

Elder Abuse

Joint Issues Paper

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Foreword

The Queensland Law Society and the Public Advocate's joint publication, '[Elder Abuse: How well does the law cope in Queensland?](#)' was released in June 2010, now more than a decade ago. That paper was an information paper which briefly identified and explored relevant legal issues with the aim of stimulating discussion and consideration of law reform. At that time, elder abuse was a relatively recently recognised phenomenon, both globally and in the Australian context.

Since the publication of the first edition, Australian society has become more aware of the issue of violence, abuse and neglect of older persons and there have been significant advances at the international, Federal and State levels in both our understanding of, and responses to, elder abuse.

The paper's purpose is to inform the reader of important reform developments to the elder abuse legal landscape since the release of the first edition and to stimulate discussion and debate on the current legal issues associated with elder abuse. The paper also makes some recommendations for law and policy reform.

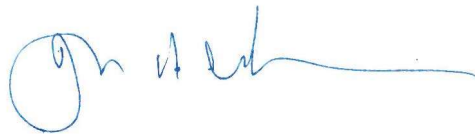
The paper encompasses a broad scope of issues, including those related to: human rights; victims and perpetrators of elder abuse; civil and criminal law; law enforcement; domestic and family violence; the guardianship regime; systemic abuse in the aged care system; comparative legal approaches; and, access to legal assistance for older persons.

The Queensland Law Society and the Public Advocate commend the paper to you for your consideration.



Kara Thomson

President, Queensland Law Society



John Chesterman

Public Advocate (Qld)

Queensland Law Society

The Queensland Law Society ('QLS' or 'the Society') is the peak professional body for the State's legal practitioners. The Society represents and promotes over 13,000 legal professionals, increases community understanding of the law, helps protect the rights of individuals and advises the community about the many benefits solicitors can provide.

A key function of the Society is to assist the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

The QLS Elder Law Committee is comprised of experienced legal practitioners who practice in the area of elder law. As part of its mandate, the Elder Law Committee seeks to identify areas of law that impact on older people or the provision of services to them and advocate for improvements to the law.

This joint paper represents the culmination of work by a QLS cross-committee working group, comprised of the Public Advocate and members of a number of QLS legal policy committees, including the Elder Law Committee, Human Rights and Public Law Committee, Health and Disability Law Committee, and the First Nations Legal Policy Committee.

The Public Advocate

The position of Public Advocate is an independent statutory role established by the *Guardianship and Administration Act 2000* (Qld) to provide systemic advocacy for adult Queenslanders with impaired decision-making capacity.¹ The Public Advocate is supported to complete this work by a team of Department of Justice and Attorney General staff, collectively known as the Office of the Public Advocate (OPA). Adults who have impaired decision-making capacity may include people with a mental illness, intellectual or developmental disability, acquired brain injury, or dementia. The functions of the Public Advocate are 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';
- promote 'the provision of services and facilities for the adults'; and
- monitor and review 'the delivery of services and facilities to the adults'.²

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

² *Ibid.*

Glossary of acronyms

<i>Aged Care Act</i>	<i>Aged Care Act 1997 (Cth)</i>
ACQS Commission	Aged Care Quality and Safety Commission
Aged Care Royal Commission	Royal Commission into Aged Care Quality and Safety
AHD	Advance Health Directive
ALRC	Australian Law Reform Commission
ALRC Report	Australian Law Reform Commission report, 'Elder Abuse – A National Legal Response'
AIFS	Australian Institute of Family Studies
CALD	culturally and linguistically diverse
Capacity Guidelines	<i>Queensland Capacity Assessment Guidelines 2021</i>
CGT	Capital gains tax
CLA	<i>Civil Liability Act 2003 (Qld)</i>
CLCQ	Community Legal Centres Queensland
CRPD	Convention on the Rights of Persons with Disabilities
<i>Criminal Code</i>	<i>Criminal Code Act 1899 (Qld)</i>
Disability Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
DFV	domestic and family violence
<i>DFV Act</i>	<i>Domestic and Family Violence Act 2012 (Qld)</i>
EAAA	Elder Abuse Action Australia
EAPU	Elder Abuse Prevention Unit
EPOA	Enduring power of attorney
Family Agreement	A legal document outlining financial and co-living arrangements
GAA	<i>Guardianship and Administration Act 2000 (Qld)</i>
General Principles	Those principles set out in s 11B of the <i>Guardianship and Administration Act 2000 (Qld)</i>
Health Care Principles	Those principles set out in s 11C of the <i>Guardianship and Administration Act 2000 (Qld)</i>

