

**Submission
No 93**

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

Organisation: Australian Lawyers Alliance

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The Director
General Purpose Standing Committee No. 2
Parliament House
Macquarie Street
SYDNEY NSW 2000

Attention: The Honourable Greg Donnelly MLC (Committee Chair)

Dear Sir,

ENQUIRY INTO ELDER ABUSE

The Australian Lawyers Alliance welcomes the opportunity to provide submissions in relation to the enquiry into elder abuse in NSW.

ABOUT THE ALA

The Australian Lawyers Alliance (ALA) is a national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or Religious belief. We oppose oppression and discrimination and support democratic systems of Government and an independent judiciary.

We value immensely the right of the individual to personal autonomy in their lives and to equal treatment under the law.

ALA SUBMISSION

In June 2012, the population of over 65s was 1.01 million in Australia. It is predicted that by 2050, 2.4 million people, that is 24% of the total population of Australia will be elderly. Data is currently limited on the scope of abuse that occurs against older people, however, the Australian Institute of Criminology estimates that 4.6% of the NSW population aged 65 and older are victims of abuse or neglect¹. Eight percent of nurses report seeing elderly abuse everyday². The ALA therefore anticipates that the prevalence of abuse is likely to rise as the population of elderly people rises.

¹ FACS, NSW Ageing Strategy, pg 16-17 available at:

http://www.adhc.nsw.gov.au/_data/assets/file/0011/257276/1282_ADHC_NSWAgeingStrategy_WEB.pdf.

² 'Elder abuse: Isolation opens way for abuse of older Australians, NSW inquiry to hear' by Philippa McDonald dated 20 November 2015. ABC news

Currently the effectiveness of NSW laws, policies and strategies in safeguarding older people from abuse are limited.

As the Committee is aware, the recent introduction of the NSW Intra Agency Policy, Preventing & Responding to Abuse of Older People has indicated that the types of abuse committed against elderly people can include:

- Physical abuse;
- psychological/emotional abuse including verbal abuse;
- sexual abuse;
- material or financial abuse;
- social abuse; and
- neglect which can occur actively or passively as a result of another person failing to meet the physical or emotional needs of an older person.

Whilst all wrongdoings against older people are covered under the broad definition of elder abuse, it is the understanding of the ALA that it does not include actions carried out by strangers, for example, assaults occurring in the street and/or tricks targeting older people. The issue facing the Committee and any law maker is therefore somewhat complicated as this type of abuse primarily involves a breach of trust and often occurs between an older person, their family members, friends or a carer and it is for this reason that elder abuse generally should be distinguished from other forms of abuse committed directly or indirectly against older people.

The key issues to which the ALA responds to in terms of the enquiry are:

1. The effectiveness of NSW laws, policies, services and strategies including the 2014 Intra Agency Policy Preventing & Responding to Abuse of Older People in safeguarding older persons from abuse.
2. The ALA's recommendations for new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse.

THE EFFECTIVENESS OF NSW LAWS, POLICIES, SERVICES AND STRATEGIES INCLUDING THE 2014 INTRA AGENCY POLICY PREVENTING & RESPONDING TO ABUSE OF OLDER PEOPLE IN SAFEGUARDING OLDER PERSONS FROM ABUSE

At present, it is understood that the agencies for referral include, but are not limited to, the Office of the Community Advocate, Nursing Homes, Retirement Villages, Hospitals, GPs, Community Nurses, the NSW Police, Social Workers, Domestic Violence Classes/Services, Older Women's Network (OWN). Whilst individually the work of each of these independent agencies cannot be criticised, it is abundantly clear that there is no central point of contact in which all of these agencies can be in communication with one another. There is also no advertised and well known single point of contact provided in circumstances where elder abuse is found to occur.

