

4. Criminal Justice Responses

Contents

Summary	75
Offences	75
Specific offence of ‘elder abuse’	75
Offences for misusing powers of attorney	78
Neglect offences	79
Police training	82

Summary

4.1 The Terms of Reference require the ALRC to consider existing Commonwealth laws and frameworks that seek to safeguard and protect older persons, and the interaction and relationship of these laws with state and territory laws, including criminal laws and criminal justice responses.

4.2 Responsibility for criminal laws and frameworks relevant to elder abuse falls to Australian states and territories. Criminal practice and procedure, intervention order legislation, court practice and procedure, policing, prosecution and victim support, and sentencing legislation and practice are also predominantly addressed at state and territory level.

4.3 In this chapter the ALRC discusses the key issues identified by stakeholders in respect of the criminal law and related processes and frameworks. These issues relate to the creation of specific offences for ‘elder abuse’, ‘elder neglect’ and ‘misuse of powers of attorney’; and police training.

Offences

Specific offence of ‘elder abuse’

4.4 Some overseas jurisdictions, including a number of North American states, have enacted specific criminal offences for the abuse of older persons. These offences broadly encompass behaviour that causes or permits an older person to suffer, be injured, or be placed in a situation in which their health is endangered.¹

1 Cal [Pen] Code § 368-368.5; Mo Rev Stat § 565.182 (2013); Fla Stat § 825 (2012).

4.5 Generally speaking, Australian state and territory laws do not provide specific offences against older persons. However a range of types of conduct, which might be described as ‘elder abuse’, are covered in all jurisdictions under offence provisions relating to personal violence and property offences. These include assault, sexual offences, kidnap and detain offences, and property and financial offences.² The Law Council of Australia noted that ‘elder abuse’ is rarely prosecuted under existing provisions.³

4.6 Some jurisdictions have offences for neglect,⁴ although these are rarely utilised in respect of older people. There are also comprehensive family violence frameworks in all jurisdictions that provide for quasi-criminal, protective responses to abuse of older people in domestic settings.

4.7 Some stakeholders supported new criminal offences that would proscribe certain types of conduct when perpetrated against an older person.⁵ It was suggested that specific elder abuse offences would act as a deterrent;⁶ recognise the increased vulnerability of older persons;⁷ and serve an educative function and increase awareness of the issue.⁸

4.8 Other stakeholders rejected these arguments.⁹ They expressed the view that the existing criminal law provided appropriate offences to respond to the types of conduct that might be understood to constitute ‘elder abuse’, particularly where there is no identified gap in coverage,¹⁰ and opposed the introduction of ‘elder abuse’ offences.¹¹ Those opposing new offences argued that creating ‘elder abuse’ offences risked ‘treating older people as a different category of citizen’¹² and was ‘discriminatory’.¹³ It was also submitted that ‘elder abuse is first and foremost a social problem that requires more education and exposure, which could occur through ongoing media strategies’.¹⁴

4.9 There will be and have been circumstances where the criminal law is appropriately engaged to respond to the most grave scenarios involving abuse of an older person. The dynamics of elder abuse, which often involve familial or close

2 A number of stakeholders referred to specific offences relating to financial abuse, and in particular abuse of powers of attorney. This is discussed below.

3 Law Council of Australia, *Submission 61*.

4 See below for discussion of neglect offences.

5 R Lewis, *Submission 99*; Office of the Public Advocate (Vic), *Submission 95*; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 7.

6 ADA Australia, *Submission 150*; Gadens Lawyers (Melbourne), *Submission 82*.

7 R Lewis, *Submission 100*.

8 See, eg, WA Police, *Submission 190*; People with Disability Australia, *Submission 167*.

9 See, eg, Seniors Rights Service, *Submission 169*; Older Women’s Network NSW, *Submission 136*; UNSW Law Society, *Submission 19*.

10 National Legal Aid, *Submission 192*.

11 See, eg, Office of the Public Advocate (Qld), *Submission 149*; Older Women’s Network NSW, *Submission 136*; Legal Services Commission SA, *Submission 128*; Legal Aid ACT, *Submission 58*; UNSW Law Society, *Submission 19*.

