**Law Reform Submission – Question 26**

Why my Submission?

I have chosen to submit the following proposal in relation to elder abuse due to the importance and respect I hold for protecting the interests of older Australians. I am currently undertaking a Bachelor of Laws at Murdoch University, Western Australia (WA) and have completed units such as Criminal Law and Legal Systems where I have examined elder abuse and whether current laws sufficiently protect their rights and interests. I concluded that there were fissures and some law reform is required. In my professional career, as a Community Corrections Officer, I have supervised offenders who have committed criminal offences against older people. Of particular interest are those offenders, either on Parole or Court Orders, who had defrauded/stolen significant amounts of money from older people, some family and close friends and others virtual strangers. I have read a number of victim impact statements and how such offences can be cataclysmic for older people. In almost all cases large amounts of funds were transferred through financial institutions, either by large lump sums or numerous and regular transactions. I often thought of what measures, if any, did the financial institutions undertake to report suspicious transactions in an attempt to protect the victims and were they obligated. For these reasons I feel that Question 26, in particular whether reporting requirements should be imposed on financial institutions, is important to address.

Financial abuse and the role of financial institutions

Financial abuse is the illegal use, improper use or mismanagement of an older person’s financial resources or assets without their knowledge or consent.[[1]](#footnote-1) Financial abuse of older Australians has been reported as one of the top categories of elder abuse[[2]](#footnote-2) which has been further supported in interviews and case studies of participants.[[3]](#footnote-3) Given society continues to become less reliant on cash and more dependent on electronic transactions, financial institutions including banks have a greater role to play in protecting the elderly and their financial assets.[[4]](#footnote-4) If financial institutions suspect or are put on notice that elder financial abuse is taking place then should they be mandated to report it, as at present they have no statutory obligation.[[5]](#footnote-5)

Mandatory reporting

Although mandatory reporting aims to protect the vulnerable, it can impact on older people’s right to autonomy and self-determination.[[6]](#footnote-6) In other countries like the United States, Israel and South Africa some jurisdictions have mandatory reporting legislation however it questionable how effective it is,[[7]](#footnote-7) research suggests it doesn’t impact positively on outcomes[[8]](#footnote-8) and mandatory reporting alone may not significantly increase reporting of financial abuse by banks.[[9]](#footnote-9) In Australia, a Commonwealth House of Representative report,[[10]](#footnote-10) canvassed mandatory reporting. Some support was expressed for it, in the aged care industry,[[11]](#footnote-11) however the majority of submissions did not. A theme for not supporting it included diminishing rights and decision making of older people however the most compelling reason is felt to be that it only creates an offence for the person failing to report it[[12]](#footnote-12) and the complexities of legislation such as needing to define what is a reportable and non-reportable offence. It is felt that this would not necessarily lead to increased reports of suspected financial abuse by financial institutions although fear of reprisal by employees could increase reporting for the wrong reasons. An enhanced approach could be working with the financial industry rather than imposing mandatory reporting obligations[[13]](#footnote-13) and there appears forums in place such as the Financial Ombudsman Service[[14]](#footnote-14) to communicate and develop a consistent approach.

Reporting (mandatory or not) and associated issues

At present in Australia, regardless of whether reporting is made mandatory or not by financial institutions, there are some keys issues which are prevalent and will challenge Government. There appears to be a lack of consistency with how financial institutions report financial abuse and this could contribute to the low incidences of abuse reported in this sector.[[15]](#footnote-15) A consistent nationwide approach to how institutions report alleged abuse is required. This then leads to a further issue of what Government/non-Government bodies will deal with referrals and are current laws sufficient. In WA there is legislation and provisions to allow reporting of such abuse however in contrast South Australia does not have the power to investigate unless the Guardianship Board is involved.[[16]](#footnote-16) Consistent legislation across states which gives the power for a specified body to investigate alleged financial abuse could give financial institutions more clarity and assurance with the reporting process.

1. New South Wales, *Elder abuse in New South Wales*, Parl Paper No 44 (2016) 77. [↑](#footnote-ref-1)
2. Peteris Darzins, Georgia Lowndes and Jo Wainer, ‘Financial abuse of elders: a review of the evidence’ (Protecting Elders’ Assets Study, Monash University, 2009) 8. [↑](#footnote-ref-2)
3. Mike Clare, Barbara Black Blundell and Joseph Clare, ‘Examination of the extent of elder abuse in Western Australia’ (A qualitative and quantitative investigation of existing agency policy, service responses and recorded data, The University of Western Australia, 2011) 48. [↑](#footnote-ref-3)
4. Peteris Darzins, Georgia Lowndes and Jo Wainer, above n 2, 19. [↑](#footnote-ref-4)
5. Rae Kaspiew, Rachel Carson and Helen Rhoades, Submission to Attorney General’s Department*, Elder abuse; Understanding issues, frameworks and responses*, 2015, 26. [↑](#footnote-ref-5)
6. New South Wales, *Elder abuse in New South Wales,* above n 1, 20. [↑](#footnote-ref-6)
7. Judith A Davey and Jayne McKendry, ‘Financial Abuse of Older People in New Zealand – A Working Paper’ (Working Paper No 11/10, Institute of Policy Studies, Victoria University of Wellington and Age Concern New Zealand, November 2011), 15. [↑](#footnote-ref-7)
8. House of Representatives Standing Committee on legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 36. [↑](#footnote-ref-8)
9. Sandra L Hughes, ‘Can Bankers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly’ (American Bar Association, 2003). [↑](#footnote-ref-9)
10. House of Representatives Standing Committee on legal and Constitutional Affairs,above n 8, 33. [↑](#footnote-ref-10)
11. Ibid 34. [↑](#footnote-ref-11)
12. Ibid 36. [↑](#footnote-ref-12)
13. Louise Kyle, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7 *Elder Law Review* 12. [↑](#footnote-ref-13)
14. Financial Ombudsman Service, *Banking and Finance*, Bulletin 56, (at December 2007) 2. [↑](#footnote-ref-14)
15. House of Representatives Standing Committee on legal and Constitutional Affairs,above n 8, 39. [↑](#footnote-ref-15)
16. Ibid 43. [↑](#footnote-ref-16)