**Law Reform Commission Submission**

**Question 4: The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in evidence?**

There are some of gaps in evidence which need to be addressed to determine the true prevalence of elder abuse, including provision of a consistent definition, data collection and addressing the issues associated with under-reporting.

*Defining Elder Abuse*

WA Police defines elder abuse as the wilful or unintentional harm caused to an older person (60 years or older) by another person or persons with whom they have a relationship implying trust. There are however, numerous definitions of elder abuse for use by service providers to this demographic which can be problematic in applying a uniform inter-agency response to elder abuse. Although there is not one consistent definition, most of the definitions consider elder abuse as an inclusive term within a family violence context which is used to describe the mistreatment of older people through acts of commission (such as physical abuse) and acts of omission (such as neglect). The majority of definitions also indicate the various forms of abuse, physical, sexual, financial, psychological and neglect.

Consideration needs to be given to diversity factors when defining elder abuse as it affects different demographic groups within the community in different ways. Within Aboriginal and Torres Strait Islander communities, different cultural connotations are applied to “elder abuse”. The term elder and differing cultural expectations associated with kinship, sharing and reciprocity which could complicate the legal understanding of elder abuse[[1]](#footnote-1) Within LGBTIQ (Lesbian, Gay, Bisexual, Transgender, Intersex and Queer) communities there is the existence of barriers to reporting crime due to their reluctance of allowing their sexuality to be revealed and questioned in the public and legal arena, and the presence of hostility -due to their sexual orientation or gender identity. These issues can manifest and victims risk social isolation, which in turn increased their vulnerability to abuse.[[2]](#footnote-2)

*Data Collection and the Issue of Under-Reporting*

Within WA, there is no specific criminal offence for elder abuse therefore it is problematic collecting consistent data on its prevalence. This has been highlighted within the Community Development and Justice Standing Committee report on *Age Friendly WA,* and recommends increased support for community and government bodies to establish the collection of reliable statistics on the prevalence of elder abuse in WA to improve targeted service delivery and response to the issues.

There are issues in determining the prevalence of elder abuse due to under-reporting. Some of the reasons for under-reporting include that the victim is dependent on the perpetrator for their daily care and are fearful that reporting may see them placed in a residential care facility, the shame associated with being a victim of elder abuse, fearful of jeopardising relationships with family, and fear of retaliation. There may also be the inability of the older person to access police services to be able to report crime, and the ability to be able to communicate what has been happening to a police officer because due to the abuser being the primary carer, the presence cognitive impairment, or language and cultural barriers. Due to the lack of awareness, individuals may not be aware that elder abuse is a crime. The presence of these factors will impact on the distortion of prevalence of elder abuse and the ability of policing organisations to adequately respond and implement strategic responses. [[3]](#footnote-3)

The types of elder abuse, based upon WA Police definition are; financial, physical, sexual, psychological, neglect and social.

The data within Appendix 1 (report 1) was taken from the WA Police Incident Management System (IMS), and shows the total number of offenses, by type, where the victim is aged 60 and above. The data indicates the highest offence type recorded by WA Police is theft, the definition of which is; *the unlawful taking or obtaining of money, goods or services, without the use of force, threat of force or violence, coercion or deception, with the intent to permanently deprive the owner or possessor of the use of the money or goods.*

Other offence types related to elder abuse, such as fraud were the 4th highest, and Non- Domestic and Domestic Assault followed (6th and 7th respectively).

In terms of offences occurring based upon the WA Police definition of Elder Abuse, there needs to be relationship between offender and victim where there is an implication of trust which results in harm to an older person. Appendix 1 (report 5) shows the relationship between the victim and offender, where the victim is identified as being sixty or over. The figures indicate a high proportion of incidents involve an offender who has relationship with the victim, however, as stated previously due to the issues with under-reporting means that this data is not a true reflection of the prevalence of elder abuse in Western Australia.

