

# Submission

## *Elder Abuse*

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ISSUES PAPER 47 (IP 47)

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Response to Issues Paper – Elder Abuse

To: The Australian Law Reform Commission

A submission from Gadens Lawyers (Melbourne)

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## 1. Introduction

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1. Gadens Lawyers is pleased to make this submission to the Australian Law Reform Commission (**ALRC**) in response to its *Issues Paper – Elder Abuse* (the **Issues Paper**).
2. The Issues Paper invites submissions in relation to 50 key questions. The matters identified in the Issues Paper are broad and traverse many areas in relation to elder abuse, such as, for example, identifying and preventing elder abuse, establishing a mechanism to effectively resolve elder abuse complaints, vulnerable community groups, social security, powers of attorney, appointed guardians and the roles of stakeholders such as lawyers and health practitioners.
3. For the purposes of this submission, Gadens Lawyers has addressed the following matters raised in the Issues Paper for the ALRC's consideration:
  - (a) the definition of elder abuse;
  - (b) the evidence and prevalence of elder abuse; and
  - (c) the criminalisation of elder abuse.
4. Comments in relation to the surveillance of care recipients are noted in the final section of this submission.

## 2. Definition of Elder Abuse

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1. A universal definition of Elder Abuse was coined by the World Health Organisation (the **WHO**) in the *Toronto Declaration on the Global Prevention of Elder Abuse*, as follows:

*... 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. It can be of various forms: physical, psychological, emotional, sexual, financial or simply reflect intentional or unintentional neglect.*<sup>1</sup>
2. It appears that this definition has been adopted, albeit inadvertently, by both government and non-government bodies as a reference point in developing policy in relation to elder abuse.<sup>2</sup>
3. We note that the ALRC has invited comment in relation to the following elements of the definition:
  - a. harm or distress;
  - b. intention; and
  - c. payment for services.
4. We note further that the ALRC has also invited general comment in relation to this definition.
5. We consider that the definition is comprehensive. However, there are some fundamental flaws which can be elicited and which may pose potential issues in the event that the definition is assumed into legislation which governs the regulation of elder abuse.
6. The first point that requires clarification is the phrase 'expectation of trust'. The term implies that in order for elder abuse to occur, the alleged abuse must occur within a relationship where there is an 'expectation of trust'.
7. The question to be considered is whether it is likely that all receivers of care will hold an expectation of trust. In view of the fact that in some circumstances care receivers are vulnerable and are sometimes not fully cognisant of their surroundings and perhaps have lost capacity, it is unlikely that all care recipients will possess an 'expectation of trust'.
8. In the light of this, we consider that an 'expectation of trust' in a relationship should not be a precursor or a precondition to establishing the existence of elder abuse. We consider that the phrase should be redrafted so that 'expectation' is substituted for 'implication'. This appears to be the favoured approach in the Victorian Department

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<sup>1</sup> *Toronto Declaration on the Global Prevention of Elder Abuse*, 17 November 2002.

<sup>2</sup> Issues Paper, 13 [16].

of Health's *Elder abuse prevention and response guidelines for action 2012 – 2014*.<sup>3</sup> The term 'implication' is not as restrictive as 'expectation'. The 'trust' element can therefore be implied into most relationships that a care recipient has, specifically, with family, friends, carers and facility providers.

9. Turning then to the terms 'harm' and 'distress', the ALRC has noted that 'harm' '... may be defined by virtue of certain conduct being considered wrongful – such as fraud or physical abuse ... [or] where the relevant conduct is directed towards personal benefit after the older person's death.'<sup>4</sup>
10. We consider that the term should be defined widely so as to capture all types of conduct or inaction which is harmful to the care recipient. Specifically, 'harm' should include physical and verbal harm, as well as social, cultural and economic harm. Furthermore, the definition should not be limited. As the elder rights arena expands and the literature becomes more settled, it is likely that more examples of elder abuse will come to the fore. In the light of this, the definition should not be limited as it may pejoratively confine the meaning of elder abuse to certain activities and consequently other activities which should be characterised as elder abuse may not fall within the scope of the definition because it has been drafted in narrow terms.
11. The term 'distress' should again be construed broadly. We note that in some circumstances, a victim of elder abuse may not realise that they have been abused. Therefore, we consider that the presence or non-presence of distress should not be used to determine whether or not elder abuse has in fact occurred. Perhaps what is more relevant is whether harm has been inflicted.
12. With regard to the term 'intention' we note that the term is abstract and that whether or not an individual held an intent to commit or perform a particular activity is a question of fact rather than law.<sup>5</sup> The term implies that an individual has a degree of awareness that their actions will result in a particular outcome.
13. We consider that the term is relevant for the purposes of defining elder law. In many cases, the perpetrator of elder abuse will possess an intent to cause harm or distress to the older person. Having said this, it may also be the case that the perpetrator of elder abuse does not intend to harm or cause distress to the older person.
14. That is, elder abuse may occur in situations where the carer has acted out of frustration towards the elder person. Or, in some circumstances, carers may not even realise that their actions have resulted in harm or distress to the elder person. In circumstances such as this, the carer may not possess the requisite 'intention' and therefore the abuse complained of may not be caught by the definition.

