

13. Criminal Justice Responses

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Summary

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

13.2 Key issues identified by stakeholders in respect of the criminal law and related processes and frameworks were: the need to create specific offences for ‘elder abuse’, ‘elder neglect’ and ‘misuse of powers of attorney’; additional support for ‘vulnerable witnesses’; and improved police responses. The ALRC considers that existing criminal laws generally adequately cover conduct which constitutes elder abuse, and does not recommend the enactment of specific offences.

13.3 In this chapter, the ALRC considers other avenues to improve the operation of the criminal law, including police responses and providing appropriate assistance for witnesses who require additional support to participate in the criminal justice system. In Chapter 14, the ALRC makes recommendations relating to adult safeguarding laws aimed at safeguarding and supporting adults ‘at risk’.¹ These laws would provide adult safeguarding agencies a role that is complementary to police, and are aimed at improving responses to elder abuse.

¹ See rec 14–2 for a definition of an ‘at-risk adult’.

Offences

Specific offence of ‘elder abuse’

13.4 Some overseas jurisdictions, including a number of states in the US, 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.²

13.5 Generally speaking, Australian state and territory laws have not enacted such offences. 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 fraud and theft offences. Some jurisdictions have offences for neglect, 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, which may be relevant for older people experiencing elder abuse in domestic settings.

13.6 Some stakeholders supported new criminal offences that would proscribe certain types of conduct, including, for example, assault when perpetrated against an older person where there is a relationship of dependence.³ It was suggested that specific elder abuse offences would: support ‘effective criminal justice pathways for victims of elder abuse’;⁴ act as a deterrent;⁵ recognise the increased vulnerability of older persons;⁶ and serve an educative function and increase awareness of the issue.⁷

13.7 The ALRC considers that the existing criminal laws largely provide appropriate offences to respond to the types of conduct that might be understood to constitute ‘elder abuse’. Where the type of conduct proscribed is already captured, new offences are unnecessary and risk duplicating existing offences. Some stakeholders also submitted that an ‘elder abuse’ offence risked being discriminatory.⁸ The ACT Human Rights Commission submitted, for example, that ‘offences limited to abuse against “elders” have the potential to be paternalistic and discriminatory’.⁹

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

3 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Eastern Community Legal Centre, *Submission 357*; R Lewis, *Submission 349*; Protecting Seniors Wealth, *Submission 312*; Office of the Public Advocate (Vic), *Submission 246*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*; Legal Services Commission SA, *Submission 128*; Office of the Public Advocate (Vic), *Submission 95*; Alzheimer’s Australia, *Submission 80*.

4 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Office of the Public Advocate (Vic), *Submission 246*.

5 See, eg, Protecting Seniors Wealth, *Submission 312*; Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150*; Gadens Lawyers (Melbourne), *Submission 82*.

6 See, eg, Australian Research Network on Law and Ageing, *Submission 262*; R Lewis, *Submission 100*.

7 See, eg, Protecting Seniors Wealth, *Submission 312*; WA Police, *Submission 190*; People with Disability Australia, *Submission 167*.

8 ACT Human Rights Commission, *Submission 337*; Legal Aid ACT, *Submission 58*. See also the Law Society of NSW’s views expressed in: Law Council of Australia, *Submission 61*.

9 ACT Human Rights Commission, *Submission 337*.

13.8 Additionally, 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 (Qld) 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.¹⁰

13.9 Stakeholders suggested that, even if new offences were not introduced, the law should be harmonised to ensure that a court can take into account the age of the victim in sentencing.¹¹ Courts in each of the states and territories are guided by a mix of statutory and common law principles. Many states and territories specifically recognise the circumstances of the victim when sentencing offenders.¹² In jurisdictions which do not specifically provide statutory guidance, the common law position applies. Under the common law, the elderly nature of a victim is an aggravating factor for the purposes of sentencing.¹³

Offences for misusing powers of attorney

13.10 In all Australian jurisdictions, there are offences that broadly relate to fraud, deceptive conduct, 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. In Victoria and Queensland there are a range of offences specifically relating to powers of attorney.¹⁴ The ALRC is unaware of any prosecutions under these provisions.

