
ALRC Elder Abuse Issues Paper

Australian Law Reform Commission

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Acknowledgement

The Law Council acknowledges the assistance of its Elder Abuse Working Group, the National Criminal Law Committee, the Law Society of Western Australia, the Law Society of South Australia, the Law Institute of Victoria (**LIV**), the Law Society of New South Wales (**LSNSW**), the Bar Association of Queensland, and the Family Law Section in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to respond to the Australian Law Reform Commission's (ALRC) Elder Abuse Issues Paper (IP 47), published in June 2016 (**Issues Paper**).
2. Elder abuse is a serious human rights issue which can result in a reduction of assets, finances, independence, dignity, security, and health. While there is no universally accepted definition of elder abuse, it may include a range of physical, psychological, sexual and financial abuse, exploitation and neglect.
3. A recent report by the Australian Institute of Family Studies (AIFS) found that while evidence about prevalence in Australia is lacking, it is likely that between two and ten per cent of older Australians may be subject to elder abuse in any given year.¹ The AIFS report also suggested that the prevalence of elder abuse is expected to rise with Australia's aging population.²
4. The prevalence and devastating impact of elder abuse is abhorrent and the Law Council commends the Government and the ALRC on this inquiry. The Law Council hopes that the inquiry will build on others referred to in its Terms of Reference to develop effective strategies to address elder abuse.
5. The Issues Paper encompasses a broad range of issues: those relating to elder abuse, social security, aged care, the national disability insurance scheme, superannuation, financial institutions, family agreements, appointed decision-makers, public advocates, health services, forums for redress and criminal law.
6. This submission provides the Law Council's preliminary views in response to certain Issues Paper questions where the Law Council, its Constituent Bodies and Advisory Committees have a particular interest, experience or knowledge of the subject matter.
7. The Law Council trusts that this submission is of assistance to the ALRC in its deliberations.

¹ Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse – Understanding issues, frameworks and responses' (Research Report No 35, Australian Institute of Family Studies, 2016) 46-7 <<https://aifs.gov.au/sites/default/files/rr35-elder-abuse.pdf>>.

² Ibid.

What is elder abuse?

Question 1

To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse:

- harm or distress;
- intention;
- payment for services?

8. The Law Council recognises the common definition of “elder abuse” as:

*a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.*³

9. A difficulty with this definition is that it is broad and is not based on reliable data about the prevalence, type or effects of elder abuse in Australia. Often reliance is placed on overseas studies to extrapolate the level and effect of abuse in the Australian community. This may or may not be appropriate. Some local studies have been undertaken. However, they are insufficient to generalise about the results across the whole population. Self-reporting, such as the Elder Abuse Hotline in Queensland, may or may not paint an accurate picture of the level or common means of abuse. The studies undertaken also do not provide an effective understanding of the prevalence and effect of elder abuse on Australian Indigenous populations.
10. There is a need for a clear definition of elder abuse, which should identify risk factors for elder abuse. Any definition should also recognise the dynamics of elder abuse and its similarities to (and differences from) other identified forms of family violence, such as isolation of the victim, financial dependence on the abuser, and the reluctance of the victim to make a formal complaint.
11. Abusers tend to be close family members (mostly adult sons or daughters) on whom the older person is dependent for their care and/or family connectedness. This means that traditional responses, such as, separation/divorce and removal of the perpetrator may not be appropriate. It may also mean that victims will protect and/or excuse the abuser due to a sense of guilt, responsibility or shame.
12. Financial abuse and psychological abuse seem to be the two most common elements of abuse. Neglect or exploitation also come before various state tribunals. In considering the elements to be taken into account in defining elder abuse, the Law Council makes the following observations:

Harm or distress – harm is an essential feature of the definition of elder abuse. While harm denotes the direct effect of action or inaction, distress captures the indirect effect in causing “*extreme anxiety, sorrow or pain*”. Distress is subjective: what distresses one person may not distress another. It is difficult to envisage how distress can helpfully be incorporated into a legal definition.

³ World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <http://www.who.int/entity/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf>.

Intention – intention may not always be evident in elder abuse, particularly with regard to neglect and financial transactions. While intention is important, what is essential is the impact of the behaviour (as is the case with discrimination law and domestic violence). Changing attitudes to behaviour is critical, particularly when some may not regard it as abusive.

Payment of services – the Law Council considers that the definition of elder abuse should not include harm caused by a person in a relationship of trust with a person who is in receipt of payment for services. Whilst this behaviour is abusive, the Law Council submits that the term “elder abuse” should be limited to personal relationships and not extended to relationships which have an economic basis. A tighter definition will ensure accurate data collection of the specific phenomenon of abuse within families and other in other trusted relationships. The Law Council also notes that, reporting of non-payment of services by nursing homes is often one of the first ways that financial abuse is identified.⁴

Exploitation – exploitation is suggested as an essential feature of elder abuse and is a broader concept than abuse or neglect (both captured in the definition) and goes to the misuse of or unfair exploitation of, another person’s resources.

13. The *Family Violence Protection Act 2008* (Vic) has a broad definition of family violence that incorporates emotional or psychological abuse as well as a range of other factors. The LIV has noted that such a definition assists in addressing some of the risk factors for elder abuse.

Question 2

What are the key elements of best practice legal responses to elder abuse?

14. The Law Council submits that it is vital that all legal responses are based on a rights based approach in which the will and preference of the older person is given primacy.
15. The key elements of best practice legal responses to elder abuse are appropriately identified in the ALRC’s Issues Paper. However, particular emphasis ought to be placed on investigation, protection, reinstatement and remedies.

Investigation

16. No organisation has responsibility for investigating allegations of elder abuse. Investigation authorities (such as the various police services) may not understand or prioritise elder abuse.
17. The Public Guardian (QLD) has the discretion to investigate allegations of abuse, neglect or exploitation of vulnerable people in Queensland.⁵ The investigative power is discretionary and is exercised only if the adult who is the subject of the abuse lacks decision-making capacity. The Victorian Public Advocate has similar powers in circumstances where a guardianship or administration order may be appropriate.⁶ However, there is no agency in Victoria tasked with carrying out investigations of at

⁴ Adult Guardian (QLD), *Annual Report 2009-2010*, (2010) 41.

⁵ *Public Guardian Act 2014* (QLD) s19.

⁶ *Guardianship & Administration Act 1986* (Vic) s16(1)(h).

risk adults in the community.⁷ In relation to older people, the investigations overwhelmingly relate to financial abuse and money may have dissipated by the time the investigation occurs.

18. Without proper investigation it is often impossible to identify or respond to individual allegations of abuse. Unless a particular organisation is tasked with the investigation process, there will be no accountability for conducting this work and victims of abuse will continue to fall between the cracks. The Law Council therefore recommends the establishment of an independent body to investigate concerns about the safety of older Australians, including instances where elder abuse is alleged, and particularly in the case of vulnerable older Australians who are isolated and may not have decision-making capacity.

Protection

19. It is appropriate that government authorities assume a protective role for adults who lack capacity to make their own decisions. The difficulty in relation to responding to elder abuse is that an adult may have decision-making capacity but nevertheless be vulnerable to exploitation because of the effects of ageing (social isolation, loneliness, and mobility issues).

Reinstatement

20. Recovering from elder abuse is often difficult because the abuse occurs toward the later part of the adult's life when financial loss may not be recoverable, and psychological damage can lead to, or exasperate, social isolation and distrust. The legal response needs to provide easy, accessible, inexpensive access to mechanisms to have the perpetrator repay stolen money or assets.

Remedies

21. Appropriate redress and criminal law options are considered in response to the ALRC's Issues Paper questions on these topics.

Question 3

The ALRC is interested in hearing examples of elder abuse to provide illustrative case studies, including those concerning:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse communities;
- lesbian, gay, bisexual, transgender or intersex people;
- people with disability; or
- people from rural, regional and remote communities.

22. The NSW Parliamentary Inquiry into Elder Abuse (March 2016) was conducted a consultation with Aboriginal Elders. This was a joint initiative with the LSNSW's Indigenous Issues Committee. The Inquiry Report provides a summary of key

⁷ John Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (Winston Churchill Memorial Trust of Australia, 2013) 7
<https://www.churchilltrust.com.au/media/fellows/Chesterman_John_2012_Report.pdf>.

themes and issues identified during this consultation, which may be of assistance to the ALRC's current inquiry (particularly pages 183-186 of the report).⁸

23. Consideration should also be given to establishing a national elder abuse prevalence study focusing on the groups mentioned above. Anecdotal reports suggest these groups are also affected by elder abuse. The research could include a focus on the abuse of Basic Cards (income management in the Northern Territory).

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 the evidence?

24. There appear to be gaps in the evidence concerning concerning informal arrangements to manage financial and personal affairs. Such informality may cause more difficulties after incapacity or death than formal arrangements like powers of attorney. It would be useful to have some study or survey into those arrangements and the problems caused. It will be easier to devise methods to prevent abuse if the problem can be better identified.
25. A prevalence study is also required to determine the extent of elder abuse within Australia.