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<sup>3</sup> *Elder Abuse prevention and response guidelines for action 2012 – 2014*, Victorian Department of Health, Health Priorities Framework 2012 -22,1  
<<http://www.easternfamilyviolencepartnership.org.au/sites/default/files/Elder%20Abuse%20Prevention%20and%20Response%20Guidelines.pdf>>

<sup>4</sup> Issues Paper, 14 [19 – 20].

<sup>5</sup> *Kural v The Queen* (1987) 162 CLR 502, *R v Moloney* [1985] AC 905.

15. In the light of this, we consider that it may be necessary to include 'recklessness' within the definition as this term may catch conduct where overt intention cannot be made out.
16. Turning then to 'payment for services', we do not consider that 'payment for services' should be included in the definition of elder abuse. Certainly, whether or not a care recipient is paying for care services will be relative to determining the type of relationship between the care giver and care receiver. However, we note that there are many circumstances where the care recipient may not be paying the care giver a financial fee for services rendered, for instance, in private arrangements between family members.
17. Therefore, we would recommend that 'payment for services' be used as a reference point in determining the type of relationship between the care giver and care receiver. However, the definition should not be limited by the requirement of 'payment for services'.

### 3. Evidence of Elder Abuse

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18. The prevalence and incidence of elder abuse in Australia is not well known.<sup>6</sup> Furthermore, it is not generally known how elder abuse manifests and what the most common types of elder abuse are.<sup>7</sup>
19. This poses a difficult problem, for obvious reasons. Namely, if meaningful and significant law and policy reform is the objective of decision makers in aged care, then there needs to be a comprehensive investigation into the presence of elder abuse in all settings, including for example, residential, home and flexible care settings.<sup>8</sup> This is fundamental to ensuring that meaningful dialogue and reform occur.
20. In 2015, the WHO reported that the prevalence of elder abuse in high or middle income countries ranged between 2% and 14%.<sup>9</sup> The WHO noted that the most common types of elder abuse are physical abuse, at 0% to 5%, sexual abuse, at 0% to 1%, psychological abuse, at 1% to 6%, financial abuse, at 1% to 9% and neglect, at 0% to 6%.<sup>10</sup> Whilst these estimates are of assistance in drawing a clearer picture of the pervasiveness of elder abuse, they should only be considered as a guide.
21. These estimates, for instance, are based only on data collected in relation to elderly people living in 'private and community settings' and does not included estimates collected from elderly people living in institutional care, or those living with a cognitive impairment.<sup>11</sup> Moreover, the estimates do not include reference to social, cultural, economic and political factors and this is necessary to interpret data.
22. In the Australian context, the Australian Institute of Family Studies (AIFS) has revealed that there have been two population based studies in Australia that are of some assistance in determining the extent and prevalence of elder abuse.<sup>12</sup>
23. The first study is an analysis of data by Australia's National Research Organisation for Women's Safety (ANROWS) collected from the Personal Safety Survey (ABS, 2012a).<sup>13</sup> In this study, the focus was on the extent to which older women experience violence.<sup>14</sup> The age for 'older women' was determined to be 55 years of age and older and the attention of the survey was on physical assault, physical threat, sexual assault and sexual threat by an intimate partner.<sup>15</sup> The statistics revealed that 0.4% of women surveyed, which amounted to 12,800 women, aged 55 years and older reported that in the previous 12 months they had experienced violence from their intimate partner.<sup>16</sup> With regard to sexual assault, 0.2% of women surveyed, which amounted

