

Elder Abuse - How well does the Law cope?

1. Background and Scope

The Public Advocate in Queensland and the Elder Law Section of the Queensland Law Society agreed to collaborate on a report of defined, limited scope (Joint Report) about the adequacy of Queensland law regarding elder abuse. The impetus for the Joint Report was shared concerns about difficulties for vulnerable older people, in particular those with impaired decision-making capacity (IDMC) in obtaining civil and criminal justice, and protection from abuse. This Joint Report is confined to these issues.

The issue of elder abuse has attracted significant global attention from government, community and the legal sectors over the past few decades. This may be attributed to the rapidly increasing proportion of older people in society. Many issues and challenges for society accompany this phenomenon, prompting the international community to take action to promote and protect the rights and interests of older persons.¹

In recent years the State of Queensland has experienced a rapid increase in population. In 2007 approximately 12.2 % of the state's population and 13% of the Australian population was aged 65 or older.² Projections suggest that by 2056, persons over 65 will constitute between 23% and 25% of the Australian population.³ It is estimated that approximately 258,000 Queenslanders and 1.13 million Australians will have dementia by 2050.⁴ As the population escalates, and average life-expectancy increases, a higher proportion of older people are likely to develop impaired decision-making capacity. This population is particularly vulnerable to elder abuse.

It is widely accepted that elder abuse is under-reported.⁵ The World Health Organisation has identified that prevalence rates in selected developed countries

¹ See for example, the World Health Organisation's *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) < http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf > at 10 July 2009.

² Australian Bureau of Statistics, *Population by Age and Sex, Australian States and Territories* (June 2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/008FDCD8258C9991CA2574740015C9A8?opendocument>> at 15 July 2009; Australian Bureau of Statistics, 'One in four Australians aged 65 years and over by 2056: ABS' (Media Release, 4 September 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Media%20Release12006%20to%202101?opendocument&tabname=Summary&prodno=3222.0&issue=2006%20to%202101&num=&view=>> at 10 October 2009.

³ Australian Bureau of Statistics, 'One in four Australians aged 65 years and over by 2056: ABS' (Media Release, 4 September 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Media%20Release12006%20to%202101?opendocument&tabname=Summary&prodno=3222.0&issue=2006%20to%202101&num=&view=>> at 10 October 2009. House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.1]. In order to explore the adequacy of Australia's legal system in addressing the needs and protection of older Australians, the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs conducted a twelve month inquiry culminating in the release of its report *Older People and the Law*. The report canvasses issues including fraud, financial abuse, general and enduring powers of attorney provisions, family agreements, discrimination and barriers to older Australians accessing legal services, and provides key recommendations.

⁴ Access Economics, *Keeping dementia front of mind: incidence and prevalence 2009-2050* (August 2009) 3 <<http://www.alzheimer.org.au/content.cfm?infopageid=6012>> at 15 October 2009.

⁵ See for example Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 1;

range from 1% to 10%.⁶ Some Australian research suggests approximately 3 to 7% of older people over the age of 65 are affected.⁷ However, this number is likely to escalate as the population ages.

Elder law is a relatively recent phenomenon in Australia.⁸ Concern about elder abuse is not confined to the legal profession however, but involves multiple sectors of society. Not only are changes to the law imperative to address this complex issue, but reform to policy, service and legislative systems is essential. Many of the areas requiring reform are not within the scope of this Joint Report, which will instead focus on the protection of the rights and interests of older people through the civil and criminal law.

This Joint Report is not a scholarly exploration of issues about elder abuse. Rather, it is an information paper. It briefly identifies and explores relevant issues, and is intended to stimulate discussion and consideration of reform options. It is hoped that the Joint Report will inform the general public, rally interested stakeholder groups, and assist both policy and law makers to formulate appropriate changes to improve access to justice for older persons who experience abuse.

1.1 Interest of the Elder Law Section

The Elder Law Section (the ELS) of the Queensland Law Society comprises lawyers who practice, or have a professional interest in legal issues associated with older people and the providers of services to older people.

As part of its mandate, the ELS seeks to identify areas of the law that may impact on older people or the provision of services to them. As such, the subject of elder abuse is directly relevant to its role and is seen by the ELS as an important matter of legal review.

1.2 Interest of the Office of the Public Advocate

The Public Advocate is an independent statutory officer established by the *Guardianship and Administration Act 2000 (Qld)* to provide systems advocacy for adult Queenslanders with IDMC.⁹ Adults with IDMC may include people with a mental illness, intellectual or developmental disability, acquired brain injury, or dementia. The role of the Public Advocate is to:

- promote and protect the rights of adults with impaired capacity for a matter;
- promote the protection of the adults from neglect, exploitation or abuse;
- encourage the development of programs to help the adults to reach the greatest practicable degree of autonomy;

Pamela Kinnear and Adam Graycar, 'Abuse of Older People: Crime or Family Dynamics?' (No 113, Australian Institute of Criminology, 1999) 3; D Rabiner, J O'Keefe and D Brown 'A conceptual framework for financial exploitation of older persons' (2004) 16 (2) *Journal of Elder Abuse and Elder Neglect* 53-73; World Health Organisation, *Prevention of Elder Abuse* <http://www.who.int/ageing/projects/elder_abuse/en/> at 1 July 2008.

⁶ World Health Organisation, *Prevention of Elder Abuse*

<http://www.who.int/ageing/projects/elder_abuse/en/> at 9 July 2009.

⁷ The Australian Pensioners' and Superannuants' League of Queensland, *The Strategic Plan for the Prevention of Elder Abuse in Queensland* (2001) 4; Les Jackson, 'Elder Abuse and Queensland legislation' (2003) 2 *Elder Law Review* 2.

⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.14-1.16].

⁹ *Guardianship and Administration Act 2000 (Qld)* s209.

- promote the provision of services and facilities for the adults; and
- monitor and review the delivery of services and facilities to the adults.¹⁰

Accordingly, the Public Advocate's legislative mandate limits its interest in this Joint Report to elder abuse of adults with impaired capacity for decision-making.¹¹

It should be noted that although this Joint Report is primarily focused on a consideration of elder law, it may be that some of the issues affect other vulnerable adults (for example, adults who are not elderly but who have a decision-making impairment as a result of intellectual disability, acquired brain injury or psychiatric disability). Some of the responses to elder abuse in other jurisdictions are also applicable to this broader group.

2. 'Elder' persons

2.1 Defining the concept of 'elder'

The concept of elder is difficult to define and is subject to contention. The Australian Concise Oxford Dictionary definition of *elder* includes:

2. (a) *persons of greater age or seniority, (b) persons venerable because of age.*

3. *a person advanced in life.*¹²

This definition does not define an elder by reference to a specific age. Instead, it considers 'elder' in the context of a relationship with others. Whilst this may be suitable for broad general application it provides insufficient clarity for legislators.

In Australia, the term 'elder' is not defined at common law, and therefore has no legal meaning. However, various pieces of State and Federal legislation create entitlements for people over a specified age or makes special provision for them. For example:

- The age pension age criteria is 65 years and over for men, and between the ages of 60 and 65 for women (depending on year of birth).¹³
- The preserved component of superannuation can only be accessed for people above the age of 55-60, depending on the person's year of birth.¹⁴
- An assault constitutes a serious assault if committed against a person aged 60 years and older.¹⁵

In 2002, the World Health Organisation's *World Report on Violence and Health* examined elder abuse.¹⁶ The report recognised that a person is usually considered of older age in developed countries at 60 or 65 years, and that this was related to the

¹⁰ *Guardianship and Administration Act 2000* (Qld) s 209.

¹¹ *Guardianship and Administration Act 2000* (Qld) sch 4 defines 'capacity' and 'impaired capacity'.

¹² Bruce Moore (ed), *The Australian Concise Oxford Dictionary* (4th ed)(2004) 447.

¹³ *Social Security Act 1991* (Cth) s43; Centrelink, *Eligibility*

<http://www.centrelink.gov.au/internet/internet.nsf/payments/age_eligible.htm> at 20 October 2009.

¹⁴ Australian Taxation Office, *Super and your retirement* (2007)

<<http://www.ato.gov.au/content/downloads/spr116101n71040.pdf>> at 14 July 2009.

¹⁵ *Criminal Code 1899* (Qld) s 340(1)(g).

¹⁶ World Health Organisation, *World Report on Violence and Health* (2002)

<http://www.who.int/violence_injury_prevention/violence/world_report/en/> at 1 July 2008. See in particular Chapter 5 entitled 'Abuse of the Elderly'.

social construct of retirement.¹⁷ There is no agreed age established by the United Nations.¹⁸

The Federal Government's 2007 report *Older People and the Law* uses the term 'older Australians' when referring to persons aged 65 years or over.¹⁹ It acknowledged that adopting an age lower than 65, such as 50 years or over, may be better practice in the case of Indigenous Australians.²⁰ Arguably, this approach may also be appropriate in the case of people with a physical or intellectual disability, who may age prematurely.

For purposes of law reform, whether and how an elder should be defined is not immediately or obviously apparent, and is a subjective exercise. There are many relevant issues to consider when determining whether to recommend an age at which a person becomes an elder, including the following:

- The use of chronological age is a practice in many developed countries. This may not be the case in developing countries, such as many African nations, where time has 'little or no importance' when determining who is of old age.²¹
- Many 60 or 65 year olds would likely be unpersuaded that special protections created by the law are appropriate for them as they continue to be active contributors to society and enjoy good health and total independence.
- If retirement was a trigger for considering a person an older person, the period in which a person is considered to be 'elderly' may span upwards of 40 years for a large number of people. This is a very significant portion of time for a person to be considered in the elder years of life.
- Some people, for example, in indigenous communities in Australia, may experience some of the characteristics and vulnerabilities of being 'elderly' earlier than the broader general Australian community as they are more susceptible to experiencing ill health, disability and death at a younger age.²²
- It is not intended and undesirable to perpetuate ageist attitudes.

It is therefore doubtful that chronological age alone is an appropriate criterion in determining who is an 'elder'. In arriving at an appropriate age, and in considering the concept of elderly, a consideration of the varying individual characteristics of older persons is necessary.

¹⁷ Ibid, 125.

¹⁸ World Health Organisation, *Definition of an older or elderly person* (2009) <<http://www.who.int/healthinfo/survey/ageingdefnolder/en/print.html>> at 6 June 2008.

¹⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.26].

²⁰ Ibid. The Report identified several reasons for preferring such an approach, including: (a) there are not clear chronological ages by which to identify an older Indigenous person; (b) premature aging due to health, environmental and lifestyle factors; and (c) the Federal Government's practice of using population estimates when planning services for the elderly.

²¹ World Health Organisation, *Definition of an older or elderly person* (2009) <<http://www.who.int/healthinfo/survey/ageingdefnolder/en/print.html>> at 6 June 2008.

²² The statistics regarding Indigenous health, disability and life expectancy are discussed in the Human Rights and Equal Opportunity Commission, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs regarding Inquiry into Older People and the Law* (December 2006) <<http://www.hreoc.gov.au/legal/submissions/2006/ADA_200612/older_people_and_the_law_dec06.html> at 14 July 2009.

