Elder Abuse Inquiry by the Australia Law Reform Commission – Submission by ADACAS

The ACT Disability, Aged and Carer Advocacy Service (ADACAS), is a not for profit community organization that provides advocacy to older people, people with disabilities, people with mental health issues and their carers in the ACT. ADACAS has provided individual advocacy to clients who experience elder abuse, and we believe there is not enough being done Australia-wide to address this very concerning issue. ADACAS welcomes the opportunity to make a submission to the Elder Abuse Inquiry currently being undertaken by the Australian Law Reform Commission.

Elder Abuse is a clear violation of the United Nations Convention on the Rights of Persons with Disabilities, to which Australia is a signatory. Article 16 of the Convention states that “State Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects”. The United Nations Principles for Older Persons states at Article 17 that “older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse”. Although the Guiding Principles are not a convention they are persuasive and can provide guidance as to how older people should be treated. It is with this international human rights framework in mind that we express our deep concern about the abuse of older people and provide the following input into the inquiry based on the advocacy we have provided to date to older people who have faced elder abuse.

**a. The Definition of Elder Abuse**

The definition of elder abuse, as provided on page 13, includes the most important elements of elder abuse and is thus an internationally accepted definition. However, we feel that there should be greater clarification. The definition you use states “there is an expectation of trust”. In our experience elder abuse revolves around relationships and thus a more accurate and commonly used definition is that there exists a “relationship of trust”. We would suggest amending the definition accordingly.

One very important form of elder abuse, which has been left out of the Toronto Declaration definition is “social abuse”. This is a particular dangerous and insidious form of abuse. In Australia, for example, more elderly people die in old age of loneliness than obesity[[1]](#footnote-1). As human beings we are wired to interact and socialize with others. Intentionally isolating older people can be a very serious and harmful form of abuse, and thus necessitates inclusion in the definition. It is serious enough to warrant specific mention in whichever definition is used, and not just including it within psychological abuse.

**b. Age Category**

At point 28 there is a suggestion that older people should be defined as anyone over the age of 45 years. We strongly disagree with this and recommend that elder abuse be defined as abuse relating to people over the age of 65. By lowering the age although this results in a greater outreach, elder abuse becomes a generalized form of abuse. It no longer focuses or emphasizes a group of people who are extremely vulnerable and potentially frail and aged, i.e. those above the age of 65. The internationally accepted age is 65 and above and we recommend that this be adopted in the current approach to tackling this issue. An alternative acceptable approach would be to tie the pension eligibility age to the definition. If a person is old enough to receive the aged pension then they would be within the age group for elder abuse. Noting that the OECD is shifting the retirement age consistent with increased life expectancy, 65 may become an arbitrary age in the future.

**c. Culturally and Linguistically Diverse Older People**

Older people from CALD backgrounds who are at risk or suffer from elder abuse require a particular understanding of their CALD backgrounds and perspectives. It is our experience that sometimes people from CALD backgrounds may encounter elder abuse due to a different interpretation or lens of their particular cultural heritage. Elder Abuse, as commonly defined in the Australian context, involves a focus on the individual’s rights, including how they are treated, how their assets are managed, and ensuring that the older person is able to exercise their right to self-determination i.e. their right to make decisions that impact on their own lives. In many cultures the focus on rights is not on the rights of the individual but on the rights of the community/family/group. Thus, a property is not viewed as owned by one particular individual, as is the case in Australian law, but as something that is held for the benefit of the whole family. If an elderly person cannot manage their own property another younger member of the family may perceive him or herself to have the right to make decisions about the property. In a cultural context this may or may not result in an act of elder abuse occurring and must therefore be treated sensitively. A particular group at risk of elder abuse in CALD communities, are older parents who are brought to Australia so that they can assist with child raising. Once the children grow up, these individuals are no longer performing a valued family role, they are often very socially isolated, have not developed English language skills and are at higher risk of elder abuse.