13.11 The Law Institute of Victoria¹⁵ and the Office of the Public Advocate (Vic),¹⁶ welcomed 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.¹⁷ The NSW Legislative Council subsequently recommended that NSW legislation be amended to be consistent with Victoria’s *Powers of Attorney Act 2014*.¹⁸

13.12 The ALRC is not persuaded that there is a need for a specific offence for misusing powers of attorney. Where they exist, offences for misusing powers of

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

11 See, eg, ACT Human Rights Commission, *Submission 337*; National Seniors Australia, *Submission 154*.

12 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l); *Penalties and Sentences Act 1992* (Qld) s 9(3)(c); *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(f)(j); *Sentencing Act 1991* (Vic) s 5(2)(da); *Sentencing Act 1995* (WA) s 6(b).

13 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 129.

14 *Powers of Attorney Act 1998* (Qld) ss 26, 61; *Powers of Attorney Act 2014* (Vic) ss 135–136.

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

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

17 These provisions reflect the recommendations made in: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) rec 61.

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

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,¹⁹ and risks increasing complexity,²⁰ without any assurance of increased prosecution of the conduct.

13.13 Criminal law requires 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. To address the issue of redress, the ALRC recommends that state and territory civil and administrative tribunals be given a power to order compensation for the misuse or abuse of a power of attorney, and in relation to an attorney's failure to comply with their obligations.²¹

13.14 The other functions served by the creation of new offences, including increased awareness of the responsibilities of attorneys, can be delivered through other mechanisms, including through recommendations relating to additional safeguards for enduring documents,²² and community education programs developed under the National Plan to combat elder abuse.²³

13.15 The ALRC does not recommend 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

13.16 Many people voluntarily assume carer roles, and most make an invaluable contribution to those they care for, and to society more broadly. In some cases, however, the person in need of care may have their needs neglected. This may be because 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'.²⁴ It would be preferable to support carers in these circumstances. Criminal prosecution for neglect should be limited to the most grievous instances.

19 This was recognised by the Victorian Parliamentary Committee that recommended the creation of new power of attorney offences in Victoria: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 209.

20 This view was supported in Law Council of Australia, *Submission 61*.

21 Rec 5-2. See also the discussion in ch 8 about the possible role of disinheritance provisions in the US as a mechanism to reduce the incentive to perpetrate financial abuse.

22 Rec 5-1.

23 Rec 3-3(b).

24 Carers Australia, *Submission 157*.

13.17 Stakeholders noted that offences for neglect resulting in something less than the death of the older person do not exist in all states and territories.²⁵ In the absence of specific offences for elder abuse, it is important to ensure that general ‘neglect’ offences exist in all states and territories.

13.18 All states and territories, except the ACT, have ‘neglect’ offences that 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. In Victoria, a broader offence framed as ‘negligently causing serious injury’ applies.²⁷ The offences are serious, attracting penalties that include terms of maximum imprisonment ranging from three to ten years, where serious harm is caused.

13.19 In broad terms, existing offences have a number of elements that must be established, including the existence of a legal duty of care,²⁸ and a threshold requirement for the likelihood of ‘serious harm’.²⁹

13.20 Some stakeholders suggested that ‘neglect’ offences should be amended to impose a specific duty on persons who care for older persons. They submitted that this would reduce barriers to prosecution arising from a need to establish the existence of a duty of care as an element of the offence.³⁰

13.21 In NSW and Victoria, there must be ‘a legal duty’ to provide the necessities or necessities of life.³¹ Such provisions rely on a common law understanding of when a legal duty of care arises for the purposes of determining criminal negligence. One example of where such a duty arises is when a person ‘has voluntarily assumed the care

25 Office of the Public Guardian (Qld), *Submission 384*; Eastern Community Legal Centre, *Submission 357*; ACT Human Rights Commission, *Submission 337*; L Barratt, *Submission 325*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*; R Lewis, *Submission 100*.

26 *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1983* (NT) 1983 s 149; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Law Consolidation Act 1935* (SA) s 14; *Criminal Code Act 1924* (Tas) s 144; *Criminal Code Act Compilation Act 1913* (WA) s 262. In Victoria, while s 24 does not explicitly state this requirement, the prosecution must establish a duty of care as an element of the offence: *Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717.

