2015): 4.

## 8.2 A Roundabout with No Exits

The creation of the Elder Abuse Helpline and Resource Unit (EAHRU) may be applauded as a helpful NGO service. The people who operate EAHRU are highly committed to their tasks and provide a fine service within the narrow constraints of what they are authorised by the government to do. EAHRU has produced an “Elder Abuse Suspicion Index” which may be helpful in sensitising people to be alert if they are witness to the warning signs.

The support of EAHRU essentially involves the Department of Family and Community Services (FACS) providing out of its annual budget the funds to enable one NGO, Catholic Community Services (a division of Catholic HealthCare), to operate it—\$618,060 in 2013-2014, and \$633,450 in 2014-2015.<sup>75</sup> It mimics the Queensland state government’s approach that a decade ago awarded a tender to Lifeline Community Care Brisbane to operate the Elder Abuse Prevention Unit.<sup>76</sup>

The helpline might be viewed from one angle as a very creative form of assistance where the government passes the task to an experienced NGO service-deliverer. However, it is also symptomatic of a policy that under the guise of efficient reform comprises an intentional reduction in the operations of the public sector. The public sector is dubiously transformed from being a qualified, experienced, and semi-independent advisor to the government, and is turned into a contractor where services become the burden of NGOs or the private sector.<sup>77</sup>

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<sup>75</sup> See the consultancy paper: WestWood Spice, *Evaluation of the NSW Ageing Strategy: Final Report* (12 June 2015), 75, available at [www.adhc.nsw.gov.au/data/assets/file/0004/331681/Ageing-Strategy-Evaluation-Final-Report.pdf](http://www.adhc.nsw.gov.au/data/assets/file/0004/331681/Ageing-Strategy-Evaluation-Final-Report.pdf)

<sup>76</sup> Leonie Sanders, *Financial Abuse of Older People: A Queensland Perspective* (Brisbane: Elder Abuse Prevention Unit, 2005), 2.

<sup>77</sup> Ross Gittins, “Weak public service, weak policy,” *Sydney Morning Herald*, 7 December 2015, 26.

While the helpline has its place in supplying basic information and making referrals, there must be something more substantial and direct from the government.

Another reference point for the public is “Victims Services” which is “a part of the NSW Department of Justice.” The “Victims Services continue to refer appropriate victims to the NSW Elder Abuse Helpline and Resource Unit (EAHRU) as a central point for information, advice, referral and data collection.”<sup>78</sup> In effect, this paints a picture where an inquirer to the Victims Services may end up redirected to EAHRU.

The great weakness is that the EAHRU has no investigative powers, which is a task that could be performed by an Office of the Public Advocate. The best advice that it can give to victims whose assets have been misappropriated or who have been assaulted, is to suggest that the victim retain the services of a lawyer to pursue a very expensive civil action suit against an offender; or, to place their hope in the efforts of an under-resourced Police force to arrest offenders who have perpetrated acts of violence, theft, and fraud, followed by criminal proceedings in court.

The EAHRU collects important data about the calls received which are all duly sorted into categories. This data provides a snapshot about abuse, which is certainly useful for further research, such as the charts tabulating data in the document footnoted here.<sup>79</sup>

However, there is no specialist investigative unit that is dedicated to receiving reports of crime and after due investigation arresting the perpetrators of abuse. While EAHRU referrals to the police may be investigated, we learn from the

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<sup>78</sup> *NSW Government Submission to Inquiry on Elder Abuse in NSW*, 22 & 23.

<sup>79</sup> *NSW Government Submission to Inquiry on Elder Abuse in NSW*, 13-21.

submission that victims may be afraid to request police intervention.<sup>80</sup> Such fear is often rooted in worries about retribution from the accused, and this fear is reinforced when the victim lives in a relationship of strong dependency on the offender. Unfortunately there seems to a view held in some sectors that the vulnerable autonomous individual must “help yourself” if there is to be any justice.

EAHRU has collaborated in training police officers to undertake “phone mentoring on recognising the signs of abuse and linking people with appropriate support services.”<sup>81</sup> However, there is so far no social scientific evidence to show that this aspect of collaboration is resulting in a decline in the annual rate of abuse.

A critical concern is that victims’ referrals largely begin or end in a circular process with helpline services. It is akin to driving a vehicle on a roundabout that has no exit routes.

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<sup>80</sup> *NSW Government Submission to Inquiry on Elder Abuse in NSW*, 22.

<sup>81</sup> *NSW Government Submission to Inquiry on Elder Abuse in NSW*, 22.

## PART THREE: CRUSHING THE ABUSE

There is no panacea for eradicating the abuse of older persons. However, a number of measures may be taken to curb the upward trend. Some measures involve social engineering and others involve taking away the incentive to engage in financial abuse via a series of legal reforms. Part three of this work sets out some practical and feasible measures.

### 9 TOWARDS A HOLISTIC POLICY

A new holistic policy is warranted because existing approaches are hopelessly deficient.

#### 9.1 Key characteristics of a holistic policy

A holistic policy should reflect the following points:

- *Takes a comprehensive and holistic approach to the problem.* This means shifting the emphasis away from a reductionist view where economic factors and the dogma of efficiency are the highest or sole determinative priority.
- *Has long range vision* that ensures what is done now also has posterity in mind, and in the present grants non-economic matters equal priority to those that are fiscal; and *is not premised on a strategy of reducing the government's role.*
- *It will start with the individual in community; not the autonomous individual.*
- *Is not created on the basis of superficially addressing problems that result in band-aid responses.*
- *Implements solutions that will actually confront head-on the ugly social reality.*
- *Is nourished by a system of shared values that promotes human dignity.*

- *Employs sophisticated mechanisms in law that are premised on a zero tolerance ethos that protects older persons from exploitation and harm; and ensures that punitive justice eliminates the incentive to abuse, and that restorative justice prevails for all victims of abuse.*
- *Is not created to improve the profile of a politician by issuing a press release that is full of slogans but is wafer thin on substantive evidence.*
- *Is not driven by a PR-focus that expediently reacts to calm things down by temporarily appeasing an angered section of the community because a public official is confronted by (a) quarrelsome letters of complaint received from Mrs A and Mr B, or (b) a radio shock jock causing embarrassment by highlighting the maltreatment of Citizen X. Quarrelsome letters and a shock-jock's on-air remarks are surface-only samples of a much wider and deeper problem.*
- *Is not at the mercy of budget cuts.*

## 9.2 Neighbour Principle in Law

One way of improving the status of older persons is to promote, and socially and legally reinforce the value of the person in community. Once public policy begins with the individual in community, as opposed to the attitude “you are independent and on your own,” then the big surprise is that the common law has been way ahead of us for more than eighty years.

Near the end of the nineteenth century Charles Pearson, the one-time Oxford scholar and politician in the colony of Victoria, lauded the values of individualism and self-reliance in the Australian context:

The settlers of Victoria, and to a great extent of the other colonies, have been men who have carried with them the English theory of government: to circumscribe the action of the State as much as possible; to free commerce and

production from all legal restrictions; and to leave every man to shift for himself, with the faintest possible regard for those who fell by the way.<sup>82</sup>

Australian legal scholar Paul Finn points out that the view expressed by Pearson in the 1890s has been swept away by the tides of change in the law. Finn states that “individualism has to accommodate itself to a new concern: the idea of ‘neighbourhood’—a moral idea of positive and not merely negative requisition—is abroad.”<sup>83</sup>

What Finn alludes to is a very important legal principle that exerts a daily influence on corporations: the “neighbour principle.” The “neighbour principle,” particularly as it relates to the common law of negligence, is something that dovetails nicely with opposing the “neglect” of older persons.

The watershed moment in the common law of negligence that produced the “neighbour principle” is the case of *Donoghue v. Stevenson*.<sup>84</sup> In England a manufacturer was accused of negligence after a consumer purchased a bottle of ginger beer that contained a decomposed snail.<sup>85</sup> The case went through an appeals process that reached the House of Lords. The decisive verdict was rendered by Lord Atkin (1867-1944) who was born in Queensland but spent most of life in England.<sup>86</sup> He made this judgment which has revolutionised the law in a positive way:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your

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<sup>82</sup> Charles H. Pearson, *National Life and Character: A Forecast* (London and New York: MacMillan, 1894), 18.

