LEGAL REFORMS TO ELDER ABUSE:

A SUBMISSION TO THE ALRC INQUIRY

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**Based on the author’s untitled unpublished mss on the subject of elder abuse.**

August 17, 2016

The Commissioner

ALRC Advisory Committee

Elder Abuse Inquiry

I wish to submit the following discussion concerning the problem of elder abuse. It includes suggestions for improvements in the law concerning the punishment of offenders particularly in the area of financial abuse.

My suggestions relate to:

* changes concerning the lawful operation of a Power of Attorney;
* changes to the Forfeiture Rule;
* introducing a system of victim’s compensation;
* The peculiar problem that requires a Public Advocate in NSW to investigate cases of elder abuse;
* The problem of the abuse of companion pets owned by victims of elder abuse.

I am not a lawyer but an interested member of the public.

Yours faithfully,

Philip Johnson.

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# PART ONE: BACKGROUND

Before I outline suggested legal reforms, I believe it is helpful to sketch some details concerning the main perpetrators of elder abuse.

## IDENTIFYING MAIN PERPETRATORS

The general consensus among researchers, irrespective of their theoretical and disciplinary biases, is that the maltreatment and exploitation of older people is a significant problem. Of all the types of abuse, it is financial abuse that is the highest form. The Council of the Ageing NSW briefly states on its website:

Elder abuse encompasses physical violence and neglect ... the most prevalent form of elder abuse is financial.[[1]](#footnote-1)

In 1995, Philip Sijuwade observed in a cross-cultural study that “in financial abuse cases the motivating factor appears to be greed.”[[2]](#footnote-2) In the past decade, journalists have recounted five stories of celebrities who have been the victims of maltreatment, all of which include financial abuse. In four cases the perpetrators were next-of-kin, while the fifth case involved a conspiracy of close associates and personal staff:

* Actor Mickey Rooney (1920-2014) [next-of-kin].[[3]](#footnote-3)
* Actor Zsa Zsa Gabor (1917- ) [next-of-kin].[[4]](#footnote-4)
* Chemist-founder of L’Oreal, Liliane Bettencourt (1922- ) [associates/personal staff].[[5]](#footnote-5)
* Texas billionaire J. Howard Marshall (1905-1995) [next-of-kin; wife Anna Nicole Smith (1967-2007)].[[6]](#footnote-6)
* New York socialite Brooke Astor (1902-2007) [next-of-kin].[[7]](#footnote-7)

The perpetrators of abuse, who in the majority of cases are next-of-kin, take advantage of their victim’s trust and dependency. Perpetrators wield power to subjugate and exploit their victims, particularly by misusing an enduring Power of Attorney to indulge in self-enrichment.

The *Wall Street Journal* declared in August 2006: *“Note to Retirees: Beware the Family.”* [[8]](#footnote-8) US lawyer Jane Black remarked in 2008:

It is not the unscrupulous financial expert, scam artist, or morally hollow caregiver who, statistically, appears to be the biggest threat—it is family. Children, grandchildren, siblings, nieces, and nephews are the people most likely to cheat the elderly.[[9]](#footnote-9)

Four South Australian researchers observe:

Financial abuse of older people is a significant social problem that is likely to intensify as Australia’s ageing population continues to rise exponentially over the next 20 years. It is the most common form of reported or suspected abuse older people (often accompanied by psychological abuse) and the older person’s adult son(s) or daughter(s) are most likely to be the abusers. With the increasing complexity associated with financial management, this type of abuse is likely to increase.[[10]](#footnote-10)

# ROOT VALUES

There are root values at stake when considering the development of public policy that opposes the abuse of older persons. At the heart of the problem of the abuse of older persons is the problem of the human heart. The undeniable indicators worldwide are that self-centrism is the fulcrum that moves the abuser to harm others.

In the early 1990s Don Rowland, a demographer at the Australian National University, forecasted:

Abuse of the elderly by their carers is likely to become more prevalent ... Familism—the subordination of individual goals to those of the family—is now at its lowest ebb this century and the alternative philosophy of individualism, which is a key factor in low fertility and childlessness in Western societies, conflicts with expectations of self-sacrifice in caring for aged parents.[[11]](#footnote-11)

Social and criminological research discloses that abusers think of themselves as occupying the central position in a relationship; that they deserve special privileges and entitlements to the exclusion of others; and are disinclined to place the interests of others at the centre.

## NEW ZEALAND RESEARCH

The problem of self-centredness in connection with the abuse of older persons is noted in a New Zealand study. The study contained interviews with both caregiver groups and older persons who had been victims of abuse. This blunt comment was elicited from a caregiver focus group in Christchurch: “Society is very selfish.”[[12]](#footnote-12) Another respondent in Auckland stated, “People are becoming more self-centred because of the economic situation, with both parents working and little time left over for the older generation.”[[13]](#footnote-13)

## SOUTH AUSTRALIAN RESEARCH

A comparative study of South Australian and Norwegian nurses, who work in community care facilities, yielded these observations concerning Australia:

In some cases of financial abuse, the participants understood the motive as obvious [i.e. the abuser self-enriches at the expense of the abused victim] ... Financial abuse of older clients in community care was a prominent issue amongst the Australian participants; its frequent mention might be a result of the recent increased attention from politicians and researchers about fraud, undue influence and substitute decision-making legislation ... Another relevant factor might be that the Australian clients are charged more for the service than are the Norwegian clients and that financial abuse became visible when the client could not pay the fees or reduced the service.[[14]](#footnote-14)

## Victorian Research

A Monash University study on financial abuse, which was commissioned by the State Trustees of Victoria, noted:

Family members may be more likely to be perpetrators as they are in close proximity to the vulnerable person, have access to the money and other financial instruments such as cheque books, credit cards, automated teller machine passwords, and may have feelings of entitlement to the money, and believe that the funds they are improperly taking are simply advances on what they will inherit, or that their elderly relatives do not need the money. The factor of entitlement comes up many times in studies of why individuals took money from family members. It seems that the mere fact that people in the community have wills sets up an expectation that assets should and will be handed down to the next generation.[[15]](#footnote-15)

This same study noted that “family greed” is a key “risk factor” and research discloses that “adult children, grandchildren and other relatives are the most likely perpetrators of financial abuse.”[[16]](#footnote-16)

## Queensland Research

Researchers in Queensland have likewise highlighted the problem of self-centredness. A study of eighty-one family members who assumed asset management responsibility for the affairs of an older relative unveiled a self-centred sense of entitlement to the money or property of their older relative.[[17]](#footnote-17)

## Australia-wide Research: Self-Entitlement

Dale Bagshaw and three colleagues published their findings from a recent national survey on financial abuse across Australia. It revealed that service providers for older people identify one of the high risk factors is “a family member with a strong sense of entitlement to an older person’s property/possessions.”[[18]](#footnote-18)

The study also established that the same risk factor was highlighted in the responses received from both older persons and intergenerational next-of-kin:

Both older people and adult sons and daughters described how their family members demonstrated a sense of entitlement in relation to older people’s finances, particularly after there was a change in the family’s circumstances, such as the death of an older person’s spouse, or an adult child having high financial commitments and an inability to meet them.[[19]](#footnote-19)

Bagshaw and his colleagues observed that their findings were consistent with results obtained by other researchers in an earlier Australian study:

Our findings on the nature of the financial abuse experienced by the respondents are similar to those of Wilson et. Al.’s descriptions of intentional financial abuse, which they defined as a desire by a carer or family member to use an older person’s assets for the benefit of others or themselves. They argued that such intentional abuse was linked to a range of attitudes to older people and their resources that suggested it was acceptable to misappropriate an older person’s assets, including notions that the older person’s assets would eventually belong to them, that the older person no longer needed their assets, or would have wanted to have their assets used in this way; or that by providing assistance, the carer had “earned” the resource in question. They pointed out that such attitudes, when linked to a capacity to access the assets and the lack of any effective monitoring, can lead to financial abuse.[[20]](#footnote-20)

Australian social research confirms that abusers are self-centred in their motives and attitudes, and have no moral qualms or social conscience about misappropriating an older relative’s property.

