

**AUSTRALIAN LAW REFORM COMMISSION**

**ELDER ABUSE**

**ISSUES PAPER 47**

**SUBMISSION BY**

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## Introduction

1. Townsville Community Legal Service Inc. (TCLS) is a community-based, non-profit legal centre. TCLS was established in 1991 as a voluntary service and funded by the Commonwealth in 1992. TCLS currently receives funding from Queensland and Commonwealth Governments.
2. TCLS is funded by the Queensland Government to provide a Seniors Legal and Support Service (SLASS). This services focuses on clients who are at risk of or are suffering elder abuse. TCLS has a decade of dealing with clients experiencing and affected by elder abuse.
3. This response does not address all matters raised in questions under the terms of reference.

## Elder abuse in Australia

4. The ALRC is well informed by recent public discussion about elder abuse in Australia. This includes the recent reports by the Australian Institute of Family Studies and various Commissions of Inquiry.
5. In Queensland, the Domestic Violence Taskforce<sup>1</sup> recommended a specific review into the prevalence and characteristics of elder abuse in Queensland to inform integrated responses.<sup>2</sup> This study is currently being conducted. The Queensland Parliament also finalized its "Inquiry into the Adequacy of Existing Financial Protections for Seniors" in 2015.<sup>3</sup>
6. Royal Commissions into Family Violence and Elder Abuse have occurred in Victoria<sup>4</sup> and New South Wales.<sup>5</sup> Both made numerous recommendations to change Government and non-government approaches to elder abuse.
7. It is well accepted that no Australian jurisdiction has laws specifically targeted to prevent, mitigate, redress or remedy elder abuse, exploitation or neglect of older persons. There are minimalistic, piecemeal measures in place. Lacey suggests "Australia's legal and policy frameworks for dealing with elder abuse are so weak it is a national disgrace..."<sup>6</sup>
8. TCLS agrees with Professor Lacey's statement and reiterates the call for a consistent national approach that combines a number of measures:

- Provides a suite of federal laws for matters within constitutional responsibility;

<sup>1</sup> Special Taskforce on Domestic and Family Violence in Queensland, Not Now, Not Ever, Putting an End to Domestic and Family Violence in Queensland.

<sup>2</sup> Ibid, see recommendations 11-13.

<sup>3</sup> Queensland Parliament, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Adequacy of Existing Financial Protections for Queensland Seniors, Report No.2 55<sup>th</sup> Parliament.

<sup>4</sup> <http://www.rcfv.com.au/Report-Recommendations>

<sup>5</sup> State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16).

<sup>6</sup> Lacey, Wendy --- "Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia" (2014) 36(1) Sydney Law Review 99, 130.

- Provides a guiding national policy framework;
  - Proposes model and uniform state and territory laws for matters outside constitutional responsibility;
  - Incorporates a national public awareness and education campaign;
  - Provides training to key areas of industry, professions and community.
9. It has been observed, "...the public-health response to elder abuse is limited by the almost complete absence of reliable evidence on the effectiveness of prevention programmes.<sup>7</sup> To a great extent this statement is true of all jurisdictions in Australia. The AIFS study reinforced this serious knowledge gap.<sup>8</sup>
10. States and territories that have programs aimed at raising awareness, educating those at risk of abuse or offending and offering remedial and support services have been developing prevention programs over the last decade. Most programmes are relatively new and chronically under-resourced. It is apparent from the work of recent inquiries that innovative programs exist but need wider rollout and greater visibility and resourcing.
11. Significantly, state commissions of inquiry and parliamentary inquiries are increasingly seeing elder abuse as a manifestation of family and domestic violence affecting a specific group, namely older persons.<sup>9</sup> Accordingly, recommendations are trending towards:
- Using existing statutory regimes as a base for reform such as family violence laws;
  - Integrated approaches to operational areas such as policing and health;
  - Developing communications, education and awareness strategies;
  - Reforming potential "tools" of exploitation such as powers of attorney, guardianship orders etc.
12. Despite several Inquiries, no state or territory inquiry has yet made recommendations about drafting specific elder abuse laws. Each of the inquiries was silent on the issue of whether specific laws are needed or in fact whether gaps exist in current protections. As noted earlier, they tended to focus on operational, interagency approaches.
13. This is a fundamental issue that the Commission needs to turn its attention to. Currently the issues paper approaches elder abuse through a patchwork of federal legal issues. Elder abuse requires more than framing principles – it needs a nationally, consistent legislative approach.
14. In Queensland, recommendations were that elder abuse fell within the statutory framework of the *Domestic and Family Violence Protection Act 2012* and should be part of an integrated

<sup>7</sup> World Health Organisation, World Report on Ageing and Health, Geneva, 2015, p.171.

<sup>8</sup> Kaspiew, R., Carson, R., & Rhoades, H. (2016). Elder abuse: Understanding issues, frameworks and responses. Melbourne: Australian Institute of Family Studies, p.38.

<sup>9</sup> State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16), p.59. Special Taskforce on Domestic and Family Violence in Queensland, Not Now, Not Ever, Putting an End to Domestic and Family Violence in Queensland, p.133; New South Wales Parliament, Legislative Council, General Purpose Standing Committee No. 2. Report no. 44, Elder Abuse in New South Wales, p.23.

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response.<sup>10</sup> Some useful preventative measures were imagined by the “Financial Protections” report.

15. These measures included improving financial resilience and financial literacy, improving access to financial advice, encourage long-term financial planning and pro-active independent decision- making, including improved uptake of powers of attorney, advanced care directives and will making.<sup>11</sup>
16. In New South Wales, recommendations were almost solely geared towards investigation of abuse via powers of attorney and the establishment of an Office of Public Guardian.<sup>12</sup>
17. In Victoria, the Royal Commission was squarely focused on the Family Violence Protection Act, operational responses and tailored support for victims.<sup>13</sup>
18. Each of these state approaches is useful within the context of each jurisdiction’s substantive and normative gaps, but also show the importance of national leadership around model laws and best practice. Without a national approach, each state and territory will likely continue to patch things up and make piecemeal changes. There needs to be a concerted effort to address elder abuse in a fulsome way.
19. TCLS appreciates that many submitters will address the difficult and problematic definitional issues in this area. This submission will focus on giving the ALRC a local picture of elder abuse in a regional community. It does this through 2 mechanisms: the results of a closed case audit completed by TCLS in 2016 (yet to be published); and through illustrative case studies.
20. This submission first looks at what can be learned from a contemporary approach to ageing policy.

### **Approaches to ageing policy**

21. TCLS proposes that any assessment of how laws might be reformed to achieve the aims set out in the terms of reference should pay attention to where ageing policy debate is currently centered.
22. This includes some key themes that must form part of any reform agenda:
  - The utility of taking a life course approach;
  - Defining aspects of elder abuse;
  - The importance of combating ageism;
  - The importance of human rights based approach;
  - Aligning with the legal needs of older persons.

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<sup>10</sup> Above note 1, p.136.

<sup>11</sup> Above note 3.

<sup>12</sup> Above note 9, p.xvii-xviii.

<sup>13</sup> Ibid, pp.34, 86, 87

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## Life course approach

23. The World Health Organization (WHO) is challenging the way we think about ageing. The Director-General has said:

“...the evidence shows, the loss of ability typically associated with ageing is only loosely related to a person’s chronological age. There is no “typical” older person. The resulting diversity in the capacities and health needs of older people is not random, but rooted in events throughout the life course that can be modified, underscoring the importance of a life-course approach.”<sup>14</sup>

24. This approach permeates all other approaches and should be a cornerstone of any structural reform agenda.

25. In response to the Second United Nations World Assembly on Ageing (2002), the WHO developed the “Active Ageing Framework”. The framework includes elder abuse under the heading of “security” to “[E]nsure the protection, safety and dignity of older people by addressing the social, financial and physical security rights and needs of people as they age.”<sup>15</sup>

26. The WHO now promotes a public health framework for healthy ageing. Key issues for action include:

- Dealing with diversity
- Reducing inequity
- Enabling choice
- Ageing in place.<sup>16</sup>

27. A similar approach could be taken to elder abuse. We commend the report and this approach to the Commission.

## Defining aspects of elder abuse

28. We must ask the question about whether age should be the defining aspect of elder abuse, or whether it should be conceptualized on the basis of “an assessment of capacity for self-care and self-protection.”<sup>17</sup> The Commission has posed this same issue at question 1.

29. The Australian Institute of Family Studies suggests “[T]his analysis highlights an important issue in considering definitions, given that many of the behaviors captured by the definition may be experienced at any stage of the life course and are covered by various criminal and civil law frameworks.”<sup>18</sup>

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<sup>14</sup> Above note 7, p.vii.