<sup>83</sup> Paul Finn, “Commerce, the Common Law and Morality,” *Melbourne University Law Review* 17 (1989): 92.

<sup>84</sup> The case is reported as H L [1932] L.R., A.C. 562.

<sup>85</sup> A parallel case in the USA involved a mouse in a Coca-Cola bottle.

<sup>86</sup> Geoffrey Lewis, *Lord Atkin* (Delhi, India: Universal Law Publishing, 2008).



neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>87</sup>

Atkin's neighbour principle in law was derived from the parable of the Good Samaritan.<sup>88</sup> The neighbour principle applies in the realm of corporate law concerning negligence and damages. The obligation imposed is to not harm. In recent decades the principle has inspired far-ranging questions about corporate accountability. Public opinion about minimal moral standards among corporations came into acute focus with the collapse of corporations such as OneTel and Enron. It has been further reinforced by motion pictures such as *The Insider* (1999), *The Bank* (2001), and *Enron: The Smartest Guys in the Room* (2005).

The neighbour principle highlights expectations that the public now holds with respect to corporations embracing virtues that reflect: fairness, honesty, integrity, and respect for others. Finn's discussion indicates that the standards of conduct now reflected in the law oppose the condoning of selfish behaviour. The individual's autonomy is now imposed on by the obligations we owe one another. It covers not only the corporation as a social citizen but also the actions between individual parties in contracts.

Finn refers to the shifts in contract law where the doctrine of unconscionable dealings is being revived; "good faith" in contracts is central; and the changes made via the Trade Practices Act 1974 have had widespread impact. While in the law of equity a number of principles have taken centre stage, including the unconscionability principle, breach of confidence, and the fiduciary principle.<sup>89</sup>

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<sup>87</sup> Donoghue v Stevenson (H L [1932] L. R., A. C., 580).

<sup>88</sup> Lewis, *Lord Atkin*, 57.

<sup>89</sup> Finn, "Commerce, the Common Law and Morality," 88-89.

One may take notice of that branch of contract law known as quasi-contract. It covers relations between two parties where one party has paid money to the other party by mistake. The quasi-contract warrants that the recipient refunds the money. It is a legal device to thwart unjust immoral enrichment.

It is in the same vein that the constructive trust operates to ensure that the interests of justice are imposed on a trust relationship. The maxim: One must not legally profit from committing a crime applies in a constructive trust. If a murderer slays a victim with the intention of inheriting from the estate, the law provides that the murderer must not benefit from this crime.

In a similar spirit of considering others, the old “Public Trust” doctrine that exists in US and Canadian environmental law highlights that the natural environs, especially waterways, must be guarded not just for the present but also for the future benefit of those not-yet born.<sup>90</sup>

All of the above provides the wider backdrop for considering the abuse of older persons as socially aberrant and being inconsistent with the shifts in the law. The shifts in contract and corporation law and in equity have brought constraints upon unbridled individual autonomy in favour of considering one’s “neighbour” and the consequences of one’s actions in harming others. These shifts provide a good template for thinking about how to deal with unaccountable individuals who seek self-enrichment through the financial abuse of older persons. The one who abuses an older person is self-centred, has no consideration for their victim or the long-term consequences of seeking self-enrichment at the expense of their “neighbour.”

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<sup>90</sup> John C. Maguire, “Fashioning an Equitable Vision for Public Resource protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” *Journal of Environmental Law Practices* 7 (1997): 1-42. Barbara von Tigerstrom, “The Public Trust Doctrine in Canada,” *Journal of Environmental Law Practices* 7 (1997): 379-401. Timothy Patrick Brady, “‘But Most of It Belongs To Those Yet To Be Born:’ The Public Trust Doctrine, NEPA, and the Stewardship Ethic,” *Boston College Environmental Affairs Law Review* 17 (1990): 621-646.

Unbridled autonomy in those areas of the law is deemed as unacceptable and deviant behaviour. If a corporation behaved in an exploitative and abusive fashion towards older persons there would be a hue and cry of condemnation. The selfish and greedy behaviour of an individual abuser of older persons might be likened to the amoral actions of the corporations negatively portrayed and lampooned in *The Insider* and *Enron: The Smartest Guys in the Room*.

### 9.3 Create an Anti-Abuse Culture

There is a noticeable “gap” in the *NSW Interagency Policy*, and in *NSW Government Submission to Inquiry on Elder Abuse in NSW*. What is missing is any proposed measure that, when implemented, will powerfully eliminate the incentive to abuse older persons, particularly in the area of financial abuse.

At best, the *NSW Government Submission to Inquiry on Elder Abuse in NSW* refers in passing to some powers available to the NSW Police under the *Crimes (Domestic and Personal Violence) Act 2007* and *Crimes Act 1900*.<sup>91</sup> The criminal code of law that punishes theft and fraud has sufficient “reach” to cover persons who steal or misappropriate assets taken from older persons.

However, a few elements are missing to ensure that abusers are prosecuted. First, there is no explicit effort made to have cases of abuse reported where law enforcement agencies root out offenders for prosecution and punishment. Secondly, social consciousness of abuse is not at the same heightened level as that related to being alert to terrorism. Thirdly, there is no serious and concerted effort from the government to expose the perpetrators of financial abuse in the public square as individuals who are guilty of anti-social criminal behaviour. Fourthly, there is no “bite” to existing legislation that renders financial abuse as a futile course of action for a potential offender to even contemplate.

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<sup>91</sup> *NSW Government Submission to Inquiry on Elder Abuse in NSW*, 22.

An over emphasis on the autonomous individual may foster an attitude of social indifference from people who belong to other generations: “The abuse of older persons: It’s not my problem, why should I be bothered?” It also carries the dangerous implication of blaming and even abandoning individuals: e.g. “you chose to live this way so it’s your own fault;” “you cause the relational tension and stress that prompts your carer to lash out in frustration.”

A good public policy would be aiming to create an anti-abuse culture in the community and corporate sector which would include:

- Reframing victims’ perceptions about being isolated and powerless; and after acts of abuse should no longer feel obligated toward their abuser(s).
- Blunt messages directed at potential and actual abusers that they are deviants, and they will be punished (including forfeiting assets to compensate their victims).
- Reinforcing a message that an older person’s property belongs to them and does not belong to family members who arrogantly assume “it’s mine.”
- Changing community attitudes and elevating the level of awareness and revulsion to that which is comparable to watchfulness about terrorists.

The NSW Elder Abuse Helpline and Resource Unit produced a postcard decorated on the front side with the hash-tag “#FreeFromAbuse.” The hash-tag seems like a catchy line one expects in a press release. It may very well have been devised by a young tech-savvy person who writes press releases. *The hash-tag might suit consumers of Twitter but it is of little use to older persons who do not use ICT devices.*

My mother is ninety years of age and lives in her own villa. She does not own a personal computer, tablet, or mobile phone. She has never used any of these devices, sees no need for them in her daily life, and has no inclination to ever

purchase such devices. She has no idea what is a hash-tag, and likewise is happily ignorant about Twitter.

A hash-tag is easily transmitted by ICT devices but it may be very prone to becoming a piece of digitalised trivia. Unless there is a heart-felt motivation to fundamentally change one's attitudes and behaviour, a hash-tag is utterly useless in effectively reducing the abuse of older persons.

A sobering illustration to recall was the 20 April 2012 “Cover the Night” event that was intended to stimulate a groundswell of protest about the failure to arrest Ugandan warlord Joseph Kony. A record-breaking number of people viewed a 30 minute film on Youtube about the “Invisible Children” that had been forced into Kony's guerrilla army. “Cover the Night” urged people to support a campaign to “stop Kony” by swarming in public gatherings on April 20. Despite multiplied millions of hash-tag distributions via Twitter and Facebook that were accompanied by digital promises to “swarm” the crowds never materialised and Kony has still not been captured.