Social security

Question 5

How does Centrelink identify and respond to people experiencing or at risk of experiencing elder abuse? What changes should be made to improve processes for identifying and responding to elder abuse?

26. The Law Council suggests that there should be appropriate training sessions for Centrelink staff to identify elder abuse.

Question 7

What changes should be made to the laws and legal frameworks relating to social security payments for carers to improve safeguards against elder abuse?

27. Carers of older people may receive minimum financial support, resulting in carer stress leading to abuse (in some cases the carer is in need of as much support as the older person when abuse occurs). Considerations should be given to adequate funding of carers and to random audits of people receiving the carers' pension to ensure appropriate care is being provided.

⁸ General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder abuse in New South Wales* (2016)
<<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6063/Report%2044%20-%20Elder%20abuse%20in%20New%20South%20Wales.pdf>>.

Question 9

What changes should be made to residence requirements or waiting periods for qualification for social security payments, or the assurance of support scheme, for people experiencing elder abuse?

28. Older people who are residing in Australia subject to an Assurance of Support are particularly vulnerable to abuse. In the event that the assurer abuses the assuree, the assuree is unable to access Centrelink payments or other services that are dependent upon receipt of a Centrelink payment. This makes it extremely difficult for an older person experiencing abuse to access alternative housing or other services.
29. Considerations should be given to a potential amendment of Part 6, paragraph 18(d), of the *Social Security (Assurances of Support) (FaHCSIA) Determination 2007* (Cth) to include elder abuse as a further special circumstance which justifies the cancellation of an Assurance of Support.
30. Similarly, qualifying periods can be a barrier to older people reporting elder abuse and taking action to leave the perpetrator. The Law Council notes the ALRC's comments concerning qualifying periods and family violence in its *"Family Violence and Commonwealth Laws – Improving Legal Frameworks"* Report (ALRC Report 117) and in particular the concern that people may falsely allege violence in order to access payments.⁹ In the experience of our members, older people are very reluctant to report abuse as they are concerned not to get the perpetrator into trouble. The Law Council recommends consideration being given to the merits of amending social security laws to enable older people experiencing elder abuse to access financial support.

Question 10

What other risks arise in social security laws and legal frameworks with regard to elder abuse? What other opportunities exist for providing protections and safeguards against abuse?

31. The Department of Human Services recognises a granny flat interest or right in circumstances where there is an agreement for accommodation for life.¹⁰ The interest is created when a payment is made for a life interest or a right to use certain accommodation for life, and the accommodation is to be the older person's principal home.
32. In the experience of practitioners, these arrangements usually arise in the context of an older person being unable to remain living in the family home. It is agreed, usually verbally, that the family home be sold, and the proceeds transferred to usually an adult child, who in turn uses the funds to pay off their mortgage, extend or renovate their home or build a granny flat on their property. The transfer is not a gift, but rather an exchange of assets for care for life.

⁹ Australian Law Reform Commission, *'Family Violence and Commonwealth Laws – Improving Legal Frameworks'*, ALRC Report 117 (2011) 138.

¹⁰ The Department of Human Services has described a "granny flat right" or "granny flat interest" as an agreement for accommodation for life – not a description of the type of dwelling a person may live in. See Department of Human Services, Government of Australia, *Granny flat right or interest* (29 April 2016) <<https://www.humanservices.gov.au/customer/enablers/granny-flat-right-or-interest>>.

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33. In the absence of recognition of a “granny flat interest or right”, the transfer could potentially be deemed a gift and the older person’s payments reduced or ceased accordingly. If the arrangement fits within the requirements of the Department of Human Services “granny flat interest or right”, the transfer is protected and the older person retains their existing income support. This is entirely appropriate. The older person was eligible for support prior to the transfer when they were the registered proprietor of the family home, and the funds have simply been transferred as a contribution to their new home.
 34. However, in order for the transfer to be recognised as a “granny flat interest or right”, the older person must not be registered on the title of the property. Whilst these arrangements can work well for many families, the arrangement can break down if circumstances change. One of the best means of protecting an older person’s interest in the second property is to ensure they are a registered proprietor, as they were prior to the transfer.
 35. By requiring older people to ensure that they are not registered on title when entering into these arrangements, the Department of Human Services policy can currently prevent older people from protecting themselves against elder abuse.
 36. The Law Council recommends that the Department of Human Services policy is reviewed and amended to enable an older person who has entered into an assets for care arrangement to be recognised on the title of the home in which they will be residing.

Aged care

Question 11

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

37. Access to appropriate housing is critical as many victims of elder abuse may be concerned that any complaints of abuse will result in their placement in an aged care facility as a result of limited appropriate options being available.
38. The high cost of housing, drug use and family breakdown may contribute to elder abuse, although these factors appear to receive little attention or appropriate funding.
39. The Law Council understands from some of its practitioners that there are many examples where the human rights of older people may have been breached, and their safety jeopardised by professional persons charged with their care. The following case studies have been provided by members whose clients are elderly people.

Case study one

40. A lawyer was asked in writing to visit an older woman in residential care. The older woman had both an Administrator and an appointed Guardian. The woman requested help and wanted advice on how to challenge her guardianship order and the decisions made under it, which included the decision on where she would live. The lawyer contacted both the professional Guardian and the private Administrator to seek permission to visit the woman. The lawyer was granted permission and

visited the residential care facility with an interpreter. The professional Guardian separately contacted the aged care facility and advised them that permission was not granted, as a result they refused the lawyer and interpreter entry. There was no alternative but to make an application to the Victorian Civil and Administrative Tribunal (**VCAT**) to direct the Guardian to permit a professional visit. At the Tribunal the Guardian was unrepentant and insisted that it was important that the resident become “settled” into the aged care facility.

Case study two

41. A professional Guardian arranged for the admission of an elderly woman into residential care. The Guardian gave directives to the facility that the woman would not be able to receive visitors, including her relatives and neighbours. The Guardian did not want the woman to know that her house was being sold and to get upset. Once the house was sold she would have no house to return to, and she would have to get used to the idea that she had no other options.

Case study three

42. A lawyer visited a woman who had been placed in residential care after a stroke. After a period of time she wanted to return home. Her daughter did not want her to return because she wanted to eject the mother’s long time domestic partner from the home before he had a chance to assert any equitable rights to the property. Enquiries revealed that the woman had been prescribed Respiridone, a very powerful anti-psychotic drug, and was housed in a locked ward. This treatment was considered appropriate as she was judged a flight risk because she expressed the desire to return to her home. The daughter had made all of these decisions under the belief that she was authorised to do so under a financial power of attorney. Again, the residential care staff acted on the belief that such directions were binding on them.

Case study four

43. An enquiry was taken from a man housed in residential care who had been an eminent engineer in his working life. He acknowledged he had high care needs but wanted to travel interstate to attend an annual dinner which was named after him and being held in his honour. He needed assistance with his plans to travel as he was immobilised and could not leave the residence without assistance. The residential care provider refused to allow him to travel and said he needs two people to accompany him and the people were not available. (In fact there were many people who volunteered to do this for him). The residential care facility misinterpreted their duty of care as extending to his absences and refused to take the risk of being liable for his wellbeing during a time of absence.

Question 12

What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?

44. Program personnel should be trained to identify the risk factors and signs associated with abuse. People could be referred to specialist advocacy services operated in each state and territory. This assumes that providers of these services (such as Community Legal Centres) continue to be funded or are adequately funded.

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?

45. Laws should be amended to balance the protection of the older person with their right of autonomy and the “dignity of risk”.

Question 14

What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

46. There is a considerable risk with consumer directed aged care models but, until such time as government agencies are equipped with the statutory mandate to investigate cases of elder abuse, people will fall through the cracks. Consumer directed aged care providers should all be trained in how to identify the risk factors and signs of elder abuse. A further suggestion might be to establish a screening process for those working with vulnerable older persons, but definitional issues will be critical as to what amounts to ‘vulnerable’ or ‘at risk of harm’.

Question 16

In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

47. The test for capacity is the lynchpin to restrictive interventions and therefore its design must be closely based on current understanding and evidence about decision-making capacity.
48. Restrictive practices may breach fundamental human rights. Appreciating the contributions that older persons make to their societies and re-affirming the dignity and worth of the person, the United Nations General Assembly adopted *Principles for Older Persons (the Principles)*.¹¹ The Principles provide, among other things, that older persons: have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being to prevent or delay the onset of illness; are able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy; and reserve the right to make decisions about their care and the quality of their lives.¹²
49. Restrictive interventions may be permitted for use in certain contexts under state and territory disability and mental health legislation.
50. In *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124), the ALRC recommended the development of a national approach to the regulation of

¹¹ United Nations, ‘Principles for Older Persons’, Res 46/91 of 16th Dec 1991
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>>.

¹² Ibid.

restrictive practices in sectors other than disability services, such as aged care and health care (Recommendation 8 – 2).