<i>HR Act</i>	<i>Human Rights Act 2019 (Qld)</i>
NARI	National Ageing Research Institute
National Plan	National Plan to Respond to the Abuse of Older Australians (2019-2023)
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate
OPAN	Older Persons Advocacy Network
OPG	Office of the Public Guardian
<i>PAA</i>	<i>Powers of Attorney Act 1988 (Qld)</i>
PGB Order	Peace and good behaviour order made under the <i>Peace and Good Behaviour Act 1982 (Qld)</i>
PPN	Police protection notice issued under the <i>Domestic and Family Violence Protection Act 2012 (Qld)</i>
Principal	A person who makes an enduring power of attorney, general power of attorney or advance health directive under Queensland legislation.
Protection Order	Protection order made under the <i>Domestic and Family Violence Protection Act 2012 (Qld)</i>
PTQ	Public Trustee of Queensland
QCAT	Queensland Civil and Administrative Tribunal
QHRC	Queensland Human Rights Commission
QLS	Queensland Law Society
QPS	Queensland Police Service
<i>RTRAA</i>	<i>Residential Tenancies and Rooming Accommodation Act 2008 (Qld)</i>
SLASS	Seniors Legal and Advisory Service
WEAAD	World Elder Abuse Awareness Day (15 June)
WHO	World Health Organisation

1. Background and Scope

QLS and the Public Advocate agreed to collaborate on an updated paper of defined, limited scope about the developments in the elder abuse legal landscape. The impetus for the second edition was recent international, national and State developments that have significantly altered the elder abuse response framework, as well as the recent advocacy that both the QLS and the Public Advocate have undertaken in this space.

Australia's demographics, like those of the rest of the world, reflect an ageing population. In 2017, 15% of Australians (3.6 million people) were aged 65 and over.³ By 2056, the number of older Australians is projected to increase to 22% of the population (or 8.7 million people).⁴ With an increasingly ageing population has come an increased prevalence of certain health conditions. For example, it is reported that almost 1 in 10 Australians aged 65 years and over are living with dementia, and although dementia is not caused by age, it predominantly affects older people.⁵ The number of people with dementia is expected to increase to 536,000 by 2025 and 1,100,000 by 2056.⁶ As the Australian population continues to grow and average life expectancy increases, a higher proportion of older people are likely to experience impaired decision-making capacity, becoming more susceptible to violence, abuse and neglect.

While public awareness of elder abuse has increased in recent years, it remains widely accepted that elder abuse is underreported in all its forms.⁷ As such, it is difficult to quantify the prevalence of elder abuse in Queensland communities, although a very recent national study (see page 17) identified that 14.8 per cent of older Australians had suffered elder abuse in the preceding year. However, a background study commissioned for the World Health Organisation's ('WHO') *World report on ageing and health*⁸ found that for middle and high income countries, the prevalence of elder abuse ranges from 2.2% to 14%. Based on estimated resident populations in Queensland, for those 65 years and older, one Queensland study estimates that the prevalence of elder abuse may range from a low of 2.2% (being 19,394 people in 2022) to 14.3% (126,061 people).⁹ Based on projected population growth, by 2037 these numbers will range between 30,625 and 503,921 people.¹⁰

The paper explores how the law responds to incidents of elder abuse and identifies significant developments that have occurred at various levels of government over the past decade. Importantly, the way we see and describe elder abuse has evolved. A shift in terminology has occurred, from "elder" and "elderly" to "older persons", with a focus on vulnerability as opposed to age. While the term "elder abuse" or "abuse of older persons" is not defined by common law or in any legislative framework, recent exploratory studies have proposed updated definitions of "elder abuse" that seek to capture a broad range of situations of violence, abuse and neglect, including (non-exhaustively): physical abuse; emotional/psychological abuse; financial/economic abuse; sexual abuse; social abuse;

³ Australian Institute of Health and Welfare, 'Older Australia at a glance' (Web report, 10 September 2018) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians>>.

⁴ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (8 July 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>> (National Plan).

⁵ Ibid 4. Only 1% of cases of dementia occur among people aged under 60.