#### **9.4 “I Wouldn't Want To Be Like You”**

Many individuals might think twice before engaging in the abuse of older persons, if it was publicly branded as “devious,” and if a message was reinforced with clear warnings about punitive legal measures (e.g. abusers will forfeit assets they have misappropriated; they will be cut out of any right to inherit from the deceased estate of the person they abused).

One component part in creating an anti-abuse culture is to engage in some social engineering to reshape attitudes and prejudices concerning older persons. One set of messages need to be transmitted that are aimed at actual and potential abusers. A helpful visual advertising campaign could be built around members of the public, including trusted celebrities, rejecting abuse by saying “abuse ...

no way. I wouldn't want to be like you." The abuser needs to be shown that their behaviour is anti-social and deviant and will not be tolerated.

A different set of messages must address victims and supporters of victims much along the lines of anti-bullying messages.

Older persons need reassurance to not be afraid of abusers because both the law and society are lined up against the abuser. The latter message must be matched by legal remedies that promote justice for senior citizens.

## 10 ENDURING POWER OF ATTORNEY

The advent of the enduring Power of Attorney as an estate-planning instrument has taken on a life that may not have been fully foreseen.

**"What distinguishes elder abuse from most heinous acts, however, is that elder abuse is often inextricably tied to the abuser's right to inherit, especially if the abuser is a family member or other trusted individual. Elder abuse happens to elders, and so occurs relatively close in time to when an estate plan takes effect. Further, in many cases the abuser commits the abuse to alter the elder's estate plan and benefit the abuser."**

Travis Hunt,

"Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 and Using It as a Model," *Brigham Young University Law Review* (2014): 450.

Abusers are exploiting a loophole as regards their accountability in the use of the Power of Attorney. An appointee under a Power of Attorney has a fiduciary duty to act honourably in the best interest of the person they represent. Self-interest must be set aside. Many appointees do act with integrity. However, the financial abuse of older persons is centred in exerting undue influence and in the deliberate misuse of the Power of Attorney for self-enrichment.

Kemp and Mosqueda point out that in cases of the misuse of a Power of Attorney:

Common business or personal ethics are not followed.<sup>92</sup>

It should be stipulated that an Attorney must keep proper transaction records. A coercive restraint is to insist that book-keeping records will eventually be audited upon the death of the person who made the Power of Attorney. An amendment to the relevant act could make it mandatory that the appointed Attorney:

- Keeps a proper set of ledger records (cross-referenced to receipts/invoices) of all transactions conducted relative to both income received, and disbursements paid to third parties for goods and services. The records will one day be audited.
- The records will be essential if a case is brought before NCAT where a verdict may be rendered to nullify a misused Power of Attorney and to appoint a financial manager.
- Since a Power of Attorney ceases upon the death of the person who made the appointment, it would be compulsory to submit the ledger as an affidavit to either the Supreme Court or NCAT for auditing.
- It would also be advantageous for such records to be accessible by a Public Advocate investigating cases of abuse.

The above proposal may be justified as part of an administrative transition step from the operation of a Power of Attorney in life over to the administration of a deceased estate:

- Executor/Administrator needs the data of transactions conducted for the preparation of a date of death income tax return.

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<sup>92</sup> Kemp and Mosqueda, “Elder Financial Abuse,” 1125.

- Similarly, an Executor would find access to such records essential in the preparation of a defence of an estate threatened by a Family Provision suit.
- It will provide a way of forensically ascertaining the net amount required for compensating the victim.

In much the same way that lawful gun ownership requires a licence, and drivers of motor vehicles must apply for a licence, there could be a compulsory training programme created for appointees on how to properly use a Power of Attorney. At the completion of such a programme the appointee would be obliged to sign a declaration under oath acknowledging that they understand their fiduciary duties and the legal penalties that will apply for breaches of those duties. Before an appointee could produce a Power of Attorney at a bank or other financial institution, proof of completion of the compulsory training should be sighted. NSW Trustee and Guardian could devise a commercial product for sale to users of Powers of Attorney to keep records just as M.Y.O.B was devised to assist small businesses to keep track of the GST.

A training programme could be jointly established by the NSW Law Society and the NSW Trustee and Guardian. Undertaking the training programme would be akin to a person with a learner's driving licence fulfilling all requirements needed to take a practical and written test to obtain a provisional driver's licence. In Sydney there are many venues where specialist lawyers and specialist staff from NSW Trustee and Guardian could offer programmes on a quarterly basis. Training programmes could be hosted across rural and regional parts of NSW via the Local Courts or in town halls or school auditoriums.

## **11 SUCCESSION AND FORFEITURE RULE**

Another measure that could be applied is to add the abuse of older persons as a category under the forfeiture rule. The forfeiture rule presently applies in cases where a beneficiary to an estate attempts to hasten the process to inherit by



murdering the testator. In cases of murder the beneficiary forfeits all rights to inherit under the will (and likewise under the laws of intestacy).

The Commissioners of New Zealand's Law Commission helpfully clarify the matter:

Nobody, an ancient legal maxim proclaims, may profit from his or her wrongful conduct: *nullus commodum capere potest de injuria sua propria*. The justice of this principle is self-evident and axiomatic. It applies in many different circumstances. In relation to succession to property on death, it disentitles a killer from benefitting economically as a result of the death of the person killed. It is well settled law in New Zealand (and almost all legal systems) that a killer is not entitled to take any benefit under a victim's will, or if no will disposes effectively of all of a victim's estate, on a victim's intestacy. As an English court said in 1914, "no man shall slay his benefactor and thereby take his bounty" (*Hall v Knight & Baxter* [1914] P 1, 7). A killer is also incompetent to be granted probate as an executor of a victim's will, or to be appointed administrator of a victim's estate.<sup>93</sup>

As the above quote makes it clear, the law covers private family affairs where a beneficiary commits murder. The only difference between the above provisions in succession law to disqualify a murderer, and the financial abuse of an older person, is that in the case of the latter the act of murder has not been committed.

*When a family member (or members) deprives a living older relative of their property and assets (i.e. financial abuse), it makes no difference that they might eventually be entitled to receive these same assets under a will. One has no right whatsoever to take what does not lawfully belong to them. An interest in a will has no lawful effect until after the testator has died. In other words, in order to inherit one must patiently wait for the testator to die.*

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<sup>93</sup> [NZLC R38] Law Commission Report 38, *Succession Law Homicidal Heirs* (Wellington, New Zealand, 1997), 1.

*It is unlawful and unacceptable behaviour to help oneself to property while the testator is living. It is likewise unlawful to immediately take the property once the testator has died. A beneficiary must wait until a grant of probate, or letters of administration, is obtained, and after all creditors' claims on the estate are settled.*

*The truth is that the unlawful taking of a person's property is theft. Abusers who misappropriate assets by (a) misusing a Power of Attorney, (b) by withdrawing funds using the victim's internet account log-in password, or (c) using the victim's PIN via a bank's ATM, are thieves. The forfeiture rule condemns those who seek to self-enrich at the expense of another via murder. The rule could be expanded to cover cases of abuse.*

If a person accused of abuse is successfully convicted then the forfeiture rule should apply to the abuser, the abuser's spouse and the abuser's line of descent (children etc). If it were widely known that an abuser would be cut out from inheriting, and also denied the right to lodge a claim against an estate under Family Provision, this would constitute a strong disincentive to commit financial abuse in the first instance.

## **12 PUBLIC ADVOCATE NSW**

One practical way of combating the abuse of older persons is through the creation of the office of the Public Advocate. Similar entities do exist in other Australian states but they primarily operate with an advocacy role on behalf of the disabled who are cognitively impaired. In other words, the problem of opposing or investigating the abuse of older persons is not at present central to their charters.