<sup>15</sup> Ibid, p.52.

<sup>16</sup> Ibid, p.35-36.

<sup>17</sup> Above note 8, p.3.

<sup>18</sup> Ibid, p.3.

30. This approach further reinforces the importance of a life-course approach. It allows a more targeted and effective preventative approach. The Commission should base its definitional discussion around this issue so as to provide a central method for comparing how we currently define elder abuse and how it currently fits within or without existing frameworks.

### Combating ageism

31. The WHO has reinforced the importance of combating ageism as “the core of any public health response to population and ageing.”<sup>19</sup>
32. Ageist attitudes
- “...limit the way problems are conceptualized, the questions that are asked, and the capacity to seize innovative opportunities. As a starting point for policy-making, they often lead to great emphasis on cost containment.”<sup>20</sup>
33. Law reform must be driven by the need to combat ageism in all manifestations: Stereotyping (incompetence, illness, and irrelevance), Prejudice (benevolent or hostile), Discrimination, harassment and vilification and Abuse, exploitation, neglect and violence.
34. Benevolent prejudice is among the most entrenched forms of ageism. It is the tendency to pity, seeing older people as friendly but incompetent. It is superficially positive but ultimately reinforces inferiority. It positions older persons as frail, easily duped and needing protection rather than vital, active and independent.<sup>21</sup> It keeps older persons in an inferior position. It is embedded in public policy.
35. The impact of ageism is amplified where it also involves another “ism”. Much of the research on elder abuse validates that gender and race can exacerbate ageism as is common with intersectional discrimination.
36. The need to combat ageism further reinforces the value of a life-course approach.
37. Any law reform approach must also observe the obvious impact of intergenerational resource tensions in the way elder abuse and other aspects of ageism develop from descriptive stereotypes (what older persons are) and prescriptive beliefs (what older persons should be).
38. Generational tensions to some extent derive from the values we draw from a hypothetical age queue – “as long as the line keeps moving, everyone gets his or her privileged turn. However those at the back of the line are dependent on those at the front transitioning away in order to keep the line moving.”<sup>22</sup>

<sup>19</sup> Above note 7, p.218-219.

<sup>20</sup> Ibid.

<sup>21</sup> The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on legal and Constitutional Affairs, *Older People and the Law*, September 2007, p.2.

<sup>22</sup> Susan T. Fiske\* and Michael S. North, A prescriptive intergenerational-tension ageism scale: Succession, identity, and consumption (SIC), *Psychological Assessment*, Vol 25(3), Sep 2013, 706-713.

39. These generational tensions can be exacerbated by laws that validate the hypothetical age queue or intergenerational attitudes:
- Facilitating active, intergenerational *succession* of enviable resources (e.g., retiring from jobs, ceding wealth),
  - Limiting passive *consumption* of shared resources (e.g., minimizing healthcare dollars, expediting highway traffic), and
  - Avoiding symbolic youth *identity* resources (e.g., social networks, popular music, fashion).<sup>23</sup>
40. Research around contestation of wills and estates<sup>24</sup> also shows that intergenerational tensions can become embedded in the legal system around processes that are essentially ageist.

### Human rights approach

41. The prevalence of disability is linked to ageing and the largest cohort of those with disability is older person. A human rights approach is essential for older persons.
42. The Commission's Equality, Capacity and Disability in Commonwealth Laws report noted "It is about respecting people's dignity, autonomy and independence, while supporting them to make their own decisions, where such support is needed."<sup>25</sup>
43. In that report the Commission noted:
- "This reflects an important movement away from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society."<sup>26</sup>
44. The Independent Expert on the Enjoyment of Human Rights by Older Persons recently noted the same approach. She noted:
- "paradigm shift from a predominant economic and development perspective to ageing to the imperative of a human rights-based approach that views older persons as subjects of law, rather than simply beneficiaries, with specific rights, the enjoyment of which has to be guaranteed by States."<sup>27</sup>
45. Accordingly any approach to law reform must embody the notions of dignity, autonomy and

<sup>23</sup> Ibid.

<sup>24</sup> Tilse, C., Wilson, J., White, B., Rosenman, L. & Feeney, R. (2015) *Having the Last Word? Will making and contestation in Australia*. The University of Queensland.

<sup>25</sup> ALRC Summary Report 124, 2014, 7.

<sup>26</sup> Ibid.

<sup>27</sup> Human Rights Council, Report of the Independent Expert on the enjoyment of all human rights by older persons, A/HRC/33/44, p.21.

independence.

46. This seems to be inherent in the framing principles within the Commission's terms of reference: "the principle that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse."

### Legal needs of older persons

47. The final issue that should be considered is the legal needs of older persons. There have been very few reports and those are now more than a decade old so elder abuse was not a focus.<sup>28</sup>
48. Age is strongly related to prevalence of legal problems, the strategies used to resolve them and whether or not they are finalized.<sup>29</sup> Legal problems tend to reflect stages of life.
49. The *Legal Australia-Wide Survey – Legal Needs in Australia* looked at predicting prevalence of legal problems based on age. It found that:

"In keeping with past research, the LAW Survey also demonstrated that different types of legal problems tend to peak at different ages and appear to reflect people's changing life circumstances as they progress through different stages of life."<sup>30</sup>

50. For older persons, the findings were that:

"...legal problems tend to decline significantly after middle age, from the mid 50s onwards ... these findings are consistent with changes in life circumstances, such as retirement and grown children leaving home. Most obviously, the low odds of legal problems related to employment in the oldest age group across jurisdictions are likely to largely reflect the high retirement rates in this age group. Although most types of legal problems are less prevalent among older people, some types of legal problems are relatively common in this age group. In particular, past research has found that wills, estates and power of attorney issues are common in the older age groups. The LAW Survey replicates these findings."<sup>31</sup>

51. These findings are somewhat bland and belie the fact that "wills, estates and power of attorney issues" are inherently linked and "part and parcel" of elder abuse and financial exploitation.
52. The NSW report did consider elder abuse in some detail. It reached the same conclusion that many have that "lack of a coherent definition of elder abuse" impacted on responses.<sup>32</sup> They also noted that elder abuses involvement with "disparate areas of law, however,

<sup>28</sup> Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry, Katrina Wong, *The legal needs of older people in NSW*, Law and Justice Foundation of NSW 2004; Susan Edwards and Antonia Fontana, *Legal Information Needs of Older People*, Law and Justice Foundation of NSW 2004.

<sup>29</sup> Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia*, Access to justice and legal needs; v. 7, p229.

<sup>30</sup> *Ibid*, p172.

<sup>31</sup> *Ibid*, p.173.

<sup>32</sup> Above note 28, p.287.

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provide little assistance in terms of a consistent paradigm or approach to the problem.”<sup>33</sup>

## Summary

53. Overall it seems appropriate that the Commission’s approach must observe that older persons are not a homogenous group and feel the impacts of elder abuse at different life stages and in different ways and as a manifestation of ageism and also because of the legal system’s piecemeal response.

## A local picture of elder abuse

54. Townsville is a regional city in North Queensland with a population of 200,000 people. Townsville’s median age is 33.3 years, which is younger than the Queensland median of 36.8 years.
55. Distribution of older persons aged 55 and older is under the Queensland average. Those aged 65 plus are 10.6% of the population (at 20,344) compared with 14% Queensland wide. Townsville is projected to have significant growth in its ageing population in the next thirty years.
56. Over the past twelve months, TCLS has conducted a close case audit of 450 of its elder abuse files and provides its response around the findings of that audit. Closed cases were assessed against six (6) data sets:
- Victim demographics
  - Perpetrator demographics
  - Types of abuse
  - Factors contributing to abuse
  - Interventions
  - Barriers to pursuing assistance
57. Each of these areas is dealt with in turn. In each case findings are compared with internationally accepted risk factors and strength of evidence for the risk factor.

## Victims

58. Overall, our findings matched Australian and wider literature on elder abuse.
59. The WHO summarized the profile of victims as follows:

*“Victims of elder abuse are more likely to be female and to have a physical disability; be care-dependent; have poor physical or mental health, or both; have a low income; 10.and lack social support”<sup>34</sup>*

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<sup>33</sup> Ibid.

<sup>34</sup> Above note 7, p.74-75.