12 Legal Aid ACT, *Submission 58*.

13 Law Society of NSW, in Law Council of Australia, *Submission 61*.

14 Advocare Inc (WA), *Submission 86*.

relationships, can deter people from making a complaint to police.¹⁵ In the event that they do make a complaint, there are increasingly stronger safeguards that operate to protect and respond to those reports, largely in the context of the family violence framework.

4.10 In the ALRC's view, creating new criminal offences in circumstances where the type of conduct proscribed is already captured by other offences is unnecessary and risks duplicating existing offences.

4.11 Many states and territories recognise age and disability, and take the victim's characteristics into account when sentencing offenders.¹⁶ There are also some jurisdictions which have aggravated forms of offences that provide for a heavier penalty when the victim is an older person, or relies on a remedial device.¹⁷

4.12 Other reasons proffered by proponents of new offences, including that they would serve to educate and raise awareness of elder abuse; act as a deterrent; recognise the 'special vulnerability' of older victims of abuse; and address the challenge of meeting the criminal threshold of proof, are able to be addressed in other ways. For example, the proposed National Plan (Proposal 2-1) would incorporate broad education and awareness campaigns, as well as training for those engaging with older persons; and through existing provisions that recognise the vulnerability of older victims during sentencing for offences.

4.13 That there are few prosecutions reflects the high evidentiary threshold applicable under criminal law and the challenges it presents to all victims of crime, including older people. The grave consequences that flow from the criminal prosecution of a person warrant the need for such a high bar and there are, in most jurisdictions, a suite of mechanisms designed to assist vulnerable people who find themselves engaged in the criminal justice system. These mechanisms tend to apply to victims with intellectual or cognitive impairment (including children), or to special classes of victims (such as victims of sexual assault).

4.14 The need for specificity in framing criminal offences presents a difficulty in seeking to create a new 'elder abuse' offence. The Office of the Public Advocate in Queensland commented, for example, that

[t]here is little value in developing a specific criminal offence of elder abuse. With the wide range of behaviours that might constitute elder abuse, the development of a definition that would effectively encompass all of those behaviours and the thresholds for criminality would be extremely difficult. In any event, there are already adequately tried and tested legal offences available to effectively prosecute a wide range of criminal behaviours that might constitute elder abuse.¹⁸

15 See, eg. WA Police, *Submission 190*; Legal Aid NSW, *Submission 137*.

16 See, eg. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(1); *Penalties and Sentences Act 1992* (Qld) s 9(3)(c); *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(f)(j). See also *Sentencing Act 1991* (Vic) s 5(2)(da) for consideration of 'personal circumstances of the victim'.

17 See, eg. *Criminal Code Act 1899* (Qld) s 340(1)(g)–(h).

18 Office of the Public Advocate (Qld), *Submission 149*.

4.15 The ALRC notes that there are specific offences that apply to certain categories of victim, namely children and people with cognitive impairment. The distinguishing feature is that, in respect of both groups, diminished cognitive ability of the victim increases their vulnerability. To suggest that a victim who does not fall into these classes is vulnerable because of their age risks being ageist and discriminatory.

Offences for misusing powers of attorney

4.16 In all Australian jurisdictions there are offences that broadly relate to fraud, deceptive conduct/obtain benefit by deception, stealing and other property-related offences. In certain circumstances, some of these may be applicable to cases of financial abuse of older people, including in respect of abuse of powers of attorney. Victoria and Queensland laws currently provide for a range of offences specifically relating to powers of attorney.¹⁹ The ALRC is unaware of any prosecution under these provisions.

4.17 A number of stakeholders, including the Law Institute of Victoria²⁰ and the Victorian Public Advocate,²¹ welcomed the new criminal offences relating to abuse of powers of attorney in that jurisdiction, and supported the creation of similar provisions in other states and territories.