The New Zealand study mentioned earlier pointed to respondents’ comments about abusers being self-centred. As regards motives, the researchers noted that one strong factor is the prospect of inheriting:

Rural families with potentially large inheritances work with legal systems to remove legal titles from the older person ... beliefs about the inter-generational transfer of money and property can lead to financial abuse, and ideas about loyalty to family members can get translated into silence about such abuse: “Some [family members] have the idea that ‘my parents’ money is ‘their own.’”[[21]](#footnote-21)

## Europe and USA

European sociologists Thomas Goergen and Marie Beaulieu have likewise noted that “greed and striving for financial gain at the expense of another person can be considered to be the typical motives for financially exploiting older persons.”[[22]](#footnote-22)

Jean Sherman from the University of Miami addressed a conference in Orlando, Florida in 2010:

The motivation of the abuser is primarily about power and control ... The current economic climate hastens these situations. Perpetrators feel entitled.[[23]](#footnote-23)

Bryan Kemp and Laura Mosqueda remark that in cases of financial abuse:

Common business or personal ethics are not followed ... The alleged perpetrator does not give consideration to the effect of the transaction on others, including the victim, other family members, beneficiaries, or the public welfare system.[[24]](#footnote-24)

The absence of any worthwhile personal and social ethic on the part of an abuser, which is coupled with an amoral disregard for the consequences, is a clear sign of the root problem of self-centredness.

## Carer Stress is NOT the root cause

The foundational root cause of the abuse of older persons *is not the stress experienced by care-givers* (*contra* the view that the “complex causes” of abuse includes “carer stress”).[[25]](#footnote-25) Even allowing for the reality that some relationships present difficulties which may include varying levels of stressful experiences, the heart of the problem of abuse is not the experience of stress. Carer stress or impatience is not a morally acceptable excuse to justify neglect, physical abuse, psychological abuse and financial exploitation of an older person.

Bonnie Brandl and Jane Raymond observe that early studies did concentrate on carer stress as the main explanatory factor for abuse. However this perspective has lost credence in the face of mounting evidence:

Seeing caregiver stress as a primary cause of abuse has unintended and detrimental consequences that affect the efforts to end this widespread problem.[[26]](#footnote-26)

Brandl and Raymond made this clear-cut observation in 2012. However, the fact that carer-stress was not the major cause was acknowledged twenty years ago when in 1995 Philip Sijuwade observed:

Even with evidence to the contrary, the tendency in the early years was to regard the stress of caring for dependent family members as the leading cause of elder abuse and neglect. This view was particularly attractive to politicians, the media and the public. It was easier to blame the victim than to challenge societal and family customs that allowed the mistreatment to occur.[[27]](#footnote-27)

## Selfishness Impacts on the Public Purse

There is more than enough cross-cultural evidence to demonstrate that self-centredness is the root principle that shapes the actions of those who abuse older persons in a myriad of ways.

The diagram below summarises the root motives that set in motion a destructive course of behaviour:

In order to effectively counter the abuse of older persons, there is a profound need to look at the problem holistically. A policy that has as its foundational principle the autonomous self is very prone to actually reinforcing the older person’s social isolation. An over emphasis on ensuring that there is maximum freedom to choose but which lacks correlative duties and social constraints, may end up denying the older person’s civil rights and simultaneously foster socially destructive behaviour.

For example, in the absence of legally enforceable punitive measures and social constraints, a policy may encourage autonomous individuals who believe that they are entitled to their relative’s assets to exercise “freedom of choice” to self-enrich, and to disregard everyone else.

A holistic approach begins with the place and solidarity of the individual in community. A shift to the individual in community grounds policy in a framework that should ensure what is beneficial to one member of society also adds to the unity and cohesion of the entire society.

A good public policy will intentionally aim to sustain positive relationships that (a) support the individual’s solidarity with the community and (b) also nurture the cohesiveness of society.

**“No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend’s or of thine own were: any man’s death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.”**

**John Donne**

**“Meditation XVII,” in *Devotions upon Emergent Occasions*, [1624] ed. John Sparrow (Cambridge UK: University Press, 1923), 98. Also available at** [**www.online-literature.com/donne/409/**](http://www.online-literature.com/donne/409/)

The individual older person who is a victim of abuse undeniably suffers the most from the unprincipled and unethical actions of their abuser.

However, the horizons for harm spread far and wide. What is harmful to one member of society is harmful to all: “the bell tolls for thee”. The impact of abuse is not limited to the immediate generation but its cumulative effect may ripple through time that shapes the circumstances for future unborn generations.

The following diagram (next page) illustrates the negative rippling effects of abuse at both the **micro** and **macro** levels of life.

The **micro level** refers to the direct effects of abuse upon the victim, and the victim’s immediate family. Abuse involves fracturing the close inter-personal relationships of the family unit, and where financial abuse occurs the victim is exposed to great risk due to the misappropriation of assets. The loss of assets impacts on the victim’s needs to financially sustain the remainder of their lifespan. It has the further consequence of diminishing the transfer of the victim’s assets after death to the victim’s beneficiaries (usually next-of-kin).

 Financial abuse adds pressure to the social welfare and health care systems. The long term effect is that as the victim’s heirs do not inherit from an intact estate they are at risk of missing out on the potential extra boost to their financial security and self-sufficiency in retirement.

At the **macro level**, the increasing number of cases of abuse has a collective impact on the rest of society. This negative impact is felt not only in the present but also extends horizontally into the long term future. Abuse is deviant anti-social behaviour. It erodes social cohesion and unity by promoting a pattern of behaviour to self-enrich by exploiting the vulnerable that others will imitate. Abuse undermines good social capital by exposing people to risk, and adds to the burden on the public purse. The corrosive effects place immediate pressure on both the welfare and health-care systems.

What is often not appreciated is that there are also long range effects particularly in the cumulative effect caused by many people engaging in self-enrichment. The future is shaped by the actions in the present. Abuse that is spread throughout the present community sets up things for the recurrence of abuse in the future. Abusers model a pattern of deviant behaviour of self-enrichment that prompts others to perpetuate. It is a destructive habit that ensures future social cohesion is weakened, and the impact on the public purse has long term consequences.