51. A National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector (**National Framework**) has been adopted as an interim step, to be taken forward into the National Disability Insurance Scheme quality assurance and safeguards framework to be implemented in the longer term.
52. The high level guiding principles underpinning the planning, implementation and evaluation of the National Framework include the human rights of people with disability, a person-centred focus, a national approach, the delivery of quality outcomes and safe work practices, accountability through documentation, benchmarking and evaluation, collaboration between service providers and raising awareness, providing education and facilitating accessible information about restrictive practices.
53. The core strategies for the National Framework are a person-centred focus, leadership towards organisational change, the use of data to inform practice, workforce development, the use within disability services of restraint and seclusion reduction tools and debriefing and practice review.
54. The high level guiding principles and the core strategies of the National Framework, and the National Framework itself, should be used as the foundation for the implementation of the recommendation of the ALRC that a national approach be developed to the regulation of restrictive practices in the aged care sector.

Question 17

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

55. Reportable assaults only currently include physical and sexual abuse. Other forms of abuse may take place in aged care settings. If any extension is to be made to reportable assaults, careful consideration should be given as to how this would interact or complement state and territory criminal laws. There has also been much discussion about mandatory responses to abuse (for example in South Australia), as opposed to mandatory reporting. The ALRC may wish to consider a mandatory response framework as part of its inquiry.

Question 20

What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?

56. Providers of aged care advocacy services (for example, through legal aid or Community Legal Centres) require adequate funding to improve the identification of, and responses to, elder abuse.
57. The community visitors' schemes, such as the Northern Territory Community Visitor Program (**NT CVP**), monitor mental health facilities, forensic disability residences and alcohol mandatory treatment. The real value of the scheme is the weekly visits to groups who traditionally do not complain. Relationships established as a result of independent visitor schemes to aged residential care and these weekly visits may

mean abuse is detected early or is disclosed to a trusted independent source. The NT CVP also makes recommendations to each service and provides a public annual report to Parliament which acts as an incentive to improve the quality of service.

Question 21

What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

58. All of the critical agencies which can provide support to victims of elder abuse are primarily at the state and territory level, but the federal government could work through the Council of Australian Governments (**COAG**) to affect a nationally consistent strategy regarding the legal framework. There are also Constitutional limits to the Federal Parliament's legislative power, which would require careful consideration in any national framework.

The National Disability Insurance Scheme

Question 22

What evidence exists of elder abuse being experienced by participants in the National Disability Insurance Scheme?

59. The Law Council is not aware of evidence that elder abuse is being experienced by participants in the National Disability Insurance Scheme (**NDIS**). However, this is unsurprising as it is too early to tell whether or not elder abuse is occurring in this cohort because:
- the NDIS is just being rolled out;
 - the NDIS only applies to a limited number of persons older than 65 - they must qualify for the service (i.e. have a pre-existing qualifying disability) before turning 65; and
 - generally the rollout is focusing on younger people.

Question 23

Are the safeguards and protections provided under the National Disability Insurance Scheme a useful model to protect against elder abuse?

60. There are measures in place that may capture instances of elder abuse. However they may not be sufficient to deal with nature of the elder abuse, neglect or exploitation that occurs within families. Two issues arise for consideration at this early stage of the program.
61. The first relates to nominees who make decisions on behalf of an adult if the adult cannot be assisted to make their own decisions. The scheme provides that the nominee must act in accordance with the wishes of the adult. However, the adult may never have been able to express wishes or may be expressing wishes that are contrary to their interests, particularly if they are subject to intellectual disability or dementia. The role of the nominee and the decision-making framework needs more

work. In particular, a model for substituted decision-making needs to be developed either along a best interests model, which may suffer from being paternalistic, or a rights based framework (for example Schedule 1 of the *Guardianship and Administration Act 2000* (QLD)).

62. The second issue relates to inspecting the adult's home and interviewing the adult about how they are being treated. The Commonwealth government inspects nursing homes on an announced and unannounced basis, advising homes about areas of their service that require change, and in delinquent cases, suspending the operation of the service. The NDIS will provide Commonwealth funding that effectively operates in individual homes. However, there is no right of entry into private premises. A legislative response should be considered which would allow entry upon the giving of notice. As the service will be diverse and non-institutional (i.e. in private homes), a service like the community visitors program, where people regularly visit and inspect the home and interview the adult, ought to be implemented (see comments above regarding the NT CVP scheme).

Superannuation

Question 24

What evidence is there of older people being coerced, defrauded, or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and redressed?

Evidence

63. Where a member of a superannuation fund has made a death benefit nomination an issue regularly arises as to the validity of the nomination. There can be disputes around whether the nomination was validly made, whether the nomination is binding, has lapsed or has ceased to have effect for any other reason. It is rare for validity to be contested on the basis that it was involuntary, although a recent example is *D15-16\112* [2016] SCTA 214.¹³ It is unusual for validity to be contested on the basis of lack of mental capacity, although an example is *D14-15\172* [2015] SCTA 31. Manipulation of the inheritance of an elderly father's interest in his self-managed superannuation fund occurred in *Katz v Grossman* [2005] NSWSC 934.
64. Given the value of many members' death benefits there is an unfortunate incentive to manipulate a member's nomination. Arguably, a power of attorney can make a nomination for a member.¹⁴ This means the potential for abuse by attorneys identified at Question 29 of the Issues Paper can extend to a member's superannuation fund, although the restriction on the persons who are eligible to receive the death benefit will somewhat limit the prospects of that abuse.¹⁵ Also, an attorney can redeem a member's accrued benefit in some circumstances.¹⁶

¹³ The allegation was made but not established.

¹⁴ That outcome was recognised in *D07-08\030* [2007] SCTA 93.

¹⁵ See *Superannuation Industry (Supervision) Act 1993* (Cth) s34; *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.17A, 6.22.

¹⁶ This may occur without penalty once the member attains 60 years of age or in cases of hardship. It may occur with penalty at a lesser age than 60.

Redress

65. Although compulsory superannuation contribution has existed for over twenty years, various parts of the estate planning surrounding a member's death benefit have been largely undeveloped. For instance:
- The mental capacity to make a death benefit nomination remains unclear.¹⁷
 - Whether the scope of an attorney's authority extends to making a nomination remains a matter of debate.
66. There would be advantages to members and their advisers if the position was clarified, preferably by legislation.
67. In addition, the opportunity for abuse through inducing an inappropriate nomination may be lessened if the death benefit is payable to the member's estate. Solicitors are often involved in the preparation of wills, but less so with the preparation of nominations. Accordingly, the potential for abuse may be reduced if a solicitor is involved and the direction of the death benefit is to the estate.

Financial institutions

Question 25

What evidence is there of elder abuse in banking or financial systems?

68. A number of studies have been undertaken to support the assertions made in paragraphs 103 and 104 of the Issues Paper regarding elder abuse in banking or financial systems. Evidence of elder abuse has been identified in several studies, including for example:
- Monash University 2009 – [Financial abuse of elders: A review of the evidence](#);
 - University of Western Australia Crime Research Centre – [Examination of the extent of elder abuse in Western Australia 2011](#).
 - CPA Australia – [Financial abuse of elder people: Awareness Recognition Tools 2016](#); and
 - Australian Institute of Family Studies – [Elder Abuse 2016](#).
69. The LIV was recently made aware of a case in which an older person suffered financial elder abuse at the hands of a relative, by means of a bank ATO (**Authority to Operate**).
70. Members of the LIV have noted that ATOs are easily obtained, and are not generally required to be witnessed, and have expressed concerns about how easily these instruments may be used as an instrument of financial abuse.

¹⁷ See *D14-15\172* [2015] SCTA 31.

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71. Whilst such instruments generally serve a useful function, they may be misused to the disadvantage of banking customers generally and not only older persons.
72. One of the difficulties in formulating policy to address financial elder abuse is the paucity of consistent data. The LIV has noted that, in Victoria, the ATO undermines the protections put in place by the relevant powers of attorney legislation and it is otherwise hard to prove fraud or abuse where the person providing the ATO has lost capacity or passed away.
73. The Law Council recommends that paragraphs 103 and 104 of the Issues Paper regarding elder abuse in banking or financial systems be accepted.

Question 26

What changes should be made to the 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?

74. The Law Council recommends the below changes to improve safeguards against and respond to financial elder abuse.

Identification

- That the issues and suggestions made in paragraphs 105 to 111 of the Issues Paper relating to the role of financial institutions in protecting against financial abuse by detecting it and intervening be accepted. There has been adequate identification and commentary provided by the Australian Bankers Association.
- That issues and suggestions in paragraph 112 of the Issues Paper regarding a nationally consistent approach to elder abuse be accepted. It is noted that a mechanism of enforcement of the safeguards proposed needs to be established.

Improve safeguards in the legal framework

- That a government regulator be created and empowered to enforce a code of conduct by financial institutions and setting up of a financial 'audit' system. This may be in conjunction with providers of welfare and health care to ensure that the elderly are:
 - receiving and utilising their government benefits;
 - receiving adequate health care;
 - subject to proper management of their assets by any person exercising their power of attorney; and
 - protected from any form of financial abuse.
- Privacy and disclosure laws should be amended to permit adequate disclosure to ensure compliance with mechanisms to protect financial assets of the elderly.