4.18 The Victorian offence provisions reflect the recommendations of the Victorian Parliament Law Reform Committee.²² The NSW Legislative Council subsequently recommended that NSW legislation be amended to be consistent with Victoria's *Powers of Attorney Act 2014*.²³

4.19 The Victorian Parliamentary Committee recognised that existing offences may already cover the type of conduct which would be the focus of new offences, but considered new offences would serve an important educative function.²⁴ Other stakeholders noted that existing broader criminal provisions were appropriate, and that 'including additional offences only complicates an already complex system'.²⁵

4.20 The ALRC is not persuaded that there is a clearly identified gap in the type of conduct to be proscribed. Where they exist, offences for misusing powers of attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct.

19 *Powers of Attorney Act 2014* (Vic) ss 135, 136; *Powers of Attorney Act 1998* (Qld) ss 26, 61. Queensland legislation also provides for similar offences in respect of financial administrators—*Guardianship and Administration Act 2000* (Qld).

20 Law Institute of Victoria referred to in Law Council of Australia, *Submission 61*.

21 Office of the Public Advocate (Vic), *Submission 95*.

22 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) rec 61.

23 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 7, 6.101.

24 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 209.

25 Law Council of Australia, *Submission 61*.

4.21 Criminal law, by its nature, will always require a high evidentiary threshold to be met to sustain a prosecution. Financial offences, in particular, are often difficult and complex to prosecute, and will continue to be so irrespective of the existence of new specific provisions relating to powers of attorney. Moreover, a criminal prosecution does not always offer appropriate redress to the victim and in instances of familial financial elder abuse, this is likely to be even more so. In that regard, the proposal to expand the jurisdiction of tribunals to award compensation to those aggrieved by financial abuse is arguably more appropriate in responding to victim needs (Proposal 5-5).

4.22 The other functions served by the creation of new offences, including increased awareness of abuse, and the responsibilities of attorneys, can be delivered through other mechanisms, including through the proposals that frontload safeguards into enduring documents (including Proposals 5-4, 5-8 to 5-13, 6-1, 6-2), and education strategies developed under the National Plan (Proposal 2-1).

4.23 The ALRC does not propose the repeal of any existing offences, nor the introduction of specific abuse of powers of attorney offences in those jurisdictions that do not have them.

Neglect offences

4.24 A number of Australian jurisdictions have ‘neglect’ offences which may apply to older people. These are generally framed as ‘fail to provide necessities or necessities of life’,²⁶ including adequate food, clothing, shelter and medical care.²⁷ The offences are serious, attracting penalties that include terms of maximum imprisonment ranging from 3 to 5 years.

4.25 Stakeholders suggested that ‘fail to provide necessities’ offences are rarely prosecuted. Legal Aid NSW, for example, reported that there had been only one conviction since 2012 in NSW, which related to a young victim.²⁸ The ALRC is aware of media reports relating to a recent NSW case in which a couple were convicted after pleading guilty to ‘failing to provide necessities of life’ to the 80 year old father of one of the offenders. It is understood one of the offenders was sentenced to a four-month intensive correction order.²⁹ National Seniors reported that, in Queensland, there had ‘been no convictions of a person for failing to provide necessities of life to an older person’.³⁰

4.26 In broad terms, these offences have a number of elements that must be established, including the existence of a legal duty to provide necessities of life, and failure to provide those necessities, and a high threshold of harm caused by the failure.

26 *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Code Act Compilation Act 1913* (WA) s 262; *Criminal Code Act 1924* (Tas) s 144, (NT) s 149. See also *Criminal Law Consolidation Act 1935* (SA) s 14 for a ‘criminal neglect’ offence.

27 Legal Aid NSW, *Submission 140*; *Guardianship and Administration Act (1993)* (SA) 1993 s 76.

28 Legal Aid NSW, *Submission 140*.

29 ABC News (Australian Broadcasting Corporation) *Couple Who Starved 80yo Man Sentenced to Four Month Intensive Correction Order* (11 April 2016).

30 National Seniors Australia, *Submission 154*.

4.27 There are a range of reasons why prosecuting such matters may be difficult in respect of neglect of older persons, including that, in some instances, a legal duty may not exist (for example, where a person is not a legal carer); that the harm threshold is not met or, where it is met, establishing causation between the failure to provide necessities of life and the harm caused in circumstances where the victim is likely to be frail and weak as a result of their age.

