

**Submission
No 59**

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

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11 November 2015

Ms Sarah Dunn

General Purpose Standing Committee no. 2

Legislative Council of New South Wales

Parliament House

SYDNEY

Dear Ms Dunn,

RE: INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES

I am enclosing with this letter a submission to the Legislative Council GPSC no. 2 Inquiry.

Please acknowledge receipt.

Yours faithfully

RODNEY LEWIS

SOLICITOR

**SUBMISSION TO GENERAL PURPOSE STANDING COMMITTEE NO.2: LEGISLATIVE COUNCIL OF
NEW SOUTH WALES: INQUIRY INTO ELDER ABUSE 2015**

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A PROPOSAL FOR AN ELDER ABUSE LAW FOR NEW SOUTH WALES

THE ELDER JUSTICE ACT

INTRODUCTION AND PURPOSE

This submission addresses some of the issues arising from matter nos. 7 & 9 of the Committee's Terms of Reference.

The purpose of this paper and the model law which it proposes (in outline) is to take the debate on elder abuse beyond concerns about definitional problems and other issues which have caused hesitation, in order to provide a vehicle to focus upon and thus to enable further constructive consideration and hopefully some further progress.

Because in its many manifestations elder abuse can intersect with close family relationships, our society has been cautious, if not timid in its approach to proscribing conduct and slow to criminalise, or at least legally regulate what, between strangers, may have long been outlawed. The obvious examples from our recent legal history have been domestic violence and family conflict over care and control of children (family law and child protection legislation). In each case our society has made great progress in recognising and dealing with these issues in recent decades and part of that progress has included legal reforms.

Elder abuse is a social phenomenon which doubtless has always been with us. However, until perhaps the 20th century, the elder generation could rely upon their experience for wisdom and authority, thus maintaining to some extent, the respect to which they claimed was their due.

With the advent of mass media and more recently the Internet, experience counts for nothing and wisdom has been apparently completely undermined by Professor Google and the University of Wikipedia. Perhaps elder abuse is on the rise just as respect for elders is on the decline. What is unarguable however is that the number of elders is increasing and the problem of abuse of elders must be addressed by our community because it will not go away.

In proposing a model law or statute, it is not intended to undermine in any way the status and value of the current community organisations, the health care and other professionals and the social means by which these social problems have formerly been managed.

It is hoped that if an elder abuse law such as is proposed in this paper, were to be accepted as a necessary enhancement of the means of addressing elder use, then it is submitted that firstly it may provide the community in general and the police and courts in particular, with the additional tools

to deal with the more common forms of elder abuse. Secondly, it may also serve the community with a means to focus on the issue. Thirdly, it may provide a deterrent to intending offenders.

RECENT DISCUSSION ON SOME LEGAL ISSUES

Financial abuse

In discussing the 2009 report "Older People and the Law"¹, it should be noted that the Terms of Reference and the Report itself omitted some substantial issues from their consideration, including elder abuse. Indeed that phrase appeared nowhere in the report.

What the Committee did contribute to the discussion on elder abuse however was its consideration of financial abuse and fraud, which does assist our discussions. The Committee noted however that there is no Commonwealth State or Territory legislation which is specifically aimed at "addressing abuse of Older People". That remains the position, some four years later.

On the question of financial abuse, some sources were quoted which claimed that there was already legislation prohibiting fraud, theft and civil remedies for undue influence and "asset stripping".²

The Committee noted some submissions called for "clawback laws" to recover property transferred under "inappropriate" or illegal circumstances. One legal practitioner argued that financial and other abuse of older Australians would continue, unless specific legislation is introduced defining that abuse is a crime and/or an actionable case and making available meaningful and readily enforceable remedies.³

On the other hand, the Victorian government claimed that lack of education about, and awareness of legal rights was the real issue, not specific legislative reform⁴.

The Australian Institute of Criminology claimed that "criminalisation of elder abuse helps to publicise the problem" but the role of the criminal law was limited because of the barriers to victims in detecting and reporting.⁵

In its recommendations the Committee disregarded the notion of specialised laws to address Elder financial abuse and opted to recommend "funding for mediation and dispute resolution services to assist older people to resolve financial disputes within the family situation". That recommendation, if acted upon by the Commonwealth Government, could mean that funds might be available for a dispute resolution service such as the one proposed in this paper for financial disputes.

Mandatory reporting

¹ House of Representatives, Standing Committee on Legal and Constitutional Affairs

² See 'Legal Actions, in Older People and the Law, pars 2.58-59, Standing Committee on Legal & Constitutional Affairs, House of Representatives, Canberra, 2009.

³ Walsh, David, Older People and the Law op cit, transcript of evidence 23 March 2007, page 32.

⁴ Older People and the Law op cit, Victorian Government, submission no.121

⁵ Older People and the Law op cit, par 2.62.

Elder abuse was dealt with by the authors of the Law Foundation report on "the Legal Needs of Older People in New South Wales"⁶. The Report had some interesting comments to make on the barriers to and mandatory reporting of elder abuse: –

There are many reasons why older people may not report their experiences of elder abuse. Some of these include:

- a lack of community and professional awareness about the problem
- a lack of identification of certain situations as constituting elder abuse, for example, where no physical violence is being experienced
- people may not know who will be able to help them—who do they report it to and what will they do?
- victims of elder abuse tend to be quite isolated, which means that they may not be able to access assistance and that the abuse continues in the absence of the scrutiny of others
- older people and professionals may be afraid that the consequences of reporting the abuse will place the victim in a worse position than they are currently in, such as being institutionalised
- older people may be ashamed that they are being abused by people they should be able to trust, such as close family members, they may not want to jeopardise important relationships with family or friends, or may fear retaliation from their abuser
- health professionals may lack protocols and procedures for addressing abuse.