⁶ Ibid.

⁷ R Kaspiew, R Carson and H Rhoades, 'Elder abuse in Australia' (2016) 98 *Family Matters* 64, 70.

⁸ World Health Organisation, *World report on ageing and health* (Report, 2015).

⁹ Blundell et al, *Review into the Prevalence and Characteristics of Elder Abuse in Queensland* (Curtin University, 2017) <<https://www.publications.qld.gov.au/dataset/end-domestic-and-family-violence-our-progress/resource/2993b80e-1eea-4a1d-a1ee-96f966b812c8>> 28.

¹⁰ Ibid.

chemical abuse (including under and over medicating a person, or controlling their access to medications); coercion; and, neglect.

There has been a paradigm shift away from a “best interests” approach to elder abuse towards a rights-based framework that seeks to do away with ageist attitudes and focus on balancing dignity and autonomy with protection and safeguarding. For example, the Australian Law Reform Commission (‘ALRC’) released its final report, ‘Elder Abuse – A National Legal Response’ in 2017 that made 43 recommendations to combat elder abuse in Australia. The ALRC framed its recommendations within a rights-based framework based on the two key principles of dignity and autonomy; and protection and safeguarding.

In the past decade, a greater understanding has also developed of the different relationships within which abuse of older persons can occur. It is now acknowledged that elder abuse can share many of the same characteristics as family and domestic violence, including elements of coercive control. Additionally, the release of the Royal Commission’s findings into Australia’s aged care system has exposed the abuse that occurs not just within the private domain of families and close social networks, but also that which is perpetrated by institutions and their employees.

While significant developments have been made, there remain barriers to accessing legal assistance for older persons, and gaps in the legal landscape that would benefit from further research and reform. The paper highlights these areas and, where appropriate, makes some recommendations for law and policy reform.

Chapter 2 explores the shift in terminology and the definitional complexity associated with describing the scope of elder abuse, as well as the difficulties that arise in quantifying the prevalence of elder abuse.

Chapter 3 provides an overview of the current response framework, looking at recent international, national and State responses.

Chapter 4 sets out the characteristics of victims and perpetrators of abuse, and explores the relationships between them, as well as factors that increase a person’s risk of abuse.

This background information provides context to the paper’s later chapters, which look at the response frameworks currently in place. Chapter 5 considers some of the civil law remedies available to victims of elder abuse, focusing on the two most common situations of elder abuse: psychological and physical abuse. Chapter 6 sets out the criminal justice response framework for elder abuse, and the debate around the enactment of specific criminal offences for elder abuse in Queensland. Chapter 6 also situates elder abuse within the domestic and family violence response framework, to highlight the potential remedies available for a victim subject to abuse within the family setting.

Chapter 7 sets out how the guardianship and administration system is applicable to those older persons who have impaired decision-making capacity, looking at recent changes to the guardianship framework to improve assessment of capacity and encourage supported decision-making where possible. Chapter 7 also explores the potential for a national register of enduring powers of attorney for financial matters to assist in preventing elder financial abuse, but sets out some of the challenges associated with a national register.

Chapter 8 explores elder abuse in residential aged care settings, focusing on the findings of the Royal Commission into Aged Care Quality and Safety and recent legislative changes to combat abuse in residential aged care settings.

Chapter 9 briefly outlines the legal responses to elder abuse in some other Australian and international jurisdictions, including: New South Wales; the Australian Capital Territory; South Australia; New Zealand; and, Canada.

Chapter 10 concludes with a summary of the advances made since the release of the paper's first edition, as well as the barriers that older persons continue to face in accessing legal assistance for abuse.

2. Defining Elder Abuse

Perhaps the most significant development since the release of the first edition of this paper is the way we see and describe the abuse of older persons. This chapter discusses the shift in terminology from “elder” and “elderly” to “older persons”, and explores the definitional complexity in describing the scope of “elder abuse”.