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- Requirement that a summary and justification of financial dealings by a power of attorney on behalf of the principal should be provided on an annual basis to the financial institution that holds the account on behalf of the principal.
 - Irregularities of any account should be reported to a national regulator on the care and protection of the elderly.

Response to elderly abuse and reporting requirements

- To adopt a regime of compulsory reporting requirements on all financial institutions to ensure compliance with safety standards in the management of financial resources of the elderly.
- With more elderly Australians being subjected to the potential of financial abuse, there should be a mandatory regime of financial protection and safeguards that include government and financial institutions. There is ample precedent for reporting requirements, for example, where a financial management order is made in the Supreme Court or Guardianship Tribunal. Periodic reports of the financial assets of the protected person are also submitted for audit.
- Mandatory training should be required for staff at financial institutions.
- Consideration should be given to the benefits and potential disadvantages of a register of financial powers of attorney. As discussed under 'Appointed Decision makers', some Law Council Constituent Bodies (such as the LIV) support a register, while others (such as the LSNSW) do not.

Family agreements

Question 27

What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

75. Casework indicates a rising popularity of verbal agreements, which may place an older person in precarious legal situation.
76. There are many decisions where a court has granted relief to the disadvantaged person in a failed family agreement. There are decisions where the family agreement is not set aside because the Court is satisfied that no legal wrong has occurred in the transaction. Decisions of both types include:
 - *Smith v Smith* [2004] NSWSC 663;
 - *Turner v Windever* [2005] NSWCA 73;
 - *Sleboda v Sleboda* [2008] NSWCA 122;
 - *Irvine v Irvine* [2008] NSWSC 592;
 - *Winefield v Clarke* [2008] NSWSC 882;

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- *Badman v Drake* [2008] NSWSC 1366;
 - *Palinkas v Palinkas* [2009] NSWSC 92;
 - *Bovaird v Frost* [2009] NSWSC 337;
 - *Waldock v Waldock* [2012] NSWSC 258;
 - *Aboody v Ryan* [2012] NSWCA 395;
 - *Sion v NSW Trustee and Guardian* [2012] NSWSC 949;
 - *Mace v Mace* [2015] NSWSC 1659; and
 - *Cohen v Cohen* [2016] NSWSC 336.

77. In both sets of circumstances, the courts have been available to protect the older person's interests. However, the decisions suggest that it is likely that the elderly face difficulty in protecting their interests when family agreements break down.

78. Some examples include:

- An older person sells their property and a financial contribution is made to a child's property. A verbal agreement to build granny flat arises but the level of care provided needs to be increased and the relationship breaks down. No granny flat is built so the older person ends up homeless and the child refuses to recognise the contribution. Eligibility for Centrelink benefits is compromised and protracted negotiation and litigation over multiple years occurs to enforce rights.
- A financial contribution was made to a child's property. The child has a drug/alcohol/gambling problem and the relationship breaks down. The older person is then unable to assert themselves due to risk of violence by child. Lack of support available means that the client sees aged care as the only practical option.
- An older person makes a financial contribution to child's home and ends up living outside in a garage.
- Very often an older person may be reluctant to take legal action, due to fear of compromising family relationships or fear of entry to aged care.

79. As discussed above in response to question 10, the requirement that the older person is not registered on title in the Department of Human Services policy for the recognition of "granny flat interest or right" is an impediment to older people protecting their interests when family agreements break down.

80. There is a very important role for conciliation of disputes in this area, which acknowledges power differences, provides constructive solutions and recognises the individual needs of an older person.

Question 28

What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

81. Recommendations 30, 31 and 32 in the Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law* (2007) Report are of relevance to this question.¹⁸
82. These recommendations refer to Family Dispute Resolution and the Family Law Council as providing appropriate family agreement models. The Law Council does not consider that the family law framework provides appropriate models. Agreements involving family members and older people often involve a number of people, not only spouses, and the subject matter of the agreement deals with a range of topics including care and accommodation services.
83. The following changes are recommended:
 - Limit operation of presumption of advancement – legislative guidance should be provided that compels both parties to prove intention, thereby limiting the operation of the presumption to the detriment of the older person.
 - Awareness-raising for the public.
 - Appropriate training should be given to professionals who interact with the elderly at the time of making arrangements – e.g. Centrelink’s financial information service, Aged Care Assessment Services (**ACAS**) assessors, the Office of the Public Advocate, social workers/care coordinators at time of discharge, lawyers and accountants.
 - Amend Centrelink rules that operate to make older person ineligible under “gifting” provisions, where the substance of a transaction indicates an “assets for care” arrangement.
 - Consideration should be given to Centrelink requiring a written family agreement before determining a “granny flat” exemption.
 - Consideration should be given to implementing robust due diligence assessments prior to aged care entry. The assessment should include a substantiation of diminished capacity, authorisation of the substituted decision-maker and determine whether an ACAS assessment has been undertaken.
 - In the circumstances where an agreement is not formalised, consideration should be given to the enforceability of a principles-based instrument to protect the rights of the older person.

¹⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law* (2007) <http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=lac/olderpeople/report/finalreport.pdf>.

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84. The Law Council also queries whether there a realistic prospect of achieving appropriate outcomes via contract law. Practitioners have, on occasion, received money back on the basis of the family agreement being weighted in favour of the other party.

Appointed decision-makers

Preliminary comments

85. The Law Council notes that depriving an individual of their right to make decisions for themselves when they have capacity is inconsistent with Article 12 of the United Nations *Convention of the Rights of Persons with Disabilities*.¹⁹ A finding that a person lacks capacity has serious consequences that will restrict the person's ability to exercise their fundamental human right to autonomy and may empower others to make decisions on behalf of the person.
86. A person may be appointed as a decision-maker by order of a court or tribunal. Examples of people so appointed are financial managers, guardians, tutors and next friends. It is important to recognise that there are two types of appointment of decision-maker that can be made: informal and formal.
87. Informal appointment is more common and prone to produce abuse than formal appointment. Two examples of informal appointment are found in *VMH v SEL* [2016] QSC 148. The first is the informal appointment as agent to complete signed blank cheques.²⁰ The second is the appointment as a co-signatory on a bank account.²¹ Another instance is *Thorn as executor of the estate of McAuley v Boyd* [2014] NSWSC 1159, where a nephew persuaded his aunt to gift him \$260,000.
88. Informal arrangements may also occur by way of unauthorised delegation by an authorised decision-maker.²²
89. In relation to formal appointments, the most well known is by a power of attorney. There are also contracts appointing an agent. The best known example is the appointment of a co-signatory on a bank account. This is addressed under the heading 'Financial institutions' and in response to questions 25 and 26.
90. Some states and territories have introduced different models. The Northern Territory, for example, has the *Advanced Personal Planning Act 2014* (NT), which enables decision-makers to be appointed for specified areas, including health and financial under an "Advanced Personal Plan". These orders are able to be registered with the Public Trustee. The scope for their use and or abuse is currently unknown.

¹⁹ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12

<<http://www.un.org/disabilities/convention/conventionfull.shtml>>. Article 12 of the Convention recognises the right of people with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life'.

²⁰ *VMH v SEL* [2016] QSC 148 [33].

²¹ *Ibid* [44].

²² See *C v W (No 2)* [2016] NSWSC 945. This decision involves a guardian's breach of fiduciary duty but not necessarily elder abuse.

Question 29

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

Evidence

91. Some NSW decisions involving instances of conduct by an attorney amounting to financial abuse, include:

- *Re R* [2000] NSWSC 886;²³
- *Watson v Watson* [2002] NSWSC 919;²⁴
- *Angliss v Urquhart* [2002] NSWCA 256;²⁵
- *Yaktime v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078;²⁶
- *Woodlands v Rodriguez* [2004] NSWSC 1167;²⁷
- *Sweeney v Howard* [2007] NSWSC 852;²⁸
- *Spina v Conran Associates Pty Ltd; Spina v M and V Endurance Pty Ltd* [2008] NSWSC 326 and *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561;²⁹
- *Badman v Drake* [2008] NSWSC 1366;³⁰
- *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 702;³¹
- *Perochinsky v Kirschner* [2013] NSWSC 400;³²
- *PGB* [2014] NSWCATGD 32;³³

²³ Loans which totalled \$4.86 million made by the principal (but signed by the attorney on his behalf) to the attorney secured by an unregistered mortgage over the attorney's home.

²⁴ The facts involved the attorney transferring the proceeds of the principal's bank account into the attorney's own account and transferring the principal's property to the attorney for inadequate consideration.

²⁵ This is a decision on an interlocutory level where conduct is alleged which, if proved, would constitute elder financial abuse.

²⁶ This involved a forged power of attorney being used by the forger to obtain a loan of \$238,000 secured against the victim's real estate.

²⁷ The attorney frequently withdrew amounts from the principal's bank account to meet the attorney's heroin addiction and then sold the principal's home.

²⁸ The impugned conduct included granting a mortgage over the principal's real estate to secure a loan to the attorney's benefit.