### **12.1 Background: 2009-2010 Proposal to NSW Government**

The possible establishment of an office of the Public Advocate emerged in NSW Parliamentary discourses in 2009. The trigger for this was NGO requests

for a public hearing on substitute decision-making. The requests coincided with the 2009 legislative merger of NSW Trustee and Guardian. A meeting was held in the State Library on 1 April 2009 where the Director-General of the Attorney General's department addressed stakeholder groups that were disturbed about the proposed legislative merger of the Public Trustee and Office of Protective Commissioner. The Director-General indicated that the Government would hold a public inquiry into substitute decision-making.

In the second half of 2009 the Legislative Council Standing Committee on Social Issues convened an inquiry into *Substitute Decision Making for People Lacking Capacity*. The Committee members comprised:

- The Hon. I. W. West (Chair)
- Hon. G. J. Donnelly
- Hon. M. A. Ficarra
- Dr. J. Kaye
- Hon. T. J. Khan
- Hon. M. S. Veitch

On 28 September 2009, the Social Issues Committee formally interviewed:

- Imelda Dodds the acting CEO of the newly formed NSW Trustee and Guardian
- Diane Robinson the President of the Guardianship Tribunal
- Andrew Buchanan Chairperson of the Disability Council of NSW
- Graeme Smith the NSW Public Guardian
- Susan Field NSW Trustee and Guardian Fellow of Elder Law (University of Western Sydney)
- Professor Terrence Carney Professor of Law (University of Sydney)
- Rosemary Kayess Associate Director of Community and Development Disabilities Studies (University of NSW).

The proceedings of that day were conducted in the presence of a public gallery and media:

The Committee has previously resolved to authorise the media to broadcast sound and video excerpts.<sup>94</sup>

When Rosemary Kayess and Diane Robinson were interviewed the proceedings ventured into a discussion about the role of a Public Advocate in relation to persons with cognitive disabilities.<sup>95</sup> Five months later, the Committee's final report was released on 25 February 2010.<sup>96</sup> The Committee stated in its final report:

The Committee notes the evidence presented during the inquiry that NSW is alone among Australian states in not having a Public Advocate ... The Committee notes that a specific proposal for an Office of the Public Advocate has not been developed. The Committee considers it important and timely that the NSW Government engage the relevant department and agency to consult the relevant department and agency to consult with relevant stakeholders and develop such a proposal.<sup>97</sup>

The deliberations in that inquiry about a Public Advocate did not specifically explore the wider problem of the abuse of older persons. It was confined to the possible role that such an office would have with reference to representing the interests of persons lacking capacity. The Committee's final report contained a recommendation (number 32) to the NSW Government:

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<sup>94</sup> Remarks from the Chair the Hon. I. W. West, [Proofs of Transcript] *Report of Proceedings Before Standing Committee on Social Issues Inquiry into Substitute Decision-Making for People Lacking Capacity*, Monday 28 September 2009, 1.

<sup>95</sup> [Proofs of Transcript] *Report of Proceedings Before Standing Committee on Social Issues Inquiry into Substitute Decision-Making for People Lacking Capacity*, Monday 28 September 2009, see for example pp 64-65.

<sup>96</sup> Legislative Council Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity*, (Report No. 43), 172-176.

<sup>97</sup> *Substitute decision-making for people lacking capacity*, 176.

That the NSW Government consult with the relevant stakeholders and develop a proposal for the establishment of an Office of the Public Advocate...<sup>98</sup>

This matter was recorded in the very first annual report (2009-2010) of the then newly merged NSW Trustee and Guardian:

Last year we made submissions to the NSW Upper House Standing Committee on Social Issues *Inquiry into substitute decision-making for people lacking capacity*. The Standing Committee released their report in February 2010 and we are currently awaiting the Government's response to their recommendations. Several of these recommendations have the potential to impact significantly on our work, including recommendations that the Public Guardian be given the authority to proactively investigate the need for guardianship for people with disabilities and assist people with disabilities without the need for a formal order and the recommendation that a proposal be developed regarding establishment of a Public Advocate in NSW.<sup>99</sup>

The state government's response to the Committee was released in August 2010. The above recommendation (number 32) elicited the following response:

#### SUPPORTED – FOR FURTHER CONSIDERATION

The Government considers that careful analysis and extensive consultation be undertaken in relation to this recommendation. Consultation should be undertaken by the Department of Justice and Attorney General (DJAG) and ADHC [i.e. Ageing Disability and Home Care] jointly.

Consultation should involve DJAG, ADHC, The Guardianship Tribunal, the Public Guardian, the Ombudsman, non government organisations, community groups and people with disabilities and their families and carers.

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<sup>98</sup> *Substitute decision-making for people lacking capacity*, 177.

<sup>99</sup> *NSW Trustee and Guardian Annual Report 2009-10*, 53.

A report which includes a summary of that consultation and costing information for further consideration should be prepared.<sup>100</sup>

The Committee's hearings were held in public. The Committee's report, the NSW Trustee and Guardian Annual Report, and the Government's response to the Committee (August 2010), are all a matter of public record. So the next questions to be answered are: when did the public consultation occur and what conclusions were reached about the merit of creating an office of the Public Advocate?

Six months after the published response there was a change of government at the state elections in March 2011. The public would expect in the normal course of events that the Directors-General of the Department of Justice & Attorney General and of Family & Community Services would have been briefed by their respective ministers before the end of 2010, and that the recommended consultation would have been set in motion, and that it would have continued under the O'Farrell government.

A check of the annual reports published by the following departments and public bodies, spanning the years 2010-11 to 2014-15 inclusive, reveals no mention whatsoever of any formal consultation with stakeholders, the community etc on the question of the Public Advocate:

- NSW Trustee and Guardian, including the Office of the Public Guardian
- Department of Justice and Attorney-General
- Family and Community Services (previously ADHC and DHS)
- Guardianship Tribunal (annual reports searched from 2009-2010 up to 2012-2013).

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<sup>100</sup> See Recommendation 32 in: *Legislative Council Standing Committee on Social Issues Substitute decision-making for people lacking capacity. Government Response*, 17, available at [www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/E00602D3C8F39CA5CA2576D500184231?open&refnavid=C04\\_1](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/E00602D3C8F39CA5CA2576D500184231?open&refnavid=C04_1)

Similarly, a search of the NSW Parliamentary website reveals “nil” results in the search for any document or report concerning an inquiry into the possible creation of an office of the Public Advocate in NSW. Almost six calendar years have elapsed since the recommendation was made by the state government to hold a consultation. Nothing has eventuated.

The public is thoroughly entitled to accept at face-value that the government was genuine in its formal response when it stated:

The Government considers that careful analysis and extensive consultation be undertaken in relation to this recommendation.

However, the fact is that nothing was ever done. The complete lack action cannot be attributed to “human error” or bureaucratic “oversight.” Instead a very bad impression is formed: the words were a token bureaucratic gesture to appease public concerns, or worse the words carried a disingenuous covert message understood only by “insiders”. When decoded they mean: stall the proposal in the hoped-for expectation that (a) the matter will be forgotten and (b) nobody will notice that nothing was ever done.