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60. Victims were predominantly women (61%). This accords with a gender being a low-moderate risk factor for abuse.<sup>35</sup>
61. Victims were Australian born (85%) who spoke English (86%) with very few have aboriginal and Torres Strait islander status (3%).
62. ATSI status is a service access issue and very few studies have looked at the place of elder abuse within ATSI community. The Commission should identify this as a key area for further discussion.
63. The victim's age range varied from 50<sup>36</sup> to 100 years of age and clients' ages were ranked as follows:
- 75-79 (17%)
  - 70-74 (17%)
  - 65-69 (14%)
  - 80-84 (13%)
  - 60-64 (9%)
  - 85-89 (7%)
  - 55-59 (4%)
  - 90-94 (2%)
  - 50-54 (1%)
  - 95-100 (<1%)
64. The predominance of clients was in age cohort aged 70-84 (61%). This accords with age 74 plus being a low-moderate risk factor.<sup>37</sup>
65. This also mirrors current Australian life expectancy for Australians, though ATSI persons are still almost 10 years behind. This adds to the importance of identifying cultural aspects of elder abuse within ATSI populations.
66. Marital status was varied with most being married (40%) then widowed (32%), single or never married (14%) and divorced (13%). Marital status is a low-moderate risk factor for elder abuse.<sup>38</sup>
67. 71% of victims had a disability. Disability<sup>39</sup> is a strong indicator of risk of elder abuse.<sup>40</sup>
68. Referral source was self (29%), other legal centre (17%), other (13%), family (11%), community agency (9%) and government agency (8%) with police at (4%). First contact

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<sup>35</sup> Above note 7, p.74.

<sup>36</sup> It is accepted by TCLS that ATSI persons can be considered "older" from age 50. This is featured in our service agreement with the Department of Communities but also in the literature.

<sup>37</sup> Above note 7, 74.

<sup>38</sup> Ibid.

<sup>39</sup> Described by the WHO as including: Dependence: significant disability, Poor physical health, Mental disorders: depression, Cognitive impairment.

<sup>40</sup> Ibid.

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mirrored referral with self at 83% and family (12%) and community agency (7%). This indicated that older persons were likely to refer and contact a service. Importantly, this undermined the mythology that older persons will not self-refer or seek help about elder abuse.

69. Income scale was below 26,000 (97%) and age pension in 95% of occurrences. 4% clients had earnings. Low income was also a recognised strong indicator of risk of elder abuse.<sup>41</sup>
70. It was a clear finding that “impacts may be particularly significant in older people who have reduced intrinsic capacity and less resilience to cope with the physical and psychological injuries that may result from abuse.”<sup>42</sup>
71. Overall, our findings about who was a victim of abuse were uncontroversial and build on the known profile.

### Perpetrators

72. The WHO summarized the character of those who perpetrate elder abuse:

“Family members who abuse older people are more likely to have mental health issues, (for example, personality disorders) and substance abuse disorders, than family members or caregivers who do not abuse. Abusers are themselves often dependent on the abused person.”<sup>43</sup>

73. Data on abusers’ demographics included a wide range of data sets.
74. Individual abusers were men (57%) and women (43%). Where age was known it tended to be predominantly under 50 (60%).
75. Relationship to the abused was key in many cases. In some cases the nature of the relationship is a low-moderate risk factor in of itself.<sup>44</sup>
76. Relationship to abused was a range of relationships including Sons (17%), Daughters (21%), sons in law (5%), daughters in law (5%). Including all forms of children (biological, in laws, adopted, fostered it was sons (23%) and daughters (28%).
77. Abused lived with abusers in 27% of occasions. This is a strong risk factor for elder abuse.<sup>45</sup>
78. Characteristics of abusers were collated and were many and varied. Of the 20 factors, key trends included:

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

- History of family conflict (15%)
- History of abuse to others (13%)
- Shared living situation (12%)
- Dependency on older persons (12%)
- Abuser was unemployed or had alcohol dependence or mental health diagnosis (7%)

79. Many of our findings matched individual risk factors for perpetrators. Dependency, drug and alcohol dependence and mental health issues are all strong risk factors.<sup>46</sup>
80. Our findings about perpetrators also validated much of what is known about them. It would be interesting for the Commission to investigate the prevalence of children based on relationship. Our own ranking was the same for sons and daughters: Highest to lowest: biological>in-law>step>adopted>foster.

### Types

81. Types of abuse were recorded against key types including verbal, psychological/emotional, physical, sexual, financial, fraud, neglect, abandonment, systemic, spiritual and cultural and institutional, medication-related.
82. The findings were that elder abuse took a myriad and hybrid forms.
83. Verbal abuse had 447 occurrences across ten (10) manifestations which were ranked as follows:
- Swearing (19%)
  - Name-calling (19%)
  - Terrorising/menacing (15%)
  - Insults (13%)
  - Belittling (10%)
  - Threats to harm others (7%)
  - Ridiculing (7%)
  - Humiliation (6%)
  - Habitual blaming/Scapegoating (6%)
84. Psychological/Emotional abuse had 659 occurrences across nine (9) separate manifestations which were ranked as follows:
- Intimidation (19%)
  - Harassment (16%)
  - Disrespect (14%)
  - Being ignored (13%)
  - Coercion (12%)

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<sup>46</sup> Ibid.

- Denial of abuse (11%)
- Being excluded (8%)
- Being isolated (5%)
- Blackmail (4%)

85. Physical violence had 117 occurrences across 12 manifestations, of which 10 were apparent and which were ranked as follows:

- Destroyed property (30%)
- Hit/Punched (15%)
- Slapped (14%)
- Pushed (13%)
- Hit with object (10%)
- Grabbed (9%)
- Weapon used (3%)
- Kicked (1%)
- Restrained (1%)

86. Sexual abuse was limited to 15 occurrences across 10 manifestations (not all appeared) which were ranked as follows:

- Rape (5)
- Attempted rape (1)
- Forced sexual acts (2)
- Exhibitionism (2)
- Sexual comments (2)
- Sodomy (1)

87. Financial Exploitation and Fraud had 537 occurrences across 28 manifestations.

88. Neglect cases included 20 occurrences over 4 manifestations including Intentional neglect (11), unintentional neglect (3), self neglect (1) and fail to provide necessities (5).

89. There were 32 cases of institutional abuse. Seven (7) of those instances included aggressive staff, 15 cases of lack of care and/or neglect within the institutional setting, 4 cases of restrictive practices.

90. There were 11 cases of abandonment. 5 occurred within a residential setting, 3 within a nursing home and 3 within a hospital setting.

91. There were 5 cases of abuse by over medicating.

92. Our results mostly mirrored prevalence studies. The results will be published in detail with commentary and analysis later this year.

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## Factors contributing to abuse

93. The factors recorded covered 33 distinct circumstances. Factors contributing to elder abuse closely aligned with accepted low-moderate risk factors. These included social isolation, lack of awareness about rights and lack of awareness of assistance.<sup>47</sup>

## Assistance

94. In roughly 50% of matters only legal assistance was required and therefore provided. In roughly one quarter of matters only social work assistance was needed. In roughly one quarter of matters both types were required.

95. 23 different types of assistance were identified by the audit. Assistance often involved a multiplicity of actions.

96. The predominant actions taken were:

- Advised of legal rights (15%)
- Giving instructions to take some action (15%)
- Written demands (11%)
- Advocacy (10%)
- Counselling (8%)
- Entering formal negotiations (4%)

97. Clients became repeats clients in one quarter of cases.

98. The assessment of whether actions reduced risk of further abuse were that the likelihood remained unchanged in 24% of cases, remained high in 20% of cases and was unlikely in 56% of cases.

## Barriers

99. TCLS considered the barriers in place for accessing assistance in each case. 24 barriers were identified by the literature.

100. In almost 25% of cases being unaware of help was a barrier.

101. In around 10% of cases two factors were identified: fear and powerlessness.

102. In around 5% of cases factors identified included: love for the abuser, fear of loss of family contact, low self esteem, fear of loss of financial resources, ongoing threats from the abuser, family loyalty were identified as barriers.

103. In cases involving ATSI persons, barriers included:

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<sup>47</sup> Ibid.

- Distrust of the legal system;
- Distrust of government;
- Prior experience with statutory authorities;
- Cultural taboos;
- Fear of lost contact with grandchildren;
- Shame;
- Acceptance of abuse; and
- A lack of specialist services.

104. In cases involving CALD persons, barriers included

- Language barriers;
- Fear of the “Australian” system;
- Social isolation;
- Lack of understanding of rights;
- Financial or emotional dependence;
- Cultural taboos; and
- Fear of institutionalisation.