27 *Crimes Act 1958* (Vic) s 24. This provision ‘punishes conduct that, if the complainant had died would have constituted manslaughter by criminal negligence’: Judicial College of Victoria, *Criminal Charge Book* (2011) [7.4.3.1]. This provision is mainly used to prosecute negligent driving offences: *Ibid*. However, it can apply to other circumstances of neglect, including, for example, neglect of a child: *Ignatova v R* [2010] VSCA 263.

28 *Crimes Act 1900* (NSW) s 44(1)(a); *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1899* (Qld) s 324; *Criminal Law Consolidation Act 1935* (SA) s 14 (1)(b); *Criminal Code Act 1924* (Tas) sch 1 cl 177; *Crimes Act 1958* (Vic) s 24; *Criminal Code Act Compilation Act 1913* (WA) app B cl s 262.

29 *Crimes Act 1900* (NSW) s 44(1); *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1899* (Qld) s 324; *Criminal Law Consolidation Act 1935* (SA) s 14(1)(b); *Criminal Code Act 1924* (Tas) sch 1 cl 177; *Criminal Code Act Compilation Act 1913* (WA) app B cl 262. This is variously referred to in state and territory laws as ‘serious harm’, ‘or a person’s health being ‘permanently injured’. In Victoria, the threshold is higher, requiring that there is serious injury, rather than the likelihood of serious injury: *Crimes Act 1958* (Vic) s 24.

30 L Barratt, *Submission 325*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*.

31 *Crimes Act 1900* (NSW) s 44(1). In Victoria, the first element that must be established for an offence under s 24 of the *Crimes Act 1958* (Vic) is that the accused owed the complainant a duty of care: *Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717.

of another, and so secluded the helpless person as to prevent others from rendering aid'.³² This duty has been codified in some states, which prescribe a duty to provide necessaries of life where a person assumes the responsibility 'of any person who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life'.³³

13.22 Some stakeholders also suggested that the need to establish a causal link between the neglectful conduct and the serious harm caused should be removed, arguing that this may remove evidentiary barriers to establishing a criminal standard of neglect where the victim is an older person.³⁴

13.23 State and territory laws vary in their treatment of causation. NSW, Victoria, Tasmania and the Northern Territory require that a causal link be established.³⁵ In Queensland and Western Australia,³⁶ the failure to provide the requisite care is deemed to have caused the serious harm.³⁷ In South Australia, it is sufficient that the perpetrator was 'aware or should have been aware that there was an appreciable risk that serious harm would be caused' by the neglect.³⁸

13.24 Prosecutions in respect of neglect of older persons may be difficult, including because, in some instances, a legal duty may not exist, or because it is difficult or not possible to establish causation in circumstances where the victim is frail and weak. However, the ALRC does not recommend establishing a specific duty on persons who care for older persons. In the ALRC's view, existing approaches which focus on the victim's inability to care for themselves or remove themselves from the care of another are preferable. Similarly, the ALRC does not recommend deeming a causal connection between a failure to provide the requisite level of care and the harm caused to an older person. However, a broader review of 'neglect' offences might consider whether it is appropriate to deem a causal link between the failure to provide the requisite care and the harm caused.

32 *R v Taktak* (1988) 14 NSWLR 226, 243–4. Here, Yeldham J quotes *Jones v United States*, 308 F.2d 307 (D.C. Cir. 1962) 310.

33 *Criminal Code Act 1924* (Tas) sch 1 cl 144. The duty is expressed in similar terms in: *Criminal Code Act 1983* (NT) 1983 sch 1 cl 149; *Criminal Code Act 1899* (Qld) s 285; *Criminal Code Act Compilation Act 1913* (WA) app B cl 262.

34 L Barratt, *Submission 325*; Australian Research Network on Law and Ageing, *Submission 262*; Office of the Public Advocate (Vic), *Submission 246*.

35 In NSW and Victoria this is expressed as requiring that the failure 'causes' the serious harm or injury: *Crimes Act 1900* (NSW) s 44(1); *Crimes Act 1958* (Vic) s 24. In Tasmania and the Northern Territory, the requirement is stated in the following terms: the accused is guilty of a crime if they fail to fulfil their duty 'whereby' the person's health is likely to be permanently injured: *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1924* (Tas) sch 1 cl 177.