²⁹ The conduct included granting mortgages over the principal's real estate securing loans to a company of which the attorney was a director.

³⁰ Using the principal's funds, real estate was purchased by her attorneys in their names.

³¹ The attorney, the principal's son, conducted the sale of the principal's property and received the proceeds of sale but neither accounted to nor paid to his mother the proceeds of sale other than to pay \$30,000 towards the bond at the aged care facility where she resided.

³² The challenged conduct included gifts of shares, or the proceeds of sale of shares, by the principal but made by the attorney in favour of the attorney and her husband.

- *HAP* [2014] NSWCATGD 4;³⁴
- *BDN* [2014] NSWCATGD 32;³⁵
- *Peter Vitek v Estate Homes Pty Ltd* [2013] NSWSC 1764 and, on appeal, *Taheri v Vitek* [2014] NSWCA 209;³⁶
- *SKC* [2014] NSWCATGD 39;³⁷
- *P v NSW Trustee and Guardian* [2015] NSWSC 579;³⁸
- *Bronkhorst v Lloyd* [2015] NSWSC 1618;³⁹ and
- *Cohen v Cohen* [2016] NSWSC 336.⁴⁰

92. Examples from other jurisdictions include:

- *Re KAA* [2008] QGAAT 7;⁴¹
- *Moylan v Rickard* [2010] QSC 327;⁴² and
- *Brennan v Western Australia* [2010] WASCA 19.⁴³

Prevention/redress

93. Suggested actions to prevent or redress abuse involving appointed decision-makers include:

- Certificate of voluntariness of a principal's decision⁴⁴ and not just understanding of effect of decision.⁴⁵
- Explanation by an informed person to attorney before attorney's acceptance.⁴⁶

³³ The son as attorney sold his mother's house, invested the proceeds with a company which was the subject of litigation, and failed to pay care providers or rent.

³⁴ The attorney terminated term deposits and transferred the funds to his name: [44] and [51].

³⁵ The attorney did not apply the principal's finances in the principal's best interests.

³⁶ The attorney guaranteed the principal's performance of a contract for sale of land entered into by a company of which the attorney was sole director.

³⁷ The principal's niece was appointed as attorney and used the principal's funds for her own benefit: [13] and [16].

³⁸ The attorney proposed purchasing the principal's real estate at a \$100,000 discount.

³⁹ The principal's daughter/attorney withdrew a total of \$914,144.95 from the principal's bank accounts within a two and half year period.

⁴⁰ The principal's son/attorney transferred her home into his name for \$1 consideration.

⁴¹ The attorney sold a property owned jointly with the principal and had the proceeds placed in an account in her name. The proceeds were then used to discharge the mortgage on a property solely owned by the attorney.

⁴² The attorneys sold the principal's (their mother) home and used the majority of the proceeds for the principal's care but also gifted themselves \$115,000 each.

⁴³ The attorney (a Solicitor) was able to operate the principal's bank account and sell and buy property in the name of principal. The attorney used this power to withdraw funds from the principal's bank accounts and to sell shares. The attorney continued to do so after the death of the principal. The principal was convicted of 70 counts of stealing from the principal's estate (a total of \$896,787) and of fraudulently attempting to gain a benefit (\$73,790.02. obtained from the sale of 2000 Wesfarmers shares).

⁴⁴ Like the certificate for an enduring guardian appointment.

⁴⁵ See *Bridgewater v Leahy* (1998) 194 CLR 457 [118] as to the difference between mental capacity and volition.

⁴⁶ Like the certificate for an enduring guardian appointment.

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- Standardised tests for mental capacity for *inter vivos* transactions.⁴⁷
 - Educate principals and attorneys about an attorney's fiduciary duties.⁴⁸
 - Restrict eligibility to be an attorney to persons who possess certain attributes, experience or training.⁴⁹
 - Educate lawyers in better preparing powers of attorney.⁵⁰
 - Introduce a statutory presumption of undue influence for an attorney and principal.⁵¹ The Law Council generally supports a statutory presumption of undue influence where the attorney effects a transaction that benefits the attorney or a relation, business associate or close associate of the attorney. An example of such a presumption is s 87 of the *Powers of Attorney Act 1998* (QLD). Consideration could be given to including a similar presumption provision in each jurisdiction's power of attorney legislation.
 - Establish and fund an easily accessible information website and telephone service.
 - Consider increasing the investigative powers of Public Advocates.⁵²
 - Ensure that that the New South Wales Civil and Administrative Tribunal (**NCAT**), VCAT, Queensland Civil and Administrative Tribunal (**QCAT**) and similar tribunals have sufficient power to hold attorneys and similar representatives to account for their actions.
 - Raise public awareness of the risk of abuse (for example, via a broad elder abuse campaign which includes television and radio).
 - Raise the skill levels of aged care facility workers, bank and financial institution employees, real estate agents and others who may be commonly involved in transactions which perpetuate financial abuse, in relation to methods to prevent or lessen the likelihood of abuse.
 - Introduce random auditing. In Queensland there are, as in NSW, many examples of abuse of Enduring Powers of Attorney (**EPOAs**). However, there appears to be limited to no such examples of abuse by administrators. This is likely a result of the fact that administrators must file a financial plan with the

⁴⁷ The *Banks v Goodfellow* (1870) LR 5 QB 549 test should not be altered for testamentary dispositions.

⁴⁸ This was recommended in the Department of Lands (NSW), *Review of the Powers of Attorney Act 2003*, (2009).

⁴⁹ See, for example, *Szozda v Szozda* [2010] NSWSC 804 [34]. The suggested attributes include trustworthiness, responsibility, wisdom, prudence, justness, financial acumen (noting that an attorney vacates office if bankrupt), integrity, availability, decisiveness, impartiality, age and location of the attorney.

⁵⁰ The Law Society of NSW runs a quarterly 4 hour Masterclass in Powers of Attorney.

⁵¹ This may be modelled on *Powers of Attorney Act 1998* (QLD) s87. The effect is to place attorneys within the group of persons where undue influence is presumed, thus throwing the burden of rebutting the presumption upon the attorney where the attorney benefits from a transaction made at its instigation. These standard relationships include solicitor and client, physician and patient, parent and child, guardian and ward, and religious advisers and their adherents: *Louth v Diprose* (1992) 175 CLR 621, 628. The reverse does not apply if the principal obtains a benefit from the attorney. This is consistent with the description of these relationships in *Johnson v Butress* (1936) 56 CLR 113, 119, where Dixon J said that these relationships of 'their very nature imply influence'.

⁵² New South Wales and the Northern Territory do not have Public Advocates. The Northern Territory does have new Guardianship of Adults legislation (which will for the first time create an Independent office of the Public Guardian). The legislation commenced on 28 July 2016, so it is too early to tell how well it works.

tribunal every year and are randomly audited by the tribunal while EPOAs are not.

General comments

94. A power of attorney may provide certainty in financial transactions.
95. The LSNSW does not support criminal sanctions against attorneys who knowingly mistreat or neglect a principal who has lost capacity as this could detrimentally impact on the willingness of people to accept the responsibility of being an attorney for someone. Existing criminal laws suitably address the circumstances where someone knowingly mistreats or neglects another person. It is not necessary to capture this under the specific power of attorney acts. However, the Law Council and LSNSW suggest that information provided for attorneys should refer to the specific criminal sanctions that presently exist. The LIV supports the introduction of the new offences in the *Powers of Attorney Act 2014* (Vic).
96. The Law Council supports the notion of a principal being able to subject the attorney to financial monitoring by an accountant by nominating this to occur in the power. However, this should not be a mandatory requirement. It could be a matter for election by the principal, and included as an option in the relevant prescribed form.
97. The Law Council supports the harmonisation of powers of attorney and guardianship laws in each State and Territory. At present there is no consistency in State and Territory laws and instruments of powers of attorney and enduring guardianship. Uniformity would reduce the current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship.
98. The Law Council supports the development of a legal framework for the recognition of powers of attorney and guardianship instruments made in other jurisdictions both in Australia and overseas, particularly in common law countries.
99. The Law Council supports a number of recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its Report, "*Older people and the law*", including:⁵³ Recommendation 5 (national, industry-wide protocols for reporting alleged financial abuse and develop national industry wide protocols); Recommendation 10 (mandate that guarantors be advised regularly of the progress with the loans); Recommendation 16 (implement uniform legislation for powers of attorney); Recommendation 17 (mutual recognition); Recommendation 18 (education strategies); Recommendation 22 (education for financial institutions); Recommendation 35 (fostering of elder law expertise in State and Territory Law Societies); and Recommendation 38 (increased funding to community legal centres).
100. The Law Council strongly supports Recommendation 38 and considers that funding for programs should also be provided to Legal Aid Commissions.

⁵³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Report, *Older people and the law* (2007) <http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=lac/olderpeople/report/finalreport.pdf>.

Question 30

Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?

101. The Law Council notes that some of its Constituent Bodies support a registration system (e.g. LIV) and others do not (e.g. LSNSW).