## Summary

105. The outcomes of the closed case audit are only sketched out here. The findings support the existing knowledge base about a range of aspects of elder abuse. There are some nuances that reflect our clients are from a rural, regional and remote area. Additionally, Townsville has very high rates of domestic and family violence. Domestic violence order applications were 3% of the population.<sup>48</sup>

## Thematic Issues

### Defining elder abuse

106. TCLS considers that the definition of elder abuse warrants significant discussion. The example of abuse in aged care shows how important issues of context are for this part of the Commission’s deliberations.

107. Abuse in aged care is complex because it is multifaceted and not all permutations fall within a traditional definition of elder abuse. Attachment “1” shows how complex reliance on the WHO definition is.

108. The diagram imagines elder abuse across a range of scenarios “under one roof”:

- Spouse who resides in the same facility
- Spouse or family member who visit the facility, including the range from grandchildren, children (biological, in-law, step, adopted, foster), spouse, siblings or more distant relatives

<sup>48</sup> Above note 1.

- Staff who work at the facility or who visit the facility
- Other residents of the facility
- Visitors to the facility

109. Using the WHO definition, some aspects of the abuse fit, others don't.
110. In the United States, institutional abuse is a subset of elder abuse and contains its own subset of overt abuse, program abuse and system abuse.<sup>49</sup> Though experts argue, a consistent definition includes "institutionally caused physical, psychological, financial, or sexual abuse or neglect."<sup>50</sup>
111. The lines are further blurred where there is a conglomerate effect – such as where a relative is abusing an older persons and the staff or facility manager is aware but takes no action – exhibiting neglectful behavior. Or where they are complicit in exploitation because of fee payments.

### Question 1

112. In some ways the target of the abuse is the only consistent concept across types of elder abuse. The victim, their assets, their relationship or dependence or their vulnerability could be the target or the trigger. The ageing process or their life course stage could be the principal causative factor. This underscores the importance of discussion around the approach suggested by Clare et al around whether age should be the determinant or defining quality.
113. Increasingly, we see age as a defining quality but not the only one. Chronological age is one of many life course issues that follow the ageing process that are relevant. A good example is the onset of poor health or impact of generational chronic poor health. It is known that poor health leads to isolation and in turn potentially abuse.
114. For example, there is the impact of inequity to take into account. Let's just pause and look at this a moment. A review of health inequalities since 2010 in the United Kingdom found that while, on average, people could expect to live to age 77, 15 of these years would be spent with some form of disability. Moreover, both life expectancy and disability-free life expectancy varied depending on where someone lived. On average, people living in wealthier neighbourhoods in England die approximately 6 years later than those living in poorer neighbourhoods. The difference in disability-free life expectancy was even greater: 13 years. So people living in poorer areas not only die sooner, but they also spend more of their shorter lives with limitations of capacity.<sup>51</sup> One might also infer a greater potential for elder abuse in poorer neighbourhoods based on what is known about victims, perpetrators and triggers/factors.
115. The WHO has recommended that the principles that matter are that the people with the

<sup>49</sup> Powers, J. L.; A. Mooney & M. Nunno (1990). "Institutional abuse: A review of the literature". *Journal of Child and Youth Care* 4 (6): 81.

<sup>50</sup> McDonald, L. (2011). "Elder abuse and neglect in Canada: the glass is still half full". *Canadian Journal on Aging* 30: 437.

<sup>51</sup> Above note 7, p.9.

greatest health needs have the fewest resources to address it and public health policy must be crafted to overcome these inequities, not reinforce them.<sup>52</sup> Elder abuse is no different and definitions need to also be part of this paradigm. We are not suggesting elder abuse is a problem solely of the poor, rather that definitions need to be crafted so as to contextualize elder abuse. The incidence within communities affected by poverty and other relevant factors cannot be ignored. If one ignores the context then prevention and response is unlikely to succeed.

116. Using the aged care scenario again, in aged care is a life course stage that has particular risks. It includes those who are most vulnerable to abuse. Working through this example, the risk factors likely to be present for residents of aged care include:
- Age cohort, gender (low-moderate);
  - ATSI background or CALD background (low-moderate);
  - Dependence: significant disability, poor health, mental disorders, cognitive impairment (strong);
  - To enter aged care an older person must have high care needs and dependence; (Strong)
  - The rate of mental illness, including depression and anxiety is higher in aged care than outside aged care and can be from 10% to 35%.<sup>53</sup> (strong)
117. Turning again to the ATSI example, “older” may equate to 50 years.<sup>54</sup> It is the ATSI status that is the defining quality, not chronological age. Indigenous people can enter aged care at 50. 24% of indigenous people in aged care are under 65 years.
118. Compare this with 3% of non-Indigenous.<sup>55</sup> An ATSI person will not have access to the Age Pension or potentially superannuation for a significant period and therefore do not have many of the hallmarks of age or societal representations necessary to be seen and treated as old, even if they have “elder” status within their indigenous community. A life course approach to this case is needed to contextualize it.

## Question 2

119. TCLS has a multi-faceted approach to elder abuse in the local community. TCLS used the concept of Health Promotion model to develop its own Elder Abuse Prevention Model. The model was based on the WHO Ottawa Charter for Health promotion.
120. The model was developed to impact on the whole population through to the individual and uses the UN principles for older persons as guiding principles. The model was and remains a work in progress.

<sup>52</sup> Ibid.

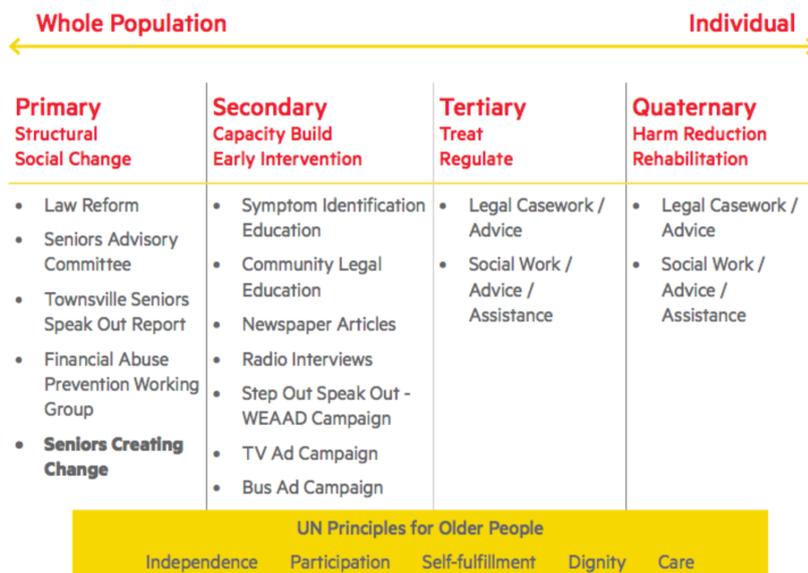
<sup>53</sup> [https://www.ranzcp.org/Files/Resources/Older\\_Australians\\_Deserve\\_a\\_Better\\_Deal\\_in\\_Mental\\_.aspx](https://www.ranzcp.org/Files/Resources/Older_Australians_Deserve_a_Better_Deal_in_Mental_.aspx); Seitz D, Purandare N, Conn D. Prevalence of psychiatric disorders among older adults in long-term care homes: a systematic review. *Int Psychogeriatr*. 2010 Nov;22(7):1025–39. PMID: 20522279.

<sup>54</sup> Cotterell, E., Leonardi, S., Coward, D., Thomson, J., & Walters, A. (2015). Elder abuse in the ACT: A literature review. Canberra: Council on the Ageing ACT.

<sup>55</sup> <http://www.aihw.gov.au/aged-care/residential-and-home-care-2014-15/characteristics/>

121. Each of the areas represents a form of advocacy. Primary and Secondary interventions aligned well with systems advocacy while Tertiary and Quaternary Interventions were legal advocacy

### TCLS ELDER ABUSE PREVENTION PLAN



122. Copies of reports on the Townsville Seniors Speak Out project and Seniors Creating Change model are included as annexures.
123. In our view the best practice response is where interventions are successful in their own right (in terms of their outcomes) but are also integrated with other responses. Seniors Creating Change is an excellent example in that it:
- Was developed through a *Primary Intervention* process (Townsville Seniors Speak Out);
  - Is a *Primary Intervention* in itself;
  - Engages in a range of *Secondary interventions* (CLE, Media, WEAAD);
  - Refers older persons for *Tertiary and Quaternary Interventions*.
124. From our perspective, the community legal centre response is a very effective one. SLASS services in Queensland report on very positive outcomes from their work, including the number of Service users that have shown improvements in being safe and/or protected from harm.
125. Additionally the outcomes from our audit showed that a multi-disciplinary response had utility in being flexible in providing the response that was needed at the time it was needed.
126. We have already noted how aged care poses a range of definitional issues for elder abuse methodology.