The other issue that often appears in the CALD context is the pronounced gender roles that are assigned to people in the family. The eldest male son may be perceived as having the right to control what happens in the family, even though this right may not be reflected within Australian law. He may decide that assets of his parents can rightly be used to benefit his own family as he is in the decision making role as the first born son and thus he can use those assets as he sees fit. This once again may result in an act of elder abuse in the Australian context.

Sometimes elder abuse in the CALD environments can be unintentional and based on ignorance or lack of knowledge as to what constitutes elder abuse. Information and training campaigns targeting ethno specific families and older people themselves are crucial.

**c. Research**

While some limited research has been conducted in different parts of Australia, there is insufficient research into the extent and understanding of elder abuse and effective responses to it. We are aware of one useful research project into elder abuse in Western Australia[[2]](#footnote-2). In order to inform policy and law it is imperative that a nation-wide data gathering exercise take place as well as dedicated research into the occurrence of elder abuse. This would be the most important starting point towards working out an effective strategy for counteracting elder abuse in Australia.

One potential source of data is the various elder abuse hotlines that exist in states and territories, however to be effective data collation points they would need to be promoted more strongly and provide a more responsive service to callers. Good training is required for the hotline staff. It has been our experience that the APRIL telephone hotline in the ACT has had limited value. It is not promoted, only operates on restricted working hours and the advice provided to callers is limited and consists of referring people on to one or two other players in the elder abuse space in the ACT. Much more work needs to be invested into the hotline, at least in the ACT, to ensure that it is a helpful and effective tool for preventing and responding to elder abuse.

**d. The Role of Centrelink in Identifying and Responding to People Experiencing or at Risk of Elder Abuse (question 5)**

We have not been aware of any cases where Centrelink has played a role in identifying or responding to people experiencing or at risk of elder abuse. However, we could foresee that Centrelink has the potential to play a very strong and important role in this regard. This would require comprehensive training about the topic of elder abuse to all staff of Centrelink. With an understanding and awareness of the issue staff would be well placed to be able to spot elder abuse happening and take the proper steps to protect the older person.

**e. Payment for Carers (question 7)**

There is always a risk that carers who receive a Carer Payment or Carer Allowance may abuse an older person by taking payment for care and not providing the care promised. This would be a form of elder abuse.

A more pressing issue than punitive monitoring of carers however, is ensuring that appropriate support is available to family carers to support them in this role. Many families commit to supporting ageing parents in their own home rather than putting them into institutional care. These arrangements are often far better for the older person however when carers become overwhelmed by the role, when care needs increase in complexity and intensity, and families are unable to manage competing demands for their time, there is increased risk of elder abuse, including chemical and physical restraint, neglect and psychological abuse. Ensuring that family carers can access appropriate levels of support, including breaks from their caring role, additional in-home care support, access to skilled medical and pharmacy advice and aids and equipment will all contribute to reducing elder abuse which comes as a consequence of family carers being unable to cope. General community awareness raising about elder abuse, its forms and responses can assist family carers to understand the impact that their care, or lack of care, may be having on the person and provide them with pathways to seek assistance.

**f. Income Management (question 8)**

Although the idea of imposing compulsory income management may seem like a solution to preventing elder abuse we are very concerned that it is an infringement of the rights of the older person to self determination. It is imperative that such measures do not impact unduly on the rights of the older person. Income management may be a useful tool if it is used in conjunction with rights focused tools such as Supported Decision Making. Supported decision making presents an opportunity to enable the older person to continue to engage to the greatest extent possible in decisions that affect them, including financial decisions, as capacity declines. Other mechanism which do not infringe on rights to the same extent, such as putting in place enduring financial instruments, powers of attorney (appropriately safeguarded) or other mechanisms of shared decision-making should be used in preference to compulsory income management.

**g. Older Migrants’ Access to Social Security Payments (question 9)**

Although we do not have direct experience of clients suffering from this issue, it is foreseeable that some older migrants may be vulnerable and at risk if they are unable to access social security payments while their residency is being finalized. Similar to domestic violence provisions in the Migration Act, this could be circumvented by ensuring that the law recognizes that older migrants can be in jeopardy and provide provision in the law to support them with payments where required.