The NSW Interagency Protocol⁷ makes a helpful contribution to the question about whether reporting of offences should be mandatory and this is an issue which requires careful consideration:-

In all circumstances, an older person who has experienced abuse has a right to report and be supported in reporting an offence to NSW Police. Any requests to report to NSW Police should be facilitated immediately. In all situations where workers are not required to notify NSW Police, the victim's right to pursue or not to pursue the crime with NSW Police and report the offence should be respected.⁸

The circumstances in which reporting will overcome the requirements of confidentiality, as suggested in the Protocol, are :

In circumstances where the situation may override an older person's right to confidentiality requirements, workers should always consult their supervisors. Some examples are:

- instances where there may be reasonable grounds to believe that a serious crime or offence has been, or may be, committed and a criminal investigation by NSW Police may be required;
- where disclosure is in the person's interest (e.g. if the person is suicidal) or where the safety of others is at risk;
- where there may be a duty to warn a third party who is in danger.⁹

Are there two opposing paradigms?

⁶ Ellison, E., Schetzer, L., Milkins, J., Perry, J., & Wong, K., Law Foundation of New South Wales, Sydney, 2004

⁷ Interagency Protocol for Responding to Abuse of Older People, NSW Government, 2007

⁸ Interagency Protocol for Responding to Abuse of Older People, NSW Government, 2007, at p.12

⁹ Interagency Protocol for Responding to Abuse of Older People, NSW Government, 2007, at p.16

The 2004 Law Foundation Report looks at the merits of arguments on both sides of the debate about criminalising elder abuse. This is an important input into the assessment of the proposed model law and needs careful consideration:

Some believe that 'elder abuse' is the more appropriate term to describe a problem that afflicts older people because of their vulnerability. Others believe that much of the behaviour that is included under the heading of 'elder abuse' is captured by popular and legal understandings of 'domestic or family violence', that is the emphasis is on the violence that characterises some familial relationships.

It is important to understand that the Older Women's Network (OWN) is critical of the term 'elder abuse'. This term has been widely accepted but there is no nationally agreed definition nor agreement as to whether or not elder abuse is different from other forms of 'family violence'. For instance, does a woman who has been physically abused during the marriage become a victim of elder abuse upon reaching the age of 65? Is it the age and not the act or the relationship between the perpetrator and victim that defines whether the violence is identified as domestic violence or elder abuse?

In terms of approaches to conceptualising the problem, Michael Collingridge notes that "two perspectives—violence and care—have come to dominate policy and practice thinking". Collingridge's description of the 'violence perspective' quickly distils into the narrower 'domestic violence perspective'. Robyn Sedger of the Aged Abuse Monitoring Project in Western Sydney also noted the divide between services. "Essentially we have a problem with language, a problem with varying philosophies between domestic violence services and aged care services."

The difference is one of perspective, with political and legal implications. The domestic violence paradigm involves the criminalisation of the 'behaviour', attributing responsibility to the perpetrator and emphasises victim safety. The care perspective, "seeks to describe elder abuse as a problem of inadequate or inappropriate care, and parallels are frequently drawn with child abuse and the dependent relationship between the victim and carer". Kinnear and Graycar frame the distinction as follows:

It is argued that labelling harmful acts as "abuse" detracts from the criminality of the behaviour and degrades the experience of victims. The key labelling issue is whether criminal acts such as assault, rape or theft are redefined as physical, sexual and financial abuse, and thus removed from the criminal justice system. The well argued dilemma is whether a criminal act should be understood as private behaviour within a relationship.

Robyn Sedger's view chimes well with Kinnear and Graycar's description:

There... seems to be an obvious distinction between how domestic violence is treated in comparison to elder abuse—one is considered to be a criminal act while the other is not and this attitude is mirrored in terms of intervention as well.

Violence and care approaches each have their limitations.

While taking account of this aspect of the debate, the draft law proposal addresses only that conduct which can be characterised as "elder abuse" but focused on the specific elements of fraud, undue influence, neglect and assault, alongside the important qualifier that the victim has a disability making them particularly vulnerable to succumbing or deferring to the offender. It is the vulnerability which is both the qualifying and the aggravating factor.

DIFFICULTY WITH DEFINITIONS

What is abuse?

When she introduced the Interagency Protocol for Responding to Abuse of Older People, the then Minister for Ageing, the Hon. Christina Keneally said:

“the Interagency Protocol for Responding to Abuse of Older People is an important document in formalising something that should be common sense to us all – older people deserve the same protection as any other member of our community”.¹⁰

Actually this proposal for a new draft law to deal with Elder Abuse is in partial disagreement with the Minister qualified to the extent that older people with a disability do indeed deserve special protection just as do other members of our community who are vulnerable to predatory behaviour such as children and the mentally ill.

The Protocol provides us with a considered view of the meaning of ‘abuse’:-

While abuse is a term that can mean different things to different people, it is fundamentally a violation of an individual’s human rights by another person or persons. Abuse can take many forms including, but not limited to, abuse of older people by a friend, relative, carer, paid or unpaid worker, partner abuse, abuse of parents by adult children and sexual abuse.

Abuse of older people is any behaviour that causes physical, psychological, financial or social harm to an older person. The abuse can occur within any relationship where there is an expectation of trust between the older person who has experienced abuse and the abuser. Abuse may involve a single act, repeated behaviour or a lack of appropriate action. It may occur when a vulnerable older person is persuaded to enter into a financial or sexual transaction to which he or she has not consented, or cannot consent. Many forms of abuse of older people are crimes. In the abuse of older people the relationship between the abuser and the older person is usually one of trust and mutual dependency.¹¹

Who is an elder?

For the purpose of this discussion the following description of an elder is proposed by the author:-

A Person over the age of 65 years and who has a disability or is subject to other factors rendering them vulnerable to the offences described in the Elder Abuse Law and which are known or ought reasonably to be known to the offender.

¹⁰ Interagency Protocol for Responding to Abuse of Older People, NSW Government, 2007, Minister’s Foreword

¹¹ Interagency Protocol for Responding to Abuse of Older People, NSW Government, 2007, chapt 2.1

In the recent report from the University of Western Australia¹² the two terms 'elder' and 'older' were assessed and the authors were critical of both:-

"Older" is a comparative term, while "elder" is either a proper noun or a synonym for older. According to the recent publication by the Office of the Public Advocate and the Queensland Law Society (2010: 2), the term „elder“ is not defined at common law and has no legal meaning. Such ambiguity enhances a risk of developing and maintaining a single and ageist stereotype amongst the “elderly”, their families and friends, and amongst the professional community that works with them (Clare 1992).