### Question 3

127. TCLS has limited experience in cases involving ATSI or CALD people. The audit did find barriers to them accessing assistance that aligned with the literature. The nuances of the RRR nature of our client cohort are yet to be completely analysed. Awareness of and access to services are two issues that seemed to feature strongly for our clients.

### Aged care

#### Question 11

128. Elder abuse occurs in all settings including residential, home and flexible care. Our closed case audit and client experience shows that perpetrators do not discriminate based on venue. There may well be contextual differences to how they abuse based on this factor. There are certainly differences in how difficult elder abuse is to detect and respond to in some settings.
129. Many of our clients have suffered elder abuse within their own home. Ageing in place carries risks that elder abuse will be more difficult to detect. It may be the most difficult to detect and many notifications for our service come from home help or visiting services. But those who do not use outside services are essentially hidden from view.
130. Those in residential care are at considerable risk of serious abuse.<sup>56</sup>
131. In overseas jurisdictions, institutional abuse is a subset of elder abuse and contains its own subset of overt abuse, program abuse and system abuse.<sup>57</sup> Though experts argue, a consistent definition includes “institutionally caused physical, psychological, financial, or sexual abuse or neglect.”<sup>58</sup>
132. The Commission needs to engender discussion around how institutional abuse differs from elder abuse or family violence within the institutional setting. And if these are different things, how might law reform bring them together in a protective regime.

#### Question 12

133. Transition to residential aged care was identified in the Townsville Seniors Speak Out Report as a fundamental concern to older persons. Key concerns included loss of dignity independence, freedom and privacy, living with restrictions, onset of depression and a lack of companionship. Lack of choice was another key concern.<sup>59</sup> These factors all weigh as risk factors for elder abuse.
134. Aged care assessment has the ability to play a very large role in detection and intervention in elder abuse. The two principal entry points at which elder abuse is detected are:

<sup>56</sup> Barnett, M. & Hayes, R. (2010). Not seen and not heard: protecting elder human rights in aged care. University of Western Sydney Law Review, 14.

<sup>57</sup> Above note 49.

<sup>58</sup> Above note 50, p.437.

<sup>59</sup> Bill Mitchell, Townsville Seniors Speak Out, 2011, 19-20.

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- The point at which health and care needs are assessed; and
  - The point at which income and assets issues are assessed
135. Most attention has been given to the former process – through the potential of elder abuse identification and detection at aged care assessment. The real quandary for policy makers is whether the process of aged care assessment should have a reporting or response process where elder abuse is suspected or detected.
136. The latter processes (income and asset assessment) have significant potential to show underlying financial exploitation and can also be a trigger or cause for exploitation. It is clearly a "hot spot" for abuse and exploitation.
137. The transition to aged care is a process that often causes family members to engage in asset and income assessment and reinvestment, which leaves assets prone to abuse, especially if the income or assets are "threatened" by the process. Family members, including likely beneficiaries may well intercept property and interests at this stage, or shore up their control by documents such as Enduring Powers of Attorney.
138. Some aged care facilities require the issue of an EPOA at the time of entry into care, which is of course a double-edged sword. The facility gains significant convenience from having an EPOA that can authorise transactions or changes in arrangements. Depending on who becomes the attorney(s), it may or may not be of benefit to the principal.

#### Questions 13 and 14

139. Notwithstanding that the aged care system is a consumer choice driven system, Townsville Seniors Speak Out listed a lack of choice as a key issue facing older persons moving into residential care.<sup>60</sup> Those with higher needs again such as dementia faced even narrower choices.
140. Many older persons find themselves in care because of the decisions of others, including medical professionals and appointed or substitute decision makers. When this occurs, the older person at the centre of the decision making process can be confused, angry and the process can have elements of elder abuse or even be a manifestation of elder abuse. In most cases care is warranted but in some it isn't – it is simply a way of removing an older person from an asset base.
141. There isn't a process by which people can challenge the decisions and circumstances that bring them into care or the particulars of agreements for care. Some of the preceding processes such as Guardianship do have avenues of review and appeal. Usually by the time the person is in care the horse has bolted – there is little they can do about their situation unless they have a relative or friend who can agitate for review and withdrawal from residential care. This usually only occurs when alternative arrangements for home care can be provided. People experiencing the onset of dementia often find themselves in this

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<sup>60</sup> Ibid.

situation. Many might well see residential care as a last resort but it is a first resort for many abusers.

142. The Charter has been criticised because “it has no enforcement or compliance mechanisms and is therefore exhortatory.”<sup>61</sup> While the Charter includes a right to live free from abuse and neglect, whether this right truly exists depends on how it translates into the accreditation and quality regime for aged care providers. There is a disconnect here between what the Charter says and the outcomes it produces. The Commission should engage in discussion around how aged care laws can seamlessly offer rights like this that produce real outcomes for residents.
143. Charters of client’s rights have long been criticised for their platitudinous limitations. Petre’s comments from 1994 are still apt: “A charter will not by itself create legal rights for which there would be sanctions, unless expressed to do so.”<sup>62</sup>
144. The right to be free from violence and abuse is both a positive and negative right. In the case of older persons, especially the most vulnerable, it requires state intervention at times to enforce.

#### Question 15

145. Quality of care is driven by statutory principles. These principles are however somewhat mechanically stated in the Quality of Care Principles 2014. Their inclusion is in such a way as to be measurable by meaningful outcomes and is linked to accreditation and quality processes. It remains to be seen whether the new principles lead to stronger human rights outcomes. Obviously monitoring the complaints mechanisms post introduction might identify trends.
146. Background checks are assessed under Guidelines which be should carried out in a proportional and appropriate manner, taking into account rights arising under *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) and associated regulations and International Labour Organisation Convention 111 (ILO 111). The system at present is essentially a self-regulating model.
147. However, there are views that the assessment would be better handled by a specialist body such as is the case with screening for blue and yellow cards in Queensland. The aged care industry employs a workforce of 352,145.<sup>63</sup> A system needs to have initial and ongoing checks of suitability to be robust. Whether all court outcomes, arrests and charges should be included is a question for discussion.
148. Obviously resourcing an agency to conduct suitability checks must be part of the compliance system and contributions should come from service providers through the

<sup>61</sup> Barnett, M. & Hayes, R. (2010). Not seen and not heard: protecting elder human rights in aged care. University of Western Sydney Law Review, 14, p.57.

<sup>62</sup> Clare Petre, Citizens’ Charters, ALJ Vol. 19, No.6, December 1994, p.296.

<sup>63</sup> <http://www.aihw.gov.au/aged-care/residential-and-home-care-2014-15/aged-care-spending/>

licensing system. An alternative would be providing referred powers to state and territory suitability assessors<sup>64</sup> based on a consistent sets of values.

### Question 16

149. Restrictive practices are “the deliberate or unconscious use of coercive power to restrain or limit an individual’s freedom of action or movement.”<sup>65</sup> International jurisprudence says that restrictive interventions must strike a lawful, appropriate balance between public interest and personal liberty.<sup>66</sup>
150. The *Aged Care Act 1997* and related laws do not explicitly address restrictive practices.<sup>67</sup> Nor do they require data collection or reporting on use. State Disability Services laws regulate their use, but do not generally apply to those over 65 years. This is an unacceptable example of ageism. It also ignores the potential differences in personal life course.
151. There are inherent complex conflicts within this system. Take the example of a 55 year-old indigenous person living in residential aged care on a disability support pension. While they would ordinarily be subject to state regimes to manage restrictive practices, on entry into age care they experience regime change that potentially waters down the protections in the system.
152. Restrictive practices used in care include:
- Seclusion;
  - Surveillance;
  - Close observation;
  - Exclusionary time out;
  - Consequence-driven restrictive practices;
  - Restraints: physical, chemical, mechanical, psychosocial, environmental.
153. Older persons with disability who show “behaviours of concern” are very likely to be administered a form of chemical restraint.<sup>68</sup>
154. Restrictive practices can amount to a deprivation of liberty, restriction of free movement, breach of privacy and assault. Six percent of residents experience harm from practices:<sup>69</sup>
- Serious injury: bruises, cuts, entrapment, strangulation and suffocation.

<sup>64</sup> <https://www.bluecard.qld.gov.au/interstate-visitors/index.html>

<sup>65</sup> Office of the Public Advocate Victoria, *Restrictive Interventions in Victoria’s Disability Sector Issues for Discussion and Reform*, August 2012, p.3.