Law Society of New South Wales Position

102. When the *Powers of Attorney Act 2003* (NSW) was reviewed in 2009, the relevant Minister released an Issues Paper⁵⁴ which sought submissions on compulsory registration of enduring powers of attorney. The final report recommended against compulsory registration of enduring powers of attorney⁵⁵. The conclusion was that “[t]he disadvantages to compulsory registration of enduring powers of attorney far outweigh any benefits”⁵⁶.

103. Two issues arise from this:

- Has anything changed to suggest that compulsory registration of powers of attorney is now appropriate?
- If compulsory registration is limited to enduring powers of attorney, there will be an anomaly with irrevocable and general powers of attorney being available to perpetuate financial abuse.

104. The rationale for registration appears to be that it will prevent people acting under false instruments or instruments that have expired or been revoked⁵⁷. It is not clear how registration will operate in any practical or effective manner to achieve this objective.

105. The Law Society of NSW does not support the proposed development and implementation of a national register of enduring powers of attorney.

106. While a register may have the benefits envisaged in identifying persons holding powers of attorney, the Law Society of NSW is not persuaded that this, in itself, would operate in any practical or effective way to prevent, or affect, the incidence of elder abuse.

107. Further information is needed to enable a sound assessment of any scheme for compulsory registration. For instance:

- How will registration be mandated?

⁵⁴ See Department of Lands (NSW), *Review of the Powers of Attorney Act 2003 - Issue Paper* (2009) <http://www.lpi.nsw.gov.au/_data/assets/pdf_file/0014/106322/Power_attorney_final.pdf>.

⁵⁵ Department of Lands (NSW), *Review of the Powers of Attorney Act 2003*, (2009).

⁵⁶ It is noted that the General Purpose Standing Committee No 2 Report on Elder Abuse in New South Wales did not come to a concluded position on registration, other than that it should be examined as part of the ALRC's enquiry: General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder abuse in New South Wales* (2016) [6.104]–[6.105] <<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6063/Report%2044%20-%20Elder%20abuse%20in%20New%20South%20Wales.pdf>>.

⁵⁷ Department of Lands (NSW), *Review of the Powers of Attorney Act 2003 - Issue Paper* (2009), [137].

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- Will it apply to all powers of attorney, including irrevocable, limited and non-prescribed powers of attorney?
 - What cost will be involved in registering?
 - Who will bear the cost?
 - What will be the process for registration?
 - Will there be unrestricted or restricted rights to search the register?
 - What cost will be involved in performing a search?
 - What are the consequences of failure to register?

108. A major concern is that the cost, delay, perceived government involvement or other difficulties with registration may induce more people to adopt informal methods to delegate decision-making which may cause of many incidents of abuse.

109. Whilst mandated registration is not supported, a uniform national legislative template for powers of attorney is recommended.

Law Institute of Victoria Position

110. The LIV supports:

- Review of professional guardians' and administrators' decisions.
- Random audits of personally appointed decision-makers in conjunction with the establishment of a register (the decision-makers would be randomly selected from the register). The LIV supports registration of powers of attorney and guardianship documents so that they are less able to be used as instruments of abuse and/or exploitation. It is noted that a Victorian Parliamentary Inquiry (2010) recommended the establishment of a register.⁵⁸
- Criminal sanctions such as those recently introduced in Victoria in relation to the misuse of a power of attorney.

111. The LIV do not support the introduction of a broader duty to prevent abuse of the represented person from abuse by anyone else as it has no evidence that this is a problem; in the cases of elder abuse it is usually the attorney who is perpetrating the abuse. Also, the LIV note that this additional obligation is likely to deter people from accepting the role.

⁵⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) recs 66-78 <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/powers_of_attorney/Report_24-08-2010.pdf>.

Question 31

Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?

112. The *Powers of Attorney Act 2003* (NSW) does not impose duties which are greater than exist under the common law. The legislation states some of those duties within its legislation. For instance:

- s 12: an attorney cannot benefit unless expressly allowed.⁵⁹
- s 13: an attorney cannot benefit a third party unless expressly allowed.
- s 11: an attorney cannot gift the principal's property unless expressly allowed.⁶⁰

113. The *Powers of Attorney Act 1998* (QLD) adopts a different approach and contains many sections stating common law duties, such as:

- s 66: an attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.
- s 67: an attorney must exercise power subject to the terms of the instrument.
- s 73: an attorney may only enter into a conflict transaction if authorised to do so.⁶¹
- s 74: an attorney can only disclose confidential information in limited circumstances.
- s 85: an attorney must keep accurate records and accounts of all dealings and transactions made under the power.⁶²
- s 86: an attorney must keep the attorney's property separate from the principal's property.⁶³

114. These duties are largely reproduced in the *Powers of Attorney Act 2014* (Vic) s 63 (and following), which legislation also provides:

- s 70: an attorney is not entitled to any remuneration unless it is specifically authorised by the enduring power of attorney or by law.

⁵⁹ This restates the common law: *Sweeney v Howard* [2007] NSWSC 852 [59]. *Powers of Attorney Act 2006* (ACT) s34 adopts the same approach.

⁶⁰ This restates the common law: see *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 702 [22]–[23]; *Re R* [2000] NSWSC 886 [39]; *In re W (Enduring Power of Attorney)* [2000] Ch 343; *Tobin v Broadbent* (1947) 75 CLR 378, 401 (Dixon J). It is considered that the essence of the NSW section is reflected in *Powers of Attorney Act 1998* (QLD) s 88. *Powers of Attorney Act 2006* (ACT) s 38 adopts the same approach as the NSW section.

⁶¹ See also *Powers of Attorney Act 2006* (ACT) s42.

⁶² See also *Powers of Attorney Act 2006* (ACT) s47.

⁶³ See also *Powers of Attorney Act 2006* (ACT) s48.

115. There is merit in the approaches reflected in the Queensland legislation⁶⁴ and Victorian legislation, as there is in the expansion of common law duties which appear in the:

- *Powers of Attorney Act 1998* (QLD) s89, *Powers of Attorney Act 2014* (Vic) s68 and *Powers of Attorney Act 2006* (ACT) s41, which provide that an attorney may provide from the principal's estate for the needs of a dependant of the principal unless the instrument provides otherwise.
- *Powers of Attorney Act 2014* (Vic) s72, namely that an attorney must implement a decision of an enduring guardian or guardian.
- *Powers of Attorney Act 2006* (ACT) s45(2), namely that an attorney has a right to all the information that the principal would have been entitled to if the principal had decision-making capacity.

Role of the Victorian supportive attorney

116. The role of a supportive attorney was introduced in Victoria on 1 September 2015 by the *Powers of Attorney Act 2014* (Vic) (“Powers of Attorney”).⁶⁵

117. Importantly, at the same time the role of a supportive attorney was introduced, the legislative provisions for enduring powers of attorney and enduring powers of guardianship were also consolidated into a single enduring power of attorney, with powers for financial and personal affairs.⁶⁶ The role of a supportive attorney enables a principal to appoint a person to support them in making and giving effect to certain decisions involving financial matters and personal affairs, while still retaining their own decision making authority.⁶⁷

118. The Powers of Attorney Act does not define the term “supported decision” or “supported decision making”. However, a supported decision under the Powers of Attorney Act appears to be limited to:

- accessing, collecting and obtaining personal information for the principal;⁶⁸ and
- communicating information relevant to a supported decision of the principal.⁶⁹

119. The Powers of Attorney Act also appears to put in place important safeguards, including:

- depriving the supportive attorney of any role in assisting the principal with a significant financial transaction;⁷⁰
- depriving the supportive attorney of any remuneration for acting as a supportive attorney;⁷¹ and

⁶⁴ *Guardianship and Administration Act 2000* (QLD) also specifies the obligations on decision makers.

⁶⁵ *Powers of Attorney Act 2014* (Vic) pt 7.

⁶⁶ Rae Kaspiw, Rachel Carson and Helen Rhoades, ‘Elder Abuse – Understanding issues, frameworks and responses’ (Research Report No 35, Australian Institute of Family Studies, 2016) 30 <<https://aifs.gov.au/sites/default/files/rr35-elder-abuse.pdf>>.

⁶⁷ *Ibid.*

⁶⁸ *Powers of Attorney Act 2014* (Vic) s87(1).

⁶⁹ *Ibid* s88.

⁷⁰ *Ibid* s89(1).

⁷¹ *Ibid* s90(2).

