**Question 28 :** What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

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I am currently completing my fifth year in a Bachelor of Law and Commerce at Murdoch University. Although I have not specifically dealt with issues of elderly abuse in my studies, I remain educated enough to apply relevant information on the subject to form a valid opinion on the issue. In addition to this, I believe the topic of protecting one’s own interests is extremely important; increasingly so when the group of people being looked at may lack the capacity to have their own best interests at heart, like the elderly.

The elderly have unique and complex legal needs, some of which pertain to criminal law relating to financial abuse specifically in the area of family agreements.[[1]](#footnote-1). Typically a family agreement will involve a transfer of property (or other assets) from an elderly person to a trusted family member for an exchange of long term care and support.[[2]](#footnote-2) The problem faced here is that they are usually made orally and without any legal advice, thus leaving out the terms and other relevant issues of the agreement.[[3]](#footnote-3) This occurs when the promise of ongoing care is not fulfilled or the relationship otherwise breaks down and the existing legal regime fails to adequately protect the rights of an older person.

I Problems with family agreements

The problem with these informal arrangement stems from the fact that there is nothing to show for the assets that have been transferred. In addition, where the agreement for a transfer of assets for care has failed, the resulting trust that could be argued to exist is complicated by equity law. This is because equity will presume an ‘advancement’ of an asset when a parent and child are involved; the older parent will need to establish no gift was intended.[[4]](#footnote-4)

II What should be done?

Currently there is no legislation governing or regulating family agreements. Consequently, a review of the law is necessary.[[5]](#footnote-5) The ‘Older people and the Law’ inquiry report suggested that formalisation and registration or mechanisms to enable the courts to dissolve family agreements should be considered at great length.[[6]](#footnote-6) Provisions of this nature would follow the British Columbia Law Institute[[7]](#footnote-7) which also proposes specific mechanisms that will assist in the equitable resolution of family agreement disputes.[[8]](#footnote-8) In essence, Agreements between parties that stipulate asset exchange for ongoing care require greater legitimacy and protection. An investigation on mechanisms for the creation and registration of family agreements should also be carried out. In doing this, we will not only heighten protection on the elderly’s assets but potentially deter the abuse from happening in the first place.

III The next step

It may be possible to take a step further through real property law. In Australia we utilise the Torrens System of land registration which pertains that only certain interests can be registered and these interests may provide an exception to indefeasibility of title.[[9]](#footnote-9) Currently, a family agreement is not a registrable interest nor is it an exception to indefeasibility. With this in mind, it may be a forward thinking solution to amend real property legislation to provide that family agreements can be registrable interest. The effect of this would mean that anyone dealing with the land would be subject to the registered interest of the older person under the registered interest of the family agreement.[[10]](#footnote-10)

IV Some Statistics

In order to understand the importance of this type of reform, it may be helpful to look at some figures that show the prevalence of financial elderly abuse in Australia today. Although these are not completely current, they offer an insight into the problem.

Figures were taken form an investigation by Boldly *et al* (2005, 2002) in Western Australia.[[11]](#footnote-11) Unfortunately there was only a thirty per cent reply rate, from this it was estimated that 0.3 per cent of the elderly (over 65 years) population in WA suffered from some kind of financial abuse.[[12]](#footnote-12)

In 2001 a study produce by Livermore *et al[[13]](#footnote-13)* on elderly abuse on the central coast of NSW further provided that financial elderly abuse was present in 1.8 per cent of the population in this area. Furthermore in 2015 the Elder Abuse helpline and resource unit used figures from their own data that showed 31 per cent of reported elderly abuse was financial in nature.[[14]](#footnote-14)

Calls to the Elderly Abuse Prevention Hotline during 2006 and 2007 were analysed to determine the nature of elderly abuse in Queensland.[[15]](#footnote-15) It was found that financial abuse was the primary abuse with 38 per cent of all cases being financially related.

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1. Seniors Rights Victoria Council on the Ageing Victoria, *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse* (2012) Seniors rights <www.seniorsrights.org.au> . [↑](#footnote-ref-1)
2. Ibid, 32. [↑](#footnote-ref-2)
3. Margaret Hall, ‘Care for life: Private care agreements between older adults and friends or family members’ (2003) 2 Elder Law Review 24. [↑](#footnote-ref-3)
4. Queensland Law Society and Office of the Public Advocate, ‘Elder Abuse: How Well Does the Law in Queensland Cope?’ (Report, Queensland Law Society and Office of the Public Advocate, June 2010). [↑](#footnote-ref-4)
5. Kyle Louise, ‘Out of the Shadows- A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 4 Elder Law Review. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. British Columbia Law Institute, ‘Private Care Agreements Between Older Adults and Friends or Family Members’ (2002) 18 British Columbia Law Institute 21. [↑](#footnote-ref-7)
8. Commonwealth of Australia, ‘Older People and the Law’ (Report, House of Representatives Standing Committee on Legal and Constitutional Affairs, September 2007) 147. [↑](#footnote-ref-8)
9. Teresa Somes and Eileen Webb, ‘What role for the law in regulating older people's property and financial arrangements with adult children?: The Case of Family Accommodation Arrangements’ (2015) 33 Law in Context 24-51, 48. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. Peteris Darzins *et al*, ‘Financial Abuse of Elders: A Review of the Evidence’ (June 2009) Elder Abuse Prevention Unit <http://www.eapu.com.au/>. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Patrick Livermore *et al,* ‘Elder Abuse among Clients and Carers Referred to the Central Coast ACAT: A Descriptive Analysis’ 20 *Australian Journal on Ageing* 41-47. [↑](#footnote-ref-13)
14. NSW Elder Abuse Helpline and Resource Unit, ‘Financial Abuse’ (2015) Elder Abuse Helpline & Resource Unit <http://www.elderabusehelpline.com.au/>. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)