**h. Evidence of Elder Abuse in Aged Care (question 11)**

There is significant evidence that abuse exists in aged care. ADACAS is often asked to provide support to residents of aged care facilities who are not satisfied with the quality of care they are receiving. Residents report that some staff are abusive in the manner in which they go about their work (e.g. tone of voice, rough handling, delay responding to requests for assistance, or leaving residents in soiled bedding) yet are fearful of making a complaint due to anxiety about retribution. Similarly clients receiving care in their own homes report carers not turning up for shifts, refusing to complete tasks assigned, rudeness, being ignored. While quality assurance processes in place for aged care providers are designed to ensure quality care, their focus on documentation and policy evidence can mask the poor experience of care recipients. We provide the following two case studies, which were experienced by our clients:

Case study – Helen

Helen is an elderly woman living in an aged care facility. She uses a wheelchair and requires assistance to move around. Helen was experiencing extreme social isolation and was confined to the facility. An advocate became involved after the Tribunal denied a request by the aged care facility for them to become Helen’s guardians. Helen expressed her dissatisfaction with a number of areas of her care but in particular with the facilities’ refusal to allow her to go out of the home. The facility denying her right to freedom of movement was a form of elder abuse. Through advocacy we were able to overcome a number of the concerns about treatment and care and also connect Helen with a community visitor who could be trained to assist her with her wheelchair and take her on outings into the community.

Case study – Joan

Joan spoke to an advocate during one of our regular visits to her aged care facility. She confided that an incident had recently occurred during which a kitchen staff member had pushed and held her against a wall and touched her inappropriately. Joan was very distressed by the incident and very fearful of raising it with management. The advocate assisted Joan to understand her options with regard to reporting the abuse so she could decide what to do next. Joan also told her family about the incident. Unfortunately the family members convinced Joan that she was better to not say anything to anyone and to let the matter drop.

**i. Aged Care Assessment Team (ACAT) (question 12)**

Staff who work as ACAT assessors are in an excellent position to become aware of elder abuse that is occurring or situations where there is a risk of elder abuse arising. However, referrals are rarely made by ACAT assessors to advocacy organisations. ACAT staff and regional assessment services (RAS) use standard assessment frameworks to determine service needs, they could however also consider risk of elder abuse based on the understanding of the person’s situation, which they develop. With additional training and resources, they are well placed to both educate older people and their families about elder abuse, and to refer or report issues of concern that they identify.

**j. Quality of Care (questions 13, 14, 15 and 17)**

At present only sexual and physical assault are offences which aged care providers are mandated to report. We submit that this should be expanded so that any form of elder abuse that an older person may experience should be reported and acted upon.

Where allegations of abuse are made against staff; staff should be required by law to report and respond to charges made against them, possibly facing additional charges if they fail to do so. At present, it is far too easy for care workers who have abuse older people to escape conviction by moving residence/place of work, and continuing their abuse in another context.

**k. Complaints and Sanctions (questions 18 and 19)**

Our experience of the aged care complaints scheme has been that the role of the scheme seems to be more conciliatory in nature rather than willing to take steps to stop the action that gave rise to the complaint. We would like to see greater consequences from complaints that are made and found to be valid, including the Scheme imposing greater sanctions and possibly adversely impacting on the care provider’s accreditation. Only in this way will complaints be taken seriously by aged care providers.

**l. Support Services (question 20)**

Availability of independent individual advocacy is a key safeguard for older people. Advocacy is a key element of an effective response to elder abuse, but there is currently limited funding for advocacy on these issues. Currently the availability of advocacy varies state by state. All jurisdictions receive federal funding under the National Aged Care Advocacy Program for advocacy related to the provision of aged care services. Some jurisdictions also have local funding for advocacy on elder abuse or other issues. Commonwealth aged care legislation enshrines the right of aged care service recipients to access advocacy. ADACAS recommends that the legislation be amended to include advocacy for matters of elder abuse and that Commonwealth funding be provided nationally for elder abuse advocacy services.