From a civil and criminal perspective, the courts would also be available to older persons. From a civil perspective this would be somewhat limited to those who have the capacity and/or financial means to access it. The ALA is aware of some cases that have been responded to by NSW Courts. In *Mattouk v Mattouk* (No 2) [2015] NSWSC, the Supreme Court heard a case whereby Mrs Mattouk claimed her son and her daughter sought to deprive her of ownership of her property which she lived in and was registered in her name. There were also claims that her son had obtained access to her credit card and used it for his own benefit and purposes. The Third Defendant in those proceedings involved a solicitor who acted for the daughter in relation to the transfer of property without regard to Mrs Mattouk's own interest and failed to seek instructions from her. What was important in this case is that the mother did not speak or understand English and signed the transfer for the home in the presence of a solicitor who spoke to her in English. It is overwhelmingly clear that this case demonstrates the type of abuse that can occur whether innocently or not and conceivably without review or recourse other than by an older person who may have the means to pursue the action in Court. Furthermore, in the case of *Trevenar v Ussfeller* [2005] NSWSC582, the Supreme Court considered whether alleged gifts exceeding \$50,000 which had been made by an 83 year old widow to a trusted friend should be set aside on the grounds of undue influence. Ultimately the Defendant conceded that a presumption of undue influence arose and in that case was unable to rebut the presumption in circumstances where there was no evidence of independent legal or financial advice to support the gift was the product of free and independent will.

As a practical point, one would think that there are a number of barriers to reporting abuse. For example, the abuse an older person may be reporting could be in relation to their primary carer, whether it be their spouse, child, carer or grandchild, to which they may depend upon for basic needs. Reporting abuse against a person in this situation would no doubt be accompanied a fear of retribution that would be attached to reporting abuse against a perpetrator. There also appears to be nothing in place under the existing frameworks to replace the care that this person may provide in circumstances where retribution or the cessation of such care occurs following a complaint.

It is therefore submitted that before one turns to the effectiveness of current NSW laws and policies, that one must first understand the barriers to reporting abuse in order to establish an effective proposal and system and/or policy that would apply to this area to encourage those who are victims of abuse to come forward. What is clear is that when one looks to the reasons why older people may not report abuse it is likely that they would often lack support whether it be by funding or direct intervention by one of the agencies mentioned above to provide and/or replace assistance that may be lost when reporting of abuse occurs. There is also little communication between the agencies mentioned above in order to provide a systematic and comprehensive protection of older people in NSW. For example, whilst the NSW Police Force are able to respond to elder abuse allegations, it usually would only occur when the situation is severe enough for the criminal justice system to intervene.

The difficulty is that it appears that the most common forms of abuse fall under the general categories of:

- (a) neglect;
- (b) psychological/emotional abuse; and
- (c) financial abuse.

This is generally outside the realm of the jurisdiction of the NSW Police and would otherwise fall into a civil sphere that without the proper funding would not be pursued by an older person unless they have the means and access to sound legal advice that could assist them in navigating any cause of action arising from abuse that occurs and any loss or damage caused as a result.

From the perspective of psychological and emotional abuse, if that were to be stopped one would expect that the abuser would need to be removed from the scenario and as noted above, this could be a personal relationship to the older person to which they might rely upon for basic needs. As a practical point, this appears to be a significant barrier in the reporting of abuse, but also the ability for that older person reporting the abuse to carry through with the report because the services that they may have lost by virtue of their reporting under the current services and strategies provided would not be available to them.

In conclusion, it appears that the individual functions of particular agencies, once they are alerted, operate well but as a combined effort to combat elder abuse the current agencies offer very little by way of deterrent nor do they have any investigative function in circumstances where no complaint is made. The ALA believes that this fundamental failure arises because there is no central body that operates to collate information and share information amongst the agencies or have the power to initiate investigations and/or prosecutions.

RECOMMENDATIONS OF THE ALA

At the outset, it is necessary to draw the Committee's attention to the fact that there is an increasing call for the Federal Government to develop a national approach to deal with elder abuse. At present, the State based frameworks contain a number of significant flaws, the most important of which include:

1. There is no dedicated agency with statute mandated responsibility to investigate cases of elder abuse.
2. Privacy laws inhibit the sharing of information.
3. Referral services do not appear to be fully funded to deal with elder abuse issues.

As the Committee is aware, there is a proposal to shift the responsibility of elder abuse to the Commonwealth in order to create a national approach to elder abuse. From a legal perspective, this presents a number of issues, particularly from a Constitutional point of view. It is the ALA's view that the Commonwealth's power is limited by virtue of Section 51 of the Constitution in that the Federal Parliament has no power to legislate on any issue concerning elder abuse or adult protection. Whilst the Commonwealth's legislative powers extend to the funding scheme of aged care packages, it does not necessarily allow for legislation concerning the enforcement of instances of elder abuse. In those circumstances, it requires the co-operation of State and Territory Governments to implement policies and services in accordance with the allocation of funds that is provided by virtue of the Commonwealth's Constitutional capacity to do so under existing Commonwealth legislation and/or the Constitution.