Current ways to operationalise these two concepts include:

- The age of „retirement“ of men aged 65 years and of women aged 60 years
- The age of access to a government pension
- The age of access to superannuation
- The age of access to a state government Senior“s Card when no longer working full-time and aged 60 years
- The age of 50 years or younger for older Aboriginal people

The definitional issues are always going to be difficult and eventually it will come down to legal choices made against a political background, as should be the case in a democracy. Relatively recently (2010) the US Congress made just such a decision in passing the Elder Justice Act and which cast the 'net' very wide by simply defining an 'elder' as 'an individual age 60 or older'.

It is also worth noting that in the “Older Persons and the Law” Inquiry, the Terms of Reference adopted the Australian Health and Welfare Institute’s definition of ‘older person’ which is someone over the age of 65 years.

OTHER MODELS AND PROPOSALS

Since this paper has been prepared in order to support a short presentation it is not the writer’s intention to catalogue all the attempts at definition or legislation on this subject. That would be the subject of a rather large book. It will assist the debate however if we look at some of the issues arising from the US experience since each of the States of the United States has its own elder abuse law, in one form or another.

Before turning to the US, our near northern neighbors have recently grappled with these issues and in a joint paper, the Queensland Law Society has put forward several suggestions for that State¹³:

The Society has also considered a proposal for inserting examples of elder abuse under the general offences in the *Criminal Code*. For example:

- a (boxed) example in Schedule 1 of the *Criminal Code 1899* (QLD) under s408C(1)(b)4 as follows:

Example: A person who dishonestly induces or compels an elderly person to transfer property to them without legal justification may be

¹² Clare, Prof M., Blundell, Dr B., Clare, Dr J., Examination of the Extent of Elder Abuse in Western Australia, Crime Research Centre, University of Western Australia with Advocare Inc., at p 38

¹³ Elder Abuse June 2011 in Queensland Law Society Joint Issues Paper, Brian Herd, Chair, at par 8.4

considered to have committed the offence of fraud.

- examples for other general offences in the *Criminal Code*, such as:
 - Misappropriation of monies, valuables or assets of an elderly person;
 - Forging signatures or cheques or counselling or procuring an elderly person to sign documents or cheques; or
 - A carer failing or neglecting to provide an elderly person with the necessities of life.^{8.5} As there are divergent views as to the benefit and utility of this proposal, the Society has not formed a view as to whether examples of elder abuse should be inserted under the general offences in the *Criminal Code*.

The US Elder Justice Act contains several definitions (in section 2011) which may be of use to us in looking at the particular terms set out below. It needs to be kept in mind that this legislation is intended for the funding of State programs and agencies in the U.S. involved in elder abuse and therefore it does not of itself have a penalty regime for offenders.:-

1. **Abuse:** The term “abuse” means the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm.

6. **Elder Justice:** The term “elder justice” means:

(A) from a societal perspective, efforts to:

(i) prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation; and

(ii) protect elders with diminished capacity while maximizing their autonomy; and

(B) from an individual perspective, the recognition of an elder’s rights, including the right to be free of abuse, neglect, and exploitation.

8. **Exploitation:** The term “exploitation” means the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets.

9. **Fiduciary:** The term “fiduciary”:

(A) means a person or entity with the legal responsibility:

(i) to make decisions on behalf of and for the benefit of another person; and

(ii) to act in good faith and with fairness; and

(B) includes a trustee, a guardian, a conservator, an executor, an agent under a financial power of attorney or health care power of attorney, or a representative payee.

16. **Neglect:** The term “neglect” means:

(A) the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an elder; or

(B) self-neglect.

18. **Self-Neglect:** The term “self-neglect” means an adult’s inability, due to physical or mental impairment or diminished capacity, to perform essential self-care tasks including:

(A) obtaining essential food, clothing, shelter, and medical care;

(B) obtaining goods and services necessary to maintain physical health, mental health, or general safety; or

(C) managing one’s own financial affairs.

What is much more to the point of our discussion is the way the various terms are treated by the States in their regulatory laws for elder abuse. There are various criteria for the so-called 'adult protective services' which are activated by the exercise of jurisdiction under the elder abuse laws. Set out below is a short listing of some of them in summary form, prepared by the American Bar Association Commission on Law and Ageing as a part of their project to list and analyse all threshold criteria by State¹⁴:

Age. As all APS¹⁵ statutes define or reference "adult," the most common criterion in the definitions is "age." Commonality ends there, however. Some states define adult as persons age 18 and over, others as persons age 60 and older, and yet some others as persons age 65 and older. Some states also define emancipated or married minors as adults, and in a few situations minors who are not emancipated or married are included.

There are some categories of persons eligible for which there is no age criterion; usually those are situations in which an individual resides in some type of facility.

Condition. In some states, simply meeting the age criterion (i.e. over the age of 65) may make an individual eligible for APS. Generally, however, an individual must also have some sort of condition, such as "mental or physical impairment," "mental or physical illness," "mental retardation," "developmental disability," "dementia," or "substance abuse."

Function. In some states, to be eligible for APS one must also have impaired ability to function in certain ways. The statutes usually refer to impaired ability to: provide selfcare, manage finances, protect oneself, perform or obtain services, or to make, communicate, or implement decisions. Many statutes that contain a function criterion also contain a condition criterion and specify that the condition must cause or relate to the functional impairment.

Lacks Assistance. A few states add the criterion that an individual have no able and willing person available to provide assistance.

Living Situation. In some states, the setting (domestic/community vs. institutional) in which an individual resides is another criterion. This criterion generally is applied in one of the following ways: (a) individuals in certain living situations are eligible if other criteria are met; (b) individuals in certain living situations are deemed eligible solely by virtue of their living situation; or (c) individuals in certain living situations are not eligible because an agency other than APS is responsible for investigating allegations that those individuals have been abused, neglected, or exploited.