Kemp and Mosqueda reported in 2005 that in the USA:

In a recent national study of elder financial abuse, it accounted for about 20% of all substantiated elder abuse perpetrated by others (after excluding self-neglect). It is also estimated that, for every known case of elder financial abuse, four to five go unreported. Rates may even be higher than this. One study estimated that about 33% of one million cases of elder abuse were financial.[[28]](#footnote-28)

In 2012, Kerry Peck noted the following with reference to the USA:

According to the *Selling to Seniors* monthly marketing report, people ages 50 and older control 77 percent of all financial assets in the United States. Therefore it is no surprise that financial exploitation continues to be the most reported type of elder abuse across the nation. The MetLife Mature Market Institute published a study (MMI 2009) on financial exploitation of older adults in the United States; the study concluded that while only one in five cases of financial exploitation is actually reported, a conservative estimate of the personal cost to victims was $2.6 billion annually.[[29]](#footnote-29)

One thing that is lacking in Australia is a comprehensive nation-wide actuarial-style report on the cost to the public purse of the financial exploitation of older persons. Queensland’s Elder Abuse Prevention Unit (EAPU) reported:

The 2007/2008 annual report of the EAPU shows that over $14 million was reported to the Elder Abuse Prevention Unit (EAPU) as being exploited from Queensland’s seniors for that financial year. However the EAPU estimates that $97 million is a more realistic figure.[[30]](#footnote-30)

If the estimate for Queensland is close to the mark, then the figure would necessarily be greater in more populous states such as NSW. In the judgment of Alzheimer’s Australia the conservative estimate for financial abuse is around 5% of the population aged over 65 years.[[31]](#footnote-31) The Royal Commission into Family Violence was informed that in the state of Victoria the sum of $57 million was reported lost in the year 2013-2014 through the misuse of Powers of Attorney.[[32]](#footnote-32)

## Victims, Abusers and Community

A holistic policy will not just aim to ostracise abusers as socially deviant selfish actors but it will also promote justice for the abused. A holistic policy begins with the individual as a member of the community because in our psyches we are hardwired for socially interdependent relationships. The sound governance of society requires initiatives that assist in strengthening the community, and particularly social networks that foster healthy relationships. It also warrants the introduction of measures that will substantially reduce the incidence of abuse.

The community must play a helpful participatory role in reducing abuse. However, the root source of the problem (self-centredness) obliges the government to exercise its duty of care by establishing legal restraints and deterrents, and fostering social constraints, that target abusers even before they act.

By opting for the autonomous individual as the starting point, there is an immediate weakness built-in to the process of policy formation. The inherent weakness is rooted in these beliefs:

* Any interference in cases of abuse may be construed as the government intruding on the individual’s right to choose (the “nanny state”).
* Cases of abuse are deemed to be a private quarrel between individual family members (“sort out your differences in a civil action in court”).
* The supply of advisory information functions as a post-interventionist “solution” i.e. action may only be spurred on after the abuse has been committed.
* A view that interprets the concept of human rights as being centred in the individual’s will to choose and the individual’s claims to demand or waiver those rights. In effect, a right is regarded as a legally protected choice.

To regard intervention in cases of abuse as resembling the “nanny state” involves a colossal trivialising of the problem. The law already stipulates that nobody is allowed to carry out acts of assault, theft or fraud. It is unlawful and unacceptable behaviour no matter what is the victim’s age or gender. Society simply does not tolerate anyone assaulting another person and misappropriating their assets. Presumably, to follow the logic of unbridled libertarianism to its extreme, the state should not intervene in any sort of criminal enterprise because it entails interfering with someone’s freedom of choice to steal, assault, or kill.

The evidence of social research is quite clear: an older person who has cognitive capacity may nevertheless feel strongly dependent on their abuser and fear reprisals. Their abuser exerts quasi-totalitarian control over the victim’s circumstances. The victim’s rights and freedom of choice are curtailed and denied. In cases of severe cognitive impairment the problem is exacerbated because the victim’s capacity to make decisions is often poor. The cognitive function and capacity to make decisions does deteriorate in the latter stages of health problems such as dementia.

The presupposition that “the state cannot interfere” in family matters turns into an absurd excuse to justify doing next-to-nothing. This is not tolerated when a child is abused or when women are victims of domestic abuse. It is odd then that there is a present-day reluctance to act when older persons are abused, which is entirely inconsistent with the societal revulsion at child abuse and domestic abuse. An abuser of older persons cannot receive any special exemptions from legal penalties on the grounds that their victim happens to be next-of-kin and that the abuse was a “private matter.”

The thinking that interprets human rights as legally protected choices and claims is very muddy that lacks clarity because it fails to provide an adequate definition and ultimate justification for the protection of rights. The empirical case from human history is that altruism and valuing freedom co-exists with human motives and actions to deceive kill or subjugate others. One weakness is that if rights merely reflect an individual’s will and choice then, since human choices, preferences and motives are quite variable, it becomes exceedingly difficult to determine that there any universal rights that require proper legal protection.

Furthermore, children and the cognitively impaired do have rights that are recognised in law (e.g. right to life, right to own property, right to inheritance) but they are unable to exercise any power to demand or waiver these rights. This fact undermines the claim that rights are to be construed as an exercise of the individual’s will and preferences: that rights are all about the individual’s choices and claims. Instead, the proper way to approach the definition and justification of rights is to understand that rights are titles which involve relationships. Rights require recognition and protection and apply to all persons even when they lack the capacity to make claims or exercise the ability to choose.[[33]](#footnote-33)

# PART TWO: ZERO TOLERANCE OF ELDER ABUSE

The rationale for zero tolerance is straightforward: abuse entails treating older persons as non-persons which denudes their dignity. There can never be any justification for maltreating older people. There can never be any self-justifying excuse by an abuser. Not even an appeal to “I am suffering from carer-stress” can be construed as “extenuating circumstances” for an abuser to weasel their way out of facing up to their unethical actions and their self-centred motives.

This is the blunt point: ***under no circumstances should any older person be subjected to abuse.***

In some quadrants of society, the moral criticism of the abuse of older persons seems to be ahead of the moral horizons in bureaucracy. This is apparent in the “neighbour principle” in the law of negligence. A dividing line must be drawn between individual freedom to exercise unrestrained choice on one side, and, on the other side, society’s crucial need for some restraint on individuals that is supported by state legislation.

One way in which both public policy and public perceptions could be reshaped is to classify, condemn, and place in the foreground of social discourses, abuse of older persons as “socially deviant” or “anti-social” behaviour. Individuals who choose to abuse and exploit older persons must be compelled to face the consequences of their actions. They are selfish violators of human trust, their life-values are aberrant, and their behaviour is socially deviant.