Providing high quality advocacy to frail older people can be challenging when resources are not available to enable face-to-face conversations. This is particularly difficult in the large states and rural and remote regions. Older people may not be able to access a phone without support and may no longer have communication skills that make phone advocacy effective. In addition, face-to-face conversations enable additional trust to be built, in our experience it is once an advocate has built trust that the more serious concerns, like elder abuse, get raised.

Advocates are able to support the older person to understand their options, including legal and criminal proceedings, and decide what response to the abuse they wish to pursue. Advocates also work with vulnerable people to develop safeguards that can protect them against further abuse. Increased funding for advocacy, including specific funding for advocacy on elder abuse issues in each jurisdiction would improve outcomes for people experiencing abuse.

In addition to individual advocacy, many advocacy agencies, including ADACAS, have developed practical training and information sessions around the issues that older people face. With additional funding, advocacy organisations are well placed to provide additional training and awareness raising in elder abuse issues to a wide range of stakeholders such as those discussed in the ALRC discussion paper.

With regards to the Community Visitors’ Scheme: this is a very important program that can help combat social isolation for older people. It is an excellent way for volunteers to learn that an elderly person is experiencing elder abuse and provide a referral to an appropriate organization that can help the victim. In order for this to happen the volunteers need to participate in a training course to help them raise their own understanding of elder abuse and guide them as to the steps that they can take if they should become aware of it.

**m. Financial Institutions (question 25)**

ADACAS supports the proposal that all bank tellers and employees participate in financial abuse prevention training so that they are able to detect elder abuse occurring and can take steps to prevent it from happening.

**n. Family Agreements (question 27)**

Given the close relationships of family members and belief in the existence of trust, family agreements and the abuse of them is a common occurrence in the elder abuse space. As was evidenced in the case study previously given, they can go awry when family relationships break down. The biggest protector for the older person is to seek independent legal advice when entering such agreements and to ensure that the agreement is documented in a properly prepared contract, detailing the conditions of the agreement. However, older people are often reluctant to take such steps for fear of spending money on legal advice and also possibly offending a family member by seeking advice outside the family unit. Perhaps information could be provided to older people about this issue, encouraging them to seek legal advice in such situations and guiding them to experts in this area of law.

Case Study – financial abuse of older persons

Marina is an eighty-year-old woman from a European background. She came to Australia with her husband in the early 1950s and they prospered. Marina worked in the business and was a driving force behind its success. When her husband died Marina was left reasonably financially secure and owned her own house in an expensive part of Canberra. Marina has a daughter living abroad and a son living in Canberra. Marina has no cognitive impairment and manages her own affairs; however in late 2011 Marina had a bad fall and broke her leg and her arm resulting in long stays in hospital. Marina’s son has four daughters who are now getting too old to share bedrooms and was looking to up size his house and move to a “better” area but needed additional finance to purchase such a property.

Marina’s recovery period was going to be long but she started to progress well physically. Being in hospital with the only visitors being her son and occasionally daughter in law and grandchildren she became isolated and started to lose confidence in her ability to live alone. When her son made her an offer to live with them, sell her house and invest in their new property under a granny flat arrangement with Centrelink, it seemed tempting. Marina had been groomed by her son over a long period of time to believe she could not manage living alone any longer. A property was found by her son with a flat attached, Marina was taken from hospital to look at the flat and returned to the hospital all within the space of a few hours. She had no opportunity to discuss a major financial decision or the suitability of the property with an independent person. Based on promises of the support the family would give her and her now complete loss of confidence in her ability to care for herself Marina agreed and invested in the son’s new property.

The arrangement was doomed from the start, the promised care and support never eventuated and the flat could not have been more unsuitable. By the time ADACAS became involved Marina was locked in to the Centrelink granny flat arrangement for five years and a large sum of money was paid to the son to secure the granny flat interest. Centrelink applies a deprivation rule if the granny flat arrangement is terminated before five years has elapsed unless the reasons for leaving could not have been foreseen at the time of entering into the agreement.