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<sup>6</sup> Australian Institute of Family Studies, *Elder abuse, understanding issues, frameworks and responses*, Research Report No. 35 – February 2016, <<https://aifs.gov.au/publications/elder-abuse/3-what-known-about-prevalence-and-dynamics-elder-abuse>>.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

to 7,000 women, aged 55 years and older indicated that they had experienced some form of sexual assault in the previous 12 months.<sup>17</sup>

24. The second study which assists in determining the prevalence of elder abuse, is the Australian Longitudinal Study of Women's Health (2014).<sup>18</sup> This study was conducted by considering a group of women, using a sampling frame, from Medicare, with the oldest cohort measure being born between the years 1921 and 1926.<sup>19</sup> Data was collected from this cohort in both 2008 and 2011.<sup>20</sup> In 2011, this cohort would have been between 85 and 90 years of age and the survey indicated that 8% had experienced some form of elder abuse.<sup>21</sup> The survey revealed similar results for this cohort in 2008.<sup>22</sup>
25. Whilst these studies are of assistance in concluding that elder abuse certainly exists, they are limited, to an extent, in their usefulness in determining the true degree of elder abuse in Australia. That is, both reports relate to women and are only samples. They are not specific, targeted surveys.
26. Consequently, in the light of the above, it is fundamental to the development and implementation of sound and effective policies and laws to conduct a considered and extensive study into the prevalence of elder abuse.

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.



#### 4. Criminalisation of Elder Abuse

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27. We suggest that elder abuse be criminalised in order to change social and political views towards it.
28. That is, if elder abuse is to be appropriately addressed, then it needs to be viewed as a crime within the collective Australian social consciousness.<sup>23</sup> Attitudes towards elder abuse may alter quite significantly if elder abuse is placed within the criminal justice system.<sup>24</sup>
29. Moreover, if elder abuse is placed within the criminal law context, it is likely that the prosecution of elder abuse will enable general and specific deterrence of elder abuse. That is, one of the purposes of the criminal law is deterrence,<sup>25</sup> to discourage individuals from participating in criminal activities. Potential perpetrators are more likely to refrain from engaging in elder abuse if there is a specific crime that relates to the prosecution of elder abuse.
30. The United States has taken significant steps in this regard. At a federal level, the *Older American Act of 1965*, addresses the issue of elder abuse at a ‘... systemic and resource level.’<sup>26</sup> Significantly, this Act includes definitions of elder abuse and makes provision for the funding of elder abuse awareness campaigns as a means to educate stakeholders as to the prevalence of elder abuse and the resources available to the community to combat it.<sup>27</sup>
31. Further, in 2009 the *Elder Justice Act* was introduced.<sup>28</sup> The purpose of this Act was to ‘... enhance the social security of the Nation, by ensuring adequate public-private infrastructure and to resolve to prevent, detect, treat, intervene in, and prosecute elder abuse, neglect and exploitation and other purposes.’<sup>29</sup>
32. In terms of entrenching elder abuse within the criminal law, the United States has enacted public welfare laws, amended the *Older Americans Act of 1965* and introduced crime bills which specifically relate to elder law.<sup>30</sup>

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<sup>23</sup> Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalisation of Elder Abuse*, 2012, American Criminal Law Review, Vol 49, No. 1, 3.

<sup>24</sup> *Ibid.*

<sup>25</sup> *R v Porter* (1933) 55 CLR 182, 186; *R v H* (1980) 3 A Crim R 53 at 74; *Yardley v Betts* (1979) 22 SASR 108 at 112; *Veen v R (No 2)* (1988) 164 CLR 465; *R v Lambert* (1990) 51 A Crim R 160 at 171; s 16A(2)(j) of the *Crimes Act 1914* (CTH); s 7(1)(b) of the *Crimes (Sentencing) Act 2005* (ACT); s 5(1)(c) of the *Sentencing Act 1995* (NT); s 3A(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW); s 9(1)(c) of the *Penalties and Sentences Act 1992* (QLD); s 10(1)(i) of the *Criminal Law (Sentencing) Act 1988* (SA); s 3(e)(i) of the *Sentencing Act 1997* (TAS) and s 5(1)(b) of the *Sentencing Act 1991* (VIC).