The notion of socially deviant behaviour is part of the stock-in-trade of sociologists:

Elder abuse may be conceived as deviant behaviour. Deviance is a term rooted in sociology, referring to behaviour or activity that breaks social norms and violates shared standards. Thus, deviance includes and at the same time goes beyond the meaning of crime by not being tied to the violation of criminal laws but including informal social rules and conventions, ethical standards, organizational rules, and laws (other than those laid down in the criminal code). Such a perspective may be useful for analysing elder abuse phenomena. Elder abuse clearly comprises criminal acts (like several physical assault, rape, fraud, theft, threat, or neglect causing death) but most definitions of elder abuse and most scientific measures applied to it include behaviours violating norms of social conduct but not necessarily criminal laws (like yelling at a person or holding somebody up to ridicule).[[34]](#footnote-34)

United community opposition might be galvanised, and greater vigilance could be fostered, if “abuse” is classified as socially deviant behaviour that is ostracised and rejected. The rejection of the abuse of older persons needs to be in society’s consciousness in the same way that there is zero tolerance for terrorists and paedophiles.

## Justice for Seniors as a category of Law

Some aspects of the abuse of older persons are covered in scattered pieces of existing legislation related to assault, fraud, theft and undue influence. However, there is no single piece of legislation that identifies abuse in a fashion that is analogous to the US Elder Justice Act.

In other words, there is a profound and urgent need to develop a fresh category of law: a piece of legislation dedicated to Justice for Senior Citizens and the Prevention of Abuse of Senior Citizens. What is needed is an anti-abuse piece of legislation, and appropriate amendments to some existing laws, such as those concerning Power of Attorney and the Forfeiture Rule, to specifically refer to the category of “abuse.”

# PART THREE: WORKING TOWARD LEGAL REFORMS

## Neighbour Principle in Law

One way of improving the status of older persons is to promote, and socially and legally reinforce the value of the person in community. Once public policy begins with the individual in community, as opposed to the attitude “you are independent and on your own,” then the big surprise is that the common law has been way ahead of us for more than eighty years.

Near the end of the nineteenth century Charles Pearson, the one-time Oxford scholar and politician in the colony of Victoria, lauded the values of individualism and self-reliance in the Australian context:

The settlers of Victoria, and to a great extent of the other colonies, have been men who have carried with them the English theory of government: to circumscribe the action of the State as much as possible; to free commerce and production from all legal restrictions; and to leave every man to shift for himself, with the faintest possible regard for those who fell by the way.[[35]](#footnote-35)

Australian legal scholar Paul Finn points out that the view expressed by Pearson in the 1890s has been swept away by the tides of change in the law. Finn states that “individualism has to accommodate itself to a new concern: the idea of ‘neighbourhood’—a moral idea of positive and not merely negative requisition—is abroad.”[[36]](#footnote-36)

What Finn alludes to is a very important legal principle that exerts a daily influence on corporations: the “neighbour principle.” The “neighbour principle,” particularly as it relates to the common law of negligence, is something that dovetails nicely with opposing the “neglect” of older persons.

The watershed moment in the common law of negligence that produced the “neighbour principle” is the case of *Donoghue v. Stevenson*.[[37]](#footnote-37) In England a manufacturer was accused of negligence after a consumer purchased a bottle of ginger beer that contained a decomposed snail.[[38]](#footnote-38) The case went through an appeals process that reached the House of Lords. The decisive verdict was rendered by Lord Atkin (1867-1944) who was born in Queensland but spent most of life in England.[[39]](#footnote-39) He made this judgment which has revolutionised the law in a positive way:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. [[40]](#footnote-40)

Atkin’s neighbour principle in law was derived from the parable of the Good Samaritan.[[41]](#footnote-41) The neighbour principle applies in the realm of corporate law concerning negligence and damages. The obligation imposed is to not harm. In recent decades the principle has inspired far-ranging questions about corporate accountability. Public opinion about minimal moral standards among corporations came into acute focus with the collapse of corporations such as OneTel and Enron. It has been further reinforced by motion pictures such as *The Insider* (1999), *The Bank* (2001), and *Enron: The Smartest Guys in the Room* (2005).

The neighbour principle highlights expectations that the public now holds with respect to corporations embracing virtues that reflect: fairness, honesty, integrity, and respect for others. Finn’s discussion indicates that the standards of conduct now reflected in the law oppose the condoning of selfish behaviour. The individual’s autonomy is now imposed on by the obligations we owe one another. It covers not only the corporation as a social citizen but also the actions between individual parties in contracts.

Finn refers to the shifts in contract law where the doctrine of unconscionable dealings is being revived; “good faith” in contracts is central; and the changes made via the Trade Practices Act 1974 have had widespread impact. While in the law of equity a number of principles have taken centre stage, including the unconscionability principle, breach of confidence, and the fiduciary principle.[[42]](#footnote-42)

One may take notice of that branch of contract law known as quasi-contract. It covers relations between two parties where one party has paid money to the other party by mistake. The quasi-contract warrants that the recipient refunds the money. It is a legal device to thwart unjust immoral enrichment.

It is in the same vein that the constructive trust operates to ensure that the interests of justice are imposed on a trust relationship. The maxim: One must not legally profit from committing a crime applies in a constructive trust. If a murderer slays a victim with the intention of inheriting from the estate, the law provides that the murderer must not benefit from this crime.

In a similar spirit of considering others, the old “Public Trust” doctrine that exists in US and Canadian environmental law highlights that the natural environs, especially waterways, must be guarded not just for the present but also for the future benefit of those not-yet born. [[43]](#footnote-43)

All of the above provides the wider backdrop for considering the abuse of older persons as socially aberrant and being inconsistent with the shifts in the law. The shifts in contract and corporation law and in equity have brought constraints upon unbridled individual autonomy in favour of considering one’s “neighbour” and the consequences of one’s actions in harming others. These shifts provide a good template for thinking about how to deal with unaccountable individuals who seek self-enrichment through the financial abuse of older persons. The one who abuses an older person is self-centred, has no consideration for their victim or the long-term consequences of seeking self-enrichment at the expense of their “neighbour.”

Unbridled autonomy in those areas of the law is deemed as unacceptable and deviant behaviour. If a corporation behaved in an exploitative and abusive fashion towards older persons there would be a hue and cry of condemnation. The selfish and greedy behaviour of an individual abuser of older persons might be likened to the amoral actions of the corporations negatively portrayed and lampooned in *The Insider* and *Enron: The Smartest Guys in the Room.*

# PART FOUR: SUGGESTED REFORMS

# ENDURING POWER OF ATTORNEY

The advent of the enduring Power of Attorney as an estate-planning instrument has taken on a life that may not have been fully foreseen.

Abusers are exploiting a loophole as regards their accountability in the use of the Power of Attorney. An appointee under a Power of Attorney has a fiduciary duty to act honourably in the best interest of the person they represent. Self-interest must be set aside. Many appointees do act with integrity. However, the financial abuse of older persons is centred in exerting undue influence and in the deliberate misuse of the Power of Attorney for self-enrichment.