2.2 Are we asking the right question?

It is evident from the widespread interest in and support for addressing elder abuse that older people as a group are perceived to be potentially deserving of special consideration, protections and support from abuse. Given the competing factors which require consideration in determining a definition of 'elder', perhaps the initial question should be '*Which elders need protection?*'.

This issue requires a consideration of what groups comprise elders. There appear to be at least three distinct categories of older people, as follows:

1. Older people who are independent and physically able to attend to all of their own needs, and who do not have IDMC;
2. Older people who do not have IDMC, but due to physical frailty or impairment are dependent on others to meet their needs, whether for activities of daily living, assistance to manage their financial affairs or for companionship.
3. Older people who have IDMC (and who may or may not also be physically frail or have another physical impairment).

A complicating factor is the nature of capacity.²³ A person may have capacity for some matters and not others. A person's level of capacity may also fluctuate. For example, an individual in the early stages of dementia may be completely lucid at times, but confused at others.

A further necessary consideration is whether different legal entitlements should be available to these different categories of older people. People with IDMC are, for obvious reasons, especially vulnerable and accordingly they deserve special arrangements to protect them from abuse, neglect and exploitation. This has already been recognised in Queensland through the guardianship regime, although notably it was developed for the benefit of all adults with IDMC, not just older people. Older people who are completely independent are arguably no different from any other category of adult in the community.

Older people who do not have IDMC, but are reliant on others to meet their needs because of physical frailty or impairment are arguably the most difficult category to adequately provide for. Often a person in this situation will be socially isolated and without appropriate support. When a person depends on another to perform the most basic of activities and has limited contact with the community, a power imbalance exists in the relationship, creating vulnerabilities. An older person in this situation may be subject to undue influence which may, for example, result in them giving sexual favours to their carer. They may also be vulnerable to financial exploitation through providing large sums of money to their carer.

Rather than categorising groups of elders, it may be that the definition of elder abuse should more properly cover the circumstances in which an act, if done to an older person, will be abuse.

²³ The *Guardianship and Administration Act 2000* (Qld) sch 4 defines **capacity**:

- Capacity**, for a persons for a matter, means the persons is capable of-
- (a) Understanding the nature and effect of decisions about the matter; and
 - (b) Freely and voluntarily making decisions about the matter; and
 - (c) Communicating the decisions in some way.

2.3 Conclusion

The above analysis illustrates that defining 'elder' is a complex matter subject to considerable debate. It is not a purpose of this Joint Report to determine or recommend the appropriate age at which a person may be categorised as an "elder", or at which older persons require protection. Instead these are identified as possibilities for consultation and debate among relevant stakeholders.

3. Elder abuse

The concept of 'elder abuse' varies broadly in legal and academic literature, and no universal definition exists. It can be said that elder abuse generally involves 'all types of mistreatment or abusive behaviour towards older adults'.²⁴ The difficulties in developing a standard definition are exacerbated by the 'wide variety of complex situations' which may constitute elder abuse.²⁵

3.1 Accepted definitions of elder abuse

The *Toronto Declaration on Global Prevention of Elder Abuse*²⁶ defines elder abuse as:

*... A single or repeated act, or lack of appropriate action, occurring within a relationship where there is an expectation of trust which causes harm or distress to an older person. It can be various forms: physical psychological/emotional, sexual, financial or simply reflect intentional or unintentional neglect.*²⁷

The Australian Network for the Prevention of Elder Abuse (ANPEA) definition is broadly similar:

*Elder abuse is any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse can be physical, sexual, financial, psychological, social and/or neglect.*²⁸

The Elder Abuse Prevention Unit in Queensland adopts similar terminology.²⁹

Most definitions do not include self-neglect as constituting elder abuse because it falls outside an 'act occurring in a relationship'.³⁰ Similarly, the concept of abandonment is often not included.³¹

²⁴ Rosalie Wolf, 'The Nature and Scope of Elder Abuse' (Summer 2000) 24(2) *Generations* <<http://www.generationsjournal.org/generations/index.cfm?page=gen-24-2/Gen-24-2-toc.html>> at 14 July 2009.

²⁵ Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 39.

²⁶ The World Health Organisation's *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf> at 10 July 2009. The World Health Organisation, in collaboration with the International Network for the Prevention of Elder Abuse (INPEA) and the University of Toronto (Canada) made a commitment to the Declaration, which calls for the prevention of Elder Abuse. It was based on the recommendations of the United Nations International Plan of Action adopted by all countries in Madrid, April 2002.

²⁷ *Ibid.*

²⁸ The Australian Network for the Prevention of Elder Abuse, *Preventing elder abuse in an aging world is everybody's business* (2007) <<http://agedrights.asn.au/pdf/ANPEA%20Brochure%20June%2007.pdf>> at 1 July 2008.

²⁹ Elder Abuse Prevention Unit, *Elder Abuse* (2008) <<http://www.eapu.com.au/ElderAbuse.aspx>> at 15 July 2009. This definition was endorsed by all Australian states and territories in December 2000 through the Healthy Ageing Taskforce.

3.2 Essential elements of *elder abuse*

Despite the variations in definitions adopted, there are two essential elements of elder abuse which emerge from them. Elder abuse generally:

1. Occurs within a relationship where there is a relationship of trust between the perpetrator and victim³²; and
2. Results in harm to the older person.

Unwillingness or inability of the victim to report the abuse is also a common feature. As noted earlier, elder abuse is considered to be significantly under-reported. This under-reporting may be attributed to factors such as:

- Feelings of shame when abuse has occurred.³³ For example, this may occur when a son or daughter has been physically violent to an older parent to coerce money from them.
- Fear of inciting further violence, or being punished or abandoned.³⁴
- The consequences of reporting may be undesirable. If the violence of an adult child to an older parent occurs in the context of the parent residing with the adult child, then the parent may be concerned that reporting will lead to placement in residential aged care.³⁵ The parent may have complicated feelings about implicating the perpetrator particularly if the person is their spouse, or carer.

Older people with IDMC are unlikely to report abuse for other reasons. In particular, they may no longer be able to recognise certain behaviour as abuse, and even if they do, they may be unable to articulate their experiences or ascertain how to report the abuse.³⁶

3.3 Dependence

The definitions of elder abuse do not explicitly contemplate dependence of the older person on the party perpetrating the abuse. However, in many relationships where elder abuse occurs, the older person is vulnerable as a result of their dependence on, and trust placed in, the perpetrator, whether for physical or psychological/emotional assistance, or for assistance with financial management. Clearly, if an older person depends on another to shower, to eat, to have medical needs met, or for companionship, there is an imbalance of power in the relationship,

³⁰ Australian definitions have most commonly excluded self-neglect. See for example P Kinnear and A Graycar 'Abuse of Older People: Crime or Family Dynamics?' (1999) 113 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 2. See also Elder Abuse Prevention Unit, *Elder Abuse* (2008) <<http://www.eapu.com.au/ElderAbuse.aspx>> at 15 July 2009.

³¹ Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 1. McCawley recognises that legal sanctions for abandonment are available only in jurisdictions where families are required by law to care for older people.

³² Dr Paul Mazerolle and Dr Jennifer Sanderson, 'Executive Summary Literature Review – Elder Abuse' (Key Centre for Ethics, Law, Justice and Governance, Griffith University, 2008) 1.

³³ Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* <<http://www.aifs.gov.au/institute/pubs/fm1/fm37mj.html>> at 15 July 2009.

³⁴ *Ibid.*

³⁵ David Cripps, Jenny Biven, Jane Northey, Phillip Rigger, "Abuse of older people: issues for lawyers" (2002) 1 *Elder Law Review* <<http://www.austlii.edu.au/au/journals/ElderLRev/2002/8.html>> at 21 July 2009.

³⁶ *Ibid.*

leading to vulnerability. Accordingly, it is suggested that some level of dependence will be a common feature of elder abuse.

3.4 Defining elder abuse: What is the answer?

The definition of elder abuse is an important issue for consideration and needs to be thoroughly explored in order to obtain clarity. A common definition is essential to ensure consistency, to properly identify behaviour which constitutes elder abuse, to provide improved protection at law, and to develop appropriate multi-disciplinary responses.

Law reform should be focused on the essential elements of elder abuse, with the phenomenon of dependency warranting specific consideration.

4. Queensland Law

This part considers civil and criminal law mechanisms in Queensland, in particular statutory provisions which apply to situations of elder abuse. This part does not contain an exhaustive list of provisions relevant to older persons, but is intended to cover areas in which they most commonly experience abuse, and require special protection by the law.

4.1 Civil Law

4.1.1 Financial abuse

In the 2007/2008 financial year the Elder Abuse and Prevention Unit (“the EAPU”) received reports that over \$14 million was inappropriately obtained from older Queenslanders through financial abuse.³⁷ Estimates suggest that the actual amount of funds may have been between \$1.8 billion and \$5.8 billion.³⁸ The prevalence of financial abuse of older persons is unable to be accurately determined in the absence of mandatory reporting obligations in Australia.³⁹ It is therefore a significant issue requiring urgent attention and consideration.

Financial abuse commonly involves activities by an attorney in violation of his or her powers, duties and responsibilities under an Enduring Power of Attorney (EPA); misappropriation of money, valuables or assets; forging signatures on cheques; denial of access to personal assets; accessing a person’s funds electronically; and forced or unauthorised changes to legal documents.⁴⁰ Financial abuse may also occur where a family member or other person takes, or attempts to take advantage of an older person who has already lost capacity, or is losing capacity, by coercing or

³⁷ Elder Abuse Prevention Unit, *The Cost of Elder Abuse in Queensland: Who pays and how much* (June 2009) 3.

³⁸ Ibid. These figures were calculated using population estimates and Elder Abuse Prevention Unit averages.

³⁹ Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, ‘Access to assets: Older people with impaired capacity and financial abuse’ (2006) 8(1) *Journal of Adult Protection* <http://findarticles.com/p/articles/mi_qa4124/is_200605/ai_n16629535/?tag=content;col1> at 15 July 2009.