<sup>66</sup> *H.M v Switzerland* - 39187/98[2002] ECHR 157(26 February 2002); *Guzzardi v Italy* - 7367/76 - Chamber Judgment [1980] ECHR 5(06 November 1980); *Witold Litwa v. Poland*(no. 26629/95, ECHR 2000-III).

<sup>67</sup> Office of the Public Advocate Victoria, *Restrictive Interventions in Victoria’s Disability Sector Issues for Discussion and Reform*, August 2012, p.2.

<sup>68</sup> See for example Lynne Webber, Mandy Donley and Hellen Tzanakis, ‘Chemical Restraint: What Every Disability Support Worker Needs to Know’ (Article, Office of the Senior Practitioner, 2008).

<sup>69</sup> <http://www.agedcarecrisis.com/restraints>.

- Changes in body systems: poor circulation, constipation, incontinence, weak muscles and bone structure, pressure sores, agitation, depressed appetite, infections, or death.
- Changes in quality of life: reduced social contact, withdrawal, loss of autonomy, depression, disrupted sleep, agitation, or loss of mobility.<sup>70</sup>

155. There have been calls for nationally consistent regulation of restrictive practices.<sup>71</sup> Australia's compliance with the Convention on Rights of Persons with Disability (CRPD) and the Convention against Torture etc. (CAT) is also called into question by the current system's lack of statutory recognition.
156. This issue warrants discussion around a number of key issues including what is best practice in regulating restrictive practices in aged care, how it might be monitored in home and other settings and what safeguards are needed. Additionally, an absence of any useful data on current and past use is concerning and needs to be addressed as a matter of urgency. It is simply unknown how often, what, when, how, why or on who these practices are used.

#### Question 17

157. Compulsory reporting of assaults is a feature of our aged care system, though only in residential care.<sup>72</sup> The regime has some serious limitations. What is reportable is weakened in two keys areas: (i) assaults between staff and residents and (ii) assaults between residents and residents.
158. As between staff and residents, any unreasonable use of force are is only notified where a staff member determines that an action constitutes unreasonable use of force.<sup>73</sup> The policy indicates in broad terms that:

"It is up to key personnel, in the first instance, to make a decision about what constitutes unreasonable use of force. The following is general guidance that may assist providers to determine if an incident has involved unreasonable force.

Unreasonable use of force ranges from what could be considered less serious (for example, use of force that does not cause injury) to more serious situations including hitting, punching or kicking a resident.

There may be circumstances when a staff member could be genuinely trying to assist a resident, and despite their best intentions, the resident is injured. This can occur because the resident may bruise easily or have fragile skin. An injury is not necessarily an indication of unreasonable use of force, nor is the absence of injury an indication that there was not an unreasonable use of force."<sup>74</sup>

<sup>70</sup> Ibid.

<sup>71</sup> ALRC Discussion Paper 81, 2014, p.201.

<sup>72</sup> See Section 63-1AA, Aged Care Act 1997.

<sup>73</sup> <http://guides.dss.gov.au/guide-aged-care-law/2/2/1#2>.

<sup>74</sup> <http://guides.dss.gov.au/guide-aged-care-law/2/2/1#2>.

159. As between residents, the legislation allows discretion not to report if a resident with an assessed cognitive impairment perpetrated the alleged assault and certain steps are taken.<sup>75</sup> This includes an unlawful sexual contact.
160. There has been significant criticism of the reporting regime. Barnett and Hayes suggest that reports made “may underestimate significantly the level of abuse, neglect, and breaches of standards by aged care facilities.”<sup>76</sup>
161. Principal concerns about the reporting system are:
- The exemptions make the system discretionary and the nature of the discretion means that there may not be an appropriate response to an assault;
  - Consequently, assaults occur for which:
    - The victim loses any right to redress or remedy;
    - The situation reinforces a substandard response to violence;
    - The family of the victim may not be aware of the assault;
    - The perpetrator potentially faces no sanctions, whether civil or criminal;
    - The service provider potentially faces no sanctions.
162. In reality, without knowing exactly how many assaults (including all defined at 63-1AA(9)) are not reported, it is difficult to determine the utility of the system. It might be very few, or notifications may represent the tip of an iceberg.
163. The authors of Norma’s Project noted that:
- “...compulsory and proposed mandatory reporting policies, while enacted with the best intentions of protecting older women, place them in a different situation to other victims / survivors of sexual assault who have the right to choose whether to report to police or not.”<sup>77</sup>
164. In our view there should be discussion around the utility of the system as it stands and recommendations for reform. The exemptions are in fact antithetical to the objects of a protective system. We are not advocating a system that persecutes those with cognitive impairments for behaviour beyond their control, rather a dynamic system that protects all from abuse.

### Questions 18 and 19

165. In our experience very few complaints of elder abuse make their way to the Complaints processes. The Commissioner in her speech on World Elder Abuse awareness Day, 2016

<sup>75</sup> Quality of Residential Aged Care: The Consumer Perspective. A Report for Alzheimer’s Australia, Paper 37, November 2013.

<sup>76</sup> Above note 61, p.47.

<sup>77</sup> Mann R, Horsley P, Barrett C, Tinney J. 2014. Norma’s Project. A Research Study into the Sexual Assault of Older Women in Australia, (ARCSHS Monograph Series No. 98), Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, Australia, p.53.

confirmed this where she said "Around 3 percent of the issues related to abuse. As I said, we don't get many complaints about abuse."<sup>78</sup>

166. Elder abuse needs a whole of Government approach.
167. This means that the three agencies (Aged Care Complaints Commissioner, the Aged Care Quality Agency and the Aged Care Pricing Commissioner) should develop an integrated strategy.
168. Elder abuse should be embedded in the principles (beyond the Charter) as follows:

*Accreditation Standards*

*1.10 protection from harm and abuse*

*The organisation's management has systems in place to identify elder abuse and protect residents from any harm or abuse including harm from staff, visitors and other residents.*

and

*Health*

*2.17*

*Care recipient's protection from harm and abuse is managed effectively.*

and

*Care Recipient Lifestyle*

*3.11*

*Each care recipient's right to freedom from abuse and harm is recognised and respected.*

169. Home care services can also be improved with the Principles including the possible inclusion of elder abuse within support services at (o), (p) and (q).
170. Clinical services could also include referral to elder abuse services where at 2 it states "Includes referral to health practitioners or other related service providers."
171. There needs to be a discussion about the utility of the aged care complaints system. It has had a number of iterations but none have been lauded. It has been subject to significant review over time including by the Ombudsman, the Productivity Commission and the Walton Review. Whether the "new" system is more successful in terms of human rights protections and outcomes for the system remains to be seen.

## Question 20

172. An integrated approach by all advocacy services involved in the area of elder abuse is needed. This includes advocacy services, specialist community legal centres, community visitors and elder abuse prevention services. This is currently being explored by the establishment of a national advocacy entity to speak for all advocates of older persons subject to or at risk of elder abuse.
173. There should not be an introduction of mandatory reporting for advocacy workers, it would be at odds with a best interests approach where they act for the individual in a personal

<sup>78</sup> <https://www.agedcarecomplaints.gov.au/resources/speeches-and-presentations/>

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advocacy role. While it might be seen that reporting obligations for elder abuse is acting in an older persons' best interests, it would only be so if the older persons actively instructed the advocate to raise or report the issues.

### Question 21

174. The aged care laws need to have an object inserted at 2-1 that says:

*“(k) to protect care recipients from exploitation, abuse and neglect”*

175. This object would then gain greater prominence and is more likely to filter down through the Act and statutory principles.

### Superannuation

#### Question 24

176. TCLS has encountered a number of cases where SMSF funds or similar were obtained by deception, used for speculation and were not returned to the older persons. This usually occurs within the parent child context. It can occur when the child is a trustee and not though the means of obtaining advantage differ.

177. We do see some potential for older persons to recover funds lost through access to the abuser's superannuation funds however. A number of our clients have been unable to obtain redress because of their abuser's (adult children's) financial circumstances, but where there are significant funds held in superannuation.

178. One potential area is the splitting and tagging of superannuation on settlement of matrimonial property. Where an older person has loaned money to a married couple that then separate, and the funds included in the settlement clearly include the older persons funds, there could be some consideration of how the older person's contribution should be resolved.

179. Third party creditor provisions in family law are not used for redress of elder abuse but are an additional point of potential redress where the matrimonial property settlement includes financial interests of older persons. These cases usually involve sale of a property with a granny flat or additional dwelling, to which the older person contributed financially, but was not afforded proper recognition by way of title or guarantee.