Receiving Services. A few states include the receipt of certain services as a criterion. Most statutes that contain the receiving services criterion also contain other criteria such as age or function. In other words, receipt of these services alone is usually not sufficient to make a person eligible for APS.

There is also a very helpful and short summary of US State laws prepared by the National Centre for State Courts¹⁶:

¹⁴ Overview of the "Threshold Eligibility Criteria for Adult Protective Services" Chart Series in Stiegel, Lori and Klem, Ellen, American Bar Association Commission on Law and Aging for the National Center on Elder Abuse

¹⁵ Adult Protective Service (see below)

¹⁶ Centre for Elders & the Courts, a Project of the National Centre for State Courts (USA) at

<http://www.eldersandcourts.org/Elder-Abuse/Elder-Abuse-Basics/Elder-Abuse-Laws.aspx> accessed 13 June 2013

Criminal codes. All states have general criminal statutes on assault, battery, sexual assault, theft, fraud and other offenses that can be applied in cases of elder abuse. Many states have specific crimes against family members (e.g., Virginia and Texas). A few states provide increased penalties for victimizing older adults (e.g., California, Connecticut, Indiana, and Florida). Some states specify elder abuse as one or more separate crimes (e.g., California Penal Code 368, Missouri, Florida's Chapter 825: Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults, and Nevada's Abuse, Neglect, Exploitation or Isolation of Older Persons and Vulnerable Persons). For information about the prosecution of elder abuse crimes see *Prosecuting Elder Abuse Cases: Basic Tools and Strategies*. Several states recently have targeted financial exploitation of older persons. In 2012, for example, Maryland enacted a law (S. 941) requiring financial institutions to report suspected financial abuse of older persons to APS or law enforcement within 24 hours of the suspicious activity. Missouri amended its elder abuse statute (S. 689) to include undue influence as an act that, when committed against an elderly or disabled person, constitutes the crime of financial exploitation.

AN ELDER LAW STATUTE FOR NEW SOUTH WALES?

Considering the format options

There is no likely head of power in the Commonwealth Constitution which would allow the Federal Parliament to legislate for a law as it is proposed, excepting the Foreign Affairs power. That power could only be used if there were an international covenant which contained similar provisions which had been ratified by the Commonwealth and where the law was implementing those provisions. That is presently far removed from reality or any reasonable prospect of happening, any time soon.

If the proposal was for a national law the most obvious means to achieve that would be to persuade the Commonwealth, States and Territory Attorneys General to put it on their agenda for a uniform National law. That would involve a cooperative enterprise in which an Elder abuse law was implemented throughout the country in almost identical terms conforming to the National model law.

The uniform law model would take political will and motivation in a measure we are unlikely to see for a long time. What then can be done in New South Wales?

There are several options for an Elder abuse law here in New South Wales including:

- (a) introduce an all inclusive bill into the New South Wales Parliament which contains a coherent set of principles measures and offences in a single package;
- (b) apply some only of the proposed measures by incorporating them into the Crimes Act, perhaps together in a separate part;
- (c) amend the Crimes Act by including the concept of "vulnerable Elder" in appropriate parts, such as offences against the person and fraud.

The proposed model falls into the category (a) above, but there are many bridges to cross and hurdles to jump before it could be proposed as a bill. There are many issues to be debated. The

proposed model should simply be a focus for starting the project process, for those who accept that legislation will be a progressive step in the struggle to contain the adverse social outcomes of elder abuse in our community.

What is the need?

Much has been said and written about the need for action against elder abuse. This paper takes the need for granted since its objective is to describe a law which is intended to address some of the issues which adversely affect vulnerable elders.

Some statistics

The Australian Institute for Health and Welfare (AIHW) in its report on Hospitalised Violence and Perpetrator Coding¹⁷ said;

The *ABS Personal safety survey* (2005) found that 2% of women and 3% of men aged 55 and over reported having been the victim of violence in the year preceding the survey. The 2005 *Crime and safety survey*, undertaken in conjunction with the *ABS Household survey*, reports a rate for assault of 20 per 1,000 population for people aged 65 and over. Assaults in this age group accounted for 3% of all assaults (ABS 2005). Violence directed at older people often goes unreported (Kinnear & Graycar 1999). The *International crime victimisation survey* 2004 found that 37% of respondents, across all ages, did not report an incident of assault or threat of assault (Johnson 2005). Astbury suggests that some of the reasons that older people do not report acts of violence is that they fear retaliation; are ashamed because the violence was perpetrated by a family member; or because they fear institutionalisation (Astbury et al. 2000).

The term 'elder abuse' has been used to encompass acts outside of the traditional physical domain and includes psychological abuse, neglect, and economic or financial abuse (James 1992), and sometimes social abuse (Boldy et al. 2002). A significant proportion of elder abuse has been found to take the form of domestic violence—often as the continuation of a long term violent relationship. Perpetrators of elder abuse (including violence) are often family members, usually residing with the victim (Astbury et al. 2000; Kurrle 2004).

In Western Australia in 2011 a report from the Crime Research Centre of the university of Western Australia made some findings drawn from several relevant sources, which also inform our discussion¹⁸:-

The Advocare data indicated that financial and psychological abuse were the most frequent types this agency encounter, the victims were predominantly female, and both the relationship to the abuser and the ethnicity of the victims were unclear in a large percentage of cases. The trend in the Advocare data suggested a reduction in the number of cases of abuse.

Analysis of the WA Police data also revealed that the vast majority of cases recorded by this agency involved victimisation for acquisitive crimes, and physical victimisation was very rare in comparison. There was incomplete information about victim ethnicity in this data set, but there was indication of repeat victimisation (with about 8% of victims experiencing 3 or more incidents in the 5-year time period). From an offending perspective, there was a sub-

¹⁷ Pointer, S., and Kreisfeld, R., Hospitalised Violence and Perpetrator Coding 2002-2005, Interpersonal Violence against Older People at par 5.1, AIHW, Canberra.