⁴⁰ David Cripps, Jenny Biven, Jane Northey and Phillip Rigger, ‘Abuse of older people: Issues for lawyers [2002] 8 *Elder Law Review* < <http://www.austlii.edu.au/au/journals/ElderLRev/2002/8.html>> at 15 July 2009; Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 5.

arranging for the older person to sign an EPA in circumstances where the older person is unable to understand the nature and effect of the document.⁴¹

Financial abuse most often impacts upon older persons with IDMC, and is primarily the result of their vulnerable position in society. However, it has been recognised that older persons who do not have impaired capacity for decision-making may succumb to the influence and power of close family or associates also.⁴²

Currently, where financial abuse has occurred:

1. Old age does not create any special legal status of vulnerability attracting the special protection of the law; and
2. Anomalies exist in the law which create higher thresholds for older people to satisfy in order to establish undue influence (than is the case in other situations), for example, the legal notion of the presumption of advancement. This is the legal presumption that a transfer of an asset from a parent to a child is a gift unless the older person can rebut the presumption by demonstrating that at the time of transfer no gift was intended, for example, by proving that undue influence occurred.⁴³

Otherwise, the same remedies as may be available at common law or in equity for financial abuse arising from improper or inappropriate dealing with any person's assets and financial resources may be available to an older person. In Queensland, remedies based in contract, equity and tort law, such as unconscionable conduct, undue influence and negligence are available to older persons who experience financial abuse.⁴⁴ Equity, through the mechanism of the constructive trust, can provide relief in some circumstances to vulnerable older persons.⁴⁵

The law of undue influence however does not adequately provide for situations of elder abuse. Undue influence developed in the 19th century in an era when people generally had a shorter life expectancy than in modern times, and less often became financially and physically dependant on others. Today, a larger proportion of older persons have substantial assets. Longer life expectancy has resulted in the regular formation of complex or ambiguous family financial relationships, which are often perceived to be an appropriate way to provide for the older person's accommodation and support needs within the family, especially where government funded aged care

⁴¹ See for example *Legal Services Commissioner v Gregory Francis Ford* [2008] LPT 12 where a solicitor was found guilty of unsatisfactory professional conduct for facilitating the revocation of an EPA (appointing the principal's daughter-in-law attorney) and execution of a new EPA (appointing the principal's friend attorney) in circumstances where the principal had 'short-term memory loss and substantial cognitive impairment'. The Legal Practitioners Tribunal concluded the solicitor '*... ought to have known that doubts might be raised about her capacity to sign the documents*', and imposed a penalty of a public reprimand and costs: <http://archive.sclqld.org.au/qjudgment/2008/LPT08-012.pdf>

⁴² Mary Joy Quinn, 'Undoing Undue Influence' (2000) 24(2) *Generations* 65.

⁴³ LexisNexis Australian Encyclopaedia of Forms and Precedents, *Gifts – Conditional and Presumed Gifts*
<<http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TACGAACAAHAAD&refPt=TAAD&pubTreeWidth=23%25>> at 15 July 2009.

⁴⁴ Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform*
< <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html> > at 15 July 2009.

⁴⁵ *Swettenham v Wild* [2005] QCA 264. This case involved a "granny flat" scenario in which the appellant purchased a house (which was later transferred to his daughter, the respondent) subject to an arrangement that he reside on the premises in a granny flat and the respondent and her family reside in the house. The relationship subsequently broke down. The Court of Appeal, applying *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137, declared that the respondent's interest in the land was held on a constructive trust in favour of the appellant. The respondent was ordered to repay the appellant the purchase price of the property with interest.

cannot, or is unavailable. In light of these factors, the incidence of and potential for undue influence has increased significantly.

In addition to mechanisms for the control of an older person's assets available under the Queensland Guardianship regime (described in Part 4.2 below), a Family Agreement is available. This involves an arrangement between an older person and another party (usually family members or carers) for an older person to transfer a benefit or property, or pay compensation to the other party in exchange for a promise of continuing or lifelong care.⁴⁶ Such agreements provide an avenue for safeguarding older people, particularly where 'granny flat' arrangements exist.⁴⁷ However, Family Agreements are fraught with difficulties as many agreements are vague, informal and undocumented, creating contention as to the terms and conditions of the Agreement, and problems in enforcing and recognising the agreements at law.⁴⁸ In the absence of specific legislation to govern and regulate Family Agreements, a review of the law is necessary to adequately protect the rights of older persons who wish to enter into such agreements.⁴⁹

The increasing prevalence of financial abuse in Queensland demonstrates that the common law has not developed sufficiently quickly to provide realistic, accessible and appropriate remedies for elder abuse victims, and does not provide a deterrent for financial abuse in the first instance. Further, the current remedies available do not properly compensate for the pain and suffering endured by victims of financial abuse, nor provide appropriate monetary recompense. Accordingly, further consultation at a multi-disciplinary level (engaging the legal profession, financial sector, community, older persons advocacy groups and law enforcement bodies) is necessary to formulate appropriate policy and legislative responses to financial abuse, with a focus on prevention measures and appropriate civil law remedies.

4.1.2 Physical, sexual and psychological abuse; and neglect

The EAPU reported that in the 2007/2008 financial year an estimated 13,896 to 42,757 older Queenslanders experienced emotional distress, physical trauma, sexual, financial and social abuse, or neglect.⁵⁰ It further estimated that elder abuse admissions resulted in an estimated additional \$9.9 million to \$30.7 million in costs being incurred to Queensland's hospitals during that period.⁵¹ These figures emphasise the significant economic and social impact of elder abuse, and the need for laws to protect older persons and deter perpetrators.

There are no special remedies available at common law or equity to address the neglect and physical, sexual, or psychological abuse of older people. Rather, remedies will generally be available to older persons under tort law for injury suffered as a result of abusive conduct. However, as discussed below, statutory changes

⁴⁶ Brian Herd, 'The Family Agreement: A collision between love and the law?' (2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alcrc/publications/reform/reform81/06.html>> at 15 July 2009.

⁴⁷ Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 8.

⁴⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [4.11-4.29].

⁴⁹ Recommendation 30 of the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law was that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements: see House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [4.45].

⁵⁰ Elder Abuse Prevention Unit, *The Cost of Elder Abuse in Queensland: Who pays and how much* (June 2009) 4.

⁵¹ *Ibid.*

effected to Queensland's personal injuries regime some seven years ago may have diminished the ability of older people to obtain appropriate compensation.

4.1.3 Remedies available in Tort

Where an older person has sustained a personal injury as a result of physical or psychological abuse, it may be possible to commence an action for damages pursuant to the *Personal Injuries Proceedings Act 2002* (Qld).

The amount of damages available is governed by the provisions of the *Civil Liability Act 2003* (Qld) (the CLA).⁵² Section 52 of the CLA (with some limited exceptions in respect of unlawful intentional acts and unlawful sexual assaults/misconduct) effectively abolishes the award of punitive, exemplary or aggravated damages in personal injuries claims.

Prior to the enactment of the CLA, one of the largest components of damages that might ordinarily have been awarded to an older person in a personal injuries claim was exemplary, punitive or aggravated damages.⁵³ Other heads of damage, for example, past loss of income and future economic loss which might be significant for a younger person are generally of little relevance for an older person. For an 85 year old, perhaps with impaired capacity, suffering personal injuries as a result of an act of abuse, albeit negligent, the most significant element of recompense has been removed by the CLA.

The CLA also restricts the general damages (compensation for an individual's pain and suffering, and loss of amenities⁵⁴) component of personal injuries claims through the introduction of injury scale values which apportion a value to all injuries, and thereby limits the damages available to a plaintiff.⁵⁵

By eliminating aggravated, punitive and exemplary damages and restricting the amount available for general damages, older personal injuries claimants have been disadvantaged. The result is a system which does not provide for adequate compensation of older victims by perpetrators of elder abuse.

4.1.4 Litigation Guardians

Rule 93 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that a person under a legal incapacity can only commence or defend proceedings by way of a

⁵² The CLA was enacted by the Queensland Government in response to a perceived crisis in tort law and apparent pressure on the viability of insurance companies, highlighted particularly by the collapse of insurer HIH.

⁵³ 'Aggravated Damages' generally refers to:

an award which is increased ... to take account of the defendant's conduct in the commission of the tort and thereafter up to the hearing of the action ... Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like ...(JL Davis and RP Balkin, *The Law of Torts* (2009) 822).

'Exemplary damages' differ from aggravated damages in that the purposes of exemplary damages:

include punishment of the defendant for a high-handed disregard of the plaintiff's rights, deterrence of the defendant to prevent him or her from reaping a gain from the wrongdoing, assuaging any feelings on the part of the plaintiff to seek revenge for the hurt done, and marking the condemnation of the court for the defendant's conduct. (Davis and Balkin, 824).

⁵⁴ *Ibid*, 821.

⁵⁵ *Civil Liability Regulation 2003* (Qld) sch 4.

litigation guardian. It is settled law that a litigation guardian is liable for the costs incurred by solicitors in conducting an action on behalf of a person with IDMC, as well as the other side's costs if the proceedings are unsuccessful.⁵⁶ The litigation guardian is however entitled to an indemnity from the estate of the person the litigation guardian represents provided the costs were properly incurred for the benefit of that person.⁵⁷ Potential liability for costs may therefore discourage litigation guardians from commencing proceedings on behalf of an older person with IDMC, particularly where the older person's estate has been dissipated and an adverse costs order is made.⁵⁸ This effectively denies access to justice for older persons with an IDMC in those circumstances. It also places the other party to the application in a position of considerable advantage in respect of costs.

4.2 The Guardianship regime

4.2.1 Overview of Queensland's Guardianship regime

Queensland's guardianship regime provides an additional mechanism to protect older persons from situations of elder abuse.

The guardianship regime is established by the *Powers of Attorney Act 1998* (Qld) (PAA) and the *Guardianship and Administration Act 2000* (Qld) (GAA) which are to be read together.⁵⁹ They provide, among other things, for a scheme for substitute decision-making by and for adults with IDMC. The guardianship regime enables various statutory guardianship bodies and officers, and private attorneys, guardians and administrators to perform functions and make decisions in accordance with prescribed rights-based principles which broadly protect the rights and interests of adults with IDMC.

Among other things, some of the primary functions of the Queensland Civil and Administrative Tribunal (QCAT) (formerly the Guardianship and Administration Tribunal) are to appoint guardians and administrators, make orders for compensation in appropriate cases, hear applications and give directions relating to enduring documents, and make decisions about special health care.⁶⁰

The Adult Guardian protects adults with impaired capacity through investigation of complaints and allegations about neglect, exploitation or abuse or actions by an attorney, guardian or administrator, and may be appointed as a guardian for individual adults.⁶¹ The Adult Guardian can suspend an attorney's power and make an application to the QCAT to protect an older person with impaired decision-making capacity from an attorney who is not acting properly.⁶² The protective powers of the Adult Guardian include the ability to recover property or money wrongfully taken or converted.⁶³

⁵⁶ This is because the solicitor's client is the litigation guardian, not the person with IDMC: *Stephenson v Geiss* [1998] 1 Qd R 542, 557.

⁵⁷ *Stephenson v Geiss* [1998] 1 Qd R 542, 558.

⁵⁸ It is understood from anecdotal information that in some cases litigation may not be initiated even where the person with IDMC has favourable prospects of success due to concerns about the litigation guardian's liability for costs.

⁵⁹ *Guardianship and Administration Act 2000* (Qld) s 8; *Power of Attorney Act 1998* (Qld) s 6A.

⁶⁰ See for example *Guardianship and Administration Act 2000* (Qld) ch 3, pt 1 (Appointment of guardians and administrators); ch 3, pt 3 (Changing or revoking an appointment order); ch 5, div 3 (Consent to special health care); and s83 (Powers).

⁶¹ *Guardianship and Administration Act 2000* (Qld) s 174 (Functions).

⁶² *Guardianship and Administration Act 2000* (Qld) s 195 9Suspension of attorney's power).

⁶³ *Guardianship and Administration Act 2000* (Qld) s 194.

Attorneys can be appointed by adults to make decisions for them for financial, personal and health matters after loss of capacity. Guardians and administrators appointed by the Tribunal can also make these types of decisions.