The ADACAS advocate was able to support Marina and help her establish a new independent living arrangement. It could so easily have been a disaster for this client locked into isolation and despair for the last years of her life. This case highlights the hidden nature of financial abuse of older persons.

**o. Existing Redress (question 28)**

The difficulty for older people seeking redress when they face a form of elder abuse is that they have to rely on the legal system to respond well. The legal system is not friendly to the older person. Some older people may suffer from cognitive impairment or memory loss due to advancing age and declining health, and find providing evidence in the witness box difficult and challenging. Elder abuse cases may also not be pursued because the police believe the person will not make a suitable witness. Court process may be extremely intimidating to the older person not to mention the shame that may be felt when “airing the family’s dirty laundry” in a public space.

One possible solution to these difficulties is to adopt a restorative justice approach to elder abuse. Evidence from other countries, particularly Canada, indicates that restorative justice is an effective response to elder abuse. It involves working with both the older person and the abuser, to restore relationships and resolve contributing factors to ensure no further harm occurs.

Mediation between the two opposing sides may be another possible alternative to accessing the legal system’s adversarial approach to resolving elder abuse cases. This is a softer, more family friendly approach, whereby discussions are held between the two sides, with the assistance of a mediator. The case is not made public thereby avoiding the shame that is often felt when people access the legal system.

**p. Powers of Attorney and Guardianship (questions 29, 30, 31 and 32)**

The abuse of enduring powers of the attorney represents a significant concern for some of our clients for whom we provide advocacy. It is evident from our work that the responsibilities of the attorney and the rights of the vulnerable person are not clear in the minds of the people who make decisions on behalf of a vulnerable person who is the subject of an enduring power of attorney. Consequently, we have seen some clients suffer elder abuse from the misuse of powers of attorney.

Case Study - Lily

Ten years ago Lily was diagnosed with various health problems. Although Lily continued to live in her own home and went to work each day, she suffered from some mental health issues, eventually resulting in Lily being admitted to hospital. Her good friend Mary ensured that she was cared for and was able to access the appropriate medical support that she needed.

Over the years Lily’s mental health continued to deteriorate until she was eventually diagnosed with early onset dementia. One day she suffered from an episode that resulted in her admittance, once again, to hospital. The situation was so critical that her doctors did not expect Lily to make it through the night. The staff at the hospital contacted Mary as Lily did not have any other family who could support her. They requested that Lily sign an Enduring Power of Attorney (EPOA) so that Mary could be empowered to make all decisions on Lily’s behalf while she was in hospital.

Once Lily was discharged from hospital the hospital staff encouraged her to move into an aged care facility so that Lily could receive the support that she needed. Around the time of Lily’s admittance into the aged care facility a work friend advised Lily to appoint her son Clive as her EPOA, so that she could ensure that her welfare and finances were being taken care of when she moved into the aged care facility. Lily signed the EPOA without anyone realising that the EPOA appointing Mary was still active.

Initially Clive visited Lily regularly, often bringing clothes and toiletries that he had purchased for Lily. These visits eventually ceased altogether. As the years went by Lily’s dementia grew worse. When her pharmaceutical bills went unpaid the management of the aged care facility attempted to contact Clive, without success.

The staff of the nursing home telephoned Mary, who was a frequent visitor, explaining that they were unable to contact Clive and that Lily’s pharmaceutical bills were not being paid. They further advised Mary to contact ADACAS for advocacy support.

An advocate visited Mary and Lily, to understand the problem. The advocate subsequently telephoned the bank which held Lily’s bank account and was able to confirm that money was regularly being withdrawn, although no money was being spent to meet Lily’s needs. It was furthermore confirmed that the pharmaceutical bill was in arrears and that no effort was being made by Clive to ensure that this bill was paid.

It was evident that the current EPOA held by Clive needed to be revoked. The advocate supported an application being made to the ACT Civil and Administrative Tribunal (ACAT) to revoke the EPOA held by Clive and to ensure that Mary was able to support Lily to manage her affairs.