¹⁸ Clare, Prof M., Blundell, Dr B., Clare, Dr J., Examination of the Extent of Elder Abuse in Western Australia, Crime Research Centre, University of Western Australia with Advocare Inc., pp 82-3, April 2011.

set of repeat offenders, and also indication of same-victims same-offender pairings. Both of these patterns could be very useful from a crime prevention perspective. Overall, this dataset revealed an increase in the frequency of these types of incidents since 2005.

The Disabilities Services Commission data lacked an appropriate age division, but the data that was provided indicated an overall decline in the number of cases this agency is encountering relative to 2005.

The WA Health Department data indicated that assaults/maltreatment cases involving patients aged 55 and over only account for about 5% of the hospital admissions data provided. However, there has been an increase in the number of these cases involve this age group over the period of analysis.

The Office of the Public Advocate data again revealed financial abuse to be the most frequent type encountered, followed by neglect. This agency has also experienced an increase in volume over the period of interest.

Overall, across these data sources, it appears that financial abuse is the most common type of abuse that is currently being recorded by these agencies, with neglect and psychological abuse the next most prevalent. There is indication of a trend overall for increased volume of cases involving older members of the Western Australian community. However, there was also a consistent degree of uncertainty about the relevance and quality of the data provided for this exercise.

The Bureau of Crime Statistics (NSW) kindly produced some data for this paper which is to be found in the [attachments](#). The first dataset indicates prevalence and numbers of offences of violence and of property offences by age occurring at residential premises. That can fairly be interpreted to mean (in this author's submission) that these are crimes in a domestic setting which are likely to involve family members. The second dataset shows the assaults by numbers in a domestic and a non-domestic setting 2007-2012.

Elder Abuse resources

In the United States in many of the States there is established (in various forms) an Adult Protective Service. The social policy mechanisms involved in providing such services are generally described as follows¹⁹:

Adult Protective Services (APS) is a social services program provided by state and local governments nationwide serving seniors and adults with disabilities who are in need of assistance. APS workers frequently serve as first responders in cases of abuse, neglect or exploitation, working closely with a wide variety of allied professionals such as physicians, nurses, paramedics, firefighters and law enforcement officers.

Most seniors and adults with disabilities live independently without assistance, however, some face abuse or neglect by others and need trained professionals to advocate on their behalf. Others may simply be struggling with routine activities and benefit from in-home support services to maintain their health and independence. APS helps by assessing each individual's unique needs, then developing a service plan to maintain his/her safety, health and independence.

The service acts on information and assesses the person's needs, initiating face to face contact and case managing the person's needs. Those kinds of coherent pro-actively managed resources simply do not exist in New South Wales.

¹⁹ See National Adult Protective Association at - <http://www.napsa-now.org/>

In this State we have resources which include the Guardianship Tribunal, the Public Guardian and the NSW Trustee. In addition elders have access, in circumstances somewhat limited by mandate and financial means testing, to the very constructive work of The Aged Care Rights Service (TARS) and the Older Persons Legal Service (a division of the Legal Aid Commission's legal services).

The Guardianship Tribunal has the main function of appointing a manager for personal decision making and for financial decision making, for persons who are unable, because of disability, to make decisions for themselves or to manage their own affairs. Any person with a genuine interest in the welfare of a person (not limited to elders) may bring the case to attention. In this way a person protected by such an order may have their affairs monitored and even, in the more suspicious or egregious cases, investigated and actioned.

The Office of Public Guardian is established under s.77 of the Guardianship Act. Cases are referred by the Guardianship Tribunal upon appointment of the PG as guardian. The Public Guardian in his 2012 report²⁰ has sought a wider more proactive role which would be no doubt welcomed by all who are involved in supporting, protecting and investigating elder abuse in this State.

In NSW, unlike some of the other jurisdictions in Australia and overseas the Public Guardian can only assist someone if formally appointed as their legal guardian. If the Public Guardian had a public advocacy role, we would be able to investigate matters earlier. Through advocacy, we would be able to change a person's circumstances and prevent further harm, often without the need to be appointed as a guardian. In the coming year, we want to explore this possibility through a process of consultation, in line with the recommendations of the NSW Parliament in 2010.

We think the events surrounding the Grand Western Lodge closure are a good example of how vulnerable people with disability in NSW could benefit from the Public Guardian having an investigative role similar to that in other jurisdictions. With the power to investigate allegations of abuse, neglect and exploitation we would be able to make applications to the Guardianship Tribunal to appoint a guardian or financial manager. It would be possible to intervene earlier.

The NSW Trustee & Guardian (also known as the NSW Trustee) is established under the New South Wales Trustee & Guardian Act. In the area of elder abuse its role as financial manager of persons who have been found unable to manage their financial affairs by the Guardianship Tribunal is the most familiar. The Tribunal looks first to see whether there is a suitable person who can be appointed as financial manager but if not, the NSW Trustee is appointed. In this way control of a person's property including their home and their money can be removed from them and this generally happens where the protected person no longer has the capacity for management or may be susceptible to exploitation.

A DRAFT MODEL LAW ?

Here is a suggested title and description statement for the draft elder abuse law:

ELDER JUSTICE ACT

DRAFT PROPOSED LAW FOR NEW SOUTH WALES FOR THE FORMAL RECOGNITION OF CERTAIN OFFENCES ARISING FROM INTERGENERATIONAL CONFLICT BETWEEN PERSONS WHO ARE OF ADVANCED AGE WITH

²⁰ Public Guardian Advocacy Report 2012, Department of Attorney General & Justice, Sydney.

A DISABILITY AND OTHERS WHO SEEK ADVANTAGE FROM OR WHO HARM THEM IN CERTAIN WAYS AND TO ESTABLISH PROCEDURES FOR CONFLICT RESOLUTION AND AVOIDANCE

Set out below are descriptions of the various measures which are suggested as suitable issues for attention as offences under the draft law. There is also a dispute resolution proposal including a register for elder law family agreements which may provide an alternative option to criminal proceedings in certain cases and which may be suitable to be included in the sentencing options applied to the management of criminal cases in the local Courts of New South Wales.

