**ALRC ISSUES PAPER: ELDER ABUSE**

**SUBMISSION: QUESTION 48**

**\*BRENDA POWELL**

1. **INTRODUCTION**

My name is Brenda Powell; I am currently enrolled in the Bachelor of Laws at Murdoch University. I have drafted this submission in response to the Australian Law Report Commission’s Issues Paper into Elder Abuse. I aim to address question 48 of the paper concerning the improvement of criminal sentencing processes relating to elder abuse.

As a law student, I have been exposed to a range of legal learning that has given me a fundamental insight into the Australian Legal System. I have also undergone practical legal training as a law clerk under the supervision of a senior criminal barrister located in Perth, WA. During my clerkship, I have been exposed to the criminal trial and appeals process which has allowed me to recognise the importance and impact that sentencing proceedings have on those convicted, the victims of crime and the wider community. Sentencing is one of the most contended points of appeal which gives reason to why it is imperative that the sentencing laws be firmly established for crimes of this nature. It is with this understanding; I respond by way of this submission into how our sentencing laws and practices relating to elder abuse must be improved to ensure certainty and efficiency in the courts and for the community.

1. **ANALYSIS**

***The need for reform;***

Elderly Australian’s are a growing demographic faced with being a disadvantaged and vulnerable group in society;[[1]](#footnote-1) it is imperative that the government acts to ensure their rights and protection are not threatened. Australian courts have recognised that the elderly are vulnerable when it comes to the nature of their victimisation.[[2]](#footnote-2) The level of vulnerability is apparent in circumstances where elderly people depend on carers, guardians and family members.[[3]](#footnote-3) Common health issues also contribute to their vulnerability such as mental incapacity and immobility. [[4]](#footnote-4) Offenders who commit crimes in this sort of capacity should be viewed to have committed a crime of a very serious nature and sentenced accordingly towards the higher scale of criminality.

***Current approach;***

There are many reasons why the development of current laws can decrease incidents of elder abuse. The changes proposed include establishing specific provisions in the *Criminal Code* or *Sentencing Act* concerning criminal offences against elders. Currently, the only statutory aggravating factor present in the *Criminal Code* is limited to physical assaults against persons over the age of 60.[[5]](#footnote-5) Other offences such as sexual assaults, fraud, and burglary are up to judicial discretion to determine if the offence against an older person is aggravating.[[6]](#footnote-6) Aggravating factors increase the culpability of the offender and often result in higher sentences.[[7]](#footnote-7) If the government is serious about the deterrence of these crimes, specific provisions and sentencing guidelines must be included in the legislation.

***Nature of vulnerability;***

The law is capable of addressing the protection of a vulnerable group of people; this is illustrated with the protection of children,[[8]](#footnote-8) and the protection of the mentally incapable.[[9]](#footnote-9) The certain provisions recognise that in these circumstances the offenders have a power assumed over their victims and there is a duty of care established. The provisions also include elements that can be met so that the offence can be determined. It is suggested that these sorts of provisions should be applied to circumstances of elder abuse so offenders can be trialled and sentenced consistently.

***The role of sentencing;***

The sentencing process has a purpose of deterrence, punishment, and protection.[[10]](#footnote-10) By increasing sentencing and imposing a harsher punishment of the offenders, this creates a general deterrence to the community, a specific deterrence to the offender and protection for the victims and community.[[11]](#footnote-11)

***Challenges of increased sentencing;***

It is noted there has been criticism as to the effectiveness of increasing sentencing as a means of deterrence. The sentencing process is limited to the extent it can encourage deterrence because it assumes that the general community or offenders are aware of these practices.[[12]](#footnote-12) Offenders also have little regard for their actions before they have committed offences, which will question as to how effective increasing sentencing will be in deterring these types of offences. [[13]](#footnote-13)

1. **RECCOMENDATION**

The changes proposed include establishing specific offences in the *Criminal Code* and provisions of the *Sentencing Act* concerning criminal offences against elders. The provisions should include maximum penalties for these offences that correspond with crimes of such a serious nature against other vulnerable persons such as the abuse of a child or those with mental incapacity. In the same way that the offenders who commit crimes against children or the mentally incapable face harsher sentencing as they have breached a duty, it is suggested this is conveyed when dealing with elder abuse. By including these provisions, it would encourage deterrence and consistency in sentencing for these types of crimes.

Thank you for the opportunity to make this submission.

Regards,

**Brenda Powell.**

1. Commonwealth, *Address at the National Elder Abuse Conference Pullman on the Park, Melbourne,* 24 February 2016 (George Brandis QC, Attorney General, Leader of the Government in the Senate). [↑](#footnote-ref-1)
2. *Wakely v Police* [2002] SASC 196. [↑](#footnote-ref-2)
3. Mike Clare, Barbara Black Blundell andJoseph Clare, Examination of the Extent of Elder Abuse in Western Australia (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) 1-5. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. *Criminal Code Act Compilation Act 1913* (WA) s 221. [↑](#footnote-ref-5)
6. West Law AU Thomson Reuters, *Australian Sentencing,* (at 03 August 2016) [450.3400]. [↑](#footnote-ref-6)
7. *Sentencing Act 1995* (WA) s 7. [↑](#footnote-ref-7)
8. *Criminal Code Act Compilation Act 1913* (WA) s 321, s 322, s 343. [↑](#footnote-ref-8)
9. Ibid*,* s 330. [↑](#footnote-ref-9)
10. West Law AU Thomson Reuters, *Ross on Crime,* (at 03 August 2016) [19.1900]. [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Ibid; Sisters Inside Inc, Submission to Queensland Law Society, *Inquiry into Elder Abuse,* March 2011, 9-10. [↑](#footnote-ref-13)