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- making a person ineligible for appointment as a supportive attorney if, in broad terms, the person is insolvent, dishonest or a care worker, health provider or accommodation provider for the principal.⁷²
120. Any examination of the role of supportive attorneys in other jurisdictions should take into consideration current legal frameworks and varied use and design of general powers of attorney. The role of a supportive attorney in practice, and the types of decisions a supportive attorney has assisted a principal to make, are unclear as the role was only introduced in September 2015.
121. The ALRC may also wish to have regard to the findings of the NSW Law Reform Commission's review of the *Guardianship Act 1987* (NSW). This review includes an examination of the relationship between the *Guardianship Act 1987* (NSW) and the *Powers of Attorney Act 2003* (NSW) and models of decision-making that should be employed for persons whose will and preferences cannot be determined.
122. The Law Council supports, in principle, a move towards a model of supported decision-making in states and territories, but notes that there may be issues in practice that will require further consideration. These issues include:
- Any proposal to apply a formal legal framework to informal family arrangements should not necessarily replace informal arrangements, unless appropriate. For example, the Law Council understands that the Guardianship Division of the NSW Civil and Administrative Tribunal avoids making a guardianship order, if possible. This recognises the benefits of informal arrangements for many people with disability and their families.
 - Supported decision-making models should enhance the decision-making capacity of people with disability and not expose people to potential abuse. Issues relating to how a person would be supported in practice need to be determined.
 - A model of supported decision-making is likely to be resource intensive and costly. In order for its practical implementation to work, there must be adequate supports and funding allocated, as required by Article 12 of the *Convention on the Rights of Persons with a Disability*.⁷³
 - A legal framework for the appointment of a support person and the scope of the powers of such an appointment need to be determined. Issues that require consideration include: the role of legal practitioners in this framework and their exposure to liability; and the exposure of the support person to liability.
 - The model of decision-making to be employed for people whose will and preferences cannot be determined because of cognitive impairment or serious mental illness, particularly in relation to decision-making about financial management.

⁷² Ibid s91.

⁷³ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12

<http://www.un.org/disabilities/convention/conventionfull.shtml>. Article 12 of the Convention recognises the right of people with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life'.

Question 32

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

Evidence

123. Abuse perpetrated by guardians and administrators may result or potentially result from an abuse of trust and it may be difficult to prevent such abuse. See, for example *HAP* [2014] NSWCATGD 4,⁷⁴ *Woodward v Woodward* [2015] NSWSC 1793,⁷⁵ and *IR v AR* [2015] NSWSC 1187.⁷⁶
124. Another instance of such abuse can be seen in *C v W (No 2)* [2016] NSWSC 945 where the abuse can be inferred from the need for the Court to consider the applicable principles for the exercise of its inherent jurisdiction to relieve a guardian, and the like, of personal liability for breach of fiduciary obligations in management of the affairs of an incapable person.
125. It should be noted that the incidence of wrong doing by private financial managers has led to the NSW Trustee and Guardian introducing mandatory surety bonds for those office holders.

Redress

126. Appropriate supervision by an independent body, such as the NSW Trustee and Guardian, may provide a mechanism to prevent abuse.
127. Some of the proposed actions to prevent or redress abuse by attorneys are equally appropriate for guardians and administrators. These include:
- Standardised tests for mental capacity for *inter vivos* transactions;⁷⁷
 - Educate appointors and appointees about a guardian's duties;
 - Restrict eligibility to be an enduring guardian to persons who possess certain attributes, experience or training;⁷⁸
 - Educate lawyers in better preparing enduring guardian appointments;
 - Establish and fund an easily accessible information website and telephone service;
 - Consider increasing investigative powers for Public Advocates.⁷⁹

⁷⁴ The enduring guardian cancelled services from care providers.

⁷⁵ The financial manager used \$184,777.18 of managed person's money for his own benefit, such as improvements to his house.

⁷⁶ A son of the managed person resisted submitting to any procedure requiring him to account for about \$1 million he acquired from his parents at a time when there were reasonable grounds for suspecting that they were under his influence.

⁷⁷ The *Banks v Goodfellow* (1870) LR 5 QB 549 test should not be altered for testamentary dispositions.

⁷⁸ The suggested attributes include: competence in deciding personal issues; willingness to act; ability to cope with issues to be decided; ability to understand needs and values; easy available; suitable age; good health; ability to work with attorney.

- Ensure that that NCAT, VCAT, QCAT and similar tribunals have sufficient power to hold guardians and similar representatives to account for their actions;
- Raise public awareness of the risk of abuse (for example, via a broad elder abuse campaign which includes television and radio);
- Raise the skill levels of aged care facility workers bank and financial institution employees, real estate agents and others who may be commonly involved in transactions which perpetuate financial abuse, in relation to methods to prevent or lessen the likelihood of abuse; and
- Specify the obligation on the decision-maker in the governing legislation.

128. A review of defined terms and concepts in the legislation should also be considered to promote consistency and the use of plain language. Such terms and concepts include “person responsible”, “alternative enduring guardian”, and “capacity”.

129. The Law Council also suggests that the ALRC may wish to consider the role of private and public protected estate managers, with particular reference to *Ability One Financial Management Pty Ltd v JB by his Tutor AB* [2014] NSWSC 245.

Public advocates

Question 33

What role should public advocates play in investigating and responding to elder abuse?

130. The Law Council supports consideration being given to an expansion of the role of public advocates to investigate cases of suspected elder abuse. The ALRC may wish to have regard to Recommendation 2 of the *Dr John Chesterman Report* (2013), albeit in the federal context. Recommendation 2 provided that the:

*The Victorian parliament should grant the Public Advocate the broader investigation power as recommended by the Victorian Law Reform Commission. This would enable the Office of the Public Advocate to investigate (following a complaint or on its own motion) ‘the abuse, neglect or exploitation of people with impaired decision-making ability’.*⁸⁰

⁷⁹ New South Wales and the Northern Territory do not have Public Advocates. The Northern Territory does have new Guardianship of Adults legislation (which will for the first time create an Independent office of the Public Guardian). The legislation commenced on 28 July 2016, so it is too early to tell how well it works.

⁸⁰ John Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (Winston Churchill Memorial Trust of Australia, 2013) 7
<https://www.churchilltrust.com.au/media/fellows/Chesterman_John_2012_Report.pdf>.

Health services

Question 35

How can the role that health professionals play in identifying and responding to elder abuse be improved?

131. Given the sensitivities and complexities associated with elder abuse, and a reluctance to disclose it, trusted health professionals are well-placed to identify elder abuse. However, health professionals may be constrained in their ability to address suspected or disclosed abuse.
132. Drawing on the practical experience of members of the legal profession working with health professionals to address elder abuse, the Law Council suggests the following strategies involving health professionals to address elder abuse.

Professional development

133. One of the key factors constraining health professional's ability to identify elder abuse is the limited consensus between older people, carers and health professionals on what behaviour constitutes elder abuse.
134. The expansion of professional development training for health professionals that improve health professionals' capacity to identify abuse, ask questions and engage legal services is vital. However, to generate the systemic change of practice needed to effectively address elder abuse, this professional development training should be: reinforced with the availability of secondary consultations; supported by a whole-of-organisation elder abuse framework; and delivered as part of a health justice partnership (HJP). Evidence-based professional development programs for health professionals should be implemented and appropriately funded. Such programs could build on, for example, the Victorian Government's Guidelines, *With Respect to Age* (2009).⁸¹

Policies and procedures

135. If health professionals are trained to ask about and identify elder abuse, they must be supported by clear guidance when abuse is suspected or disclosed. A framework for responding to suspected or disclosed elder abuse must be timely and client-centred, utilising the trust placed in health professionals.
136. As multiple services are generally required to address instances of elder abuse, professionals must be able to easily access to up-to-date information about local services.
137. The Law Council recommends that:
- A whole-of-organisation elder abuse framework should be expanded and adapted to hospitals and community health centres.
 - An online directory of community services to complement existing family violence, aged and disability networks should be established.

⁸¹ Victorian Government, *Guidelines: With Respect to Age – 2009*, (2009).

Dedicated resources

138. While greater emphasis is placed on the role of front line staff to address elder abuse, finding the organisational capacity to undertake these initiatives becomes more difficult when funding is increasingly tied to direct service-delivery. The Law Council suggests that dedicated funding be allocated to develop and implement the necessary elder abuse frameworks to build workforce capacity and establish strategic partnerships.

Dedicated culturally and linguistically diverse workers

139. To overcome barriers associated with engaging older people from culturally linguistically diverse communities (**CALD**), the involvement of trusted CALD community workers can help raise awareness in their communities, ask questions if abuse is suspected or disclosed and support the client in engaging with services. Dedicated CALD community workers should be integrated within health services.

140. There is also a role for Aboriginal controlled health services to play in both independently and culturally supporting Indigenous older people, who may be subject to abuse. They may assist in upskilling staff to recognise the signs and to be aware of options to address abuse. Legal clinics in Aboriginal controlled health services to assist older people who may be subject to elder abuse also warrant consideration.

141. In addition, there is a role for medical general practitioners, which are often a trusted source of information for older people.

Question 37

Are health-justice partnerships a useful model for identifying and responding to elder abuse? What other health service models should be developed to identify and respond to elder abuse?

142. The Law Council considers HJPs to be a worthwhile model for identifying and responding to elder abuse. Being located on site, and incorporated as part of a client-centred service, a HJP lawyer can help address instances of elder abuse that require an immediate and flexible response.

143. HJPs embrace inter-disciplinary collaboration as a core component. The HJP model focusses on creating a systemic change of practice to address the social determinants of health, providing more immediate legal assistance within a healthcare setting and promoting joint advocacy efforts.