FACTORS RENDERING A PERSON VULNERABLE TO ELDER ABUSE

A person might be said to be a “vulnerable elder” if they have a physical, mental, psychological or psychiatric disability to the extent that the person is wholly or partially unable to :

- Defend themselves against physical, mental, emotional or psychological abuse;
- Defend themselves against exploitation;
- Understand the nature and effect of their decisions;
- Make decisions freely and voluntarily;
- Communicate decisions;
- Report abuse;
- Be reasonably mobile in their freedom of personal movement;
- Or otherwise be frail in body or mind or have a short life expectancy.²¹

A “disability” may include –

- Impaired cognitive capacity;
- Dependence upon the offender or an associate of the offender including emotional, financial and psychological dependence;
- A position of power or authority over the victim by the offender
- Social isolation;
- Any other matter the Court considers which contributes to the vulnerability of the victim/elder

PROTECTION OF PERSONS WHO PROVIDE INFORMATION TO AUTHORITIES

If there is to be a network of government organisations and authorities who are to accept responsibility for dealing with allegations and claims of elder abuse and in dealing with people who are accused of breaches of the offences provisions of the law then legal protection should be extended to those who draw cases to attention and who may thereby put themselves at some legal risk of action or intimidation. Protection should be available for ‘whistle blowers’ against-

Threats intimidation or harassment

Defamation claims (if reports are made to the proper authorities).

²¹ The author has partly drawn upon some material in the paper *Elder Abuse: How well does the law in Queensland cope?* A joint paper of the Office of Public Advocate (Qld) and the Queensland Law Society, June 2010, p.3

AGGRAVATED UNDUE INFLUENCE

One of the common ways of taking financial advantage of a special relationship with an elder who has some cognitive impairment is to apply undue influence which results in a financial advantage. This can happen in many ways, including manipulating the elder to make gifts, loans, guarantees for loans, withdraw money from the bank, agree to payment for services not fully provided – or at all (such as by business cheats and scams like house repairs and minor work promised but not delivered).

Undue influence involves a person acting in a way which is to the financial advantage of another person (often another family member such as an adult child) and in circumstances where the elder is aware and appears willing to give effect to the transaction but in fact is acting not with their own will but because of the overbearing will of the other person and because of a special relationship which exists between them. These and similar transactions involving unconscionable conduct can be set aside by a court but the proceedings are very expensive (usually in the Supreme Court) and many actions which are commenced are settled. This author submits that the existence of an offence designed to catch the offensive conduct carrying a term of imprisonment will act as a deterrent.

The offence is called ‘aggravated’ because firstly there has never been a criminal offence of ‘undue influence’ and it is only in the circumstances described that the offence is proposed. Secondly, because of the presence of cognitive impairment or other disability known or which ought to have been known to the offender (whether by prior knowledge and history of the relationship, or by reason of the nature of the dealings with the elder and the elder’s responses to those dealings).

Penalty is suggested to be maximum 2 years imprisonment or appropriate fine and return / reimbursement/reinstatement of the property taken. If a conviction is recorded without penalty, or for example with sentencing deferred, terms such as engaging in similar conduct and return of property may be imposed in any bond or recognisance.

AGGRAVATED BREACH OF FIDUCIARY DUTY

There is a great deal of encouragement and good reason for people to consider making a delegation of authority by way of Power of Attorney. It is good policy, it makes sense to all concerned and, it helps to avoid the problems and attention focussed on family conflict which may arise in cases which come to the attention of the Guardianship tribunal.

However, it is also apparent that for some, the temptation to abuse the trust placed in them by the donor of the power as an appointed attorney, can be so great that they lose sight of their obligations. Among those obligations are not to mix their property or money with that of the donor²², not incur debt and not to convert the donor’s property to their own use. All these transgressions are examples of breach of fiduciary duty.

²² The principal or donor in a Power of Attorney is the person delegating their authority. The attorney or donee is the person who receives authority under the Power of Attorney in the circumstances defined in the document.

When and if the donor's mental capacity becomes impaired, and the attorney deals with the donor's property for his/her own financial advantage, that is a breach of law which often goes unpunished, especially if the attorney is a family member. It is submitted the deterrence of these kinds of unlawful acts may be improved by including them in an Elder Abuse law to highlight their significance and to make it easier for the donor to retrieve the money of property.

The elements of the offence would be :

- (i) Appointment of the offender as an attorney under an Enduring Power of Attorney;
- (ii) Knowingly breaching the fiduciary duty of the attorney resulting in a financial advantage to the attorney or his/her family or associates and/or a financial loss for the principal;
- (iii) The offence occurs at a time when the principal is under a disability including cognitive impairment and the attorney knew or ought to have known of the disability;
- (iv) The victim is 65 years or older.

The offence could carry a penalty of up to 2 years imprisonment or a fine. Importantly the Court could order or arrange through sentencing options, return of property or repayment of money.

AGGRAVATED UNLAWFUL RESTRAINT OF AN ELDER WITH DISABILITY

There is anecdotal evidence²³ which tends to show that a significant percentage of persons in residential aged care are unlawfully restrained from time to time whether by physical, chemical or environmental means.

Unlawful restraint under the common law is known as trespass to the person. It can also involve the use of force if that were necessary to put the restraint in place. However use of force seems to be (anecdotally- to this writer) uncommon in elder abuse settings. It is the restraint itself which is the alarming feature in institutional elder abuse, when it occurs without proper consent, whether from the person themselves or by their guardian or other person with proper authority, in advance .

There is no criminalisation of this highly objectionable practice to be found in the NSW Crimes Act. This is surprising, considering that restraint is a form of deprivation of liberty negating or denying the very fundamental right to freedom of movement, an indispensable part of our right to freedom generally. If we wish to claim the benefits of living in a free society how can we not do all we can to preserve the right of our most vulnerable citizens and deter those responsible?