**Question 11: What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?**

Data extracted from the WA Police IMS system, Appendix 1 (report 2 (b)), shows the prevalence of offences committed against persons in aged care settings, including within residential, home and flexible care settings. Research has not been undertaken to analyse whether these offences and incidents come within the WA Police definition of elder abuse.

**Question 13: What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?**

WA Police consider there to be a couple of options to be explored within legal frameworks to provide better protection of care recipients. Considerations include the use of surveillance devices, either hidden or overt cameras, which would require amendments to the *Surveillance Devices Act 1988 (WA)* so the evidence obtained in this way could be used without the person obtaining the footage being charged for illegally using, installing and maintaining surveillance devices. The legislation stipulates within the section 6 of the *Surveillance Devices Act 1988 (WA),* the regulation of use, installation and maintenance of optical surveillance devices where a party is not privy to their installation and use constitutes an offence, and the provisions enforce criminal sanctions. The use of surveillance devices was recently highlighted as a potential resolution for elder abuse cases in aged care in a recent case where a daughter captured footage via a covert camera, of her father being physically assaulted by a staff member at an Adelaide Nursing Home. The use of surveillance devices in this manner would provide greater transparency in aged care facilities in ensuring proper care of vulnerable and uncommunicative aged care residents so older people and their families can feel safe.It would also the remove the hidden nature of elder abuse offences.

Another recommendation would be introducing a bypass of the 'right to silence' provisions for staff and personnel operating in the aged care environment via the introduction of mandatory reporting of offences within legislation similar to child sexual abuse offences. It is a legal requirement in Western Australia for doctors, nurses, midwives, teachers, police officers and boarding supervisors to report all reasonable beliefs of child sexual abuse to the Department of Child Protection and Family Support under provisions within s124B of the *Children and Community Services Act 2004*. A similar legislative provision in a relevant Act for mandatory reporting of elder abuse incidents in aged and residential care settings would protect vulnerable and uncommunicative aged care residents who are susceptible to becoming victims of elder abuse.

**Question 17: What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?**

Mandatory reporting in situations where the victim is unable to self-report, and there is the existence of a duty of care [[4]](#footnote-4) and evidence exists to support the supposition that the victim is being abused could improve safeguards and be an adequate investigative and judicial response to elder abuse. We have received feedback from medical practitioners providing medical care within aged care facilities wanting to know when they should report a crime to police and not having a clear understanding of duty of care requirements in these circumstances. An example where clear reporting guidelines would be supported by mandatory reporting to protect victims who are unable to protect themselves is a situation where there has been a suspicion of elder abuse, and the alleged perpetrator was the husband of the victim. The victim was incapacitated due to dementia. The assaults were occurring when the husband was taking his wife out of the aged care facility for weekly visits. The GP who phoned WA Police did not want to report the allegations, but wanted a police presence when they met with the husband as he was known to be violent to aged care staff on previous occasions. The provision of mandatory reporting requirements would have meant that the doctor in this instance would have been required to make an obligatory report to the police.

**Question 26: What changes should be made to laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?**

Awareness campaigns which highlight the problems of financial abuse, and more broadly elder abuse are required to reduce the prevalence of elder abuse. From the perspective of Major Fraud, improvements to the witnessing of Power of Attorney documentation through the use of an independent third party could potentially limit fraud offences, and act as a deterrent for any potential abuse.

Major Fraud within WA Police currently works in conjunction with the private and government organisations on proactive policing initiatives which identify fraud offences. This was evidenced recently through Project Sunbird which was implemented to improve safeguards and to disrupt the transfer of money out of from Western Australia to scammers in Africa[[5]](#footnote-5). An outcome of the project was the alleviation of victimisation of financial abuse towards older people. This was a specific initiative between Major Fraud within WA Police and the Department of Commerce as a crime prevention strategy that was aimed at identifying victims who may not have good knowledge of how to use technology, and are thereby susceptible to cyber criminals and financial abuse. This project ran until February 2016, assisting over one thousand fraud victims. This project was able to demonstrate a 55% decrease in fraud offences and a 36% decrease in money sent to West African countries in 2015. This project demonstrates what can be achieved when there is a proactive inter-agency approach to reducing victimisation which had a specific impact on the elderly.