2.1. Older Persons

The way we refer to older persons and define older age is a dynamic issue. This includes the terminology we use in everyday discourse, but also how we define older age for societal reasons such as social security, social protections, and health and welfare systems. Previously, the concepts of “elder” and “elderly” were typically used as descriptors for victims of elder abuse.¹¹

However, the term “older persons” is now preferred for the following reasons. Firstly, in Aboriginal and Torres Strait Islander culture, the term “elder” refers to appointed community representatives with cultural and other responsibilities, and may not necessarily denote, or be associated with, a person’s age. Secondly, the terms “elder” and “elderly” have been rejected by various international bodies as ageist.¹² Thirdly, the United Nations has shifted its description to remove references to “the elderly” and other value laden terms and now uses “older persons” and “ageing” as central defining concepts.¹³ Many people who could be labelled as ‘elderly’ would not self-identify as such and would dispute the term related to or applied to them. As such, “older persons” is considered more appropriate terminology.

Furthermore, “older persons” accounts better for the ageing process which is important, because older persons are not homogenous, nor is the ageing process consistent. The WHO’s 2015 *World Report on Ageing and Health* heralded a landmark shift in our understanding of ageing, noting that the loss of ability typically associated with ageing is only loosely related to a person’s chronological age and that there is no “typical” older person.¹⁴ The report noted that resulting diversity in the capacities and health needs of older people is not random but rooted in events throughout the life course that can often be modified, underscoring the importance of a life-course approach.¹⁵

In Australia, for population measurement purposes, “old” is conventionally defined as people aged 65 and over. In Queensland, for elder abuse service provision, a person is eligible to receive a service if they are 60 years or older (or 50 years or older in the case of Aboriginal and Torres Strait Islander people).¹⁶ However, the use of such age proxies or age limits to define when someone reaches older age are limited in their effectiveness. The United

¹¹ Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How well does the law in Queensland cope?* (Information Paper, 2010) <https://www.justice.qld.gov.au/_data/assets/pdf_file/0007/54691/elder-abuse_issues-paper.pdf> 2-3.

¹² Dale Avers et al, ‘Use of the Term “Elderly”’ (2011) 34(4) *Journal of Geriatric Physical Therapy* 153, 153-4; United Nations Committee on Economic Social and Cultural Rights, *The Economic, Social and Cultural Rights of Older Persons* (1995).

¹³ A/RES/50/141 in conformity with the United Nations Principles for Older Persons (Adopted by General Assembly resolution 46/91 of 16 December 1991). See also the Department of Economic and Social Affairs (DESA); the Office of the High Commissioner for Human Rights (OHCHR); the Independent Expert on the Enjoyment of All Human Rights by Older Persons and the Secretary General’s recent brief.

¹⁴ World Health Organisation, ‘World Report on Ageing and Health’ (Report, 2015) vii <<https://www.who.int/publications/i/item/9789241565042>>.

¹⁵ World Health Organisation, ‘World Report on Ageing and Health’ (Report, 2015) vii <<https://www.who.int/publications/i/item/9789241565042>>.

¹⁶ See the Queensland Government’s Older People Investment Specification 15 December 2020 <<https://www.dsdsatsip.qld.gov.au/resources/dcdss/industry-partners/funding-grants/specifications/investment-spec-older-people.pdf>>

Nations High Commissioner for Human Rights highlights that ‘the ageing process is a continuous one and the significance of the stage of life which a person has reached and their designation as “old” varies according to social context, so choosing a specific chronological age is a problematic way to define the start of older age.’¹⁷

The first edition of this paper identified a number of difficulties in recommending an age at which a person becomes “old” that remain current, including the following:¹⁸

- The use of chronological age is a practice in many developed countries. This may not be the case in developing countries, such as some African nations, where time has little or no importance when determining who is of old age.
- 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 full independence.
- If retirement was a trigger for considering a person an older person, the period in which a person is considered to be “old” may span upwards of 40 years for some people. This is a very significant portion of time for a person to be considered in the later years of life.
- Some Australians (for example, Aboriginal and Torres Strait Islander people), may experience some of the characteristics and vulnerabilities of being “older” earlier in life than the broader general population, as they are more susceptible to chronic health conditions earlier.

More recent literature argues for a move away from age-based criteria to “at-risk” characteristics in identifying who is, or may be, subject to abuse among Australia’s older persons.¹⁹ This is evident in recently enacted criminal offences in the Australian Capital Territory, which define “vulnerable people” as those over 60 years old with additional vulnerabilities.²⁰ The paper explores risk factors for abuse in more detail in Chapter 4.

This paper adopts the language of “older” and “older persons”, although “elder abuse” is also used, as the generally recognised term to describe the abuse of older persons.