Kemp and Mosqueda point out that in cases of the misuse of a Power of Attorney:

Common business or personal ethics are not followed. [[44]](#footnote-44)

It should be stipulated that an Attorney must keep proper transaction records. A coercive restraint is to insist that book-keeping records will eventually be audited upon the death of the person who made the Power of Attorney. An amendment to the relevant act could make it mandatory that the appointed Attorney:

* Keeps a proper set of ledger records (cross-referenced to receipts/invoices) of all transactions conducted relative to both income received, and disbursements paid to third parties for goods and services. The records will one day be audited.
* The records will be essential if a case is brought before NCAT where a verdict may be rendered to nullify a misused Power of Attorney and to appoint a financial manager.
* Since a Power of Attorney ceases upon the death of the person who made the appointment, it would be compulsory to submit the ledger as an affidavit to either the Supreme Court or NCAT for auditing.
* It would also be advantageous for such records to be accessible by a Public Advocate investigating cases of abuse.

The above proposal may be justified as part of an administrative transition step from the operation of a Power of Attorney in life over to the administration of a deceased estate:

* Executor/Administrator needs the data of transactions conducted for the preparation of a date of death income tax return.
* Similarly, an Executor would find access to such records essential in the preparation of a defence of an estate threatened by a Family Provision suit.
* It will provide a way of forensically ascertaining the net amount required for compensating the victim.

In much the same way that lawful gun ownership requires a licence, and drivers of motor vehicles must apply for a licence, there could be a compulsory training programme created for appointees on how to properly use a Power of Attorney. At the completion of such a programme the appointee would be obliged to sign a declaration under oath acknowledging that they understand their fiduciary duties and the legal penalties that will apply for breaches of those duties. Before an appointee could produce a Power of Attorney at a bank or other financial institution, proof of completion of the compulsory training should be sighted.

# SUCCESSION AND FORFEITURE RULE

Another measure that could be applied is to add the abuse of older persons as a category under the forfeiture rule. The forfeiture rule presently applies in cases where a beneficiary to an estate attempts to hasten the process to inherit by murdering the testator. In cases of murder the beneficiary forfeits all rights to inherit under the will (and likewise under the laws of intestacy).

The Commissioners of New Zealand’s Law Commission helpfully clarify the matter:

Nobody, an ancient legal maxim proclaims, may profit from his or her wrongful conduct: nullus commodum capere potest de injuria sua propria. The justice of this principle is self-evident and axiomatic. It applies in many different circumstances. In relation to succession to property on death, it disentitles a killer from benefitting economically as a result of the death of the person killed. It is well settled law in New Zealand (and almost all legal systems) that a killer is not entitled to take any benefit under a victim’s will, or if no will disposes effectively of all of a victim’s estate, on a victim’s intestacy. As an English court said in 1914, “no man shall slay his benefactor and thereby take his bounty” (*Hall v Knight & Baxter* [1914] P 1, 7). A killer is also incompetent to be granted probate as an executor of a victim’s will, or to be appointed administrator of a victim’s estate.[[45]](#footnote-45)

As the above quote makes it clear, the law covers private family affairs where a beneficiary commits murder. The only difference between the above provisions in succession law to disqualify a murderer, and the financial abuse of an older person, is that in the case of the latter the act of murder has not been committed.

*When a family member (or members) deprives a living older relative of their property and assets (i.e. financial abuse), it makes no difference that they might eventually be entitled to receive these same assets under a will. One has no right whatsoever to take what does not lawfully belong to them. An interest in a will has no lawful effect until after the testator has died. In other words, in order to inherit one must patiently wait for the testator to die.*

*It is unlawful and unacceptable behaviour to help oneself to property while the testator is living. It is likewise unlawful to immediately take the property once the testator has died. A beneficiary must wait until a grant of probate, or letters of administration, is obtained, and after all creditors’ claims on the estate are settled.*

*The truth is that the unlawful taking of a person’s property is theft.* Abusers who misappropriate assets by (a) misusing a Power of Attorney, (b) by withdrawing funds using the victim’s internet account log-in password, or (c) using the victim’s PIN via a bank’s ATM, are thieves. The forfeiture rule condemns those who seek to self-enrich at the expense of another via murder. The rule could be expanded to cover cases of abuse.

If a person accused of abuse is successfully convicted then the forfeiture rule should apply to the abuser, the abuser’s spouse and the abuser’s line of descent (children etc). If it were widely known that an abuser would be cut out from inheriting, and also denied the right to lodge a claim against an estate under Family Provision, this would constitute a strong disincentive to commit financial abuse in the first instance.

# PUBLIC ADVOCATE NSW

One practical way of combating the abuse of older persons is through the creation of the office of the Public Advocate. Similar entities do exist in other Australian states but they primarily operate with an advocacy role on behalf of the disabled who are cognitively impaired. In other words, the problem of opposing or investigating the abuse of older persons is not at present central to their charters.

## Background: 2009-2010 Proposal to NSW Government

The possible establishment of an office of the Public Advocate emerged in NSW Parliamentary discourses in 2009. The trigger for this was NGO requests for a public hearing on substitute decision-making. The requests coincided with the 2009 legislative merger of NSW Trustee and Guardian. A meeting was held in the State Library on 1 April 2009 where the Director-General of the Attorney General’s department addressed stakeholder groups that were disturbed about the proposed legislative merger of the Public Trustee and Office of Protective Commissioner. The Director-General indicated that the Government would hold a public inquiry into substitute decision-making.

In the second half of 2009 the Legislative Council Standing Committee on Social Issues convened an inquiry into *Substitute Decision Making for People Lacking Capacity*. The Committee members comprised:

* The Hon. I. W. West (Chair)
* Hon. G. J. Donnelly
* Hon. M. A. Ficarra
* Dr. J. Kaye
* Hon. T. J. Khan
* Hon. M. S. Veitch

On 28 September 2009, the Social Issues Committee formally interviewed:

* Imelda Dodds the acting CEO of the newly formed NSW Trustee and Guardian
* Diane Robinson the President of the Guardianship Tribunal
* Andrew Buchanan Chairperson of the Disability Council of NSW
* Graeme Smith the NSW Public Guardian
* Susan Field NSW Trustee and Guardian Fellow of Elder Law (University of Western Sydney)
* Professor Terrence Carney Professor of Law (University of Sydney)
* Rosemary Kayess Associate Director of Community and Development Disabilities Studies (University of NSW).

The proceedings of that day were conducted in the presence of a public gallery and media:

The Committee has previously resolved to authorise the media to broadcast sound and video excerpts.[[46]](#footnote-46)

When Rosemary Kayess and Diane Robinson were interviewed the proceedings ventured into a discussion about the role of a Public Advocate in relation to persons with cognitive disabilities.[[47]](#footnote-47) Five months later, the Committee’s final report was released on 25 February 2010.[[48]](#footnote-48) The Committee stated in its final report:

The Committee notes the evidence presented during the inquiry that NSW is alone among Australian states in not having a Public Advocate ... The Committee notes that a specific proposal for an Office of the Public Advocate has not been developed. The Committee considers it important and timely that the NSW Government engage the relevant department and agency to consult the relevant department and agency to consult with relevant stakeholders and develop such a proposal.[[49]](#footnote-49)

The deliberations in that inquiry about a Public Advocate did not specifically explore the wider problem of the abuse of older persons. It was confined to the possible role that such an office would have with reference to representing the interests of persons lacking capacity. The Committee’s final report contained a recommendation (number 32) to the NSW Government:

That the NSW Government consult with the relevant stakeholders and develop a proposal for the establishment of an Office of the Public Advocate... [[50]](#footnote-50)