The advocate prepared the supporting documents for the hearing, including statements from Lily’s doctor advising that Lily had already been diagnosed with dementia before signing the EPOA appointing Clive. Considering these circumstances, it was clear that the EPOA appointing Clive was invalid.

The advocate attended the Tribunal hearing with Lily, who felt very nervous. Clive did not attend the hearing but was interviewed by the Tribunal member by teleconference call. Clive admitted that for the past six years he had been spending Lily’s money for his own personal use and that he had even given some of her money to his housemate. A few days before the hearing he had written a cheque from Lily’s account to pay for his car registration.

On the basis of the evidence before her the member revoked the EPOA held by Clive, stating that the case constituted a clear case of financial abuse of an elderly person. As it was a civil matter the member clarified that she was unable to proceed with considering the criminal ramifications of Clive’s actions.

Mary was once again granted EPOA of the management of Lily’s financial affairs. Upon further investigation it was discovered that Lily had no money left in her bank account as Clive had spent it all.

The inability of the tribunal to act other than revoking the power of attorney meant that there were no consequences for Clive’s actions. Increasing the power of Tribunals to act against abusers in elder abuse matters would be a welcome and appropriate step.

In addition we recommend that:

1. uniform, Commonwealth legislation, is enacted so that people throughout Australia are subject to the same laws in the creation and exercise of power of attorneys;
2. all powers of attorney be registered, so that it can easily be checked by relevant stakeholders whether or not a person is subject to a power of attorney;
3. training be provided to all holders of powers of attorney and guardians so that they know what their responsibilities are and do not erroneously believe that exercising a power of attorney can be done for the attorney’s sole benefit. It is evident from our work that there exists a lot of misinformation and lack of clarity as to the role of the attorney in this regard; and
4. more stringent audits be conducted to ensure that attorneys and guardians are making decisions that are consistent with the relevant legislation.

**q. Health Services (questions 35 and 36)**

Health professions can play a greater role in both preventing, detecting and not participating in elder abuse by ensuring that they receive training and information about elder abuse, both during their years of study for their qualification and as continuing professional education. We have represented clients who we believe have been subjected to a degree of elder abuse by health professionals who have tried to coerce elderly frail people to move to a nursing home, even in circumstances where the elderly person would prefer to remain living at home. This is often a consequence of frail elderly people being perceived by health professionals as “bed blockers”, taking too long to recuperate and preventing other patients from being able to access limited hospital beds. There is a role for primary health care and pharmacy in monitoring medication use and being alert for instances of chemical restraint.

**r. Police and Prosecution Response (question 46)**

More work needs to be done to ensure that both the police and prosecution are better able to respond to incidents of elder abuse and support the elderly victim. This includes training staff about elder abuse and ensuring that the police employ a Senior Liaison Officer for elderly people, as is the case in the ACT.

**s. Court Processes (question 47)**

Victims’ services and court processes could be enhanced and become more user friendly if advocacy support services were available for elderly people who need to use these services. The court landscape could further be enhanced via the use of hearing technology; ensuring that there is better wheelchair accessibility; and providing a less intimidating environment for elder abuse victims.

**t. Restorative Justice (question 49)**

As previously discussed, restorative justice has a strong role to play in addressing the issue of elder abuse and putting the victim in a better position to have their voice heard and to access the remedies that they require. The older person’s feelings about what has happened and how the solution can be created has a better chance of being articulated and acted upon within a restorative justice framework.

We thank you for the opportunity to provide a submission on these important issues and would welcome the opportunity to participate further as the review progresses.

Yours sincerely,

Fiona May

Chief Executive Officer

ADACAS

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1. Refer to <http://www.agedcare.org.au/publications/social-isolation-and-loneliness> 23 August 2016. [↑](#footnote-ref-1)
2. University of Western Australia 2011, ‘An Examination of the Extent of Elder Abuse in WA’ [↑](#footnote-ref-2)