The offence would consist of :

- (i) Unlawful restraint by any means where proper consent was not sought or given;
- (ii) Of an elder – where the victim is a person apparently over the age of 65 years;
- (iii) The victim has a disability or cognitive impairment which renders them vulnerable to accept or acquiesce in the restraint or is otherwise for reasons of disability unable to protect themselves from the offender.

²³ See The Use of Restraint in Residential Aged Care Homes, Information sheet 10, The Aged Care Rights Service, Sydney, April 2010

Available defences should include:

- urgent necessity including imminent harm to the person or to others;
- informed consent including by the legal guardian or other person nominated by Guardianship Law.

Penalty should be up to 2 years imprisonment or a fine or both.

AGGRAVATED BATTERY OF AN ELDER PERSON

Battery is physical contact (which may but does not necessarily result in injury) by one person with another without the other's consent. Battery commonly occurs with an assault. An offender may threaten another person with a weapon, such as a knife, thus putting the victim in fear. When the weapon is actually used in contact with the victim, that is the battery. Consent is normally a defence to the charge.

When medical treatment occurs and informed consent has not occurred that will be a battery. More commonly however the claim will be for (medical) negligence. Medical treatment including the administration of prescription drugs such as anti-psychotics given without proper legal consent apparently occurs quite commonly. This is often because the attending health / medical professionals fail to obtain the consent of the appropriate person when the patient/ aged care resident is cognitively impaired and therefore is unable to provide the legally necessary consent themselves.

The Guardianship Act 1997 (NSW) makes this kind of transgression an offence punishable by imprisonment and fine. However a prosecution under this section is unknown. The Bureau of Crime Statistics advises that no prosecution has occurred under s. 35 of the Guardianship Act 1987, since 1994. It is submitted that by including a similar offence to battery in a proposed Elder Abuse law may lead to a greater awareness and thus deterrence.

Elements of the offence

- (i) the offender is in a position of authority such as a health professional, carer;
- (ii) the offender administers or causes a prescription drug to be administered apparently without prior consent;
- (iii) the victim is disabled including having a cognitive impairment;
- (iv) the victim is over the age 65 years to the knowledge of the offender or is apparently over the age of 65;

The defences will include:

- a) urgent necessity in the interests of the health of the patient or resident;
- b) the act is done in the best interests of the person to avoid imminent harm to self or others;
- c) notes must be made and kept;
- d) the person whose consent is legally required is informed in circumstances as in (a) or (b) above, as soon as reasonably practicable thereafter.

Penalties include 2 years imprisonment and fines.

AGGRAVATED ASSAULT OF AN ELDER PERSON

One of the most obnoxious kinds of elder abuse is assault. When that occurs in cases of conflict or attack by strangers the community becomes outraged and often the media becomes involved.

In cases where the elderly are assaulted by –

- Members of their own family;
- Carers;
- Staff in residential aged care homes,
- Other residents in an aged care setting

the assault may be concealed, other excuses given and in cases where there is the relationship of dependence coupled with latent intimidation that may result in difficulty or reluctance in bringing the case to attention.

These assaults can be similar to the domestic conflict occurring between relationship partners and which historically were sometimes ignored by police and law authorities²⁴. Those attitudes have very substantially changed but in the case of elder abuse we must not allow hesitation or reticence to interfere in domestic relationships to enable a violent dependent relationship to continue without correction of the offender and protection of the victim.

Elements:

1. victim aged 65 or over;
2. offender in a position of dominance (domestic or family situation);
3. victim in a position of dependence (domestic or family situation)
4. offender has a duty of care towards the victim;
5. the victim suffers assault, battery, harassment or intimidation;
6. the victim has a reasonable apprehension of all or any of assault, battery, harassment or intimidation.
7. In the special case of an offender who resides in the same aged care establishment as the victim without any barriers preventing occurrence and where occurrence is likely by reason of cognitive impairment coupled with a tendency to aggression.

Penalties

- a) imprisonment for 2 years;
- b) fines;
- c) good behavior bond on condition of refraining from further acts;
- d) orders not to approach harass, intimidate, assault – as with apprehended domestic violence (ADVO) types of orders.

²⁴ See now the Crimes (Domestic and Personal Violence) Act 2007 NSW

- e) In the special case the offender may be subject to an appropriate isolation regime [under the delegated supervision of an appropriately qualified person – for example a person attached to the Office of Public Guardian] or other protective measures designed for the interests of the particular residential community of aged persons.

AGGRAVATED NEGLECT OF AN ELDER

In circumstances where a person has the care of another and the other suffers from that neglect, the law has been reasonably clear. The case law can probably be divided into two categories, namely those in which the person in care has died, and those in which the person in care has suffered from neglect.

The South Australian Supreme Court (Full Court) in a recent case of *R v Staker* ((2011) SASFC 87) set out in part the law in relation to negligent homicide by way of explanation-

In (*R v Instan*, (1893) 1QB 450) the accused was convicted of the murder of her elderly aunt with whom she lived. The deceased suffered from a disease which prevented her from fending for herself and it was established that her death was accelerated by want of food and medical attention. The conviction for manslaughter was upheld on the basis that:

The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty.

In *R v Taktak* ((1988) 14 NSWLR 226) the accused was convicted of manslaughter. He had procured a 15-year-old prostitute to attend a party at the home of an acquaintance and had later received a telephone call from the acquaintance advising him to collect the girl. He found her lying in the foyer of a building. She was unconscious as a result of consuming drugs. He took her to his home and attempted to revive her but the prosecution alleged that he did not provide her with sufficient care. She subsequently died. The conviction was quashed by Yeldham and Loveday JJ on the ground that any failure to obtain medical assistance did not amount to the high degree of negligence or recklessness required for manslaughter. Carruthers J concluded that the evidence did not establish that the omission to obtain treatment was the proximate cause of death. He was also of the view that criminal negligence was not proved.

...