144. Dr Liz Curran has noted that

... a significant impediment to vulnerable and disadvantaged people in accessing the legal system is that their problems are often cumulative and compounding, that their sources for seeking advice are often non-legal and that both clients and non-legal service providers often lack of knowledge, confidence and capacity in

*seeking assistance from lawyers or identifying cases that are of a legal nature and making appropriate referrals.*⁸²

145. The HJP model encourages victims and health professionals to seek advice on elder abuse issues by making the process of seeking advice simpler. The strength of the HJP model is that it creates a 'one-stop-shop' for the interconnected health and legal issues that arise in cases of elder abuse. The HJP model brings the lawyers to the victims and the health care professionals rather than requiring those people to more actively seek advice.
146. Co-location of the legal and health professionals also enables consistent interaction which allows relationships to develop and awareness to be raised about elder abuse and other legal issues. Over time this can also help to develop the capacity of health care professionals to identify cases of elder abuse, particularly when a professional development component is included in the implementation of a HJP program.
147. Further, a distinctive element of the HJP model is the ability to tap into the significant pro bono resources of the legal profession. For example, Justice Connect in coordinating its HJP program with Cohealth and St Vincent's Hospital, Melbourne has been able to utilise the capacity and resources of its pro bono member firms, matching complex elder abuse matters with specialist legal professionals willing to provide pro bono support. This type of process allows complex legal issues to be addressed in a timely manner by specialists in the relevant field.
148. The Law Council therefore recommends funding for the expansion of the HJP model of service delivery for older people experiencing elder abuse, including trialing the model in other states and territories.

Question 38

What changes should be made to laws and legal frameworks, such as privacy laws, to enable hospitals to better identify and respond to elder abuse?

149. Current privacy and confidentiality laws should be reviewed. Currently, the legislative framework may impede upon the ability of agencies to collaborate and support families dealing with elder abuse, particularly in cases where the older person refuses to disclose or does not wish action to be taken. The framework should be reviewed to assess the merits of allowing agencies to seek support, referral, information and advice from other agencies that may be able to assist.

⁸² Liz Curran, 'Relieving some of the legal burdens on clients: Legal aid services working alongside psychologists and other health and social service professionals' (2008) 20 *Australian Community Psychologist* 47, 47.

Forums for redress

Question 39

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

150. In general terms, it may be unnecessary to provide civil and administrative tribunals with greater jurisdiction to hear and determine matters related to elder abuse.
151. There is a complexity of matters involving elder abuse, the common law and equitable principles involved in a breach of trust and fraudulent behaviour. A court may be an appropriate forum to consider these matters and provide equitable remedies. The Supreme Court of NSW currently conducts informal settlement conferences facilitated by a Judge in small estate family provision matters. Mediation is also mandatory for all family provision matters. This is provided by the Court or can be conducted privately.
152. The following jurisdictional issues would need to be resolved if civil and administrative tribunals were provided with greater jurisdiction to hear and determine elder abuse matters:
- The financial threshold for financial claims. The NSW Civil and Administrative Tribunal and Local Court of NSW currently have lower thresholds than the Supreme Court of NSW.
 - The procedural powers of a Tribunal to consider all affected interests in any disputes of claims for redress.
 - The enforcement of Tribunal decisions. A court has wide powers to enforce a judgment debt, such as, an order to an employer to garnishee wages.
 - The availability of equitable remedies.
153. In Victoria, the VCAT has jurisdiction to deal with equitable claims and does so using the VCAT Real Property List. Examples of such matters involving parents and adult children include:
- *Protyniak v Henry (Real Property)* [2009] VCAT 8;
 - *Michell v Winch (Real Property)* [2012] VCAT 1524;
 - *Pavlovich v Pavlovich (Real Property)* [2012] VCAT 869;
 - *Taylor v Taylor (Real Property) (Revised)* [2014] VCAT 796; and
 - *Gievski v Gievski (Real Property)* [2009] VCAT 2768.

Question 41

What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services, and where should they be located?

154. Services should be client focused rather than lawyer focused. Clients should have a right to legal representation in alternative dispute resolution forums, but the location of negotiations should suit the client, such as using a teleconference or conducting mediation at the residence of a client, including a nursing home.

Criminal law

Question 42

In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

155. Generally practitioners within this area agree that there is significant underreporting of Elder Abuse. While it is difficult to extrapolate about the potential numbers of criminal investigations, it seems nevertheless that few matters result in criminal prosecution and that some matters that ought to result in prosecution do not. It is outside the scope of this submission to say whether this is as a result of:

- The criminal provisions being insufficient to ensure elder abuse is legally prohibited and susceptible to criminal prosecution.
- Police services being unwilling to prosecute what they may regard as “family business”.
- Failure to report serious allegations of abuse to the police so that they are in a position to prosecute.

156. Some investigation of these matters needs to occur to allow a proper assessment to be made about whether there ought to be specific offences concerning elder abuse.

157. The question of whether there ought to be a criminal offence in relation to elder abuse is an issue about which there is some controversy. The Public Advocate (QLD) and the Queensland Law Society have written a joint paper endorsing the creation of specific criminal offences.⁸³ The benefit of the approach is that it sends a strong message to the community about the inappropriateness of the behaviour, and that the risk taken in subjecting an adult to elder abuse may also affect perpetrators personally by attracting criminal sanction.

158. Many lawyers practicing criminal law argue that adequate offences currently exist to respond to elder abuse and that including additional offences only complicates an already complex system. However, there may be a concern that although a lot of

⁸³ Queensland Law Society and the Public Advocate (QLD), *Elder abuse: How well does the law in Queensland cope?* (2010) <https://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse_issues-paper_v6.pdf>.

behaviour that constitutes elder abuse could be the subject of criminal charges, few charges are brought by the police.

159. The LSNSW does not support the introduction of offences specifically concerning elder abuse, as it considers that it is discriminatory to have laws based on age. Rather, any age related vulnerability can be taken into account at the sentencing stage in cases that are prosecuted under the existing criminal law.

160. As previously noted, the LIV supports criminal sanctions (such as those recently introduced in Victoria) in relation to misuse of a power of attorney.

Question 43

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

161. The Law Council notes that the Queensland Law Society and Public Advocate have analysed the criminal law in Queensland and in their assessment the law is insufficient to ensure that elder abuse is legally prohibited and susceptible to criminal prosecution. The joint paper recommends the implementation of specific criminal offences in relation to elder abuse.⁸⁴

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?

162. Anecdotally, it seems that protection orders are being used to protect people from elder abuse. However, legal practitioners report that few applications are brought. This seems to arise as a consequence of victims being reluctant to report abuse, particularly when it occurs within families.

Question 45

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

163. Part of the difficulty with reporting abuse is that if reporting occurs without clearly identifying the purpose of the reporting, it simply imposes a layer of administrative requirements (and expense) without necessarily producing consequential benefits. A common definition of abuse and categories of abuse across states and territories may assist in aiding clarity and ensuring the usefulness of data from any reporting system. If reporting is considered to have a useful purpose, a central coordinating agency needs to be identified or created to collect and report on the data.

164. The Law Council does not support mandatory reporting of elder abuse in circumstances where the older person has decision-making capacity. From a rights-based approach, it is vital that the older person retains the right to decide whether to report the abuse or not.

⁸⁴ Ibid 28.

Question 46

How should the police and prosecution responses to reports of elder abuse be improved?
What are best practice police and prosecution responses to elder abuse?

165. Professional education and training for police working with vulnerable older people (for example, those without decision-making capacity and/or those who are socially isolated) would improve police response to detecting and investigating elder abuse.

Question 47

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

166. Police, courts and victim services need to be educated about the prevalence and effect of elder abuse to assist them to discriminate between civil and criminal matters, and to understand the very damaging effect elder abuse may have on older Australians. Elder abuse is not family business. Victims may be reluctant to report, embarrassed, socially isolated, and need assistance to access and understand the system. If the police, courts and victim services understand the circumstances and effect of abuse, victims will be able to more easily access the system and the system will more appropriately respond to individual cases.

Question 48

How should sentencing laws and practices relating to elder abuse be improved?

167. Age related vulnerability should be taken into account at sentencing where this is not already available.

Question 49

What role might restorative justice processes play in responding to elder abuse?

168. Elder Abuse occurs in relationships of trust in circumstances where the victim often has a diminishing circle of friends and may be socially isolated. The effect of abuse on an individual's confidence can be extremely problematic, particularly if the adult is suffering from diminishing decision making capacities. As part of a suit of responses to elder abuse, restorative justice may be worthwhile. However, it should be used only in appropriate circumstances where the victim is properly supported. Restorative justice should not necessarily be regarded as the remedy of choice.

Question 50

What role might civil penalties play in responding to elder abuse?

169. Civil penalties offer the opportunity for softer option response to elder abuse that may result in more prosecutions and more convictions. As an adjunct to a comprehensive response to elder abuse, civil penalties may assist to increase the community's awareness of the issues and decrease the prevalence of the abuse.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.