36 *Crimes Act 1900* (NSW) s 44(1); *Criminal Code Act 1983* (NT) 1983 sch 1 cl 183; *Criminal Code Act 1899* (Qld) s 324; *Criminal Law Consolidation Act 1935* (SA) ss 14(c)–(d); *Criminal Code Act 1924* (Tas) sch 1 cl 177. The only exception to this requirement is in Western Australia, where it is sufficient to establish the existence of a duty and a failure to fulfil that duty. Where these elements are fulfilled, the accused 'is held to have caused any consequences which result to the life or health of the other person': *Criminal Code Act Compilation Act 1913* (WA) app B cl 262.

37 *Criminal Code Act 1899* (Qld) s 285; *Criminal Code Act Compilation Act 1913* (WA) app B cl 262.

38 *Criminal Law Consolidation Act 1935* (SA) s 14(1)(c).

Alternatives to specific offences

13.25 Stakeholders submitted that factors—other than the availability of offences—may limit the availability and efficacy of criminal justice responses. These include, for example, a lack of understanding of what elder abuse is, a reluctance to acknowledge and report elder abuse, and low rates of prosecution.³⁹ WA Police stated:

Some of the reasons for under-reporting include that the victim is dependent on the perpetrator for their daily care and are fearful reporting may see them placed in a residential care facility, the shame associated with being a victim of elder abuse, fear of jeopardising relationships with family, and fear of retaliation. There may also be an inability of the older person to access police services to be able to report crime, and the ability to be able to communicate what has been happening to a police officer due to the abuser being the primary carer, the presence of cognitive impairment, or language and cultural barriers.⁴⁰

13.26 The following case study provided by the Eastern Community Legal Centre is illustrative:

‘Larry’ was a client in the ECLC family violence duty lawyer list. He told the police that he didn’t want to proceed with the intervention order application that the police had initiated on his behalf. The police referred Larry to the ECLC duty lawyer to talk about his rights.

Larry told the ECLC duty lawyer that this was the third time that the police had attended at his home in the last six months due to his being subjected to assaults by his adult son (aged 30). The assault that precipitated the recent police attendance had rendered Larry unconscious. Larry refused to admit that his son had assaulted him and claimed that he fell down the stairs. Larry said that the second time that the police attended, they had warned him that they would make an intervention order application on his behalf if they were called out to his home again. He was immensely embarrassed and feared that his son would be rendered homeless if he agreed to exclude him from the home (as recommended by the police). Larry indicated that he understood that the police and ECLC were very concerned about his safety, but said that he loved his son too much to agree to exclude him from the home.

When he appeared before the Magistrate, the Magistrate questioned Larry closely on his safety. In the questioning, the Magistrate deduced that even if Larry were to have a full intervention order excluding the son from the home, that Larry would still allow him to stay.⁴¹

13.27 The ALRC considers that, rather than creating a new elder abuse offence, other initiatives such as the establishment of specialist elder abuse units by police and improvements in support for vulnerable witnesses may better achieve improvements in criminal justice responses. Such initiatives should be combined with initiatives to enhance community awareness of elder abuse as part of a National Plan.⁴² Advocare

39 See, eg, Eastern Community Legal Centre, *Submission 357*; National Legal Aid, *Submission 192*; Justice Connect, *Submission 182*; Seniors Rights Victoria, *Submission 171*; Carers Australia, *Submission 157*; National Seniors Australia, *Submission 154*; Legal Aid NSW, *Submission 140*; Federation of Ethnic Communities’ Councils of Australia, *Submission 89*; Law Council of Australia, *Submission 61*.

40 WA Police, *Submission 190*.

41 Eastern Community Legal Centre, *Submission 177*.

42 See ch 3.

supported this approach, stating that ‘elder abuse is first and foremost a social problem that requires more education and exposure, which could occur through ongoing media strategies’.⁴³

Improving police responses to elder abuse

13.28 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.⁴⁴ A significant number of stakeholders were supportive of increased police training as a mechanism to enhance the criminal justice system response to elder abuse.⁴⁵ Some suggested that this could be best achieved through the training and deployment of specialist officers or specialist units.⁴⁶

13.29 However, NSW Police, in evidence to the NSW Legislative Council’s inquiry into Elder Abuse (NSW Elder Abuse Inquiry) cautioned that ‘the constable on the street is not a walking encyclopaedia’.⁴⁷ Bearing this in mind, additional training and tools for frontline police might focus on further guidance on identifying elder abuse.