This matter was recorded in the very first annual report (2009-2010) of the then newly merged NSW Trustee and Guardian:

Last year we made submissions to the NSW Upper House Standing Committee on Social Issues *Inquiry into substitute decision-making for people lacking capacity*. The Standing Committee released their report in February 2010 and we are currently awaiting the Government’s response to their recommendations. Several of these recommendations have the potential to impact significantly on our work, including recommendations that the Public Guardian be given the authority to proactively investigate the need for guardianship for people with disabilities and assist people with disabilities without the need for a formal order and the recommendation that a proposal be developed regarding establishment of a Public Advocate in NSW.[[51]](#footnote-51)

The state government’s response to the Committee was released in August 2010. The above recommendation (number 32) elicited the following response:

SUPPORTED – FOR FURTHER CONSIDERATION

The Government considers that careful analysis and extensive consultation be undertaken in relation to this recommendation. Consultation should be undertaken by the Department of Justice and Attorney General (DJAG) and ADHC [i.e. Ageing Disability and Home Care] jointly.

Consultation should involve DJAG, ADHC, The Guardianship Tribunal, the Public Guardian, the Ombudsman, non government organisations, community groups and people with disabilities and their families and carers.

A report which includes a summary of that consultation and costing information for further consideration should be prepared.[[52]](#footnote-52)

The Committee’s hearings were held in public. The Committee’s report, the NSW Trustee and Guardian Annual Report, and the Government’s response to the Committee (August 2010), are all a matter of public record. So the next questions to be answered are: when did the public consultation occur and what conclusions were reached about the merit of creating an office of the Public Advocate?

Six months after the published response there was a change of government at the state elections in March 2011. The public would expect in the normal course of events that the Directors-General of the Department of Justice & Attorney General and of Family & Community Services would have been briefed by their respective ministers before the end of 2010, and that the recommended consultation would have been set in motion, and that it would have continued under the O’Farrell government.

A check of the annual reports published by the following departments and public bodies, spanning the years 2010-11 to 2014-15 inclusive, reveals no mention whatsoever of any formal consultation with stakeholders, the community etc on the question of the Public Advocate:

* NSW Trustee and Guardian, including the Office of the Public Guardian
* Department of Justice and Attorney-General
* Family and Community Services (previously ADHC and DHS)
* Guardianship Tribunal (annual reports searched from 2009-2010 up to 2012-2013).

Similarly, a search of the NSW Parliamentary website reveals “nil” results in the search for any document or report concerning an inquiry into the possible creation of an office of the Public Advocate in NSW. Almost six calendar years have elapsed since the recommendation was made by the state government to hold a consultation. Nothing has eventuated.

The public is thoroughly entitled to accept at face-value that the government was genuine in its formal response when it stated:

The Government considers that careful analysis and extensive consultation be undertaken in relation to this recommendation.

However, the fact is that nothing was ever done. The complete lack action cannot be attributed to “human error” or bureaucratic “oversight.” Instead a very bad impression is formed: the words were a token bureaucratic gesture to appease public concerns, or worse the words carried a disingenuous covert message understood only by “insiders”. When decoded they mean: stall the proposal in the hoped-for expectation that (a) the matter will be forgotten and (b) nobody will notice that nothing was ever done.

## Role of the Public Advocate in Tackling Abuse of Older Persons

The Public Advocate needs to be created with the powers to investigate cases on behalf of senior citizens. Some powers along that line were vested in the Guardianship Tribunal (now NSW Civil and Administrative Tribunal) but that Tribunal was clearly under-resourced in terms of personnel and funding to realistically execute all powers and duties in forensic investigations of financial abuse.[[53]](#footnote-53)

The Public Advocate would be a statutory officer who as a public official at law would operate for the public convenience and interest. The Public Advocate’s role and duties would include:

* Promote and protect the rights of adults, especially older adults, who are cognitively impaired in their decision-making capacity. It could also act on behalf of older persons who do not suffer from cognitive impairment but who fear reprisals from their abuser. This duty would converge with Australia’s obligations in international law to implement in its domestic laws the provisions and stipulations of article 12 of *United Nations Convention on the Rights of Persons with Disabilities*.
* The Public Advocate would have legal standing in courts and tribunals to represent the interests of victims.
* Receive reports and investigate cases of financial abuse of older persons, especially those who are disabled, or suffer from dementia, or other forms of cognitive impairment.
* The Public Advocate would be empowered to interview older persons free from coercive and undue influence from next-of-kin in domestic settings, aged care facilities and similar institutions.
* The investigative power would allow the Public Advocate to access financial records of transactions conducted by the accused (next-of-kin, trusted person, acquaintance or stranger) who has in managing an older person’s assets:
* Abused the use of an enduring power of attorney to dispose of an older person’s realty or financial assets, and has misappropriated the realty or proceeds for self-enrichment or to benefit a third party.
* Misappropriated funds using an older person’s credit card, EFTPOS card, cheque account, and other liquid investments that may be accessed for transactions via a PIN, website password, or authorised signature.
* Defrauded an older person by compelling them to pay cash, sign cheques, or conduct an electronic bank transaction for goods and services that are never received.
* Exerted undue influence to compel an older person to transfer shares in a company into the accused’s name or accused’s business firm; or compelled a testator to change the provisions of their Will to the direct benefit of the accused, the accused’s spouse/partner and line of descendants.

In cases where the evidence is unequivocal, the matter is then placed in the hands of the Police and Director of Public Prosecutions. There would in effect be an investigative coalition as diagrammed below:

In cases where parties are at logger-heads, the Public Advocate might assume the role of a mediator in hearings convened at the Local Court. The Local Court offers a cost-effective arena for dispute resolutions. If such matters are unresolved then the case might be directed to either NCAT or a higher court.

## Governance of the Public Advocate

The governance of the office of the NSW Public Advocate would be characterised by these distinctive features:

* The NSW Governor would appoint the NSW Public Advocate for a position of five calendar years, with the possibility of contract renewal.
* The NSW Governor would be empowered to suspend and remove an appointee from the office for acts of corruption, crime, or misconduct.
* The NSW Governor would appoint individuals to the position(s) of Deputy Public Advocate, with the possibility of contract renewal; and with the power to suspend or remove a Deputy from the office.
* The NSW Public Advocate would be empowered to delegate his authorities to designated subordinate officers.
* *The NSW Public Advocate would be established as a corporation sole, with perpetual succession*, with the power to take proceedings, hold and deal with property in its corporate name, and do all things necessary for or incidental to the purposes for which it is constituted. The conferring of the status of “corporation sole” would be a significant legal and operational indicator that the Public Advocate was a statutory officer who has genuine independence from government.

Some bureaucratic critics of the NSW Public Trustee in 2008 maintained that the concept of “corporation sole” was an idea originating from a bygone era. The argument was that because it is an old idea it is irrelevant to the twenty-first century. This status of corporation sole was abolished when the draft bill was created for the NSW Trustee and Guardian which further eroded its independence from government.