4.28 These considerations explain why these offences are more readily utilised in relation to children, who are almost invariably under the legal care of a parent or guardian when the omission causing harm occurs, and establishing a causal link between the omission to provide and the harm is less likely to be attributable to other factors.

4.29 The Australian Research Network on Law and Ageing (ARNLA) highlighted the duty element as presenting a particular challenge in prosecuting neglect offences in relation to older persons:

There is little evidence in the case law of the duty sections being invoked in relation to prosecutions concerning the death/injury of older persons as a result of carer/familial abuse.³¹

4.30 ARNLA noted the ‘rich ethical discourse surrounding the issues which arise in connection with imposing criminal liability for omissions ... as opposed to those more commonly criminalised situations where the accused acts and inflicts harm’.³²

4.31 A number of stakeholders were supportive of neglect offences, with the common theme being that persons who fail to provide for older people—usually family members—ought to be subject to criminal penalty. For example, Rodney Lewis suggested that a new offence of ‘negligent abuse of an elder’ be introduced, with the following elements:

- (i) Assumption by an adult of the care of an elder (whether or not related by blood or marriage) whether voluntarily or for some advantage or reward;
- (ii) The care required may be general care or for some particular health or disability;
- (iii) The duty of care has been wilfully and deliberately or recklessly or negligently without caring about the consequences, underperformed.
- (iv) The person in care has suffered pain or injury as a result of the lack of care or failure to provide sufficient care.³³

31 Australian Research Network on Law and Ageing, *Submission 90*.

32 *Ibid.*

33 R Lewis, *Submission 99*. Lewis’ proposal describes a ‘vulnerable elder’ (the person has a ‘physical, mental, psychological or psychiatric disability’ which impacts them in particular ways, with offences incorporating an age threshold requiring the victim be 65 years of age); proposes a number of defences; and penalties of two years imprisonment and fines.

4.32 There was some support among stakeholders to this inquiry for a model of this type.³⁴ Other options included creating an offence of ‘neglect of an older person’ akin to the ‘neglect of children and young persons’ offence in NSW.³⁵

4.33 A number of stakeholders submitted that existing neglect provisions were adequate.³⁶ ARNLA, for example, said that

[i]t is certainly possible for a prosecution to be based upon the duty to provide the necessities of life ... to an older person but under both the Codes and the common law, this would require a situation where the person has assumed the care of the older person and the older person is demonstrated to be incapable of removing him/herself from that care. Most of the case law with respect to this duty has been associated with the failure to care for children, and it may well be harder for older persons to ‘fit’ within the scope of this duty, particularly if they retain mental and/or physical capacity.³⁷

4.34 The Older Women’s Network suggested that increased community and professional education about elder abuse and criminal behaviour would enhance responses to the issue.³⁸ Legal Aid ACT noted that there were potential undesirable consequences of ‘fail to provide necessities of life offences’, including that they might act as a deterrent to people taking on carer roles.³⁹

4.35 Rather than proposing new offences, the ALRC considers that:

- the law has the capacity to respond to neglect cases;
- creating a new offence to apply only to ‘elder’ persons is inappropriate, discriminatory and paternalistic; and
- creating a new offence may deter people from taking on carer roles.

4.36 The ALRC acknowledges stakeholder concerns regarding the neglect of older people, and in particular the community anger in respect of neglect cases resulting in the death of older people who are not properly provided for.⁴⁰

4.37 The criminal law does, however, have the capacity to respond to these cases. For example, there is at common law a recognition that criminal negligence (including neglect or omission) resulting in death can be established provided a court is satisfied that the accused had a duty of care which gave rise to a legal duty to act, and that the

34 Seniors Rights Service, *Submission 169*; Office of the Public Advocate (Vic), *Submission 95*.

35 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 228.

36 Legal Aid NSW, *Submission 140*; Older Women’s Network NSW, *Submission 136*; Legal Aid ACT, *Submission 58*.

37 Australian Research Network on Law and Ageing, *Submission 90*. Citations omitted.

38 Older Women’s Network NSW, *Submission 136*.

39 Legal Aid ACT, *Submission 58*.

40 See, eg, Cynthia Thoreson matter, cited in: Justice Connect, *Submission 182*; Townsville Community Legal Service Inc, *Submission 141*. See also Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 *Sydney Law Review* 99.

defendant's omission to act was not to the standard of a reasonable person in the same situation.⁴¹

4.38 There is some evidence that, while rare, the 'fail to provide necessities' offence can be utilised in respect of older persons, although the ALRC acknowledges media reports that the defendants each entered a plea of guilty in the case referred to above. The ALRC is not aware of any other matter where the provision has been tested in court in relation to an older victim.