The Public Advocate performs systemic advocacy which promotes and protects the rights and interests of adults with IDMC by identifying areas in need of reform. The Public Advocate advocates for appropriate change in policy, program delivery and legislation across government and private sectors. The functions of the Public Advocate include the protection of adults from neglect, exploitation or abuse; promoting the provision of services and facilities for adults; and monitoring and reviewing the delivery of services and facilities.⁶⁴

In making decisions or exercising functions under the guardianship regime, all statutory officers and appointees must apply the general principles, or, for health matters, the health care principle.⁶⁵ These principles are perhaps as close to a bill of rights as the law in Queensland comes. The general principles include that adults are presumed to have capacity and the same human rights as others, have the right to have a valued role and participate in society, have a right to confidentiality, and should have their self reliance and judgment recognised.⁶⁶ Other duties and responsibilities are imposed on substitute decision-makers under the regime.⁶⁷

Under the PAA there is a presumption of undue influence in a principal's favour where a transaction is entered into between principal and attorney.⁶⁸ Only reasonable gifts to relatives or close friends can be made under an Enduring Power of Attorney (EPA)⁶⁹ or by an administrator.⁷⁰ An attorney may be required by court order to compensate the principal for any loss caused by the attorney's failure to comply with the requirements imposed.⁷¹ There is a similar provision in respect of compensation from administrators and guardians.⁷²

The guardianship regime therefore has an important protective function for older people who have impaired capacity and provides a mechanism for redress when certain types of abuse have occurred by a substitute decision-maker, provided there are funds available to seek from them by way of recompense. It does not provide remedies more generally following abuse, although the appointment of a substitute decision-maker to make decisions about legal matters provides an avenue for an adult with IDMC to seek compensation in other circumstances. However, as discussed later in Section 4.1.4 of this Joint Report, there are other disincentives to do so, in particular costs ramifications.

4.2.2 Limitations of the Guardianship regime

It is important to note that Queensland's guardianship regime is limited to the protection of adults with IDMC. Consequently, the regime does not provide protection for older people who do not have impaired capacity but may nevertheless be vulnerable to abuse.

⁶⁴ *Guardianship and Administration Act 2000* (Qld) s 209.

⁶⁵ *Guardianship and Administration Act 2000* (Qld) s 11, sch 1; *PAA* ss 75-76, sch 1.

⁶⁶ *Guardianship and Administration Act 2000* (Qld) sch 1.

⁶⁷ *Guardianship and Administration Act 2000* (Qld) ss 33-55; *Power of Attorney Act 1998* (Qld) s 65-80.

⁶⁸ *Power of Attorney Act 1998* (Qld) s 87.

⁶⁹ *Power of Attorney Act 1998* (Qld) s 88.

⁷⁰ *Guardianship and Administration Act 2000* (Qld) s 54.

⁷¹ *Power of Attorney Act 1998* (Qld) s 106.

⁷² *Guardianship and Administration Act 2000* (Qld) s 59. Compensation for loss of benefit in an estate may also be sought from an attorney or an administrator: *Power of Attorney Act 1998* (Qld) s 107; *Guardianship and Administration Act 2000* (Qld) s 60.

Despite the safeguards currently provided by the regime, financial abuse of older persons with IDMC by attorneys occurs regularly whether unintentionally or deliberately perpetrated.⁷³ While many attorneys manage their principal's assets appropriately and responsibly, some, through limited education and ignorance of the provisions relevant to attorneys, inadvertently mismanage their principal's affairs.⁷⁴ Others intentionally misappropriate funds for their own purposes, resulting in deliberate financial abuse. As there are no mandatory reporting requirements in Australia obliging financial institutions to report financial abuse, or legislation compelling EPAs to be registered in Queensland⁷⁵, it is relatively easy for the misuse of EPAs to occur undetected, especially in circumstances where the older person lives an isolated life, or has a limited support network. These legislative instruments may therefore be maliciously used to facilitate elder abuse.

An analysis of a sample of the former Queensland Guardianship and Administration Tribunal's files in May 2006 concluded that EPAs did not protect older persons with IDMC from financial abuse, nor prevent the occurrence of such abuse.⁷⁶ Family members were strongly linked to financial abuse, as cases where EPAs had been given to family members were twice as likely to involve suspected financial abuse.⁷⁷ The nature of EPAs is such that the principal will be unable to oversee the attorney's activities once the principal has impaired capacity for financial decision-making.⁷⁸ In the absence of requirements for EPAs to be compulsorily registered and monitored, no accountability mechanisms to monitor the activities of attorneys presently exist.

Further, by the time suspected financial abuse is notified to the Adult Guardian and/or an application to the QCAT is made, the abuse has already occurred. The current guardianship regime is responsive rather than preventative, leaving the older person affected in a vulnerable and disadvantaged position.⁷⁹

The Queensland Law Reform Commission will shortly conclude its comprehensive review of Queensland's guardianship legislation and regime. It is anticipated that recommendations to address issues regarding attorneys and enduring documents including EPAs will be made in its final report.⁸⁰

4.3 Reporting requirements

⁷³ Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *Journal of Adult Protection* <http://findarticles.com/p/articles/mi_qa4124/is_200605/ai_n16629535/?tag=content;col1> at 15 July 2009.

⁷⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [3.47-3.50].

⁷⁵ Section 25(1) of the *Powers of Attorney Act 1998* (Qld) provides that a power of attorney may be registered, but does not require mandatory registration. The Act is silent as to the registration of enduring documents such as Enduring Powers of Attorney. The issue of registration of enduring documents is currently being considered by the Queensland Law Reform Commission as part of its guardianship review. For further information about the review, see [www.qlrc.qld.gov.au](http://www qlrc qld gov au).

⁷⁶ Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *Journal of Adult Protection* <http://findarticles.com/p/articles/mi_qa4124/is_200605/ai_n16629535/?tag=content;col1> at 15 July 2009.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ The Terms of Reference of the review may be obtained at the website of the QLRC at <http://www.qlrc.qld.gov.au/guardianship/reference.htm>.

Apart from one limited exception (namely, the reporting provisions in the *Aged Care Act 1997* (Cth) discussed below) there is currently no statutory requirement for the mandatory reporting of suspected cases of elder abuse in Queensland. Unlike the field of child care and safety, health professionals and community care organisations are not required to report suspicions of elder abuse.

The Federal Government enacted legislation in 2007 to provide new mechanisms for the protection of older people residing in residential aged care facilities from physical and sexual abuse.⁸¹ Under the *Aged Care Act 1997* ('the Act') approved residential aged care providers are obliged to report alleged or suspected assaults⁸² in aged care facilities funded by the Commonwealth to the police and to the Department of Health and Ageing.⁸³ The Act is not intended to provide a comprehensive regime for preventing the abuse of all older Australians, and is limited to protecting the recipients of aged care services from approved providers from physical abuse only.⁸⁴ There is therefore no regulation of assaults which occur within aged care facilities which do not receive Federal Government funding.⁸⁵

Mandatory reporting has been the subject of controversy among elder advocacy groups, government and the legal profession, involving competing interests of the autonomy of older persons against the protection of persons vulnerable to abuse.⁸⁶ Criticism and opposition to reporting has arisen primarily due to uncertainty regarding the effectiveness of reporting mechanisms in reducing and preventing the incidence of abuse, and protecting those with IDMC.⁸⁷ Critics opine that reporting may undermine the right of older persons to self-determination, and to make personal choices.⁸⁸ It has also been argued that the funds necessary to establish a reporting service (similar to that of the Adult Protection Service in the United States of America) could be better allocated to prevention and awareness initiatives, and other resources necessary to address elder abuse.⁸⁹

Conversely, supporters of mandatory reporting argue it is essential to protect vulnerable older persons.⁹⁰ It could also be argued that a common law duty of care may require the reporting of elder abuse by persons who observe such abuse or have suspicions that abuse is occurring, in particular bank officers (in the case of financial abuse).⁹¹

⁸¹ *Aged Care Amendment (Security and Protection) Act 2007* (Cth).

⁸² A reportable assault is defined in the *Aged Care Act 1997* (Cth) s 63-1AA(9).

⁸³ *Aged Care Act 1997* (Cth) s 63-1AA(2).

⁸⁴ *Aged Care Act 1997* (Cth) s 63-1AA(9)(b). See also the objects of the *Aged Care Act 1997* (Cth) s 2.1

⁸⁵ Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* < <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html> > at 15 July 2009.

⁸⁶ Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* < <http://www.aifs.gov.au/institute/pubs/fm1/fm37mj.html> > at 15 July 2009; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.78-2.92].

⁸⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.85-2.90]; Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006) 4.

⁸⁸ *Ibid*, 9.

⁸⁹ *Ibid*, 7

⁹⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.80-2.81].

⁹¹ Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 41.

In considering the issue of mandatory reporting, several important issues were identified by the Australian Government in its *Older People and the Law* report, in particular⁹²:

- If mandatory reporting were introduced, should an individual's wishes and competence should be taken into account?;
- The need to balance an older person's right to autonomy against the protection of vulnerable persons;
- If reporting was required, what type of abuse should be reported;
- The costs associated with establishing a mandatory reporting regime; and
- The potential for a mandatory reporting system to be abused, for example, by family members.

In Australia, banking and financial institutions are not required to report suspicions of financial abuse, although bank officers and lawyers are well placed to recognise and report possible abuse.⁹³ Some reasons for the lack of reporting requirements include the absence of uniform protocols requiring the monitoring of accounts for suspicious activity; reluctance by institutions to expend money and resources to detect illegal activity; concerns regarding confidentiality and privacy; and a desire not to become involved.⁹⁴ In the absence of compulsory reporting and supervision of attorneys, personal representatives and guardians, the banking system can be utilised by perpetrators to facilitate financial exploitation of older persons.

The Queensland legislature has not ignored the issue of reporting as a possible protection against abuse. There are some incentives created in legislation such as the GAA to report abuse, where perpetrated by an attorney under an EPA.⁹⁵ This protection is in the form of whistleblower protection, both civilly and criminally, for those who report suspected abuse which breaches the PAA or GAA.⁹⁶ However, curiously this protection is only available where a report is made that is later substantiated as a breach of either Act. The protection does not extend to a person who makes a report in good faith, in circumstances where it is later found that there was no breach. The requirement for a breach to have occurred effectively negates the usefulness of this protection and may discourage reporting. The Queensland Law Reform Commission is currently exploring these issues as part of its guardianship review.

4.4 Criminal Law

Queensland's criminal law make some provision for situations of elder abuse through creating offences for physical and sexual assaults, neglect and domestic violence. However, no specific offence of elder abuse currently exists in the Queensland Criminal Code (the Code).

The Code contains a number of provisions which enable a perpetrator of elder abuse to be prosecuted. These include particular offences of violence such as assault⁹⁷,

⁹² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.78]- [2.95].

⁹³ Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 41.

⁹⁴ *Ibid*, 41-43.

⁹⁵ *Guardianship and Administration Act 2000* (Qld) s 247.

⁹⁶ *Guardianship and Administration Act 2000* (Qld) s 247.

⁹⁷ *Criminal Code Act 1899* (Qld) s 245.

sexual assault⁹⁸, and stalking⁹⁹, and property offences such as stealing¹⁰⁰ and fraud.¹⁰¹ These offences are applicable to the general population regardless of the age of the victim.