## **12.2 Role of the Public Advocate in Tackling Abuse of Older Persons**

The Public Advocate needs to be created with the powers to investigate cases on behalf of senior citizens. Some powers along that line were vested in the Guardianship Tribunal (now NSW Civil and Administrative Tribunal) but that Tribunal was clearly under-resourced in terms of personnel and funding to realistically execute all powers and duties in forensic investigations of financial abuse.<sup>101</sup>

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<sup>101</sup> Juliet Lucy, “The Demise of the Guardianship Tribunal and the Rise of the NSW Civil and Administrative Tribunal,” *Elder Law Review* 9 (2013) available at <http://www.austlii.edu.au/au/journals/ElderLawRw/2013/9.html>

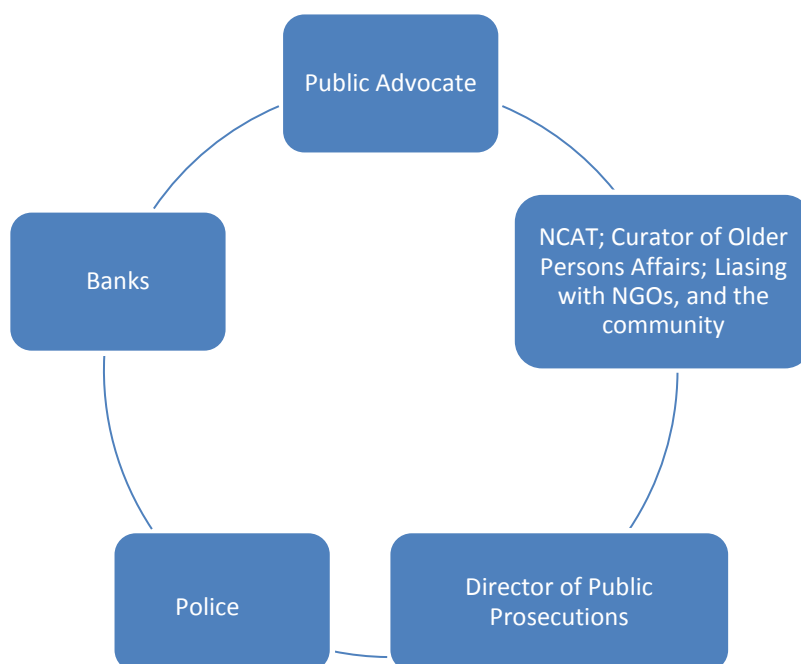
The Public Advocate would be a statutory officer who as a public official at law would operate for the public convenience and interest. The Public Advocate's role and duties would include:

- Promote and protect the rights of adults, especially older adults, who are cognitively impaired in their decision-making capacity. It could also act on behalf of older persons who do not suffer from cognitive impairment but who fear reprisals from their abuser. This duty would converge with Australia's obligations in international law to implement in its domestic laws the provisions and stipulations of article 12 of *United Nations Convention on the Rights of Persons with Disabilities*.
- The Public Advocate would have legal standing in courts and tribunals to represent the interests of victims.
- Receive reports and investigate cases of financial abuse of older persons, especially those who are disabled, or suffer from dementia, or other forms of cognitive impairment.
- The Public Advocate would be empowered to interview older persons free from coercive and undue influence from next-of-kin in domestic settings, aged care facilities and similar institutions.
- The investigative power would allow the Public Advocate to access financial records of transactions conducted by the accused (next-of-kin, trusted person, acquaintance or stranger) who has in managing an older person's assets:
  - ✓ Abused the use of an enduring power of attorney to dispose of an older person's realty or financial assets, and has misappropriated the realty or proceeds for self-enrichment or to benefit a third party.
  - ✓ Misappropriated funds using an older person's credit card, EFTPOS card, cheque account, and other liquid investments that may be accessed for transactions via a PIN, website password, or authorised signature.



- ✓ Defrauded an older person by compelling them to pay cash, sign cheques, or conduct an electronic bank transaction for goods and services that are never received.
- ✓ Exerted undue influence to compel an older person to transfer shares in a company into the accused's name or accused's business firm; or compelled a testator to change the provisions of their Will to the direct benefit of the accused, the accused's spouse/partner and line of descendants.

In cases where the evidence is unequivocal, the matter is then placed in the hands of the NSW Police and Director of Public Prosecutions. There would in effect be an investigative coalition as diagrammed below:



In cases where parties are at logger-heads, the Public Advocate might assume the role of a mediator in hearings convened at the Local Court. The Local Court offers a cost-effective arena for dispute resolutions. If such matters are unresolved then the case might be directed to either NCAT or a higher court.

### 12.3 Governance of the Public Advocate

The governance of the office of the NSW Public Advocate would be characterised by these distinctive features:

- The NSW Governor would appoint the NSW Public Advocate for a position of five calendar years, with the possibility of contract renewal.
- The NSW Governor would be empowered to suspend and remove an appointee from the office for acts of corruption, crime, or misconduct.
- The NSW Governor would appoint individuals to the position(s) of Deputy Public Advocate, with the possibility of contract renewal; and with the power to suspend or remove a Deputy from the office.
- The NSW Public Advocate would be empowered to delegate his authorities to designated subordinate officers.
- *The NSW Public Advocate would be established as a corporation sole, with perpetual succession, with the power to take proceedings, hold and deal with property in its corporate name, and do all things necessary for or incidental to the purposes for which it is constituted. The conferring of the status of “corporation sole” would be a significant legal and operational indicator that the Public Advocate was a statutory officer who has genuine independence from government.*

Some bureaucratic critics of the NSW Public Trustee in 2008 maintained that the concept of “corporation sole” was an idea originating from a bygone era. The argument was that because it is an old idea it is irrelevant to the twenty-first century. This status of corporation sole was abolished when the draft bill was created for the NSW Trustee and Guardian which further eroded its independence from government.

On the basis of that cultural snobbery about the past one might say that making a Will, raising taxes, and arresting people for the crime of murder are likewise ideas originating from bygone days and therefore they have no relevance in this century. It is worth noting, *contra the critics' claim* that the legal concept of a corporation sole is widely used in contemporary Britain and is not confined to the establishment of the Monarchy and the Church of England. Other bodies in Britain, Australia and Eire that are a corporation sole include: Auditor General of Wales, Police Ombudsman for Northern Ireland, Queensland Treasury Corporation, Registrar General of ACT, and each minister of the Government in the Republic of Eire. Every state of the USA recognises “corporation sole” for a variety of organisations including non-profit scientific research groups. The most recent case is the Commissioner for Older Persons (Wales) which was established as a corporation sole under an Act in 2006.<sup>102</sup>

The antipathy toward the concept of corporation sole is rooted in the “antiquated” views of the nineteenth century legal historian Frederic Maitland whose critical view was shaped by his own time-bound cultural prejudices: a negative gender bias toward women and his specific constitutional antipathy toward Queen Victoria.<sup>103</sup>

- *The NSW Public Advocate would report directly to the NSW Attorney General as portfolio minister BUT would not report administratively via the Chief Executive Officer/Director-General of the Department of Justice/Attorney General.* The rationale for directly reporting to the

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<sup>102</sup> See *Commissioner for Older People (Wales) Act 2006* available at <http://www.legislation.gov.uk/ukpga/2006/30/contents>

<sup>103</sup> Gail Turley Houston, *Royalties: The Queen and Victorian Writers* (Charlottesville and London: University of Virginia Press, 1999), 21-23.

minister is that (a) the Public Advocate should act as a statutory officer who is independent of government, and (b) the added layer of administrative bureaucracy is an operational and budgetary inefficiency that wastes time and money, and simply boosts on paper the curriculum vitae of a departmental director.

- The office of the NSW Public Advocate would also be accountable to external agents such as the NSW Audit Office, NSW Ombudsman, and Independent Commission Against Corruption.

The legislation to establish the Public Advocate would need to contain some “unalterable objects” to prevent intermeddling with both its independence and its funding.

#### **12.4 Funding the Public Advocate**

Establish a future fund out of the current 2015-2016 budget surplus (amounts to more than \$3.6 billion), which should enable the Public Advocate to become a self-funding body after its first ten years of operation. The future fund would be kick-started with a designated sum set aside from the surplus in the vicinity of \$100 million. The commitment of this level of funding would have a winsome effect on public perceptions concerning the government’s determination to rid society of abuse.

Like the work of Legal Aid, the Public Advocate would be entitled to collect a fee for service in matters that are successfully prosecuted. In small-value cases the Public Advocate would exercise the discretionary power to reduce or waive fees under the canopy of a Community Service Obligation.

In addition to the creation of a future fund, and levying a fee for service, there are other regular streams of support that could come from existing revenue raised, such as *Bona Vacantia* matters. The use of the aforementioned sources to

fund the operations of the Public Advocate would be a tangible way of promoting good social capital.

### **12.5 Bona Vacantia**

In Succession Law where a person dies without a valid will, the rules of intestacy apply which requires that an administrator must establish by certificate and affidavit evidence the next-of-kin who are entitled to a share in the estate. If next-of-kin inquiries establish that there are no living next-of-kin who might be entitled then the matter is deemed to be *Bona Vacantia*. The proceeds of these estates are paid to the Crown.