4.39 The ALRC has policy concerns about introducing offences for specific classes of people identified on the basis of age. To create 'elder neglect' provisions in a way that is akin to those applicable in respect of 'child neglect' may be overly paternalistic.

4.40 The ALRC acknowledges that many people voluntarily assume carer roles and that most make an invaluable contribution to those they care for, and to society more broadly. There will be cases that warrant a criminal justice response. In some instances the carer may not have the 'necessary skills, capacity or knowledge to address the needs of the person being cared for, or the resources to access education, support and training in support of their caring role'.⁴² It would be preferable to support carers in these circumstances, rather than resort to prosecution, save for the most grievous instances.

Police training

4.41 The Issues Paper acknowledged that, in recent years, police responses to family violence have greatly improved. It noted that some police agencies have specialist liaison officers or specialist vulnerable person units that can assist when the police are interacting with older persons who might be victims of crime. It also suggested that there may be some reluctance among police to 'investigate crimes such as fraud when the victim has dementia'.⁴³

4.42 A significant number of stakeholders were supportive of increased police training as a mechanism to enhance the criminal justice system response to elder abuse.⁴⁴ Some suggested that this could be best achieved through the training and deployment of specialist officers or specialist units,⁴⁵ while others supported broader education campaigns to raise awareness of 'elder abuse'.⁴⁶

41 The common law test for negligent manslaughter by omission is well established. See, eg, *R v Lavender* (2005) 222 CLR 67; *R v Miller* (1983) 2 AC 161; *R v Instan* (1893) 1 QB 450; *R v Stone & Dobinson* (1977) QB 354; *R v Taktak* (1988) 14 NSWLR 226; *R v Russell* [1933] VLR 59.

42 Carers Australia, *Submission 157*.

43 Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (2016) 191.

44 See, eg, National Seniors Australia, *Submission 154*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Macarthur Legal Centre, *Submission 110*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

45 See, eg, Office of the Public Advocate (SA), *Submission 170*; Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*; Legal Services Commission SA, *Submission 128*; S Kurrle, *Submission 121*; Legal Aid ACT, *Submission 58*; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

46 N Smith, *Submission 127*.

4.43 Key concerns raised by stakeholders included that police did not always respond appropriately to ‘low level’ abuse, including neglect or financial abuse; and that ageist perceptions of older persons could affect police dealings, including that older people would not make reliable or competent witnesses.

4.44 The ALRC recognises that police in all states and territories are trained to respond to wide range of incidents. This includes training on identifying whether a criminal offence has been committed, and whether there is evidence to support an investigation. Police are also familiar with laws relating to protection or intervention orders, which can offer safeguards that can be, and are, initiated by police in appropriate circumstances including in respect of older persons suffering from elder abuse.

4.45 The ALRC notes that police receive comprehensive and ongoing training in respect of family violence, which is the context for a majority of abuse against older persons.⁴⁷

4.46 While some forms of ‘elder abuse’ are criminal in nature, there are some forms of conduct that would fail to meet the criminal threshold of harm, and/or the evidentiary thresholds required to commence and/or sustain a prosecution. The ALRC has heard that where it is not appropriate or possible for police to take action (for example, where an incident is not clearly criminal or where a victim is unable to make a statement), police need to be supported by the availability of appropriate and accessible referral pathways. The issue appears to be one more of availability (or lack thereof) and appropriateness of referral services that can support people where concerns responded to by police do not meet the requisite standard for criminal justice response.

4.47 The proposed National Plan, as well as other proposals (including those relating to a new investigative role for the public advocate—Proposal 3-1) will assist in bridging this gap.

⁴⁷ The ALRC has previously recommended that family violence legislation recognise the particular impact of family violence on older persons: Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 7–2.