The Code also creates several specific offences where the victim is a person with 'an impairment of the mind'.¹⁰² The definition of a 'person with an impairment of the mind' encompasses all persons, regardless of age, with an intellectual, psychiatric, cognitive or neurological impairment which substantially reduces the person's capacity.¹⁰³ Arguably, these existing offences already address some aspects of abuse to older people, although they are not specifically offences of elder abuse.

Accordingly, there is no specific offence which deals with financial abuse or exploitation, and consequently financial abuse is commonly prosecuted as misappropriation of property and fraud.¹⁰⁴ In the absence of discrete criminal offences which specifically protect older Queenslanders from elder abuse, the closest that the Code comes to criminalising such behaviour is through making a person liable to imprisonment for serious assault if they assault a person who is 60 years old or more.¹⁰⁵

An aspect of elder abuse, namely neglect, arises in the Code offences of 'duty to provide necessities'¹⁰⁶ and 'failure to supply necessities'.¹⁰⁷ These offences impose a duty on a person who has charge of another person who is unable to provide themselves with the 'necessaries of life' to provide those necessities. Given that the duty only arises where a person has the 'charge' of another, for example, where a person is the primary carer of an older person, these provisions, while technically applicable to the neglect by a carer of an older person, will not have any application to other types of abuse. No convictions of a person for failing to provide necessities to an older person are reported in Queensland. It appears that the offence has largely been relied upon to prosecute parents for failing to provide the necessities of life to their children, particularly in relation to medical treatment.¹⁰⁸

The *Penalties and Sentences Act 1992* (Qld) does not specifically refer to the advanced age of a victim, or the impaired capacity of a victim as a consideration which a court must have regard to when sentencing an offender.¹⁰⁹ Instead, the circumstance of an older person or a person with impaired capacity as the victim tends to be an aggravating factor which the courts take into account when sentencing. For example, the fact that older female householders had been targeted for housebreaking and stealing offences was considered a 'particularly abhorrent

⁹⁸ *Criminal Code Act 1899* (Qld) s 352.

⁹⁹ *Criminal Code Act 1899* (Qld) ch 33A.

¹⁰⁰ *Criminal Code Act 1899* (Qld) ch 36.

¹⁰¹ *Criminal Code Act 1899* (Qld) s 408C.

¹⁰² See for example *Criminal Code Act 1899* (Qld) s 208(1)(c) and (d) (Unlawful sodomy); s 216 (Abuse of persons with an impairment of the mind); s 217 (Procuring young person etc. for carnal knowledge); and various Prostitution offences in ch 22A (Prostitution).

¹⁰³ *Criminal Code Act 1899* (Qld) s 1.

¹⁰⁴ *Criminal Code Act 1899* (Qld) s 408C. An example of a recent case where financial abuse was prosecuted as fraud is *R v Naidu* [2008] QCA 130. In that case, the Appellant was convicted at trial of two counts of fraud for receiving over \$370,000 by way of "gifts" from the victim, who was aged in his late 70s, and suffered from dementia. An appeal against conviction was dismissed.

¹⁰⁵ *Criminal Code Act 1899* (Qld) s 340(1)(g).

¹⁰⁶ *Criminal Code Act 1899* (Qld) s 285.

¹⁰⁷ *Criminal Code Act 1899* (Qld) s 324.

¹⁰⁸ See for example *R v SAV; ex parte A-G* (Qld) [2006] QCA 328; *R v PU* [2004] QCA 392; and *R v Nielsen v Anor* [2001] QCA 85.

¹⁰⁹ The principles to which the courts must have regard in sentencing offenders are outlined in the *Penalties and Sentences Act 1992* (Qld) s 9.

feature of the crimes’¹¹⁰ and was relevant to sentencing. Similarly, reference was made to the ‘strong demands of deterrence and community protection’¹¹¹ in the determination of the sentence where an older woman died of a heart attack after her home was invaded and she was assaulted.

In summary, Queensland’s criminal law recognises abuse of older persons as a significant aggravating feature for sentencing purposes. However, if older people are considered generally vulnerable, their vulnerability has not been recognised through the creation of specific offences which criminalise their abuse, neglect, or exploitation, despite the implementation of special provisions for other categories of vulnerable people like children and people with intellectual impairment. It may be that the ‘vulnerability’ of older persons generally is not viewed as seriously as the vulnerability of other groups of vulnerable people. It is therefore questionable whether elder abuse is given equivalent moral value as other forms of abuse in the absence of the specific protection of the criminal law.

4.5 Victims of crime

4.5.1 Compensation for Victims of Crime

From late 1995 compensation for victims of crime in Queensland was regulated by the *Criminal Offence Victims Act 1995* (Qld)(the Act). Under the Act, any person who suffered direct harm as the result of a criminal offence, or was a dependent or immediate family member of a victim, could apply to the court or to the Department of Justice and Attorney-General for an order that the person who committed the offence pay compensation for the injury suffered because of the offence.¹¹² The amount of compensation a victim was entitled to receive was dependent upon the nature of the injuries sustained by the victim and the monetary amount assigned to those injuries pursuant to the Compensation Table detailed in the Act.¹¹³ In making an order, the Court was limited to the amounts detailed in the Compensation Table, and was not able to award additional amounts based on the circumstances of the offence, or the characteristics or circumstances of the victim.

On 1 December 2009, a new financial assistance regime for victims of crime, governed by the *Victims of Crime Assistance Act 2009* (Qld), commenced. The vulnerability of older victims, and the significant effects of crime upon older people are expressly recognised under the new regime. The financial assistance¹¹⁴ granted to a victim may consist of a number of components, including a component for special financial assistance for an act of violence perpetrated against a person over the age of 60.¹¹⁵ Special financial assistance for persons over 60 are available only in certain circumstances, and the amount payable depends on the nature of the crime, and the severity of the injuries sustained by the victim.¹¹⁶ The maximum special

¹¹⁰ *R v Gee* [1998] QCA 321, 5. See also *R v Cameron-Smith* [1995] QCA 218 and *R v Elliot* [2002] QCA 170 where the offences related to the defrauding of elderly victims.

¹¹¹ *R v Sinden* [2005] QCA 414, 5.

¹¹² *Criminal Offence Victims Act 1995* (Qld) ss 5, 24, 32.

¹¹³ *Criminal Offence Victims Act 1995* (Qld) sch 1, s 20. See for example *R v SAV; ex parte A-G* (Qld) [2006] QCA 328; *R v PU* [2004] QCA 392; and *R v Nielsen v Anor* [2001] QCA 85.

¹¹⁴ The *Victims of Crime Assistance Act 2009* (Qld) establishes a scheme for the payment of ‘financial assistance’, as opposed to compensation. It replaced the former compensation model with a financial assistance model which aims to assist the victim in recovering from the effects of crime by paying for or reimbursing the costs of goods and services expended by the victim in recovering from the crime: Department of Justice and Attorney-General Queensland, *Victims of Crime Review Report* (Nov 2008) 4.

¹¹⁵ *Victims of Crime Assistance Act 2009* (Qld) s 39(h), sch 2(1) and (3).

¹¹⁶ *Victims of Crime Assistance Act 2009* (Qld) s 39(h), sch 2(1) and (3).

financial assistance payable is \$10,000.¹¹⁷ The Victims of Crime Review Report describes the special financial assistance as ‘a gesture of recognition by the State of the significant effects on the victim of the serious violent act’.¹¹⁸

4.7 Domestic Violence Protection Orders and Peace and Good Behaviour Orders

The attributes of elder abuse can be compared to that of domestic violence between partners¹¹⁹ rather than abuse of other vulnerable categories of persons such as children and people with a cognitive impairment. In a significant proportion of cases of elder abuse, the older person may not lack capacity but does not address or report abuse because of power dynamics, shame, loyalty to family members and fear of reporting.¹²⁰ In other cases, the older person has impaired capacity and is unable to independently obtain protection.

Relief from some forms of elder abuse, in particular physical and psychological abuse, may be available to older persons through the Domestic Violence and Peace and Good Behaviour Order regimes. However, as discussed below, these mechanisms have some limitations which restrict the protection afforded to older persons.

4.7.1 Domestic Violence Protection Orders and elder abuse

The *Domestic and Family Violence Protection Act 1989* (Qld) provides that a person subject to actual or threatened physical violence within a spousal, intimate, family, or an informal care relationship may apply for a Protection Order to prevent the offending behaviour from reoccurring.¹²¹

The inclusion of family relationships and informal care relationships in the domestic violence legislation is of particular relevance for elder abuse. An informal care relationship is defined as a relationship in which one person is dependent upon another who helps them with an activity of daily living.¹²² However, the definition is narrowed as follows:

- It does not include care provided by a third party entity or employer such as an in-home community-based care entity, whether that care is provided on a voluntary or paid basis.¹²³
- Irrespective of whether the carer belongs to a care organisation, if a fee is paid, it is not an informal care relationship, unless the fee is the consequence of threatened or actual violence, damage to property or intimidation and harassment.¹²⁴

¹¹⁷ *Victims of Crime Assistance Act 2009* (Qld) sch 2(2).

¹¹⁸ Department of Justice and Attorney-General Queensland, *Victims of Crime Review Report* (Nov 2008) 31.

¹¹⁹ Rosslyn Monro, ‘Elder abuse and legal remedies – practical realities?’ (Spring 2002) 81 *Reform* < <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.

¹²⁰ Marianne James, ‘Abuse and Neglect of Older People’ (1994) 37 *Family Matters* < <http://www.aifs.gov.au/institute/pubs/fm1/fm37mj.html>> at 15 July 2009.

¹²¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 3A.

¹²² *Domestic and Family Violence Protection Act 1989* (Qld) s 12C. Examples of activities of daily living include dressing, preparing meals, shopping, or arranging a medical appointment.

¹²³ The explanatory notes to the *Domestic Violence Legislation Amendment Bill 2001*(Qld)(which introduced the informal care relationship provision) indicate that the legislation is not intended to cover care provided by Meals on Wheels or Blue Care.

¹²⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 12C(4).

- The definition requires that the relationship is a consequence of a person's disability, illness or impairment.¹²⁵ This is likely to cover many, but not all categories of dependence by older persons on others for assistance in daily living.
- An informal care relationship between child and parent is not covered, but would be captured by the family relationship category.¹²⁶

An informal care relationship is therefore a relationship that involves a non-family member, who is not attached to any care organisation, and to whom no fee is paid for their services (unless this is abusively extracted). It is therefore doubtful that the application of the *Domestic and Family Violence Protection Act 1989* (Qld) extends to the situation of care of many older people.

4.7.2 Applying for a Protection Order

To obtain a Protection Order, an aggrieved person must show that one of the following types of violence has occurred: injury, damage to property, intimidation or harassment, indecent behaviour, or a threat to commit any of those actions.¹²⁷ A relevant example of 'intimidation and harassment' captured by the definition of domestic violence is 'Regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque'.¹²⁸

Accordingly, to some extent issues of financial abuse of older persons may be captured by the 'intimidation and harassment' category. However, the focus is actual or threatened physical abuse or damage to property. No provision is made for circumstances of neglect.