2.2. Abuse of Older Persons

Currently, the term “elder abuse” or “abuse of older persons” is not defined by common law or in any legislative framework. One commonly accepted definition includes that adopted by the WHO, which defines elder abuse as involving ‘a single or repeated act or lack of appropriate action, occurring within any relationship where there is any expectation of trust, which causes harm or distress to an older person’.²¹ Importantly, this definition captures abuse occurring in different types of relationships that involve trust, and emphasises not only positive actions but “lack of appropriate action” to capture acts of neglect.

¹⁷ Office of the High Commissioner for Human Rights, United Nations, ‘Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons’ (Working Paper, March 2021) <<https://social.un.org/ageing-working-group/documents/eleveth/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>> 11.

¹⁸ Queensland Law Society and Office of the Public Advocate, *Elder Abuse: How well does the law in Queensland cope?* (Information Paper, 2010) <https://www.justice.qld.gov.au/_data/assets/pdf_file/0007/54691/elder-abuse_issues-paper.pdf> 2-3.

¹⁹ Moir et al, ‘Best Practice for Estimating Elder Abuse Prevalence in Australia: Moving towards the Dynamic Concept of “Adults at Risk” and away from Arbitrary Age Cut-Offs’ (2017) 29(2) *Current Issues in Criminal Justice* 181.

²⁰ *Crimes Act 1900* (ACT) s 36A.

²¹ World Health Organisation, *Elder Abuse* (Fact Sheet, 4 October 2021) <<https://www.who.int/news-room/fact-sheets/detail/elder-abuse>>.

Similarly, the Office of the High Commissioner for Human Rights now recognises that ‘violence, neglect, exploitation and abuse cover a wide variety of different actions or omissions carried out by state actors and non-state actors in different places’.²² Consequently, the scope of abuse of older persons is expanded beyond the private sphere of families and close social networks to include abuse in other contexts, including residential or institutional care facilities and informal care relationships. Indeed, studies note the heightened vulnerability to violence, abuse and neglect in these contexts.²³ This paper discusses legal developments in responding to the abuse of older persons in institutional settings in Chapter 8.

While the WHO definition of abuse of older persons is useful to capture a broad range of situations of violence, abuse and neglect, the Australian Institute of Family Studies (‘AIFS’) highlights that there is ‘a significant distance between the broad formulations in the accepted definitions, such as the WHO definition, and the level of precision that is required to develop measures for the purpose of assessing prevalence’.²⁴ The AIFS has attempted to set out an approach to developing a working definition of “elder abuse” that is more suitable to assessing prevalence of abuse of older persons in Australia.²⁵ This definition includes five elements:

Element 1 – the person who experiences the abuse is an older person, without specification of a precise age or vulnerability requirement.²⁶

Element 2 – the act or omission includes physical abuse, emotional/psychological abuse, financial/economic abuse, sexual abuse, social abuse/isolation and neglect. Intention should not be a requirement of this element and frequency and severity are not referred to in the proposed working definition.

Element 3 – the perpetrator of the act or omission may range from family members and friends through to professionals and carers whose relationship with the older person is such that it gives rise to an expectation of trust.

Element 4 – concerns the circumstances that arise where there is an expectation of trust between the older person and the perpetrator. Circumstances where there is a power imbalance are also incorporated.

Element 5 – the consequences are based on a broad and multi-dimensional understanding of the harm or distress to the older person. The proposed working definition leaves open both subjective and objective interpretations.²⁷

²² Office of the High Commissioner for Human Rights, United Nations, ‘Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons’ (Working Paper, March 2021) <<https://social.un.org/ageing-working-group/documents/eleveth/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>> 34.

²³ Ibid.

²⁴ Kaspiew et al, ‘Elder Abuse National Research – Strengthening the Evidence Base: Research Definition Background Paper’ (Australian Institute of Family Studies, 2019) <https://aifs.gov.au/sites/default/files/publication-documents/1908_elder_abuse_national_research_strengthening_the_evidence_base.pdf> 3 (‘Strengthening the Evidence Base’).

²⁵ Ibid.

²⁶ Despite this, the study does note that the definition will be applied in the Australian Prevalence Study having regard to the generally accepted age-based criteria of 65 years and above for older people in the mainstream Australian population: Ibid 3-4.

²⁷ Ibid.