Specific strategies for preventing financial abuse in Indigenous and CALD communities need to be developed which are cognisant of the way this crime type manifests and how it differs to the rest of the community. Abuse can range from harassment for money on pension day to neglect by people providing support and care to the elderly to facilitate access to their finances.

Another safeguard to be implemented which may assist in reducing victimisation and could be explored further is changing financial family agreements from currently being informal and verbal, to introducing a system where such agreements need to be lodged with a regulatory body. This would be further enhanced by the protections offered by a legislative framework protecting the elderly from victimisation.

**Question 29: What evidence is there of elder abuse committed by people acting as appointed decision makers under instruments such as power of attorney? How might this type of abuse be prevented and redressed?**

There is currently limited data available from within WA Police corporate databases to identify offenders as appointed decision makers. See data in Appendix 1 (report 6). These low numbers could be due to a number of reasons such as reluctance to report abuse, the lack of visibility by independent third parties of power of attorney instruments to identify where financial abuse is occurring, and the lack of awareness of elder abuse as a crime type.

**Question 32: What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?**

As above.

**Question 33: What role should public advocates play in investigating and responding to elder abuse?**

As outlined above the reluctance to report offences makes it difficult for the WA Police to adequately understand the prevalence of elder abuse and the types of crimes being committed against the older population. Therefore the role of an advocate can assist in encouraging people to report abuse. This has been successfully demonstrated by the uptake and use of the Elder Abuse Helpline, operated by Advocare. Strengthening the role of advocate groups to on report to WA Police suspected cases of abuse would assist in investigating and responding to these crimes.

**Question 34: Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?**

Currently three levels of remedies are available in responding to elder abuse – preventative measures, civil legal remedies and state intervention. Preventative measures regulate the provision of services to older people via legislation like the *Aged Care Act 1997* (Cth) which imposes mandatory reporting obligations. Presently, the effectiveness of mandatory reporting in preventing elder abuse within *Aged Care Act 1997* (Cth) is limited because its primary function is to regulate service providers who do receive government funding. The Act’s primary purpose is not intended to be the prevention of elder abuse, rather the provision of funding for aged care services.

Mandatory reporting for cases of elder abuse is contentious and centers on a balance being achieved between the self- determination of the capable older persons to make decision about their own life versus the need to ensure older people with limited capacity which may require the intervention of a third party to protect their rights, safety, health and well-being. Mandatory reporting would see all people in professions where there is implied trust via a duty of care to comply with mandatory reporting of elder abuse. Provisions for mandatory reporting may need to be centered solely around where the victim has limited capacity and they need to have their rights protected. Mandatory reporting in these circumstances will also assist where the victim has a disability. In 2012, 39.5% of people aged 65–69, 78.7% of those aged 85–89, and 85.9% of those aged 90 and above had a disability. Cognitive impairment, such as dementia is another factor that increases vulnerability[[6]](#footnote-6). Therefore, as the rate of disability increase with age, it is anticipated that people will become increasingly more vulnerable to the risk of abuse.

There are fears mandatory reporting will impact on an older persons’ independence and could potentially have repercussions if the abuser is the primary carer. This may impact on an older person’s willingness to seek medical attention if they know conversations will not be confidential and their abuse could be reported. There is considerable literature exploring the effectiveness of mandatory reporting and whether it discourages older people from seeking medical attention. Proponents of mandatory reporting claim it would place elder abuse on the social agenda, and would ensure adequate funding to service providers in response to elder abuse. There is also the belief that mandatory reporting may assist in identifying persons at risk earlier.[[7]](#footnote-7)