On the basis of that cultural snobbery about the past one might say that making a Will, raising taxes, and arresting people for the crime of murder are likewise ideas originating from bygone days and therefore they have no relevance in this century. It is worth noting, *contra the critics’ claim* that the legal concept of a corporation sole is widely used in contemporary Britain and is not confined to the establishment of the Monarchy and the Church of England. Other bodies in Britain, Australia and Eire that are a corporation sole include: Auditor General of Wales, Police Ombudsman for Northern Ireland, Queensland Treasury Corporation, Registrar General of ACT, and each minister of the Government in the Republic of Eire. Every state of the USA recognises “corporation sole” for a variety of organisations including non-profit scientific research groups. The most recent case is the Commissioner for Older Persons (Wales) which was established as a corporation sole under an Act in 2006.[[54]](#footnote-54)

The antipathy toward the concept of corporation sole is rooted in the “antiquated” views of the nineteenth century legal historian Frederic Maitland whose critical view was shaped by his own time-bound cultural prejudices: a negative gender bias toward women and his specific constitutional antipathy toward Queen Victoria.[[55]](#footnote-55)

* *The NSW Public Advocate would report directly to the NSW Attorney General as portfolio minister BUT would not report administratively via the Chief Executive Officer/Director-General of the Department of Justice/Attorney General.* The rationale for directly reporting to the minister is that (a) the Public Advocate should act as a statutory officer who is independent of government, and (b) the added layer of administrative bureaucracy is an operational and budgetary inefficiency that wastes time and money, and simply boosts on paper the curriculum vitae of a departmental director.
* The office of the NSW Public Advocate would also be accountable to external agents such as the NSW Audit Office, NSW Ombudsman, and Independent Commission Against Corruption.

The legislation to establish the Public Advocate would need to contain some “unalterable objects” to prevent intermeddling with both its independence and its funding.

# VICTIM’S COMPENSATION

There is a need to tackle the abuse of older persons from two standpoints: the punitive and restorative.

## Disincentives to Abuse

The incentive to abuse older persons may be taken away by introducing punitive measures that ensures no abuser will be permitted to financially benefit from their activities.

Some disincentives include what has been discussed in previous sections concerning punitive measures and social restraints on those who contemplate or perpetrate abuse:

* The introduction of a compulsory training programme on how to properly operate a Power of Attorney with an oath taken that the appointee comprehends their fiduciary duty and the penalties for misusing the power conferred.
* The mandatory keeping of proper financial transactions in light of an audit that would be conducted when the Power of Attorney is terminated either by order or at death
* Expanding the Forfeiture Rule in deceased estates to cut out an abuser and the abuser’s line of descent from inheritance.

A further disincentive is to introduce a victim’s compensation scheme where a convicted abuser forfeits all misappropriated assets. The prospect of being disinherited and of having misappropriated assets confiscated would act as a powerful restraint on “risk-avoiders” who might contemplate abuse.

The enforcement of penalties of being disinherited and of having misappropriated assets confiscated will effectively impact on “risk takers” who choose to abuse and have the attitude “catch me if you can.” This penalty serves as a line in the sand: Society will ensure that an abuser does not profit from abuse.

There is already a precedent for this punitive approach because the NSW Trustee and Guardian is responsible for assets confiscated under the provisions of:

* The *Criminal Assets Recovery Act 1990*.
* The *Confiscation of Proceeds of Crime Act 1989*.[[56]](#footnote-56)

The establishment of a victim’s compensation scheme would be consistent with what has recently been introduced in Victoria where VCAT may hear cases and award compensation to a victim of abuse.

The awarding of compensation to the victim constitutes a form of restorative justice. Cases where compensation is awarded would be handled in hearings before NCAT or in criminal courts. The NSW Trustee and Guardian could play a supporting role in the process of the confiscation of a perpetrator’s ill-gotten assets. When a case has been decided and the perpetrator of abuse is found guilty, the proceeds of the assets that have been taken from the victim could be transferred to the NSW Trustee and Guardian until the accused has exhausted all avenues of court appeal. Once that process is exhausted, then the proceeds would be restored to the victim, or distributed through a victim’s estate in cases where the victim has died.

Victim’s compensation not only entails yielding justice but also carries with it the promotion of good social capital.

# ABUSE OF COMPANION PETS

Centuries ago influential thinkers, such as Thomas Aquinas, John Locke, and the artist William Hogarth, observed that when children behave cruelly toward non-human creatures, this behaviour often translates in adulthood toward the abuse of fellow humans.[[57]](#footnote-57) This point was illustrated in Hogarth’s *Four Stages of Cruelty* which begins with the child Tom Nero abusing animals. As an adult he abuses people, and commits murder; and in the final stage of his life is executed for murder, and then, post-mortem is viciously dismembered.

During the nineteenth century anecdotes about children and cruelty were often reiterated in books, articles, and pamphlets produced by the pioneers of the Royal Society for the Prevention of Cruelty to Animals, and similar anti-cruelty organisations.[[58]](#footnote-58) In recent years, rigorous studies in many disciplines, such as sociology, psychology, criminology, have indicated that the abuse of non-human creatures is perpetrated by many who also abuse children, women, and older persons. Studies of serial killers indicate that they began in childhood by abusing non-human creatures.[[59]](#footnote-59)

## Abuse Bereavement and Mental Well-Being

Older persons often form companion relationships with pets. These relationships involve positive and mutual reciprocity: pets are cared for, and older persons enjoy daily interaction and companionship. The relationship bonds between pets and humans include benefits for health, healing, and well-being, which is a point that was first observed by the Quaker entrepreneur William Tuke (1732-1822) in his pioneering work to assist persons suffering from mental illness.[[60]](#footnote-60)

For older persons the abuse of a pet by another party, such as next-of-kin, is highly distressing. The death of a pet entails experiences of bereavement. It might be said that when an older person’s companion pet is abused but without causing death, this cruel activity is a trigger for the commencement of an experience of grief.

Australian social workers Christine Morley and Jan Fook have underscored the point that “services and policies” must include recognition of the significance of the normative bonds formed between humans and their pets. They insist that the loss of a pet is a “mainstream experience” and that pet-friendly policies, including bereavement counsel, are an essential component in the delivery of health-care services for the elderly.[[61]](#footnote-61)

There are discriminatory attitudes held in some quadrants of society toward those experiencing bereavement that arises from the death of pets. A huge corpus of scholarly literature challenges such socially discriminatory attitudes, and highlights that bereavement over deceased pets represents “disenfranchised grief.”[[62]](#footnote-62) Outsiders may be very dismissive, or intentionally down-grade the significance of bereavement in connection with pets, which involves a fundamental failure to (a) have empathy and (b) understand the consequences for health and well-being for those who experience it.

## Domestic Violence and Office of Animal Welfare

The prevalence of domestic violence in Australia includes violence perpetrated against companion animals. The abuse of older persons does also involve abusers harming companion pets. In light of these social scourges, a holistic policy will not marginalise the abuse of animals but rather will legitimate public concerns for stronger criminal sanctions imposed on offenders than the tepid fines currently applied. A holistic policy will support the creation of an Office of Animal Welfare or a Commissioner for Animal Issues.