The current AIFS working definition of “elder abuse” is:

*A single or repeated act or failure to act, including threats, that results in harm or distress to an older person. These occur where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person.*²⁸

The AIFS also sets out the acts or omissions that can be captured by the working definition:

- *physical abuse* (including pushing/shoving, hitting/slapping, punching and kicking);
- *emotional/psychological abuse* (including verbal abuse such as yelling insults and name calling; intimidation/bullying and harassment; damaging or destroying property; threatening to harm the older person or their family members/friends or pets; threatening to withdraw care and preventing or attempting to prevent access to funds, telecommunication or transport);
- *financial/economic abuse* (including misuse or theft of finances or other assets and abuse or misuse of enduring powers of attorney ('EPOAs'));
- *sexual abuse* (including unwanted sexual contact and rape);
- *social abuse* (including preventing or attempting to prevent the older person from having contact with family, friends or community – social isolation, as well as restricting participation in religious or cultural practices)²⁹; and
- *neglect* (including the failure to provide access to essentials such as food and hydration, clean and appropriate shelter, adequate hygiene or medical care).³⁰

While accepted definitions remain in flux, and conceptual and theoretical approaches continue to evolve, this paper adopts this working definition of abuse of older persons because it reflects the most recent attempt in Australia to define the abuse of older persons for the purposes of assessing prevalence. Furthermore, the definition adopts a widely accepted approach by incorporating situations where power imbalances exist, in addition to an expectation of trust.

Although not included in the working definition of abuse of older persons, the ALRC identifies that the use of restrictive practices can amount to abuse.³¹ Common forms of restrictive practice include: detention (e.g. locking a person in a room or ward indefinitely); seclusion (e.g. locking a person in a room or ward for a limited period of time); physical restraint (e.g. clasp a person's hands or feet to stop them from moving); mechanical restraint (e.g. tying a person to a chair or bed); and chemical restraint (e.g. giving a person sedatives).

The abuse of older persons may also include *chemical abuse*, which can involve: inappropriate use (underuse or overuse) of prescribed medication; failure to provide or supervise medication; taking prescriptions or dispensed medications for addiction or financial

²⁸ Ibid 4.

²⁹ SA Health, *Elder abuse, signs and indicators* (2021) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/what+is+elder+abuse>>.

³⁰ Ibid.

³¹ Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) 239 [11.237] ('Discussion Paper').

gain; or, if the carer is a substance abuser, he or she may provide drugs or alcohol to the older person.³²

One of the most significant recent developments in this area has been the recognition that *systemic abuse* can be described as abuse of older persons. Systemic abuse is described as abuse 'perpetuated due to organisational or society structures and systems'.³³

The definition of abuse of older persons continues to be developed to ensure that it is broad enough to capture any situations of abuse, and the relationships in which such abuse can occur. However, it is recognised that the current working definition does not resolve the question: where, along a potential continuum of experience from modest to extremely severe, should an experience be considered abuse of an older person where all five elements of the working definition are satisfied?³⁴ This question also raises the issue of whether certain thresholds should be applied, particularly in relation to the frequency and severity of acts and omissions, as well as their impact.³⁵

International approaches to the issue of particular thresholds have been considered,³⁶ but this question remains unanswered in the Australian context.

2.3. Prevalence of Abuse of Older Persons

The Council of Attorneys-General released the 'National Plan to Respond to the Abuse of Older Australians (2019-2023)'³⁷ ('National Plan') to provide a framework to respond to abuse of older persons over a four year timeframe. The National Plan identified the urgent need for a study into the prevalence of abuse of older persons in Australia:

We don't yet have a detailed picture of how extensive the problem of abuse of older people is in Australia. What we do know from overseas studies is that abuse of older people affects between 2% to 12% of older people, and it affects both women and men. It has been estimated that as many as 185,000 older people in Australia experience some form of abuse or neglect each year.³⁸

Chesterman³⁹ highlighted the variety of issues that needed to be accounted for in any national prevalence survey:

The national prevalence study, which exists as the National Plan's first initiative, will need to capture the experiences of a diverse population and take account of the wide social and cultural contexts that affect how the abuse of older people is recognised, reported, and responded to. Crucially, it will need to take account of experiences of people with cognitive impairments, who at the very least are considered to account for a significant minority, if not a majority, of those experiencing abuse.⁴⁰

³² SA Health, *Elder abuse, signs and indicators* (2021) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/what+is+elder+abuse>>.