The implementation of mandatory reporting obligations needs to be considered for its impacts on Indigenous and CALD communities. There is a strong likelihood older Indigenous people who currently experience elder abuse may have been represented in the Stolen Generation. There is a concern that mandatory reporting legislation for elder abuse will result in the removal of large numbers of older people from their community, many for a second time in their lifetime. For members of the CALD community, they face issues in accessing essential services and barriers in reporting due to language. This places this demographic in a position where they could be vulnerable to abuse because of cultural connotations around family and the care of elderly parents which means they are dependent on their family to assist them to communicate and access services. As with mainstream reporting, elderly within CALD communities may not disclose abuse at the hands of their children due to embarrassment as they feel a sense of responsibility and guilt in being abused by those they raised.

WA Police would welcome any initiatives to improve the safety and well-being of elderly people in the community.

**Question 39: Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?**

Older people who experience financial abuse have civil remedies available via contract law for actions such as undue influence and unconscionable conduct. Tort law also provides potential remedies in elder abuse for negligence, assault or liability for nervous shock. However, the issue with civil and equitable remedies is they require the victim of elder abuse to have sufficient funding available to seek legal assistance and litigate the matter. This can be problematic if their only asset has been involved in the financial abuse and could be prohibitive in them seeking a legal remedy. WA Police welcome any initiatives that improve the safety and well-being of elders, but such initiative need to be cognisant of any issues which may preclude a victim from utilising this remedy.

**Question 42: In what ways should criminal laws be improved to respond to elder abuse? For example, should there be specific offences concerning elder abuse?**

There are legislative protections elderly people who are victims of physical assaults. Section 221 (1) (d) of the *Criminal Code* creates an aggravating factor and increases the sentence available to the jurisdictional courts where the victim is over the age of 60 years. Consideration could be given to creating a new offence (much like the indecent dealing provisions for children) that overcomes defences available to the term 'assault' which are problematic to negate with witnesses whose competency may be affected by age-related factors.  In essence; introducing legislation that assists a victim aged over 60 who are deemed to be an ‘incapable person’ in broader offences. Similarity in the term may be derived and modified from s.330[[8]](#footnote-8) of the *Criminal Code* in defining an incapable person whilst being mindful to respect the rights of those victims over the age of 60 who are not deemed to be vulnerable as victims because they maintain their faculties and the ability to provide evidence within the court context. The term incapable person relative to victims aged over 60 may rely on the competency of the person as a witness and their ability to give evidence that allows the prosecution to meet the burden of proof in the provision of evidence within a criminal court.

While the criminalisation of elder abuse creates community awareness, the impact of criminal laws to act as a deterrent may be limited. The lack of deterrence may be due to under-reporting and the barriers which exist in detecting and reporting crimes where the victim has limited capacity or emotional ties to the victim which also means few perpetrators are successfully prosecuted. Regardless of the criminalisation of elder abuse, there will always be an element of under-reporting as these situations can be highly emotional and confrontational, and any form of legal redress available is an option few elderly people wish to pursue, particularly where the abuser is the primary carer.

**Question 43: Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?**

People in WA have duties within the *Criminal Code* relating to the preservation of human life, however in order to be brought to account for a failure to act, the omission must be linked to a provision of a duty of care to the victim. Neglect is not a stand-alone offence, it must be considered within the context of a duty of care and the presence of other criminality. Therefore; consideration may be given to creating an offence type of neglect, with amendments to existing legislation rather than elderly specific legislation (as per response to Q13).

**Question 44: Are protection orders being used to protect people from elder abuse? What changes should be made to make them a better safeguard against elder abuse?**

Currently there is no data available to inform on the usefulness of protection order as a response to elder abuse. Like their use in the context of family and domestic violence there are issues with their use. Specifically within the setting of elder abuse, there can be issues for the victim as the perpetrator may be their primary carer, and the reality of a protection order being in place is that are now reliant on the aged care environment for their daily care.