It is one of the roles of the NSW Trustee and Guardian to administer intestate estates where an alternative administrator is unable to do so. Each year the NSW Trustee and Guardian transmits the proceeds in finalised estates deemed *Bona Vacantia* to the Office of State Revenue. Those proceeds could then be applied to the funding of the Public Advocate. The use of these resources in funding a Public Advocate would resonate with the public interest in bringing justice to older persons.

### **12.6 “Jobs and Growth”**

A government that is truly committed to ridding society of the scourge of the abuse of older persons will not allow itself to be held captive to the reductionist concerns of econocrats whose obsession with “funding” is short-sighted. Indeed, as governments of all political persuasions repetitively state to the public: the justification for their initiatives is the focus on “jobs and growth” so there should be no impediment to creating the Public Advocate.

Establishing the Public Advocate will entail job creation in response to the increasing problem of abuse. The aged population is “growing” in size every year and will continue to do so through to 2050. The aged care industry in the private sector is likewise “growing” and its operations need to be kept in view because cases of abuse occur in retirement villages and aged care institutions.

So, even using the econocrats' narrow slogan of "jobs and growth" one must see the logic: the Public Advocate leads to job creation that is crucial to crushing the underbelly "growth industry" of the abuse of older persons. It also recognises that older persons constitute a sizeable bloc of influential voters who will not tolerate government indifference to the problem of abuse.

### **12.7 Remaining separate from the Public Guardian**

Although other Australian jurisdictions have a Public Advocate their role in many respects mirrors the functions assigned to the Office of the Public Guardian in NSW. This is particularly true in acting as a substitute decision-maker on behalf of those who are unable to make decisions concerning matters outside the strict boundaries of financial management: lifestyle and medical issues.

There is probably a great temptation to think that the proposal of the Public Advocate could simply become new tasks assigned to the Office of the Public Guardian. A few points count against that bureaucratic pathway:

- The Public Guardian must report administratively to the CEO of NSW Trustee and Guardian.<sup>104</sup> The Public Advocate needs to be kept independent from government, and this would not exist if the Public Guardian was renamed the Public Advocate.
- The Public Guardian is not a self-funding body: see the table below regarding the annual level of government funding for its operating revenue over recent years. If the Public Guardian became the Public Advocate it would be incapable of carrying out the investigative tasks described above because of (a) revenue restraints and (b) a lack of human resources with appropriate qualifications to undertake the tasks of investigating the abuse of older persons.

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<sup>104</sup> *NSW Trustee and Guardian Annual Report 2014-2015*, 35.

- “The Public Guardian 2014-15 budget is consolidated with the NSW TG Budget.”<sup>105</sup> Since there is a major restructure occurring within NSW Trustee and Guardian, the establishment of the Public Advocate as the successor to the Public Guardian would impose many complex administrative and revenue raising issues that would be an unwelcome addition to tasks in a critical time of cultural change taking place inside NSW Trustee and Guardian.

**Table: Operating revenue of Public Guardian 2011-2015**

	2011-2012 <sup>106</sup>	2012-2013 <sup>107</sup>	2013-2014 <sup>108</sup>	2014-2015 <sup>109</sup>
Operating Revenue				
Investment Income	187,000	154,000	195,000	176,000
<b>Government Funding</b>	<b>7,720,000</b>	<b>7,920,000</b>	<b>8,119,000</b>	<b>9,713,000</b>
<b>Total Operating Revenue</b>	7,907,000	8,074,000	8,314,000	9,894,000

The above table of the Public Guardian’s revenue indicates a steady increase in government funding from \$7.72 million in 2011/12 up to \$9.89 million in 2014/15. It is difficult to see how the Public Guardian could in its present structures and revenue streams add on the tasks and duties of a Public Advocate.

<sup>105</sup> *NSW Trustee and Guardian Annual Report 2014-2015*, 52.

<sup>106</sup> *NSW Trustee and Guardian Annual Report 2011-2012*, 48.

<sup>107</sup> *NSW Trustee and Guardian Annual Report 2012-2013*, 42.

<sup>108</sup> *NSW Trustee and Guardian Annual Report 2013-2014*, 49.

<sup>109</sup> *NSW Trustee and Guardian Annual Report 2014-2015*, 52.

## 13 VICTIM'S COMPENSATION

There is a need to tackle the abuse of older persons from two standpoints: the punitive and restorative.

### 13.1 Disincentives to Abuse

The incentive to abuse older persons may be taken away by introducing punitive measures that ensures no abuser will be permitted to financially benefit from their activities.

Some disincentives include what has been discussed in previous sections concerning punitive measures and social restraints on those who contemplate or perpetrate abuse:

- The introduction of a compulsory training programme on how to properly operate a Power of Attorney with an oath taken that the appointee comprehends their fiduciary duty and the penalties for misusing the power conferred.
- The mandatory keeping of proper financial transactions in light of an audit that would be conducted when the Power of Attorney is terminated either by order or at death
- Expanding the Forfeiture Rule in deceased estates to cut out an abuser and the abuser's line of descent from inheritance.

A further disincentive is to introduce a victim's compensation scheme where a convicted abuser forfeits all misappropriated assets. The prospect of being disinherited and of having misappropriated assets confiscated would act as a powerful restraint on "risk-avoiders" who might contemplate abuse.

The enforcement of penalties of being disinherited and of having misappropriated assets confiscated will effectively impact on "risk takers" who choose to abuse and have the attitude "catch me if you can." This penalty serves as a line in the sand: Society will ensure that an abuser does not profit from abuse.



There is already a precedent for this punitive approach because the NSW Trustee and Guardian is responsible for assets confiscated under the provisions of:

- The *Criminal Assets Recovery Act 1990*.
- The *Confiscation of Proceeds of Crime Act 1989*.<sup>110</sup>

The establishment of a victim's compensation scheme would be consistent with what has recently been introduced in Victoria where VCAT may hear cases and award compensation to a victim of abuse.

The awarding of compensation to the victim constitutes a form of restorative justice. Cases where compensation is awarded would be handled in hearings before NCAT or in criminal courts. The NSW Trustee and Guardian could play a supporting role in the process of the confiscation of a perpetrator's ill-gotten assets. When a case has been decided and the perpetrator of abuse is found guilty, the proceeds of the assets that have been taken from the victim could be transferred to the NSW Trustee and Guardian until the accused has exhausted all avenues of court appeal. Once that process is exhausted, then the proceeds would be restored to the victim, or distributed through a victim's estate in cases where the victim has died.

Victim's compensation not only entails yielding justice but also carries with it the promotion of good social capital.

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<sup>110</sup> NSW Trustee and Guardian Annual Report 2014-2015, 5.

## **14 CURATOR OF OLDER PERSON'S AFFAIRS**

Another measure is to consider creating a Curator (or Commissioner) of Older Person's Affairs. The Curator could be established as one who liaises directly with senior citizens by touring cities and regional areas and addresses community organisations that serve and support older persons. The Curator could be empowered to review state laws that affect senior citizens, be an active voice in opposing age-based discrimination, and promotes their rights. The Curator could also be empowered to challenge state government departments and agencies, and corporate entities such as privately controlled aged-care institutions that evidence serious lapses in their treatment of senior citizens.

### **14.1 Neighbourhood Scheme**

Another role that the Curator could play is in fostering better community relationships for senior citizens. One practical measure is to develop a neighbourhood scheme akin to neighbourhood watch for children.

Although the major offenders of abuse are next-of-kin, a holistic policy will also take into consideration measures to counter the activities of con-artists. Many forms of fraudulent activity occur via emails (such as variations on the Nigerian Bank scam), or through phone-calls (such as claims about unpaid taxes being pursued by the Commonwealth Public Prosecutor; or those emanating from India purporting to be the "technical department" of "Windows" calling about reported errors on a PC). Alerts about these kinds of scams do exist on various government websites.