13.30 For example, NSW Police and the Elder Abuse Helpline and Resource Unit have worked together to prepare an ‘aide memoire’ that has been issued to all ‘first responders’.⁴⁸ It sets out what may constitute elder abuse, and is produced in card form to fit in the inside cover of notebooks issued to all police officers.⁴⁹ Other initiatives that may be of assistance might be the development of a risk assessment and

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

44 See, eg, Women’s Legal Services Australia, *Submission 343*; Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; NSW Ombudsman, *Submission 160*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian Bankers’ Association, *Submission 84*.

45 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Women’s Legal Services Australia, *Submission 343*; Speech Pathology Australia, *Submission 309*; Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; NSW Ombudsman, *Submission 160*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Macarthur Legal Centre, *Submission 110*; Australian Bankers’ Association, *Submission 84*; Alzheimer’s Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

46 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*. See also, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 10; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 49.

47 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Superintendent Robert Critchlow, Commander, The Hills Local Area Command, NSW Police Force); Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Assistant Commissioner Denis Clifford, Corporate Spokesperson on Vulnerable Communities).

48 Robert Critchlow, ‘NSW Police and the Abuse of Older People’ (2016) 10 *Elder Law Review*.

49 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Assistant Commissioner Denis Clifford, Corporate Spokesperson on Vulnerable Communities).

management tool. For example, in Victoria, a ‘Family Violence Risk Assessment and Management Report’ is completed where there is a family violence incident. This report informs the action to be taken by Victoria Police. The report guides police through a risk assessment and risk management process, including:

- identifying and recording the most relevant evidence-based risk factors and indicators
- ensuring that decisions by police or others regarding the safety and welfare of affected family members are well informed
- making a structured assessment of the likelihood of future family violence
- determining the most appropriate strategy.⁵⁰

13.31 Additional training and access to tools could be supplemented by the establishment of a network of specialist officers or units who could provide advice and support to frontline staff as necessary.⁵¹ Stakeholders were supportive of this approach.⁵² In a submission to the NSW Elder Abuse Inquiry, the Elder Abuse Helpline and Resource Unit noted that the level of police response ‘varies from exemplary to less than adequate at times, risking the possibility of further unnecessary suffering of the older person’. It suggested that specialist positions should be rolled out across the state to support frontline staff to achieve a ‘consistently high standard’.⁵³

13.32 An illustrative example of how specialist officers can assist frontline staff was provided by Superintendent Robert Critchlow in evidence before the NSW Elder Abuse Inquiry:

We had a matter recently in Ku-ring-gai where an abusive relative was appropriately charged with a domestic violence offence against an older person. The constables, in their keenness, removed the offender from the home—as they normally would—and left the older person alone. We relied upon the assistance of an inspector who worked in the command ... who was able to step in, amend the bail conditions, intervene appropriately, remedy the situation and train the constables as to what better approach could have been taken.⁵⁴

13.33 In 2016, Victoria Police began a three-year trial to embed and streamline specialist assistance in family violence matters. During the trial, police officers use a

50 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 17.

51 The NSW Legislative Council also recommended the establishment of vulnerable community support officers in each regional command: Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 10. The Royal Commission into Family Violence supported strengthening the role of specialist officers, recommending that career structures within Victoria Police reflect the role of specialist family violence liaison officers as core business: Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 49.

52 See, eg, Women’s Legal Services Australia, *Submission 343*; Eastern Community Legal Centre, *Submission 177*.

53 NSW Elder Abuse Helpline and Resource Unit Submission No 33 to General Purpose Standing Committee No 2, NSW Legislative Council, *Elder Abuse in New South Wales* (November 2015).