The use of family and domestic violence legislation in incidences of elder abuse enable the victim to apply for a protection order where they have experienced actual or threatened physical violence within a family or informal caring situation. Application of the compliance provisions in s62C of the *Restraining Orders Act 1997* whereby a police officer can apply for a protection order on behalf of the victim. A police officer after conducting an investigation and having a reasonable suspicion that an act of family and domestic violence has occurred, can make a determination that the behavior constitutes a criminal offence and has put the victim’s safety at risk, then the officer can apply for a restraining order on the victim’s behalf. The police officer can make the application under s18(1) or s 25(1)(b) of the *Restraining Orders Act 1997* on behalf of the victim. The advantage of s62C of the *Restraining Orders Act 1997* is that it removes the blame for the arrest and imposition of the protection order from the victim. WA Police issue Police Orders as a safety measure for victims in family violence settings. WA Police also provide advice and referral pathways for applicants, including the elderly in the community to apply for Violence Restraining Orders. WA Police consider the current provisions as satisfactory to meet the needs of the community and do not advocate for separate protection orders specific to elderly community members.

**Question 45: Who should be required to report suspected elder abuse, in what circumstances, and to whom?**

WA Police consider that individuals directly responsible for people considered by virtue of competency to be an ‘incapable person’ (refer to WA Police response to Q.42) should have some obligation to report suspected offending on behalf of the incapable person. However, there is the potential for reporting to impact negatively upon relationships between parties and reduce the likelihood of affected parties to report incidents to police. In circumstances where an offence has been committed against that victim and their competency is in question, there may be some benefits in having a mandatory report to police so that the allegations of the offence may be investigated. As a result of implementing mandatory reporting, this could have the benefit of improved data capture to identify a more accurate picture of the prevalence of elder abuse.

Similar response to question 17, the example is still pertinent here. We have received feedback from medical practitioners providing medical care within aged care facilities. There has been a situation where there has been a suspicion of elder abuse, and the perpetrator was the husband of the victim. The victim was incapacitated due to dementia. The assaults were occurring when the husband was taking his wife out of the aged care facility for weekly visits. The GP who phoned did not want to report this matter to the police, but wanted police to be present when she met with the husband as he was known to be violent to aged care staff on previous occasions. Mandatory reporting in situations where the victim is unable to self-report, and there is the existence of a duty of care and evidence to support the supposition that the victim is being abused could improve safeguards and be an adequate response to elder abuse. There is also the need to balance the need for mandatory reporting with the ability of the victim to have some say in the way the matter progresses if they are capable of making those decisions for themselves. This could impact on the disclosure of elder abuse to people within positions of trust if the person knows that the person they disclose the allegation to has a duty to make a mandatory report and they then have no control of how the matter progresses and how the perpetrator is deal with.

**Question 46: How should the police and protection responses to report of elder abuse be improved? What are the best practice police and protection responses to elder abuse?**

Best practice police and protection responses to elder abuse should include the development of a consistent inter-agency strategy and guidelines on elder abuse responses. Collaborative and proactive policing initiatives which link in to responses and resources available within other government agencies similar to the Project Sunbird initiative. Development of crime prevention strategies to raise awareness of elder abuse to strengthen the reporting of crime by this demographic.

As with many social problems such as family and domestic violence and child abuse, a muilti-agency response is imperative in addressing and resolving elder abuse. WA Police respond to reports from the community that may be influenced by the social stigma’s attached to the crime type, including family violence, sexual penetration offences and offences committed against the elderly. As per responses to Question’s 42 and 45; WA Police consider that building upon and expanding existing legislation may assist in the provision of evidence relative to older victims and allegations of elder abuse. In terms of investigation by WA Police; an elderly victim may be considered – within the definition of an assault within the Criminal Code; as a victim 60 years of age or older, and therefore more severe sentencing options are applied.