<sup>26</sup> Office of the Public Advocate (QLD) and the Queensland Law Society, 2010, *Elder Abuse: How well does the law in Queensland cope?*

<[http://www.eapu.com.au/uploads/research\\_resources/How\\_Well\\_Does\\_the\\_Law\\_Cope\\_JUL\\_2010-QLS.pdf](http://www.eapu.com.au/uploads/research_resources/How_Well_Does_the_Law_Cope_JUL_2010-QLS.pdf)> 22.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Section 795, 111th Congress, 1st Session 3(2009), cited in *Elder Abuse: How well does the law in Queensland cope?* above n 26, 22.

<sup>30</sup> *Elder Abuse: How well does the law in Queensland cope?* above n 26, 22.

33. In 2006, Wisconsin created an Individual-at-Risk Restraining Order.<sup>31</sup> This Order enables interested persons to apply to the Courts to prevent a person from engaging in specified types of contact with a person aged 60 years or older, '... who has experienced, is currently experiencing or is at risk of experiencing abuse, neglect self-neglect, or financial exploitation.'<sup>32</sup>
34. Furthermore, the United States has also seen the development of the '... creation of elder justice court systems which funnel elder abuse cases to judges with specialised training, and which typically seek to incorporate social services into court processes.'<sup>33</sup>
35. The introduction of these legal reforms has resulted in an increase in the resources allocated to the prosecution of elder abuse.<sup>34</sup> For instance, specialised training is offered in some states with regard to identifying elder abuse and investigation options.<sup>35</sup>
36. In the Australian context, there are recognised crimes which are applicable to all Australians regardless of their age and vulnerability.<sup>36</sup> For instance, physical and sexual assault<sup>37</sup>, negligence<sup>38</sup>, domestic violence<sup>39</sup>, stalking<sup>40</sup> and property offences, are recognised offences in Australian states.<sup>41</sup>
37. However there do not appear to be any specific elder abuse related offences. The United States example proffers some interesting reference points for Australian states to consider in introducing offences that relate to elder abuse.
38. In the main, Australian states should consider the following:

<sup>31</sup> Nina A. Kohn, above n 23, 7.

<sup>32</sup> See Wisconsin State 813, 123(1)(cg), 46.90(1)(br) (2010), cited in Nina A. Kohn, above in 23, 7.

<sup>33</sup> Lori A. Stegel & Pamela B. Teaster, *Final Technical Report to the National Institute of Justice on "A Multi-Site Assessment of Five Court-Focused Elder Abuse Initiative"* (2010) <[http://www.americanbar.org/content/dam/aba/uncategorised/2011/2011\\_aging\\_ea\\_fin\\_ct\\_fcus.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorised/2011/2011_aging_ea_fin_ct_fcus.authcheckdam.pdf)> cited in Nina A. Kohn, above n 23, 7.

<sup>34</sup> Nina A. Kohn, above n 23, 6.

<sup>35</sup> C Heisler, *Elder Abuse and the Criminal Justice System: New awareness, new responses*, (2000) 24(2) *Generations* 52-58, 54, cited in *Elder Abuse: How well does the law in Queensland cope?* above n 26, 24.

<sup>36</sup> This was noted in relation to the Queensland context in *Elder Abuse: How well does the law in Queensland cope?* above n 26, 14.

<sup>37</sup> See for example, ss 187, 188 and 192(3) of the *Criminal Code Act 1983* (NT); ss 245 and 349 of the *Criminal Code 1899* (QLD); ss 20(1) and 48(1) of the *Criminal Law Consolidation Act 1935* (SA); ss 182 and 185 of the *Criminal Code 1924* (TAS); ss 222 and 325 of the *Criminal Code Act Compilation Act 1913* (WA); ss 31(2) and 38 of the *Crimes Act 1958* (VIC); s 54(1) of the *Crimes Act 1900* (ACT); s 61I of the *Crimes Act 1900* (NSW).

<sup>38</sup> See for example, s 25 of the *Crimes Act 1900* (ACT); s 54 of the *Crimes Act 1900* (NSW); s 24 of the *Crimes Act 1958* (VIC); s 174E of the *Criminal Code Act 1983* (NT).

