**Elder Abuse Inquiry Submission**

I Introduction

This report addresses Question 43, ‘Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?’ As a penultimate year law student I have studied criminal law and done great amounts of research throughout my degree, which has equipped me with the skills necessary to provide a submission. I believe that Australian criminal laws fail to provide an appropriate response to neglect. With Australia’s increasingly ageing population, it is important that laws are amended or alternative measures adopted to address this issue.

II Current Legislation

‘Neglect’ has been defined as:

[T]he failure of a caregiver to provide the necessities of life to an older person, that is, adequate food, shelter, clothing, medical care, or dental care… Examples include abandonment, non-provision of food, clothing or shelter, underuse of medication, and poor hygiene or personal care.[[1]](#footnote-1)

Most Australian jurisdictions have criminal laws providing for a failure to provide the necessaries of life, except the Australian Capital Territory and Victoria.[[2]](#footnote-2) There is a duty to provide the necessaries of life on every person having charge of another who because of age, sickness, mental impairment, detention or any other case is unable to provide themselves with such necessaries.[[3]](#footnote-3) The person owing the duty is held to have caused any consequences to the life or health of the other person by any lawful or unlawful act or omission.[[4]](#footnote-4)

In the Northern Territory, any person who unlawfully fails to provide for the necessaries of life to another person to whom they owe such a duty,[[5]](#footnote-5) and the life or health of the other person is endangered, is guilty of a crime.[[6]](#footnote-6) Such a person is liable for seven years imprisonment.[[7]](#footnote-7) In Queensland, the equivalent offence is only three years imprisonment.[[8]](#footnote-8)

The New South Wales provision pertaining to the necessaries of life also requires that the person be recklessly or intentionally negligent in their failure to provide the necessaries of life to a person to whom they owe such a duty to.[[9]](#footnote-9) A person in breach of this provision is liable for up to five years imprisonment.[[10]](#footnote-10)

South Australia is the only Australian jurisdiction that provides for an offence of ‘criminal neglect.’ A person will be liable if they fail to take steps to protect a vulnerable adult from death or serious harm if they owe a duty of care.[[11]](#footnote-11) ‘Vulnerable adult’ is defined as a person over the age of 16 years whose ability to protect themself from an unlawful act is significantly impaired through physical disability, cognitive impairment, illness or infirmity.[[12]](#footnote-12) Thus this provision can apply not only to the elderly but also those with a disability. Where the victim dies the penalty is 15 years imprisonment, and five years where the victim suffers serious harm.[[13]](#footnote-13)

III Terms of Reference

The terms of reference provided by the Attorney-General contain little specifics on criminal laws against neglect. The *Report on Violence, Abuse and Neglect against People with a Disability*[[14]](#footnote-14) discussed the prevalence of abuse towards people with a disability, including the elderly. One recommendation was the establishment of a national system to deal with disability abuse and act as a national watchdog.[[15]](#footnote-15) A similar expert, national body could be established as a more appropriate response to the neglect of the elderly.

In *Older People and the Law*, the report included a lengthy discussion on the barriers to accessing legal services; which may be cultural, personal, financial, or related to the evidentiary difficulties of capacity.[[16]](#footnote-16) Although not expressly discussing neglect, this impacts upon the appropriateness of such laws, which cannot be deemed suitable if victims are unable to gain access to legal advice. The Committee also noted in *Older People and the Law* that outreach models of delivery in local communities will be well-suited to assisting the legal needs of the elderly, as elderly people ‘do not readily make use of legal services.’[[17]](#footnote-17)

 IV Issues / Recommendations

The existing penalties for most neglect provisions are quite weak and few cases are being prosecuted for neglect against the elderly. This could potentially increase if harsher penalties are enforced or new laws of ‘criminal neglect’ as seen in South Australia are introduced in other jurisdictions. However, if few people are currently being prosecuted for the crime, amending the legislation may not make a difference. Regardless of the laws put in place, they are worthless if there are few mechanisms for victims or others around them to report neglect. This is of particular importance in cases where the victim subject to neglect is within a relationship of trust with the perpetrator.[[18]](#footnote-18)

In South Australia, an integrated, advocacy approach has been taken, where the Government is going beyond criminal laws to the consideration of elder abuse within a range of community services.[[19]](#footnote-19) States and Territories need not only tougher laws but to raise greater awareness of neglect and its elderly victims.

**Bibliography**

*A Articles*

Breedon, Laura, ‘Elder Abuse and Neglect: Challenges and Directions for Legal Reform’ (2010) 18(1) *Journal of Law and Medicine* 19

Kurrle, Susan and Gerard Naughtin, ‘An Overview of Elder Abuse and Neglect in Australia’ (2008) 20(2) *Journal of Elder Abuse and Neglect* 108

*B Legislation*

*Crimes Act 1900* (ACT)

*Crimes Act 1900* (NSW)

*Criminal Code 1899* (Qld)

*Criminal Code Act 1924* (Tas)

*Criminal Code Act 1983* (NT)

*Criminal Code Act Compilation Act 1913* (WA)

*Criminal Law Consolidation Act* *1935* (SA)

*C Reports*

Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007)

Senate Standing Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with a Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015)

1. Susan Kurrle and Gerard Naughtin, ‘An Overview of Elder Abuse and Neglect in Australia’ (2008) 20(2) *Journal of Elder Abuse and Neglect* 108, 113. [↑](#footnote-ref-1)
2. The ACT does have specific provisions for child abuse. See, eg, *Crimes Act 1900* (ACT) s 39(1): a person must not ill-treat or abuse a child in their care or neglect a child for whom they had paternal responsibility. [↑](#footnote-ref-2)
3. *Criminal Code Act Compilation Act 1913* (WA) s 262. See also *Criminal Code Act 1983* (NT) s 149, *Criminal Code Act 1924* (Tas) s 144, *Criminal Code 1899* (Qld) s 285, *Criminal Law Consolidation Act* *1935* (SA) s 30. [↑](#footnote-ref-3)
4. *Criminal Code Act Compilation Act 1913* (WA) s 262. [↑](#footnote-ref-4)
5. *Criminal Code Act 1983* (NT) s 149. [↑](#footnote-ref-5)
6. *Criminal Code Act 1983* (NT) s 183. See also *Criminal Code 1899* (Qld) s 324, *Criminal Code Act 1924* (Tas) s 177, *Crimes Act 1900* (NSW) s 44. [↑](#footnote-ref-6)
7. *Criminal Code Act 1983* (NT) s 183. [↑](#footnote-ref-7)
8. *Criminal Code 1899* (Qld) s 324. [↑](#footnote-ref-8)
9. *Crimes Act 1900* (NSW) s 44. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. *Criminal Law Consolidation Act* *1935* (SA) s 14. [↑](#footnote-ref-11)
12. Ibid s 14(4). [↑](#footnote-ref-12)
13. Ibid s 14(1)(a), (b). [↑](#footnote-ref-13)
14. Senate Standing Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with a Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015). [↑](#footnote-ref-14)
15. Ibid [10.16]-[10.17]. [↑](#footnote-ref-15)
16. Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), 158-162. [↑](#footnote-ref-16)
17. Ibid 158-159. [↑](#footnote-ref-17)
18. Ibid 15. [↑](#footnote-ref-18)
19. Kurrle and Naughtin, above n 1, 116. [↑](#footnote-ref-19)