180. There are many permutations of this situation but the commonality is that the funds are difficult to recover because of how they are held or how they are about to be affected by other processes such as property settlement.

## Financial institutions

### Question 25

181. There is a substantial evidence base the elder abuse occurs in banking and financial systems. Financial exploitation is the most common form of abuse (prevalence of up to 9%).<sup>79</sup>
182. Importantly the data shows that financial exploitation commonly occurred concurrently with other types of abuse, particularly psychological and emotional abuse, verbal abuse and physical abuse. Given this, the data tends to validate the understanding that financial exploitation does not occur within a vacuum.
183. US research indicates that hybrid financial abuse is more likely to be perpetrated by family members or caregivers whereas pure financial exploitation or abuse is more likely to be perpetrated by non family members.<sup>80</sup>
184. Recent pilots of online education and assessment tool to help bank staff combat rising financial abuse of vulnerable people are promising.<sup>81</sup> The Australian Bankers Association has guidelines on exploitation.<sup>82</sup> More needs to be done in this area and it is ripe for further discussion by the Commission.
185. It would be instructive to have financial institutions conduct a blind study of contested or disputed accounts with a view to looking at features of elder abuse within those files and accounts. Our own data indicates that of the financial exploitation cases almost one quarter involved a financial institution including:
- Unauthorised, coercive or unduly influenced withdrawals
  - Misuse of an EPOA in context of financial services
  - Unauthorised financial transactions on accounts
  - Prevent older person from accessing accounts
  - Coercion to act as guarantor/security
  - Undue influence in asset transfer

### Question 26

186. Given that Banks and other financial institutions have a range of existing report obligations, whether they are obliged in respect of elder abuse should be discussed.

<sup>79</sup> Kaspiew, R., Carson, R., & Rhoades, H. (2016). Elder abuse: Understanding issues, frameworks and responses. Melbourne: Australian Institute of Family Studies, p.5.

<sup>80</sup> Sherif Soliman and Jason Beaman, One Piece of the Puzzle-Financial Exploitation and Elder Abuse, Chapter 2 in Aging and Money – Reducing the risk of financial exploitation and protecting financial resources (Ronan Factoria Ed), Humana Press, 2014, p.21.

<sup>81</sup> <http://www.bankers.asn.au/Media/Media-Releases/Media-release-2015/New-tool-to-help-detect-financial-abuse-of-Australians>.

<sup>82</sup> Australian Bankers' Association, Protecting vulnerable customers from potential financial abuse Industry Guideline, December 2014.

187. Currently anti-money laundering and terrorism laws require reporting of certain transactions. Large transactions undertaken by a POA holder might attract particular attention.
188. Banks should be required in the very least to record transactions undertaken by a POA holder, identifying whether it was in the company of the account holder or not. A major forensic issue when investigating financial exploitation cases is finding evidence that corroborates stories about amounts being taken either without knowledge or consent or against the interests of EPOA holders.
189. It is somewhat trite for the ABA to call for a consistent approach to elder abuse. It is within the ABA's purview to investigate, develop and implement best practices in this regard. It may well be that legislative intervention is required.
190. For example the responsible lending guidelines in the *National Consumer Credit Protection Act 2009* and *Regulatory Guide 209* could easily include elder abuse. They already include additional considerations that involve reverse mortgages.<sup>83</sup>
191. Likewise, the obligations for financial advisers under the *Corporations Act 2001* (Cth) such as the best interests obligations should be considered to identify whether there are areas that elder abuse might be recognised as an issue where older persons are co-investors or funding investments of others.
192. The Financial Ombudsman Service has produced some resources in this regard.<sup>84</sup> It includes relevant case studies.

## Family Agreements

### Question 27

193. Like many legal documents a family agreement can be a two edged sword. It can be very effective at setting out the rights of interests of older persons who willingly enter them but can also be a wolf in sheep's clothing – a tool of abuse in itself.
194. In the 450 closed-case audit, not one single older person had their interests reduced to writing in a family agreement or similar.
195. The audit revealed many cases where family agreements would have been very effective to record certain aspects of the agreements including the parties intentions:
- What was borrowed/lent and for what purpose
  - How it will be repaid including in what manner, with or without interest
  - Whether land or property was included and if so, how title or ownership was agreed to be settled

<sup>83</sup> <http://download.asic.gov.au/media/2243019/rg209-published-5-november-2014.pdf>

<sup>84</sup> See for example FOS Banking and Finance Bulletin 56.

- What happens on default, frustration or separation
- How rights can be enforced

196. A fundamental issue is when should family agreements be made or required and how can they be accessed by older persons in a way that is independent and affordable. Many agreements relied upon by children in elder abuse litigation was drawn up by lawyers without the parties seeking independent legal advice. Lawyers' professional commentary should expressly warn against acting for multiple parties in the drafting or execution of agreements or transfer of money or property as a result.

### Appointed decision makers

#### Question 29

197. In our closed case review, 13% of financial exploitation cases involved misuse of a power of attorney document.

198. There are a number of other cases where it was intimated but we had no proof that a POA was used, even though the perpetrator held it. In our estimation 15% of financial exploitation cases involve a POA of some form.

199. This is a major area for discussion. Many of the necessary changes have already been discussed in the Commission's previous Inquiry Reports and those of its state counterparts.

#### Question 30

200. We support registration of powers of attorney and integration into personal affairs information such as MyGov or Medicare.

#### Question 31

201. One would think that this is already part of the attorney's fundamental duties. Section 66 of the Powers of Attorney Act 1998 at section 66 provides that "An attorney must exercise power honestly and with reasonable diligence to **protect the principal's interests.**"

202. In reality the financial literacy of substitute decision makers is of crucial importance.

203. The system of appointment of attorneys only requires a willingness to act, rather than any competence to comply with the requirements of diligence, avoiding conflict, exercise of investment power, record keeping, separation of property.

204. The simple fact of the matter is most substituted decision makers are unaware of their obligations and responsibilities.

205. The consequences for failing to comply are serious and can include compensation and criminal prosecution. Obviously the consequences also include detriment to the principal. These arrangements can also lead to discord between family members, friends, supporters etc.

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206. Agencies with statutory roles inevitably owe duties to principals and are not in a position to assist Attorneys or Administrators with advice, especially if it involved a question about possible failure to comply with statutory duties. In some cases the attorney ends up unwittingly incriminating themselves over a breach of their obligations under law.
207. Balancing the proactive appointment of POAs with ensuring they are properly used and monitored is a very important aspect of this Inquiry.

### Question 32

208. Guardianship proceedings are like POAs, they can be sued effectively to protect and older person's interests and can also be a tool for abusers to disempower older persons. They are most commonly used between family members (usually siblings) in cases where there are suspicions of elder abuse. Regular Tribunal intervention is a protective layer but appointments are still made without proper training for guardians and administrators.
209. There is some merit in proposing a school for attorneys / guardians / administrators / trustees. It could well be an online training forum, which was adapted to the unique issues for each jurisdiction.

### Public advocates

#### Question 33

210. Public advocates have already taken an important role in the arena of elder abuse.
211. Public Advocates around the country have published important research in this area based on first hand experience. In our submission the Office of the Public Advocate should be separate and independent of the Office of Public Guardian. We note that the MNSW Parliament has recommended such a role be established after its elder abuse inquiry.
212. TCLS does not support Public Advocates taking on an adult protective services role. Investigating on own motion or complaint is very different to mandatory reporting.

#### Question 34

213. Our position is that current adult guardianship regimes are adequate and a general system of adult protective services would not improve the lives of Australians in any state or territory.
214. Reporting has also been said to potentially disadvantage cultural and linguistically diverse communities and aboriginal communities.<sup>85</sup>
215. There is an overwhelming move towards using guardianship jurisdiction as a battleground for contestation.

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<sup>85</sup> [http://www.eapu.com.au/uploads/research\\_resources/Mandatory\\_Reporting\\_Position\\_Statement\\_MAR\\_2\\_006-EAPU.Pdf](http://www.eapu.com.au/uploads/research_resources/Mandatory_Reporting_Position_Statement_MAR_2_006-EAPU.Pdf).

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## Health services

### Question 35

216. Teaching medical and allied health students about elder abuse and how it can be identified would be a very good first step. Including it in any practical or clinical training curriculum has obvious utility.
217. Working with specialists such as gerontologists, geriatricians and geriatric psychiatrists and community specialists such as lawyers, advocates and social workers to build a curriculum for students and clinicians and an education campaign for general practitioners and health professions such as nurses and allied health practitioners would be beneficial.
218. The role of health professionals is not mandated for elder abuse in the same way as child abuse. There may be some benefit in looking at reporting within the aged care setting for the medical profession. At this stage, they have no specific role in the Age Care reporting regime.