4.7.3 Who may apply for an Order

An authorised person or the police can apply for a Protection Order.¹²⁹ This does not offer sufficient protection for many older persons as some, regardless of their capacity to exercise such rights, may be reluctant to report abuse or pursue legal remedies. Further, the only other person authorised to apply for an order on behalf of the aggrieved (other than the police) may be the attorney perpetrating the abuse, rendering it impossible from a practical perspective for the older person in that domestic violence situation to make an application. It is noted that this limitation is equally relevant to all victims of domestic violence, not just older people.

4.7.4 Peace and Good Behaviour

As an alternative to Protection Orders, a Peace and Good Behaviour Order (PGB Order) can be made under the *Peace and Good Behaviour Act 1982* (Qld) without the requirement of a family, spousal, intimate or informal care relationship.

The Queensland Magistrates Court can make a PGB Order if satisfied a complainant has been threatened with physical injury or with damage to property by a person who

¹²⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 12C(2).

¹²⁶ *Domestic and Family Violence Protection Act 1989* (Qld) ss 12B, 12C(5).

¹²⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 11.

¹²⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 11(c)(4).

¹²⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s14. An authorised person includes a person authorised in writing by the person aggrieved, an administrator under the *Guardianship and Administration Act 2000*, the adult guardian, or a person who has an enduring power of attorney: s14(2).

has care or charge of the complainant.¹³⁰ The essential requirement is that the complainant is in fear of the perpetrator due to the behaviour threatened.¹³¹

As with a Domestic Violence Protection Order, the availability of a PGB Order is limited in that only the complainant can make a complaint, or a person with the 'care or charge' of another.¹³² In circumstances where an older person is suffering abuse at the hand of a carer or guardian, it may be impossible for a complaint to be made, particularly in the absence of adequate support.¹³³ 'Care or charge' is not defined, rendering uncertainty as to who may make a complaint on a behalf of another.¹³⁴ These orders therefore depend on the person who is the subject of the abuse having the knowledge, willingness and relevant support to make the complaint.

4.7.5 Some limitations

The major limitation of Queensland's domestic violence legislation in relation to older persons is that Domestic Violence Protection Orders do not cover formal care relationships (presumably because of the domestic and personal nature of the relationships to which the Act is directed), and do not apply to some common categories of elder abuse such as financial abuse and neglect. Further, the physical and social dependence of many older persons on the care of others, particularly in order to make an application or complaint, is an issue which is not adequately addressed by the current domestic violence protection framework.

While PGB Orders may be used to address abuse in relationships not covered by the *Domestic and Family Violence Protection Act 1989* (Qld), they do not offer the same flexibility regarding the making of a complaint, and are restricted to threatened physical injury and damage to property.

5. The Aged Care complaints regime

Every accredited provider of aged care services is compelled under the *Aged Care Act 1997* (Cth) (the Act) to have an internal complaints process for aggrieved persons through which complaints may be initially dealt with.

Some incidences of elder abuse may be reported to and investigated by the Australian Government's Aged Care Complaints Investigation Scheme (CIS),¹³⁵ and, in certain circumstances, reviewed by the Office of the Aged Care Commissioner (ACC).

The CIS investigates complaints regarding service providers in the aged care industry. The complaint must relate to an approved provider's responsibilities under the Act or Aged Care Principles.¹³⁶ The primary consideration in investigations is

¹³⁰ *Peace and Good Behaviour Act 1982* (Qld) ss 4 and 6.

¹³¹ *Peace and Good Behaviour Act 1982* (Qld) s 4.

¹³² *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

¹³³ Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982* (Qld), Report No 63 (December 2007) [6.32].

¹³⁴ Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982* (Qld), Report No 63 (December 2007) [6.33].

¹³⁵ The Complaints Investigation Scheme forms part of the Office of Aged Care Quality and Compliance, Department of Health and Ageing.

¹³⁶ *Investigation Principles* (Cth)(made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) s 16A.6(1).

whether the relevant provider has, or has not, breached its responsibilities under the Act or Principles, rather than an investigation of the alleged abuse or neglect itself.¹³⁷

In addition to other functions, the ACC, a statutory appointment independent of the CIS, is able to review and examine decisions made by the CIS.¹³⁸ However, the CIS is not obliged to implement the recommendations, and instead may confirm, vary or set aside the examinable decision, and substitute a new decision.¹³⁹

There exist a variety of issues and limitations in relation to the protection afforded to older persons by the CIS, and the ACC. It is not within the scope of this Joint Report to fully examine these matters. It is however important to further note that the CIS may only investigate complaints concerning an Australian Government-subsidised aged care service.¹⁴⁰ Therefore, abuse which occurs in aged care facilities which do not receive Australian Government funding fall outside the ambit of the investigative powers of the CIS.

6. Accessing legal assistance

While some civil and common law, and equitable remedies are available to older persons who experience abuse, their ability to access legal advice and services may be restricted or limited by physical, personal, economic, social and environmental factors. Some of the barriers include:

- Pursuing civil legal remedies through litigation requires an older person to have the funds to pay for legal fees. The vulnerable financial situation in which an older person finds themselves may preclude them from securing legal assistance, or initiating civil actions, which are generally expensive and time-consuming.¹⁴¹
- Older persons may be reluctant to implicate family members in legal processes through initiating civil action or reporting criminal behaviour, particularly where a person is dependent upon family members for accommodation, care and support.¹⁴²
- Some older persons with IDMC may be unable, as a result of their condition, or social isolation, to access legal services without appropriate support.¹⁴³ Further, their lack of capacity may render it difficult for them to identify situations of abuse.
- Feelings of shame and guilt, and fear of retribution from the perpetrator if they attempt to end the abuse.¹⁴⁴ Older people may also fear that a consequence of reporting will be institutionalisation through placement in a retirement home

¹³⁷ *Investigation Principles* (Cth)(made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) s 16A.8(1).

¹³⁸ *Aged Care Act 1997* (Cth) s 95A-1 outlines in full the functions of the Aged Care Commissioner.

¹³⁹ *Investigation Principles* (Cth)(made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) s 16A.25.

¹⁴⁰ *Investigation Principles* (Cth)(made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) ss 16A.5, 16A.6(1).

¹⁴¹ Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* < <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.

¹⁴² Les Jackson 'Elder abuse and Queensland Legislation' (2003) 2 *Elder Law Review* < <http://www.austlii.edu.au/au/journals/ElderLRev/2003/2.html>> at 21 July 2009.

¹⁴³ Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 5.

¹⁴⁴ David Cripps, Jenny Biven, Jane Northey, Phillip Rigger, "Abuse of older people: issues for lawyers" (2002) 1 *Elder Law Review* < <http://www.austlii.edu.au/au/journals/ElderLRev/2002/8.html>> at 21 July 2009.

or other aged care facility, resulting in the undermining of their autonomy and independence.¹⁴⁵

- Concerns about declining health and well-being, particularly where lengthy litigation is likely.¹⁴⁶
- Difficulties with mobility may render some older persons physically unable to attend legal services.¹⁴⁷
- Limited legal and community resources available for older people, particularly those with impaired capacity. In Queensland, there are a number of community legal centres and advocacy services which specialise in providing legal advice, advocacy and support services to older persons, including the Seniors Advocacy Information and Legal Service¹⁴⁸, the Seniors Legal and Support Service¹⁴⁹, and the Queensland Aged and Disability Advocacy Inc.¹⁵⁰ There are other services located in Queensland regional centres which may provide advice about elder law issues.¹⁵¹ However, often these services are unable to assist clients who are incapable of providing instructions.¹⁵² Further, representation is only available, in most cases, in specific limited circumstances.

These impediments to older persons accessing legal assistance reinforce the urgent need for law reform to develop and implement appropriate prevention and deterrence mechanisms in order to reduce the incidence of elder abuse in Queensland.

7. Legal responses in other Australian jurisdictions

This Joint Report is intended to provide an overview of the Queensland law relevant to elder abuse, and to examine the adequacy of those laws. Accordingly, it will not consider the appropriateness of the law, and legal responses to elder abuse, in other jurisdictions.

8. Overseas Jurisdictions

Some overseas jurisdictions, particularly the United States of America, have been proactive in examining the issue of elder abuse and incorporating civil and criminal

¹⁴⁵ Ibid.

¹⁴⁶ Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* < <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html> > at 15 July 2009.

¹⁴⁷ Ibid; Les Jackson 'Elder abuse and Queensland Legislation' (2003) 2 *Elder Law Review* < <http://www.austlii.edu.au/au/journals/ElderLRev/2003/2.html> > at 21 July 2009.

¹⁴⁸ The Seniors Advocacy Information and Legal Service (SAILS) is operated by the Caxton Legal Centre in Brisbane. SAILS offers free legal advice, support and in certain circumstances legal representation to older persons in relation to elder abuse and other issues affecting older persons. A list of services offered by SAILS can be viewed at www.caxton.org.au/sails.

¹⁴⁹ The Seniors Legal and Support Service (SLSS) is funded by the Queensland Department of Communities and provides free legal and support services for older persons affected by elder abuse, mistreatment and financial exploitation. They also offer legal representation in certain circumstances. For further information, see the Department of Communities website at www.communities.qld.gov.au/seniors/legal-support/about/.

¹⁵⁰ The Queensland Aged and Disability Advocacy Inc is a free legal advocacy service which assists older people. For further information, view their website at www.qada.org.au.

¹⁵¹ For a complete list of Community Legal Centres in Queensland, see Legal Aid Queensland's website at http://www.legalaid.qld.gov.au/applications/organisations/organisation_results.asp?location=&Range=&SearchParam1=&SearchKey1=&SearchKey2=&SearchKey3=&searchKeyWord=community+legal+centres&sort=service&pagenum=1.

¹⁵² Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 10.

protection for older persons into legislation. It is therefore useful to examine approaches taken in other jurisdictions when considering a reform agenda. This part is not intended to provide a comprehensive overview of those approaches, nor a detailed analysis of their likely desirability or effectiveness in the Queensland context. The examples are provided to merely stimulate discussion and generate thought.

8.1 The United States of America

At a federal level in the United States of America (USA), for some 40 years the Federal *Older Americans Act of 1965* has addressed the issue of elder abuse at an overarching systemic, funding and resource level. It provides definitions of elder abuse and authorises the use of federal funds for research at the National Centre on Elder Abuse, and to fund elder abuse awareness and coordination activities at State and local community levels.

In the last year greater legislative attention has been focused on elder abuse. The *Elder Abuse Victims Act of 2009* was introduced in 2009 with the purpose of protecting older persons from elder abuse through establishing prosecution and research programs. If passed, the new legislation will also provide training on elder abuse to prosecution and law enforcement agencies, and to provide emergency crisis response teams to combat abuse.¹⁵³

The *Elder Justice Act of 2009* was also introduced in February 2009 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 for other purposes.*¹⁵⁴

Among other areas, it addresses at a federal level key issues relating to elder abuse including funding and resources to combat abuse; victim assistance; training; prosecution of offenders; and research and data collection.¹⁵⁵

By 1985, all 50 states in the USA had legislation authorising the provision of Adult Protective Services (APS) which respond to elder abuse. In essence, the APS is a system for the reporting and investigation of elder abuse and for the provision of social services to support or assist the victims.¹⁵⁶ State statutes vary significantly as to the age and circumstances in which a person is eligible for assistance, the definition of abuse, types of abuse, neglect and exploitation that are covered, whether the abuse is classified as criminal or civil, reporting obligations and the remedies for abuse.¹⁵⁷

8.1.1 Criminal Law

¹⁵³ This legislation is yet to be passed: See the website of the Library of Congress at <http://thomas.loc.gov/cgi-bin/thomas>.