However con artists are not limited to defrauding people through contact via ICT devices. The classic approach of door-to-door fraud ensues. The ploy often involves impersonating an official from a local council, government agency, a company, or tradesman service, in order to gain physical access to the premises to commit robbery. A variant ruse is the "it's me" scam: claiming to be an acquaintance "you remember me from the club ... church ..." The older person is

cajoled into believing that they have “forgotten” the door-knocker as an acquaintance.<sup>111</sup>

A positive measure launched late in 2015 that has been developed to counter the activities of bogus visitors in Northern Ireland is the “Nominated Neighbour Scheme.”<sup>112</sup> The scheme is a joint venture between the Police Service of Northern Ireland and the Commissioner for Older People for Northern Ireland.<sup>113</sup> It is a positive way of improving social capital by making older people feel safer in their homes.

The essence of the scheme is that a trusted neighbour or near-by relative agrees to help a vulnerable older person check on the bona fides of those who door-knock. The older person keeps a card handy at the front door, which has the logo of the police displayed on it, states:

## **I DO NOT RECOGNISE YOU!**

**Please speak to my nominated neighbour [displays contact details of the neighbour]. They will check your identity and return with you. If my neighbour is not available, you will have to make an appointment. I do not wish to be rude, but you are not recognised. If you persist in gaining entry alone, I WILL CONTACT THE POLICE.**

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<sup>111</sup> Goergen and Beaulieu, “Criminological Theory and Elder Abuse Research” 189-190.

<sup>112</sup> On Northern Ireland’s Commissioner for Older People see [www.copni.org/](http://www.copni.org/)

<sup>113</sup> See “Statement on crime against older people,” dated 9 November 2015 at [www.copni.org/news](http://www.copni.org/news)

The above card contains the contact details of the nominated neighbour. The view expressed by the Irish Commissioner for Older People is that a genuine caller will not object to having their credentials cross-checked.

An information leaflet for neighbours explains:

If an unrecognised caller attends the address of the person named overleaf while they are alone in the house, the caller will be handed a card instructing them to contact you, their Nominated Neighbour ... This ensures that your vulnerable neighbour does not have to talk to any unrecognised callers at the door, until you have verified who they are and if necessary have returned with the caller to your neighbour's address. If you are unsure whether the caller is on legitimate business or you are unable to verify who they are, then politely ask them to make an appointment. If they continue to try and gain entry to your neighbour's home, then call the Police.<sup>114</sup>

A NSW Curator of Older Persons Affairs would also forge a relationship with the Commonwealth's Commissioner for the Aged in promoting the value of senior citizens in today's society.

## **15 ABUSE OF COMPANION PETS**

Earlier in this work (section 1) brief reference was made to the problem of the abuse of animals occurring in conjunction with the abuse of older persons. A few more remarks on the topic are warranted, particularly since the Hon. Mark Pearson of the Animal Justice Party is an elected member of the NSW Legislative Council.

Centuries ago influential thinkers, such as Thomas Aquinas, John Locke, and the artist William Hogarth, observed that when children behave cruelly toward

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<sup>114</sup> Nominated Neighbour Information leaflet is available at [www.copni.org/](http://www.copni.org/)

non-human creatures, this behaviour often translates in adulthood toward the abuse of fellow humans.<sup>115</sup> This point was illustrated in Hogarth's *Four Stages of Cruelty* which begins with the child Tom Nero abusing animals. As an adult he abuses people, and commits murder; and in the final stage of his life is executed for murder, and then, post-mortem is viciously dismembered.

During the nineteenth century anecdotes about children and cruelty were often reiterated in books, articles, and pamphlets produced by the pioneers of the Royal Society for the Prevention of Cruelty to Animals, and similar anti-cruelty organisations.<sup>116</sup> In recent years, rigorous studies in many disciplines, such as sociology, psychology, criminology, have indicated that the abuse of non-human creatures is perpetrated by many who also abuse children, women, and older persons. Studies of serial killers indicate that they began in childhood by abusing non-human creatures.<sup>117</sup>

### **15.1 Abuse Bereavement and Mental Well-Being**

Older persons often form companion relationships with pets. These relationships involve positive and mutual reciprocity: pets are cared for, and older persons enjoy daily interaction and companionship. The relationship bonds between pets and humans include benefits for health, healing, and well-being, which is a point that was first observed by the Quaker entrepreneur William Tuke (1732-1822) in his pioneering work to assist persons suffering from mental illness.<sup>118</sup>

For older persons the abuse of a pet by another party, such as next-of-kin, is highly distressing. The death of a pet entails experiences of bereavement. It might be said that when an older person's companion pet is abused but without

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<sup>115</sup> See my text *The Noah Challenge* (forthcoming 2016).

<sup>116</sup> Kathryn Shevelow, *For the Love of Animals: The Rise of the Animal Protection Movement* (New York: Henry Holt, 2008), 127-163.

<sup>117</sup> Andrew Linzey Ed. *The Link between Animal Abuse and Human Violence* (Eastbourne UK; Portland, Oregon: Sussex Academic Press, 2009).

<sup>118</sup> See my book *The Noah Challenge* (forthcoming 2016).

causing death, this cruel activity is a trigger for the commencement of an experience of grief.

Australian social workers Christine Morley and Jan Fook have underscored the point that “services and policies” must include recognition of the significance of the normative bonds formed between humans and their pets. They insist that the loss of a pet is a “mainstream experience” and that pet-friendly policies, including bereavement counsel, are an essential component in the delivery of health-care services for the elderly.<sup>119</sup>

There are discriminatory attitudes held in some quadrants of society toward those experiencing bereavement that arises from the death of pets. A huge corpus of scholarly literature challenges such socially discriminatory attitudes, and highlights that bereavement over deceased pets represents “disenfranchised grief.”<sup>120</sup> Outsiders may be very dismissive, or intentionally down-grade the significance of bereavement in connection with pets, which involves a fundamental failure to (a) have empathy and (b) understand the consequences for health and well-being for those who experience it.

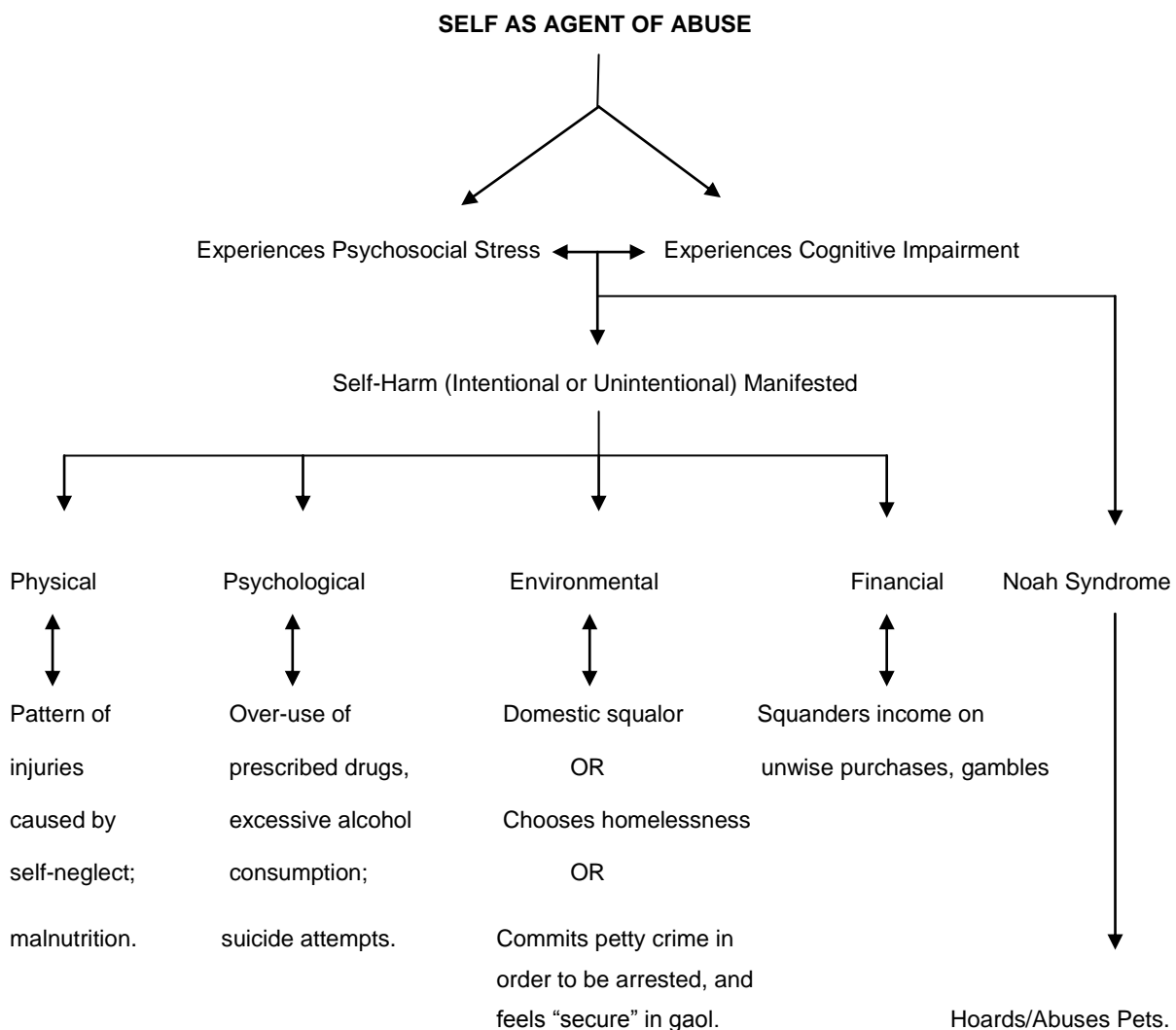
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<sup>119</sup> Christine Morley and Jan Fook, “The importance of pet loss and some implications for services,” *Mortality* 10 (May 2005): 127-143.