The seriousness of the problem and the need for better legal remedies is expressed by Vivek Upadhya:

The law’s failure to do so leaves a powerful method of harm underregulated, and thus leaves the significant abuse of both humans and animals underpunished. Designating animal abuse as a domestic violence offense would plug a prominent gap in the criminal approach to domestic violence and make available a large number of specialized protective and rehabilitative measures currently available to domestic violence victims, such as protective orders and mandatory therapy for abusers ... Ultimately, the frequency with which domestic violence and animal abuse co-occur, the severe harm that this abuse inflicts, and the substantial protective and remedial benefits that would follow together suggest the criminalization of this form of abuse is a necessary and highly effective approach against both domestic and animal abuse.[[63]](#footnote-63)

The public interest in developing good policy to stamp out the abuse of animals has been steadily rising in Australia in recent years. The problem of the abuse of companion animals in connection to the abuse of older people needs to be incorporated into Government policy. It cannot be relegated to the margins as if the problem is already encompassed by the *Prevention of Cruelty to Animals Act (POCTA)* and merely requires intervention by the RSPCA NSW. The abuse of animals and violence against humans go hand-in-glove as recent research worldwide has made very plain.[[64]](#footnote-64)

**“Abusers frequently threaten or harm an animal as a method of harming a human victim, or as a method of establishing control, gaining revenge, or coercing compliance with a particular demand. The deep emotional bond that most individuals—especially those who are abused—share with their animals makes this a potent form of abuse; indeed, it is the depth of the relationship between human and animal that enables the relationship to be exploited as a method of harm and control in the first place.”**

**Vivek Upadhya**, “The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization,” *Emory Law Journal* 63 (2014): 1163-1164.

There is a social and monetary cost associated with the abuse of animals, and the wanton dumping of pets at animal shelters and pounds.

There is increasing public interest in stamping out such abuse and cruelty, as witnessed in public proposals for the establishment of an Office of Animal Welfare. It is suggested that those who abuse companion animals pay compensation to the older person whose pet has been abused. A victim’s compensation fund could be held in trust and managed by the various Public Trustees in cases where victimised owners, whose pets have been abused, are cognitively impaired affairs and have their affairs administered under a financial management order. It is therefore important to bring punitive measures to bear on those who abuse companion animals in conjunction with the abuse of older persons.

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2. Philip O. Sijuwade, “Cross-Cultural Perspectives on Elder Abuse as a Family Dilemma,” *Social Behaviour and Personality* 23 (1995): 249. [↑](#footnote-ref-2)
3. See Gary Baum and Scott Feinberg, “Tears and Terror: The Disturbing Final Years of Mickey Rooney,” *Hollywood Reporter*, 21 October 2015, available at [www.hollywoodreporter.com/features/mickey-rooneys-final-years-833325](http://www.hollywoodreporter.com/features/mickey-rooneys-final-years-833325). [↑](#footnote-ref-3)
4. Danielle and Andy Mayoras, “The Tragedy of Francesca Hilton, daughter of Zsa Zsa Gabor and Hilton Founder,” *Forbes Magazine*, 13 January 2015, available at [www.forbes.com/sites/trialandheirs/2015/01/13/the-tragedy-of-francesca-hilton-daughter-of-zsa-zsa-gabor-and-hilton-founder](http://www.forbes.com/sites/trialandheirs/2015/01/13/the-tragedy-of-francesca-hilton-daughter-of-zsa-zsa-gabor-and-hilton-founder) [↑](#footnote-ref-4)
5. Peter Mikelbank, “The Bettencourt Affair: 8 Found Guilty of Taking Advantage of the World’s Richest Woman,” *People Magazine*, 28 May 2015, available at [www.people.com/article/liliane-bettencourt-8-guilty-taking-advantage-worlds-richest-woman](http://www.people.com/article/liliane-bettencourt-8-guilty-taking-advantage-worlds-richest-woman). Kerry R. Peck, “Lifestyles of the Rich and Famous: Infamous Cases of Financial Exploitation,” *Generations* 36 (2012): 30-31. [↑](#footnote-ref-5)
6. Daniel Fisher, “The Oilman, The Playmate, and the Tangled Affairs of the Billionaire Marshall Family,” *Forbes Magazine*, 4 March 2013, available at [www.forbes.com/sites/danielfisher/2013/03/04/the-billionaire-the-playboy-bunny-and-the-tangled-affairs-of-the-marshall-family/](http://www.forbes.com/sites/danielfisher/2013/03/04/the-billionaire-the-playboy-bunny-and-the-tangled-affairs-of-the-marshall-family/). [↑](#footnote-ref-6)
7. Serge F. Kovaleski, “Judge Orders Astor Legal Papers Turned Over for Tests on Writing,” *New York Times*, 26 September 2006, B5. *Good Morning America* (ABC broadcast on 27 July 2006). [↑](#footnote-ref-7)
8. Jeff D. Opdyke, “Intimate Betrayal: When the Elderly Are Robbed by their Family Members,” *Wall Street Journal*, 30 August 2006, D1. [↑](#footnote-ref-8)
9. Jane A. Black, “The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population,” *St. John’s Law Review*, 82 (2008): 294. [↑](#footnote-ref-9)
10. Dale Bagshaw, Sarah Wendt, Lana Zannettino, and Valerie Adams, “Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members,” *Australian Social Work* 66 (2013): 87. [↑](#footnote-ref-10)
11. D. T. Rowland, *Ageing in Australia* (Melbourne: Longman Cheshire, 1991), 199. [↑](#footnote-ref-11)
12. Kathryn Peri, Janet Fanslow, Jennifer Hand, and John Parsons, “Keeping Older People Safe by Preventing Elder Abuse and Neglect,” *Social Policy Journal of New Zealand* 35 (2009): 164. [↑](#footnote-ref-12)
13. Peri, Fanslow, Hand and Parsons, “Keeping Older People Safe,” 165. [↑](#footnote-ref-13)
14. Astrid Sandmoe, Marit Kirkevold, and Alison Ballantyne, “Challenges in handling elder abuse in community care. An exploratory study among nurses and care coordinators in Norway and Australia,” *Journal of Clinical Nursing* 20 (2011): 3358 and 3361. [↑](#footnote-ref-14)
15. Peteris Darzins, Georgina Lowndes, Jo Wainer, Kei Owada, and Tijana Mihaljcic, “Financial abuse of elders: a review of the evidence” *Protecting Elders’ Assets Study* (Clayton, Victoria: Monash Institute of Health Services, Faculty of Medicine, Nursing and Health Sciences, 2009), 16. [↑](#footnote-ref-15)
16. Darzins, Lowndes, Wainer, Owada, and Mihaljcic, “Financial abuse of elders,”15. [↑](#footnote-ref-16)
17. Deborah Setterlund, Cheryl Tilse, Jill Wilson, Anne-Louise McCawley, and Linda Rosenman, “Understanding financial elder abuse in families: the potential of routine activities theory,” *Ageing and Society* 27 (2007): 599-614. [↑](#footnote-ref-17)
18. Bagshaw, Wendt, Zannettino, and Adams, “Financial Abuse of Older People,” 99. [↑](#footnote-ref-18)
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