At common law liability for a failure to act is exceptional and in the case of homicide the limited authority that there is restricts liability to situations where there is a duty to perform a particular act: [*R v Phillips* \(1971\) 45 ALJR 467 at 477](#). In *Taktak's case* it was held that the accused assumed a duty

to take care of the deceased girl by removing her while she was helpless from a situation in which others might have rendered assistance to her. Examples of situations in which similar duties might be said to arise are also to be found in the Criminal Law Revision Committee 14 Report (UK), par 252, where it is said:

...

(ii) one who voluntarily undertakes the care of a helpless and infirm person owes a duty to that person (*R v Nicholls* (1874) 13 Cox 75);

(iii) members of a household in which a person becomes infirm and helpless may be held to have assumed a duty to that person (*R v Stone and Dobinson* [1977] QB 354);

In making this proposal for a new offence to be established for negligent abuse of an elder, it is not proposed to further alter the law in relation to homicide. However the same principles should inform the framing of a failure of care where pain and injury is the result, but falls short of death or hastening death (for which offences under the Crimes Act would apply).

Elements of the offence-

- (i) Assumption by an adult of the care of an elder (whether or not related by blood or marriage) whether voluntarily or for some advantage or reward;
- (ii) The care required may be general care or for some particular health or disability;
- (iii) The duty of care has been willfully and deliberately or recklessly or negligently without caring about the consequences, under performed;
- (iv) The person in care has suffered pain or injury as a result of the lack of care or failure to provide sufficient care;

Defences may include reasonable excuse, lack of awareness of the health or disability which has been neglected, reasonable attempt to deliver care.

Penalties should include 2 years imprisonment and fines.

AGGRAVATED ELDER ABUSE

The elements of the offence could include:

- (i) Repeated or persistent emotional, verbal or physical abuse by a carer or other person upon whom the vulnerable elder is dependent and whose conduct is causing or may potentially cause serious harm, and where the perpetrator knows or ought to know of the harm suffered by the elder;
- (ii) Defence could include 'reasonable excuse' or
- (iii) That the elder has reasonably available means to avoid or terminate the harm themselves and the court would need to balance the needs of the victim against the

potential penalties for the offender [for example requiring the offender to leave a home; requiring an offender to undertake to not approach the victim]

Penalties should include 2 years imprisonment and fines

ALTERNATE SENTENCING OPTIONS

The provisions of the Criminal Procedure Act 1986 regarding the giving of evidence by vulnerable persons [chapter 6, division 6] should be available and applied in appropriate cases. Likewise the intervention programs sentencing options [chapter 7, part 4] should be applied with appropriate programs supported by State government, community and other purpose specific organisations and professionals enlisted in aid of providing solutions to the people [victims and offenders] involved in cases brought before the court under the proposed Act.

DISPUTE RESOLUTION SERVICE

One of the enduring legal and practical problems affecting most elders in the area of financial abuse, in the experience of this writer, is the impossibly high barrier of making a claim which involves the issues which only a Court of Equity can entertain.

These kinds of claims include undue influence, unconscionable conduct and constructive trusts. Ordinary people with ordinary means are excluded from seeking equitable relief because of the very substantial costs and the risk of an adverse costs order being awarded against them. Such claims have always been brought to the Equity Division of the Supreme Court of New South Wales which has been established for generations at King Street, Sydney. To enter into a dispute in the Equity Division without the assistance of learned Counsel could fairly be considered as a folly. Potentially the expense is almost open-ended.

The facts are that the court best suited and most widely distributed throughout the state, the Local Court, does not have the trained lawyers to properly adjudicate on such complex financial claims as the ones mentioned.

In the House of Representatives Older Persons and the Law Enquiry, the Law Institute of Victoria made this helpful submission, taken further by State Trustees of Victoria: –

The Law Institute of Victoria argued that it "... would see the criminalisation of these situations as the last resort, because while it may help remedy some cases, there are all kinds of issues with enforcement and bringing the claims in the first place. We would advocate at first instance, information and education programs on the part of older persons, their families, their carers and solicitors". This was also supported by State Trustees, who suggested "having dispute resolution mechanisms available where the mediation can be used rather than having people finishing up in courts and tribunal is. Mediation can be used as a precursor before things get to the stage of involving lawyers".²⁵

²⁵ Older People and the Law, op cit at par 2.68

In the proposed draft law an "Elder Justice Division" of the Local Court would be established to which cases of undue influence and fraud could be referred and could be dealt with in parallel to criminal proceedings, if any. Cases could also be brought directly by the elder or on their behalf. The court would be asked to oversee the process and normally would refer the case to mediation and if mediation failed, for arbitration decision making by qualified lawyers who would need to act as a scale of fees contributed by each party and related to the assessed ability of the person to pay and/or at the legal aid rates.

If an arbitration procedure was the course followed by the parties and by the court, the proceedings would need to be recorded so that appeals could be taken on errors of law in the normal way.

FAMILY AGREEMENT REGISTER

In mitigation of the risk of litigation of intergenerational disputes, the proposed law could establish a formal register of family agreements, such as for loans, guarantees and elder apartments, and to preserve privacy there would be limited (not public) access to documents. The agreements would be

- required in any financial transaction involving an elder who may be vulnerable, and
- could be pleaded as a defence to the charge of fraud or aggravated undue influence;
- the agreement would be unenforceable at law without registration.

Some of the requirements for registration might include-

- Legal and financial advice to be given to the elder;
- The legal advice would be specifically prescribed in part at least and certified by the legal practitioner giving the advice, similar to the certificate presently given for third party guarantees and loans under the former NSW Solicitors Rules –Rule 45;
- Certain clauses for protection of the elder to be included in the agreement (for example clauses which address various contingencies (where relevant) such as bankruptcy, separation of counterparties (such as adult son and his partner) caveatable interest in property, consultation with other family members and so on).
- When a Will is made the solicitor must certify that advice, given to a person who apparently fits the description of elder (or his/her client does not fit the definition) touches upon all the issues as to validity which the law requires (as to which the case of *Banks v Goodfellow* and other more recent cases of the Supreme Court are well known)
- Registration refused in the event the elder is found to be vulnerable in the process of making and certifying the agreement for registration.

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