<sup>120</sup> John Archer and Gillian Westchester, “Bereavement following death of a pet,” *British Journal of Psychology* 85 (1994): 259-271. Paul T. Clements, Kathleen M. Benasutti, and Andy Carmone, “Support for Bereaved Owners of Pets,” *Perspectives in Psychiatric Care* 39 (2003): 49-54. Wendy G. Turner, “Bereavement Counseling: Using a Social Work Model for Pet Loss,” *Journal of Family Social Work* 7 (2003): 69-81. Thomas A. Wrobel and Amanda L. Dye, “Grieving Pet Death: Normative, Gender, and Attachment Issues,” *Omega* 47 (2003): 385-393. Tamina Toray, “The Human-Animal Bond and Loss: Providing Support for Grieving Clients,” *Journal of Mental Health Counseling* 26 (2004): 244-259. Tarris D. Rosell, “Grieving the Loss of a Companion Animal: Pastoral Perspective and Personal Narrative Regarding One Sort of Disenfranchised Grief,” *Review and Expositor* 102 (2005): 47-63. Julie A. Luiz Adrian, Aimee N. Deliramich, and B. Christopher Frueh, “Complicated grief and posttraumatic stress disorder in humans’ response to the death of pets/animals,” *Bulletin of the Menninger Clinic* 73 (2009): 176-187. Nigel P. Field, Lisa Orsini, Roni Gavish, and Wendy Packman, “Role of Attachment in Response to Pet Loss,” *Death Studies* 33 (2009): 334-355. Millie Cordaro, “Pet Loss and Disenfranchised Grief: Implications for Mental Health Counseling Practice,” *Journal of Mental Health Counseling* 34 (2012): 283-294.

## 15.2 Noah Syndrome

A different form of abuse that affects pets is associated with what is called the “Noah Syndrome.” An older person who is suffering from acute experiences of psychosocial stress or loneliness may hoard large quantities of pets.<sup>121</sup> This latter syndrome, which is a form of mental illness, leads to the unintended abuse of pets but it is nevertheless a problem that sadly requires intervention and rectification. The problems of self-neglect are diagrammed as follows:



<sup>121</sup> A. Saldarriaga-Cantillo and J. C. Rives Nieto, “Noah Syndrome: a variant of Diogenes Syndrome accompanied by animal hoarding practices,” *Journal of Elder Care and Neglect* 27 (2015): 270-275.

### 15.3 Domestic Violence and Office of Animal Welfare

The prevalence of domestic violence in Australia includes violence perpetrated against companion animals. The abuse of older persons does also involve abusers harming companion pets. In light of these social scourges, a holistic policy will not marginalise the abuse of animals but rather will legitimate public concerns for stronger criminal sanctions imposed on offenders than the tepid fines currently applied.

A holistic policy will support the creation of an Office of Animal Welfare or a Commissioner for Animal Issues. One measure that could be developed is to link the previously mentioned “neighbourhood scheme” of watchfulness concerning vulnerable senior citizens to include “watchfulness” concerning the abuse of pets.

The seriousness of the problem and the need for better legal remedies is expressed by Vivek Upadhyia:

The law’s failure to do so leaves a powerful method of harm underregulated, and thus leaves the significant abuse of both humans and animals underpunished. Designating animal abuse as a domestic violence offense would plug a prominent gap in the criminal approach to domestic violence and make available a large number of specialized protective and rehabilitative measures currently available to domestic violence victims, such as protective orders and mandatory therapy for abusers ... Ultimately, the frequency with which domestic violence and animal abuse co-occur, the severe harm that this abuse inflicts, and the substantial protective and remedial benefits that would follow together suggest the criminalization of this form of abuse is a necessary and highly effective approach against both domestic and animal abuse.<sup>122</sup>

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<sup>122</sup> Upadhyia, “The Abuse of Animals as a Method of Domestic Violence,” 1164.



## 16 SUMMARY

1. Create a holistic policy that addresses abuse in a comprehensive manner and is based on zero tolerance. The policy should be framed around the place of the individual in community rather than as an autonomous individual in order to build good social capital.
2. Establish a piece of legislation that is dedicated to Justice for Senior Citizens, and amend other statutes with pertinent sections that refer to the criminality and punishment of those who abuse older persons.
3. Create a compulsory training programme for appointees under a Power of Attorney including the signing under oath that the appointee post-training understands their fiduciary duty and the penalties associated with misusing their delegated authority.
4. Make it mandatory that an Attorney maintains proper book-keeping of transactions, and that there will be a final audit required when the Power of Attorney ceases at death. This provides a restraint on those who might contemplate financially exploiting their relative.
5. Introduce a Victims Compensation Scheme to restore lost assets to the victim. The scheme would entail the confiscation of assets that the Attorney has misappropriated. The confiscation of misappropriated assets would provide a strong disincentive to abuse. Compensation funds for the victim who is cognitively impaired would be administered by the NSW Trustee and Guardian.
6. Expand the Forfeiture Rule in Succession Law so that convicted abusers never inherit from the deceased estate of their victim. This would include cancelling out the abuser's spouse and descendants from inheriting, and nullifying any claims against an estate via Family Provision claims. This

amendment to the Forfeiture Rule would add a very powerful disincentive to anyone contemplating financial abuse.

7. Create the NSW Public Advocate with powers to forensically investigate cases of financial abuse and to represent victims in tribunals, courts and mediatory sessions.
8. Create the Curator of Older Person's Affairs to promote the interests and rights of senior citizens and to challenge public and private sector institutions that discriminate against them. This would include introducing a "neighbourhood scheme" of watchfulness for older persons and for their companion pets.
9. Ensure that the abuse of companion pets has increased penalties by linking it into the criminality of domestic violence and of the abuse of older persons.
10. Create an anti-abuse culture. Develop a public awareness campaign to socially re-engineer attitudes with messages that (a) target abusers by classifying them as social deviants and (b) encourage older persons to feel secure and socially supported and to disregard abusive next-of-kin as selfish persons of ill-repute who act like a pathetic school-yard bully and in reality are powerless wimps.