The most significant problem that the ALA has discovered is that there appears to be no co-ordination between agencies nor does there appear to be any authority for investigative functions. At present it appears that certainly the frameworks in place in NSW only allow for the receipt of enquiries or claims which are then referred to the appropriate agencies for assistance. There is also very little legal protection for any victim of elder abuse to actually have any recourse unless they suffer significant financial loss or suffer injuries of a criminal nature in order for the law to respond. When one looks to the major forms of abuse and the circumstances in which abuse takes place, particularly psychological, emotional, social abuse and neglect, then what is made abundantly clear is that in NSW there is no protection whatsoever for an older person who suffers this form of abuse. It is the ALA's submission that these types of abuse can occur without recourse because there is no law in existence in NSW that can respond to it. The ALA believes that if there were human rights legislation in place in NSW to recognise these forms of abuse, for example inhuman and degrading treatment, that this would provide some legal protection for the rights of older persons.

If the Committee were to look at recommending human rights based legislation, then this could provide the framework that is necessary to bring to the forefront the rights of older persons. It would also allow a legal based approach to the types of abuse that appear to commonly arise but which there is little protection for, if any i.e. psychological, emotional, social abuse and neglect. If one were to consider a human rights based approach, then the first step would be to establish a specific legislative framework dealing solely with the protection of older people.

Potential Legislative framework

In addition to first establishing a Human Rights Act in NSW recognising international principles of human rights that would apply to older people the ALA believes a comprehensive legislative framework would need to be put in place to recognise the issues that apply to Elder abuse specifically.

Perhaps the most comprehensive example would be the approach that has been adopted in Scotland under the *Adult & Support Protection Act 2007* (Scot). As a starting point, when one undertakes an examination of that Act the committee will note that the scope of elder abuse recognises the notion of harm in adults at risk as opposed to evidence of abuse³. The Act also provides powers to conduct enquiries, investigations and visits as well as formal assessments, removal, banning and protection orders from the Courts in circumstances where harm is discovered⁴. What is paramount under this legislation in Scotland is that there is an overriding acknowledgement that action would only be taken in circumstances where there is evidence to show that an adult at risk or an older person would be provided with benefit from such an action being taken⁵.

Furthermore, the important thing to note about the legislative framework in Scotland is that it is also afforded further protection by the enactment of the *Human Rights Act 1998* (UK) which enforces that the legislation complies with the human rights obligations to which the UK are signatory. It also recognises and

³ See sections 3, 7, 8, 9 and 10 of the *Adult & Support Protection Act 2007* (Scot).

⁴ See section 4 of the *Adult & Support Protection Act 2007* (Scot).

⁵ See sections 1 and 2 of the *Adult & Support Protection Act 2007* (Scot).



provides validation for the forms of abuse that can arise in cases involving abuse of old people. What this means in practice is that there is a comprehensive framework at international law that provides greater definition of the types of treatment expected of human beings which may not be recognised by existing laws and policies in NSW, for example inhuman and degrading treatment.

Therefore, if one were to consider a comprehensive response to elder abuse in NSW, the ALA submits that not only would a comprehensive legislative framework be required to recognise the forms of abuse that fall outside the scope of criminal and civil spheres, but would also need to implement a legislative framework that recognises human rights obligations such as what is contained in the UK in the *Human Rights Act 1998*. It would therefore require a progressive approach to not only elder abuse as a wider issue in NSW but also one that directly gives rise to the implementation of a human rights framework that would enable a proactive response to occur in circumstances where abuse is identified.

Therefore, in summary, the ALA would recommend the following:

1. A central agency is created that is able to collate information, direct and oversee referrals and be provided with investigative and prosecutory functions.
2. That a comprehensive piece of legislation, not unlike the *Adult Support & Protection Act 2007* (Scot) be implemented.
3. That a *Human Rights Act* recognising NSW's obligation to human rights recognised at international law be considered to complement any framework that is enacted.

We thank the Committee for this opportunity to provide our responses in relation to this enquiry. The ALA remains committed to assisting the Committee in relation to this enquiry and should further assistance or information be required, please do not hesitate to contact the General Manager, M

Yours faithfully,

Roshana May
NSW Branch President
Australian Lawyers Alliance