The issue for police primarily rests with the competency of the witness (victim) to be able to give evidence so the prosecution can meet the burden of proof required in criminal courts. There is a need to support and respect elderly victims and on the occasions that an elderly victim/witness is not deemed a competent witness to assist them through the legal process to provide what evidence they can. Elderly victims as witnesses can present challenges on competency due to cognitive impairment associated with dementia. It makes older people more susceptible to abuse because of the perceived invisibility of crime and makes it more difficult for victims to be credible witnesses for the purposes of investigation and prosecution. Amendments to the current provisions within the *Evidence Act 1906*, specifically 106B(2) and s.106HB around the admissibility in criminal proceedings of visual recording of interviews with children or a person with mental impairment by adding in provisions for the elderly to provide their evidence by other means than in an open court, to potentially increase their competence and credibility away from the pressures of the court environment.

WA Police participate in APEA (Alliance for the Prevention of Elder Abuse) which is a working group established in 2005 to promote the development of an inter-agency policy framework which values and supports the rights of older people. The members of APEA work collaboratively to raise awareness of elder abuse issues, and to influence current attitudes, policies and practises relating to elder abuse. A significant amount of work has been undertaken by APEA in WA in the development of protocols addressing the prevention of elder abuse as a guide to specific agency policies.

All police organisations, government organisations and service providers who provide assistance to victims of elder abuse need provide a consistent approach to statistical capture of incidents to obtain a more accurate picture of the prevalence of elder abuse which can be utilised to inform future strategies. Police responses to elder abuse reports could be improved through the provision of training for frontline police officers on the prevention, screening and assessment of elder abuse. This is supported by recommendation 34 in the Community Development and Justice Standing Committee report on *Age Friendly WA* which stated that WA Police needed to focus training on ways to recognise signs of elder abuse and to implement practices to successfully prosecute perpetrators.

**Question 47: How should victims' services and court processes be improved to support victims of elder abuse?**

In line with other states, elder abuse should be responded to by Police in the same manner as domestic violence. Support for elderly victims will be required to assist them through the prosecution and court processes.

**Question 48: How should sentencing laws and practices relating to elder abuse be improved?**

As stated previously, amendments to legislation to introduce aggravating factors based on age for certain offences. This would then translate into increased penalties to reflect the vulnerabilities, including the age of the victim.

**Question 49: What role might restorative justice processes play in responding to elder abuse?**

Restorative justice could play an important role in responding to elder abuse as it may assist in rebuilding family relationships and building new trust which may influence recidivism.

**Question 50: What role might civil penalties play in responding to elder abuse?**

Civil penalties could have a role in responding to elder abuse and address issues such as neglect and inattention. As stated previously, the issue with civil and equitable remedies for victims of financial abuse is they require the victim of elder abuse to have sufficient funding available to seek legal assistance and litigate the matter on their own behalf which they may not have the capacity or finances to do. This could create a potential barriers for victims of elder abuse utilising this avenue as a form of redress for elder abuse.

1. Office of the Public Advocate (WA), Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities (2005) [↑](#footnote-ref-1)
2. Australian Law Reform Commission: Elder Abuse Issues Paper 47 (IP 47). June 2016 [↑](#footnote-ref-2)
3. ANZPAA. Elder Abuse Scoping Paper (2009) [↑](#footnote-ref-3)
4. A duty of care for medical practitioners is the identification of a real and identifiable danger to the public or any person then confidential information is able to be released to a responsible authority [↑](#footnote-ref-4)
5. http://www.scamnet.wa.gov.au/scamnet/Fight\_Back-Project\_Sunbird.htm [↑](#footnote-ref-5)
6. Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2012* (2013 [↑](#footnote-ref-6)
7. ANZPAA. Elder Abuse Scoping Paper (2009) [↑](#footnote-ref-7)
8. An incapable person according to s330 of the *Criminal Code*  is a person so mentally impaired as to be unable to:

Understand the nature of the act and the subject of the charge against them;

Incapable of guarding him/ herself against sexual exploitation. [↑](#footnote-ref-8)