### Questions 37 and 38

219. Health Justice Partnerships do have the potential to identify and respond to elder abuse in a clinical setting. TCLS is in the process of setting up a HJP with Townsville Hospital aimed at elder abuse in recognition that the hospital setting is an ideal catchment for identification of elder abuse.
220. Hospital social workers are common referrers of elder abuse cases.
221. Privacy issues must be navigated carefully in this area and TCLS will only work with a client makes direct contact as opposed to conducting secondary consultations with allied health or other workers.
222. A reduction in privacy protections would be a poor price to pay where outcomes were not improved. Referral pathways with informed consent can be just as successful. One of the principal advantages of a HJP is that the lawyer is present and the referral is immediate.

## Redress & criminal law

### Question 39

223. Redress would need to have some basis within originating legislation. TCLS has concerns about how it would be achieved. It is an idea worth contemplation but probably difficult to implement.

### Question 40, 47 and 48

224. The question should be posed much more broadly about access to the legal system.

225. The administration of justice represents a keen example of the inconsistent treatment of older persons. Miller said, “If you design for the young you exclude the old, but if you design for the old you include everyone.”<sup>86</sup> This is true for legal and policy systems.
226. Many issues were identified in the 2007 report “Older People and the Law”.<sup>87</sup> Other national institutions have undertaken or are undertaking thematic research.<sup>88</sup> Many of the recommendations remain unimplemented.
227. International jurisprudence says competent judicial authorities should display particular diligence in handling cases involving older persons, taking in to account age and health.<sup>89</sup> The advanced age of a person is a factor in whether a case was dealt with “within a reasonable time” and may tighten the requirement for prompt trial.
228. Old age limits compensatory damages in all Australian jurisdictions and has a chilling effect on litigation. The principles were stated in *Packer v Cameron*:<sup>90</sup>
- “The amount of an elderly plaintiff’s damages for pain and suffering for a severe permanent injury – the loss of an arm, say, or very disfiguring scars – will usually be much less than a young person would get for the same injury, simply because the younger person can expect to have to endure its effects for a much longer time. There may be countervailing considerations working in the elderly plaintiff’s favor, but they are not likely to compensate, at least in most cases, for the discounting effect of his advanced age.”<sup>91</sup>
229. This principle is often applied.<sup>92</sup> It is a concern that such a principle would be carried over into any area of compensatory damages that sought to compensate older persons for abuse, but it seems likely without statutory intervention.

#### Question 42 and 48

230. The criminal law has not made any real advances in respect of elder abuse in any Australian jurisdiction.
231. Old age is a mitigating and aggravating factor in sentencing. Victim’s age aggravates<sup>93</sup> while offender’s age potentially mitigates.<sup>94</sup>

<sup>86</sup> Attributed to Glenn Miller, Director of Education and Research, Canadian Urban Development Institute.

<sup>87</sup> The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, Older people and the law, September 2007, Canberra; Government Response to House of Representatives Standing Committee on Legal and Constitutional Affairs, Older people and the law, undated.

<sup>88</sup> ALRC Report 120, 2013, Australian Human Rights Commission, Human rights approach to ageing and health: Respect and choice, 2012.

<sup>89</sup> See for example: Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons, ¶55. See cases: including *Süssmann v. Germany* (1998) 25 EHRR 64 and *Jablonská v. Poland* (2003) 36 EHRR 27.

<sup>90</sup> *Packer v Cameron* (1989) 10 MVR 173.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Reece v Reece, Varga v Galea* [2011] NSWCA 76, *Marshall v Clarke* (Court of Appeal, unreported 5 July 1994) and *Christalli v Cassar* [1994] NSWCA 48 (at 3).

<sup>93</sup> Section 16A(2)(d), Crimes Act 1914 (C’t’h).

<sup>94</sup> Penalties and Sentences Act 1992 (Qld), section 9(2)(e); Section 16A(2)(m), Crimes Act 1914 (C’t’h).

232. There are minimalistic, piecemeal measures such as criminal code aggravation of offences involving age.<sup>95</sup>
233. Examples of elder abuse laws can be found in other overseas jurisdictions and are worth considering. However it may be more pragmatic to begin by looking at existing criminal laws at state/territory and commonwealth levels to see what can be used.
234. It is important to not fall into the collocation of redress for offending conduct with protection from violence. Too many responses to family and domestic violence rely on protection order systems without a parallel and complementary criminal justice sanction.

### Question 43

235. Prosecutions for criminal neglect<sup>96</sup> are rare and civil cases rarer still. Judgments that set out sentencing for necessities of life cases invariably involve children.
236. The factual matrix of the elder abuse/neglect cases is chilling. In *R v Miller*, AJA Wilson recounted the neglect of a 76-year of woman by her daughter:

*"[26] Police and paramedics attended the applicant's house on the night Mrs Hys died. The living conditions were squalid: filth, faecal smearing on the walls, an overwhelming smell of animal urine and rotting food, and gross clutter and rubbish piled up to the point where moving around the house was difficult."*<sup>97</sup>

237. The facts of other cases such as in sentencing, Chesterman JA said, "[S]ociety must show its deprecation of those in responsible positions who neglect ...the elderly in their care to the point of death or serious illness."<sup>98</sup>
238. The question must be asked, are we as horrified with cases of neglect involving older persons, as we are children? Older persons die anyway, don't they? Is this an example of how we undervalue older person's lives and practice benevolent prejudice?
239. Coroner's Courts commonly deal with these issues. In Queensland, the *Thoreson* case raised chilling issues:

*"When Cynthia Thoresen was brought to RBWH, her state of filth, faecal contamination and the existence of numerous pressure sores suggested a severe degree of neglect by family members, particularly by her daughter ... The three week delay between the fall at home and the patient's presentation to RBWH for treatment, during which she was in pain, completely immobile and bedbound, I consider neglectful to the point of cruelty in a distressed, demented and totally dependent patient."*<sup>99</sup>

<sup>95</sup> The Criminal Code, section 340(1)(g).

<sup>96</sup> Such as section 285 Criminal Code.

<sup>97</sup> *R v Miller* [2011] QCA 160.

<sup>98</sup> *Ibid.*

<sup>99</sup> Findings of the Inquest into the Death of Cynthia Thoresen, 22 May 2013, 13.

240. While cases may be uncommon, prevalence will increase as society ages. Like so many cases, the Coroner noted caring responsibilities “can be a difficult challenge for a family.”<sup>100</sup>
241. Deaths in aged care seem to stay below our consciousness, part of the invisibility of older persons. There are good reasons for this. Deaths in aged care are not automatically reportable.<sup>101</sup>
242. The older the deceased is, the less chance of an autopsy or death investigation.<sup>102</sup> It is generally assumed, in the absence of clear indications to the contrary, that death was a result of natural causes.<sup>103</sup> Reform is needed as to how deaths of older persons, including in aged care, are reportable.

#### Question 44

243. For aspects of elder abuse that fit within the domain of family violence, laws should be adapted and amended to ensure that they do fit and can be accessed by those who require protection.
244. In our experience the definitional issues mean that many elder abuse cases do not fit within family violence laws. They are a square peg in a round hole. Policing of these cases also requires significant education and awareness so that police understand the nature of elder abuse.

#### Question 45

245. There are few occasions where reporting should be mandated in our view. The health system may be one of those areas in specific types of abuse, as might banking and finance for specific types of transactions. However we do not support a system that relies on an adult protective system.

#### Question 46

246. Police response is about priority and resourcing. Once elder abuse achieves some level of both in police services, it may improve in all areas of potential policing including protection orders, criminal prosecutions etc.

#### Question 50

247. Currently power of attorney and guardianship laws allow for compensation orders to be made where the principal has suffered a loss through the attorney’s actions. This might be a basis for exploring further law reform.

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<sup>100</sup> Above note, 14.

<sup>101</sup> [http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0006/84561/m-osc-deaths-in-care.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0006/84561/m-osc-deaths-in-care.pdf).

<sup>102</sup> Collins, K A & Presnell, S E 2006, “Elder homicide: a 20 year study”, *The American Journal of Forensic Medicine and Pathology*, vol. 27, no. 2, pp. 183–7.

<sup>103</sup> Payne, BK 2009, “Elder abuse”, in J Miller (ed.), *21st century criminology: a reference handbook*, SAGE Publications, Thousand Oaks, pp. 581–90.

**Attachment 1**