<sup>39</sup> See for example, *Domestic Violence and Protection Order Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT); *Crimes (Domestic and Personal Violence Act 2007* (NSW); *Domestic and Family Violence Protection Act 2012* (QLD); *Family Violence Protection Act 2008* (Vic).

<sup>40</sup> s 35(1) of the *Crimes Act 1900* (ACT); s 189(2) of the *Criminal Code Act 1983* (NT); s 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); s 359E(1) of the *Criminal Code 1899* (QLD); s 19AA(2) of the *Criminal Law Consolidation Act 1935* (SA); 192(1) of the *Criminal Code 1924* (TAS); s 21A(1) of the *Crimes Act 1958* (VIC); s 338E(1) of the *Criminal Code Act Compilation Act 1913* (WA); and s 35(2) of the *Crimes Act 1900* (ACT).

<sup>41</sup> For example, ss 300 – 342 of the *Criminal Code 2002* (ACT); ss 130 – 144 of the *Criminal Law Consolidation Act 1935* (SA); ss 71 – 90 of the *Crimes Act 1958* (VIC).

- (a) the definition of elder abuse;
- (b) whether it is relevant to consider a person's age in determining whether or not the individual is an older person. Or, if the question as to whether someone is an older person is a more subjective test which requires consideration of the person as a whole, rather than merely their age;
- (c) specialised training of government departments, judges, lawyers, health practitioners, aged care providers, carers, relatives and other associated stakeholders who are involved in setting the dimensions of elder abuse related offences; and
- (d) whether it is appropriate to establish a separate tribunal or court which specifically deals with elder abuse concerns.

## 5. Surveillance

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39. The question of whether it is appropriate to install a surveillance camera which records a care recipient's care and treatment by a care giver has received recent attention.
40. State legislation differs on whether such surveillance is lawful. Generally, the consensus appears to be that if all parties consent to being recorded then the installation of a surveillance device is most likely lawful.<sup>42</sup>
41. The issue is that many care recipients do not possess the capacity to consent to such installation. Consequently, the decision to install a surveillance device which records a care recipient is being made by appointed powers of attorney or next of kin, sometimes covertly and sometimes overtly.
42. Such surveillance raises a number of issues. Firstly, if a care recipient is receiving care and treatment within an aged care facility, or in their home and a family member has installed a camera in the care recipient's room, the camera will record all intimate and private activities, including for example, the changing of undergarments and toiletry garments. We submit that it is contrary to the principles of privacy and confidentiality to record this type of information. Furthermore, it is contrary to the principles of human dignity to record such private activities.
43. Secondly staff, employers, support works and care givers who attend to the care and treatment of care recipients may also be recorded. It is necessary to consider their right to privacy and confidentiality.
44. Thirdly, the viewers of the material, for instance, the next of kin or the appointed decision maker, pursuant to a power of attorney, by default, become the 'referee' of quality control and management. If they view something which they may have misunderstood or perhaps misconstrued, then they may make unreasonable and unwarranted demands on the facility or home care worker, as the case may be. In some situations, family members or appointed decision makers pursuant to a power of attorney, may be vexatious and consequently, more likely to find issue with all care and treatment provided, even if they do not possess any grounds for their dissatisfaction.
45. Finally, the material collected by a surveillance device is potentially capable of being disseminated to third parties and again, this raises questions in relation to privacy and confidentiality.
46. On the other hand, if elder abuse is being committed by a home care worker or an employee of an aged care facility, then the use of a surveillance camera may be instrumental in ensuring that perpetrators of elder abuse are caught.

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<sup>42</sup> See for example s 7 of the *Surveillance Devices Act 1999* (Vic).

47. Clear direction on whether or not it is lawful and appropriate to install cameras in a care recipient's room which records all activities is needed. It is submitted that policy reform be developed in this area.

## **6. Conclusion**

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48. In the main, it is imperative that a well-resourced investigation into the prevalence of elder abuse is conducted.
49. Fundamentally, it is difficult to assert what types of changes and reforms need to be implemented as it is not known how elder abuse is committed, the particular groups most affected by it and the perpetrators of it.
50. Currently, only assumptions can be drawn from related studies. This is not sufficient if effective policy and legal reform is to be implemented.