¹⁵⁴ This legislation has not yet been passed: The status of this Bill can be viewed at the website of the Library of Congress <<http://thomas.loc.gov/cgi-bin/bdquery/D?d111:3:./temp/~bdbweB:./bss/111search.html>>.

¹⁵⁵ S.795, 111th Cong, 1st Sess §3 (2009).

¹⁵⁶ National Centre on Elder Abuse, *About Adult Protective Services* <http://www.ncea.aoa.gov/NCEARoot/Main_Site/Find_Help/APS/About_APS.aspx> at 21 January 2010.

¹⁵⁷ For example, see the State Resource Directory on Elder Abuse Prevention prepared by the National Centre on Elder Abuse <http://www.ncea.aoa.gov/NCEARoot/Main_Site/Find_Help/State_Resources.aspx> at 4 August 2009.

In the USA legislative responses for victims of elder abuse and their families have been developed through the enactment of public welfare laws, special provisions in the *Older Americans Act of 1965*, and the introduction of multiple crime bills. Many states have passed laws that provide criminal offences and penalties for various forms of elder abuse.¹⁵⁸

For example, section 15656 of the California *Welfare and Institutions Code*, provides as follows:

- (a) Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, wilfully causes or permits any elder or dependent adult to suffer, or inflicts unjustifiable physical pain or mental suffering upon him or her, or having the care or custody of any elder or dependent adult, wilfully causes or permits the person or health of the elder or dependant to be injured, or wilfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three or four years.

Further, subsection (c) provides that:

- (c) Any caretaker of an elder or a dependent adult who violates any provision of law prescribing theft or embezzlement, with respect to the property of that elder or dependent adult, is punishable by imprisonment in the County Jail not exceeding one year, or in the State Prison for two, three, or four years when the money, labour, or real or personal property taken is of a value exceeding \$400.00 and by fine not exceeding \$1,000.00 or by imprisonment in the County Jail not exceeding one year, or by both that imprisonment and fine, when the money, labour, or real or personal property taken is of a value not exceeding \$400.00.

'Elder' is defined to mean any person over the age of 65 years.¹⁵⁹ 'Caretaker' means any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult.¹⁶⁰ Interestingly, section 15657 allows for the institution of civil proceedings for similar conduct and for the awarding of punitive damages.

The California Penal Code also contains specific provisions for crimes against older people (aged 65 and over) or dependent adults and extends the maximum penalty for some crimes where they have been committed against older people.¹⁶¹

Helpfully, the Californian penal provisions also contain an explanation and rationale for the provisions:

¹⁵⁸ American Prosecutors Research Institute, *Prosecution of Elder Abuse, Neglect and Exploitation: criminal Liability, Due Process, and Hearsay* (2003) 3.

¹⁵⁹ CAL Welfare and Institutions CODE § 15610.27 (2009).

¹⁶⁰ CAL Welfare and Institutions CODE § 15656(d) (2009).

¹⁶¹ CAL Penal CODE § 368(2) (2009).

368. (a) The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

In California, sentences for people convicted of specific crimes against older persons have also been increased. If a person is convicted of specific financial crimes against an older person, restitution (in addition to a term of imprisonment) may be ordered, and if a person inflicts great bodily harm on a person 70 years of age or older, the sentence is increased by five years.¹⁶²

Consistent with this approach, California's *Financial Elder Abuse Reporting Act* of 2005 mandates the reporting of elder abuse by certain organisations. This legislation renders Californian banks and other financial institutions liable if they fail to report suspicions of financial elder abuse, and represents a trend by US state governments to extend reporting obligations to third parties.¹⁶³

South Carolina's legislature has also implemented legislation to deter elder abuse by changing elder neglect from a misdemeanour to a felony.¹⁶⁴ Penalties for elder abuse ranged from five to 30 years imprisonment.¹⁶⁵

8.1.2 Prosecution of elder abuse

Across the USA, several jurisdictions have developed initiatives to investigate and prosecute cases of abuse of older persons, including specialised laws and training.¹⁶⁶ For example, under Florida law, if the victim is aged 60 or older and suffers from the infirmities of ageing (through advanced age or organic brain damage, or other physical, mental or emotional dysfunction resulting in impairment of ability to adequately care for or protect themselves) special prosecution mechanisms apply.¹⁶⁷

In California, there is statutory provision for prioritisation and expedition of cases where an older person is the victim of an offence. In prescribed criminal actions involving a person aged 70 or over, or a dependent adult as a witness or a victim, the case is given precedence in the order of trial, and the trial must be commenced within 30 days after arraignment, except in exceptional circumstances.¹⁶⁸

8.1.3 Training of law enforcement staff

It is understood that some states are providing specialist training about elder abuse, ageing and investigation. Increasingly, prosecutors are trained in dealing with elder abuse cases, and specialised courses have been offered in various states.¹⁶⁹

¹⁶² CAL Penal CODE § 368(3)(d) (2009).

¹⁶³ California State Senate, *Senate Bill No. 1018* < http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1001-1050/sb_1018_bill_20050829_chaptered.pdf > at 17 August 2009.

¹⁶⁴ SC CODE ANN § 43-35-85(B).

¹⁶⁵ SC CODE ANN § 43-35-85(B)-(D).

¹⁶⁶ C Heisler, 'Elder Abuse and the Criminal Justice System: New awareness, new responses' (2000) 24(2) *Generations* 52-58, 54.

¹⁶⁷ *Ibid.*

¹⁶⁸ CAL Penal CODE § 1048 (2009).

¹⁶⁹ C Heisler, 'Elder Abuse and the Criminal Justice System: New awareness, new responses' (2000) 24(2) *Generations* 52-58, 55. These include California, Arizona, Washington, Minnesota, Wisconsin, Virginia, Delaware, Texas, and Tennessee.

8.1.4 Support for victims

Some law enforcement agencies have created specialised units which receive complaints and work with older vulnerable adults. Several agencies have specialised investigators to manage elder abuse cases.¹⁷⁰ Some prosecutors also undertake vertical prosecution, whereby one attorney manages a case and the victim from beginning to end.¹⁷¹

8.1.5 Taking evidence of vulnerable witnesses

Older victims of crime are generally recognised as being more vulnerable than other members of society when giving evidence, compelling many States to permit the use of special procedures for obtaining and retaining for later use the testimony of an older person.

The victim (or witness) is examined before a judge who rules on evidentiary matters.¹⁷² The proceedings may take place at a venue which suits the victim, including at a private residence, hospital, or nursing home.¹⁷³ The testimony (provided under oath) is transcribed by a court reporter, and may be videotaped, so that if the person is later unavailable at trial, the recording is used instead of live court testimony.¹⁷⁴

Some states including Illinois, California, Oregon, Florida and Delaware permit the use of the out-of-court hearsay statement particularly where the victim may later be unable to testify due to illness, disability, memory problems, or death.¹⁷⁵ However, the constitutional validity of these provisions has been challenged. In Florida, the Supreme Court ruled that the elder victim hearsay exception was unconstitutional due to the sixth Amendment, which provides that in criminal proceedings the accused has a right to be confronted with the witnesses against him.¹⁷⁶

8.1.6 Mandatory Reporting

Mandatory reporting laws vary considerably from state to state within the USA. The laws differ as who is protected, who must report, definitions of reportable behaviour, requirements for investigation of reports, penalties and guardianship.

In Florida for example it is mandatory to report suspected abuse, neglect or exploitation of a vulnerable older person to a state central abuse hot-line.¹⁷⁷ The hot-line is run by Adult Protective Services within the Florida Department of Children and

¹⁷⁰ Ibid, 55.

¹⁷¹ Ibid.

¹⁷² Ibid, 56.

¹⁷³ Ibid, 57.

¹⁷⁴ Ibid.

¹⁷⁵ American Prosecutors Research Institute, *Prosecution of Elder Abuse, Neglect and Exploitation: Criminal Liability, Due Process and Hearsay* (July 2003) <www.ndaa.org/pdf/elder_abuse_web.pdf> at 17 August 2009.

¹⁷⁶ Ibid.

¹⁷⁷ FLA STAT ch 415.1034(1) (2009).

Families, and investigators are available on a 24 hour basis.¹⁷⁸ Other states encourage reporting, but it is not mandated.¹⁷⁹

In the banking arena, while most jurisdictions have made financial abuse a reportable form of elder abuse, relatively few states require banks to report.¹⁸⁰ This is due primarily to concerns about legal liability.¹⁸¹ In 1995, Oregon passed legislation giving immunity from liability to banks when reporting suspected financial abuse of older persons, however it does not constitute a mandatory reporting law.¹⁸²

8.1.7 Civil Law

In the USA, there have been some relevant developments in the civil law arena concerning elder abuse.

Alabama's *State Code* contains a provision to revoke transfer of property which may be the subject of family agreements in certain circumstances.¹⁸³ There has been criticism of the right to revoke however, essentially due to the potential for mischief and unfairness.¹⁸⁴

In California, the *Civil Code* provides for the imposition of discretionary fines, penalties, or other remedies in actions brought by, on behalf of, or for the benefit of, senior citizens or disabled persons, which involve unfair or deceptive acts or practices, or unfair methods of competition.¹⁸⁵

Further, under the *Californian Welfare and Institutions Code*, where there is convincing evidence of a defendant's liability for abuse or neglect of an elder or dependent adult, and where the defendant has been guilty of recklessness, oppression, fraud, or malice, the elder or dependent adult is entitled to certain enhanced remedies such as punitive damages, reasonable legal costs and a claim for pain and suffering which survives the victim's death.¹⁸⁶

In Maine, the *Maine Revised Statutes* address undue influence and dependant elders. A presumption of undue influence can arise where an older dependant person has transferred real estate or undertaken a major transfer of personal property or money for less than full consideration.¹⁸⁷ The transfer may be set aside or other remedies made available to the elder in certain circumstances.¹⁸⁸ This legislative

¹⁷⁸ Florida Department of Children and Families, *About the Department* <http://www.myflorida.com/cf_web/> at 17 August 2009.

¹⁷⁹ Elizabeth Reynolds Welfel, Paula Danzinger, Sheila Santoro, 'Mandated Reporting of Abuse/Maltreatment of Older Adults: A primer for Counselors' (Summer 2000) 78(2) *Journal of Counseling and Development* 284, 284-292.

¹⁸⁰ Sandra L. Hughes, *Can Bank Tellers Tell – Legal Issues Related to Banks Reporting Financial Abuse of the Elderly* (2003) <http://www.ncea.aoa.gov/NCEARoot/Main_Site/pdf/publication/bank_reporting_long_final_52703.pdf> at 17 August 2009.

¹⁸¹ Ibid.

¹⁸² Kaisha Harris, *Protecting Your Elderly Customers* (March 2005) 97(3) *ABA Banking Journal* 7, 7.