54 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Superintendent Robert Critchlow, Commander, The Hills Local Area Command, NSW Police Force).

tiered screening tool to determine when a family violence incident should be referred to the family violence specialist team as well as the appropriate response by the specialist team. The tool includes two parts: Part A is to be completed by frontline police at the scene of the incident to determine whether to refer the matter on; and Part B is to be completed by the family violence specialist team to prioritise risk.⁵⁵

13.34 Part A includes 14 questions that are scored by police. Six questions rely on interviewing the victim, three questions rely on police observation, and the remaining five questions rely on a review of crime databases to ascertain matters such as relevant criminal history. If the assessment results in a score of four or more, the matter is referred to a specialist team.⁵⁶ Part B includes 10 items, and a maximum possible score of 12. If the assessment results in a score of four or more, the specialist team will assign a more fine-grained risk prioritisation. Cases that are categorised as ‘standard’ will receive a ‘standard police response’. Specialist teams will take carriage of risk management for cases prioritised as ‘moderate’ or ‘high/very high’.⁵⁷

13.35 Specialist staff or units may also be responsible for initiatives targeted at a more holistic response to elder abuse. WA Police suggested that this might include participating in interagency activities, developing proactive approaches which harness responses and resources available elsewhere within the government and community sector, and engaging in community awareness activities.⁵⁸ For example, NSW Police and the Elder Abuse Helpline and Resource Unit have also worked closely to establish referral pathways such that ‘police are now common callers’ to the NSW elder abuse helpline.⁵⁹ Similarly, police involvement in networks such as the Eastern Elder Abuse Network⁶⁰ and the Western Australia Alliance for the Prevention of Elder Abuse,⁶¹ which bring together professional staff working with older people, provides further opportunities to develop and use referral pathways. Recognising the time constraints on frontline police, the establishment of specialist positions or units provides an opportunity for greater engagement in such networks.

55 Jude McCulloch et al, ‘Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)’ (Final Report, School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, for Department of Health and Human Services (Vic), 2016) 45–46.

56 Ibid 46. Police also retain a discretion to refer a matter to a specialist team if the score falls below this threshold.

57 Ibid.

58 WA Police, *Submission 190*.

59 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Monday 7 March 2016, 24–32 (Superintendent Robert Critchlow, Commander, The Hills Local Area Command, NSW Police Force).

60 Eastern Community Legal Centre, *Submission 177*.

61 WA Police, *Submission 190*.

Assisting ‘vulnerable witnesses’

13.36 In addition to the factors above, the low rate of prosecutions for elder abuse may also arise from 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 witnesses’ who find themselves engaged in the criminal justice system. ‘Vulnerable witnesses’ are witnesses who require additional support. They are usually defined as witnesses with intellectual or cognitive impairment, children, or special classes of victims (such as victims of sexual assault). Stakeholders responding to the Discussion Paper suggested that such mechanisms be improved.⁶² The Office of the Public Advocate (SA) pointed to reforms which:

- provide access to assistance for witnesses with complex communication needs;
- allow evidence to be taken in informal surroundings in circumstances where a vulnerable witness is involved; and
- allow alternative mechanisms for the presentation of evidence given by vulnerable witnesses at trial, including pre-recorded evidence.⁶³

13.37 The use of witness intermediaries was suggested by Disabled People’s Organisations Australia, referring to the successful use of intermediaries in the United Kingdom.⁶⁴ Speech Pathology Australia also supported this initiative, describing it as a best practice example of communication assistance.⁶⁵

13.38 The ALRC recognises the need for adequate support and assistance to ensure ‘vulnerable witnesses’ can engage with the criminal justice system. Broader reviews of support provided to ‘vulnerable witnesses’ should specifically consider older people’s needs.

62 Office of the Public Guardian (Qld), *Submission 384*; Disabled People’s Organisations Australia, *Submission 360*; Office of the Public Advocate (SA), *Submission 347*; Speech Pathology Australia, *Submission 309*.

63 Office of the Public Advocate (SA), *Submission 347*.

64 Disabled People’s Organisations Australia, *Submission 360*.

65 For a summary of vulnerable witness provisions across the states and territories, see: Department of the Attorney General and Justice (NT), *Consultation Results Report: Consultation Regarding Application in the Lower Courts of Recorded Statement Protections for Vulnerable Witnesses: Section 21B of the Evidence Act* (2014) 16–17.