¹⁸³ British Columbia Law Institute, *Private Care Agreements Between Older Adults or Friends or Family Members*, Report No 18 (2002) Section D <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> at 17 August 2009.

¹⁸⁴ Ibid.

¹⁸⁵ CAL Civil CODE § 3345 (2009).

¹⁸⁶ CAL Welfare and Institutions CODE § 15657 (2009).

¹⁸⁷ ME REV STAT ANN § 1022 (2009).

¹⁸⁸ ME REV STAT ANN § 1023 (2009).

scheme demonstrates that it is possible to apply the law of undue influence in a manner that accurately reflects and is responsive to modern day realities.

8.2 United Kingdom

Elder abuse has no legal status in the United Kingdom, and the term is not recognised by English law.¹⁸⁹ Recourse to generic common law and statutory remedies is therefore the major source of relief available for victims of elder abuse.

8.3 South Africa

In South Africa, the *Older Persons Act 2006* has been introduced to maintain and promote the status, well-being, safety and security of older persons; and to combat the abuse of older persons.¹⁹⁰ Importantly, the physical, sexual, psychological and economic abuse of an older person is an offence¹⁹¹, and is any abuse of an older person during the commission of a crime or offence an aggravating factor in sentencing.¹⁹² An older person, in the case of a male, is 65 years or older and, in the case of a female, is 60 years or older.¹⁹³ Conduct or lack of appropriate action within a relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person, constitutes abuse.¹⁹⁴

8.4 Canada

Each Canadian State and six Canadian provinces have enacted legislation to protect vulnerable older adults from abuse.¹⁹⁵ Under Part 48 of the Charter of Human Rights and Freedoms, 'every aged person and every handicapped person has a right to protection against any form of exploitation'.¹⁹⁶

While not a legal measure, in Canada older persons have begun authorising their banks to monitor their accounts for unusual transactions.¹⁹⁷ The bank may then raise its concerns with the account holder, and can warn against fraud.¹⁹⁸ It is at the discretion of the account holder as to whether they have regard to the warnings provided.¹⁹⁹

9. Conclusions

¹⁸⁹ House of Commons Health Committee, *Elder Abuse Second Report of Session 2003-04 Volume (2004)* 7 <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhealth/111/111.pdf>> at 17 August 2009..

¹⁹⁰ *Older Persons Act 2006* (South Africa) s 2.

¹⁹¹ *Older Persons Act 2006* (South Africa) s 30(1).

¹⁹² *Older Persons Act 2006* (South Africa) s 30(4).

¹⁹³ *Older Persons Act 2006* (South Africa) s 1.

¹⁹⁴ *Older Persons Act 2006* (South Africa) s 30(2).

¹⁹⁵ Elizabeth Reynolds Welfel, Paula Danzinger, Sheila Santoro, *Mandated Reporting of Abuse/Maltreatment of Older Adults: A primer for Counselors* (Summer 2000) 78(2) *Journal of Counseling and Development* 284, 284.

¹⁹⁶ The Charter of Human Rights and freedoms can be accessed at <http://www.cdpcj.qc.ca/en/commun/docs/charter.pdf>.

¹⁹⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.102].

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

This Joint Report has identified that although Queensland legislation and the common law provide some protection against certain circumstances of elder abuse, the law fails to address the particular vulnerability of older persons engendered where circumstances such as dependence, frailty, immobility and IDMC exist. Queensland law does not therefore currently adequately protect older persons from elder abuse.

The increasing prevalence of elder abuse in Queensland is indicative that the state's criminal laws do not provide adequate deterrence against the physical or psychological harm of older persons, nor the financial exploitation of older persons. The Queensland law does not criminalise the abuse of older people in the same way as the abuse of other vulnerable minorities such as children or the intellectually impaired. An explanation for this may be that many older persons generally have capacity and intellectual maturity, and the age at which they become vulnerable to abuse is personal to each individual. However, as discussed earlier, this is also due to the fact that elder abuse has not received the same level of attention or interest.

In many ways Queensland's domestic violence legislation best reflects the special vulnerability of older people in abusive relationships. However, the legislation does not make provision for financial abuse (which constitutes a significant proportion of elder abuse) and does not extend to situations of neglect or formal care relationships.

Where abuse occurs, the civil law does not offer appropriate or adequate remedies to compensate older persons for the harm suffered by them.

Similarly, the present guardianship regime does not provide protection for some vulnerable older persons from abuses of power by their attorneys. As noted earlier in this report, the regime has limitations and therefore, in certain circumstances, Queensland's guardianship laws have proved unsuccessful in protecting the rights and interests of some older persons.

In light of the failure of Queensland's current laws to adequately provide for the protection of older persons from abuse, a holistic multi-agency approach to address the complex issues surrounding elder abuse, and to instigate legal reform is required and imperative in order to address the needs of older Queenslanders. Government is urged to establish a mechanism for this to be done.

Both the ELS and the Public Advocate are reluctant to provide detailed recommendations in this brief Joint Report, which is designed only to stimulate discussion and thought. However, some general observations and recommendations flow from the consideration of elder abuse issues.

9.1 Defining elder and the concept of 'elder abuse'

As discussed in Parts 2 and 3 above, there is no universal definition of the term 'elder', or the concept of abuse.

Further consideration of these matters at a multi-agency level is necessary to obtain clarity and consistency, to identify and characterise behaviour which amounts to elder abuse, and for the purpose of law reform.

9.2 Civil Law

Undue influence, unconscionable conduct and constructive trusts remain the primary civil remedies available for victims of elder abuse. These remedies were never developed in response to elder abuse and evolved in an age when the phenomenon was not, at least to courts and policy makers, widely considered. Further, these notions have remained relatively static in terms of the principles underscoring their application and have failed to adapt to the innovative techniques of the creative malfessor. The paucity of reported cases in which these recourses have been adopted in circumstances of elder abuse is also indicative of their dubious utility as a vehicle of justice for the abused.

Consideration should be given to whether these recourses adequately reflect and respond to elder abuse, in particular, financial abuse, and should be re-examined. For example, the higher threshold that applies for older people to establish undue influence should be reconsidered to determine whether it is justified.

The law in relation to financial agreements and the liability of costs for litigation guardians also requires further consideration and reform.

9.3 The presumption of advancement

In situations where there is a transfer of an asset from an elderly parent to an adult child, the presumption of advancement is an outdated notion, and requires review. In particular, consideration might be given to amendments to the law in favour of elders with impaired decision-making capacity.

9.4 The *Civil Liability Act 2003*

As discussed earlier, the CLA's abolition of exemplary damages has removed one of the largest components able to be awarded in a personal injuries claim for a person no longer earning wages. The CLA also adversely affects the general damages component of claims for all persons with IDMC, regardless of age.

It is recommended that consideration be given to the availability of exemplary damages for older people. This may also be appropriate in the situation of all persons with impaired capacity, and other vulnerable groups.

9.5 The Guardianship regime

As discussed in Part 4.2 above, the current guardianship regime, in some cases, offers limited protection to older persons due to the abuse of EPAs, and absence of regulation and monitoring of attorneys.

It is anticipated that the Queensland Law Reform Commission, in its final report regarding its review of Queensland's guardianship legislation and regime, will make recommendations in respect of these issues.

9.6 Mandatory Reporting

This vexed issue has not been examined in any depth in this report. However, as the incidence of elder abuse is more than likely significantly under-reported, the question of whether reporting should be mandated cannot be ignored.

As discussed above, there is considerable debate about the utility of mandatory reporting, and in particular its effectiveness as a tool to reduce and deter elder

abuse. This issue requires further consultation with relevant stakeholders at a state and national level to determine the best approach.

Alternatives to mandatory reporting could include an extension or bolstering of the current whistleblowing provisions contained in the GAA and the PAA .Currently, it would seem that the protection afforded to a whistleblower will only arise if the report proves to be true and can be substantiated as a breach of the relevant legislation. There does not appear to be any protection for a report made in good faith which, while reasonable in the circumstances, may not ultimately prove to be a breach of an alleged offender's duties. It is anticipated that issues regarding the protection afforded to whistleblowers will also be explored by the Queensland Law Reform Commission in its final report arising from its guardianship review.

9.7 Criminal Law

Given the often subtle nature of elder abuse involving older people with impaired capacity²⁰⁰ there is a strong argument for the introduction of discrete criminal offences regarding elder abuse.

Arguably, it is not sufficient to simply tinker with the penalty provisions of conventional offences to incorporate incapacity or old age as an aggravating feature, nor to incorporate specific offences in substitute decision-making legislation such as the PAA and the GAA.

Consideration should be given to the introduction of specific elder abuse offences reflecting the approach taken in the USA²⁰¹ that send a clear message of the opprobrium with which the law regards certain conduct towards older persons generally, and those with IDMC. This might also encompass the adoption of new language to describe offensive conduct reflecting that of the offences referred to in the USA's legislation.²⁰²

This exercise may also result in an examination of the current redundancy and obsolescence of the provisions in the Queensland Criminal Code concerning the duty to provide the necessaries of life. Consideration should be given to whether a duty to provide necessaries is one that should be imposed on, for example, adult children in relation to their dependent parents.

Any discussion may also necessitate an examination of whether any criminal offences should be accompanied by a concomitant civil recourse.

The absence of any specific reference in the *Penalties and Sentences Act 1992 (Qld)* to the elderly age of a victim, or the IDMC of a victim as an aggravating factor in sentencing an offender should also be given consideration.

9.8 Support for victims of crime

The introduction of specific provisions in the *Evidence Act 1977 (Qld)*, similar to those in the USA, which apply to situations where an older person is a victim of crime, or is required to give evidence, warrant consideration.

²⁰⁰ For example, it may not be possible for the victim to even consent to or oppose the offensive conduct.

²⁰¹ See the discussion above at Section 8.1.

Specialised training for law enforcement authorities which identifies the forms of abuse confronted by older persons and appropriate responses should also be considered.

9.9 Domestic Violence and Peace and Good Behaviour Orders

It is recommended that the *Domestic and Family Violence Protection Act 1989* (Qld) and the *Peace and Good Behaviour Act 1982* (Qld) be reviewed, and provisions inserted to address the limitations discussed in Section 4.7 above.

In particular, consideration should be given to extend the availability of Domestic Violence Protection Orders to all formal care relationships and all forms of elder abuse (in particular, financial abuse). Similarly, the circumstances in which a Peace and Good Behaviour Order may be obtained should be extended to all situations of elder abuse.

Consideration must also be given to mechanisms to overcome the difficulties experienced by some older persons in making a complaint or application which may otherwise preclude them from obtaining an order.

9.10 Other considerations for reform

This report has identified a number of obstacles experienced by older persons when accessing legal advice, support and assistance to address elder abuse. These issues require consideration in order to improve access to legal advice and representation, advocacy services and support in Queensland. These barriers further highlight the need for amendments to the civil and criminal law in order to reduce and prevent the incidence of elder abuse in the community.

The initiatives undertaken by the USA and other jurisdictions to address and prevent elder abuse warrant detailed consideration, with a view to the implementation of similar practices and provisions, where appropriate, in Queensland.