³³ Blundell et al (n 9) 57.

³⁴ Kaspiew et al, 'Strengthening the Evidence Base' (n 24) 4.

³⁵ Ibid.

³⁶ Ibid 18-21.

³⁷ Council of Attorneys-General, *National Plan* (n 4).

³⁸ Ibid 13.

³⁹ John Chesterman was formerly the Deputy Public Advocate of Victoria, and commenced as the Public Advocate in Queensland on 13 August 2021.

⁴⁰ John Chesterman, 'The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives' (2020) 73(3) *Australian Social Work* 381, 383 ('The Abuse of Older Australians').

In December 2021, the AIFS released the findings of the first ever national systematic study of elder abuse prevalence in Australia. The study utilised two key methodologies – one survey of 7,000 people aged 65 and over living in the community (i.e. those who are not in residential aged care settings), and one survey of 3,400 members of the general population. Drawing on the first of these surveys, the study identified that 14.8 per cent of older people had been subject to elder abuse in the preceding 12 months. Psychological abuse (11.7 per cent) was the most frequent form of abuse, after which came neglect (2.9 per cent), financial abuse (2.1 per cent), physical abuse (1.8 per cent) and sexual abuse (1 per cent). Multiple kinds of abuse had been experienced by 3.5 per cent of older people.⁴¹ It is important to highlight, however, that the study did capture the experiences of people with impaired decision-making capacity. The exclusion from the study of both people in residential aged care settings and people with impaired decision-making capacity means the overall prevalence of elder abuse is likely to be higher than 14.8 per cent.

At a State level, the Queensland Government recognises that it currently lacks the tools to accurately determine the prevalence of abuse, and in particular financial elder abuse, occurring in Queensland.⁴² As highlighted earlier, one Queensland study estimates that the prevalence of elder abuse may range from a low of 2.2% (being 19,394 people in 2022) to 14.3% (126,061 people).⁴³

2.4. Data Gaps

It is important to acknowledge the significant data gaps that continue to exist in elder abuse research. The United Nations Independent Expert on the enjoyment of all human rights by older persons has highlighted that only 17% of 133 countries surveyed gather data on the abuse of, and violence perpetrated against, older persons.⁴⁴ Many demographic and health surveys exclude women over 50 and men over 55 or 60.⁴⁵

Additionally, in many surveys older persons are typically ‘represented in statistics as a single age cohort of 55 plus, 60 plus or 65 plus’, which fails to capture their diversity of experiences.⁴⁶ Similarly, Queensland Government crime data currently only reports on victims aged 60 years over as one cohort, broken down by male and female victim statistics.⁴⁷

Queensland has seen an increase in family and domestic violence reporting over recent years.⁴⁸ This can be attributed, in part, to a reduction in social stigma and growing community education about the types, causes and effects of family and domestic violence;⁴⁹ and a growing awareness of human rights; together with a focused response from State and Federal

⁴¹ L. Qu et al, *National Elder Abuse Prevalence Study: Final Report* (Australian Institute of Family Studies, Research Report, December 2021), 1-2, 21, 22 & 32.

⁴² Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the adequacy of existing financial protections for Queensland’s seniors* (Report No. 2, 55th Parliament, August 2015) <<https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2015/5515T876.pdf>> 137 (*Inquiry into the adequacy of existing financial protections*).

⁴³ Blundell et al (n 9) 28.

⁴⁴ *Human rights of older persons: the data gap, Report of the Independent Expert on the human rights of older persons, Rosa Kornfeld-Matte*, A/HRC/45/14 (2020) [27].

⁴⁵ Ibid [60].

⁴⁶ Ibid [33].

⁴⁷ Queensland Government Statistics Office, *The Crime Report, Queensland*, <<https://www.qgso.qld.gov.au/issues/7856/crime-report-qld-2018-19.pdf>>. The report provides an overview of the volume and nature of crime in Queensland as reported (by victims, witnesses or other persons) or detected by the Queensland Police Service.

⁴⁸ Australian Bureau of Statistics, *Recorded Crime – Offenders* (11 February 2021) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#family-and-domestic-violence-statistics>>.

⁴⁹ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (Report, 2019) 57.

governments.⁵⁰ By contrast, the National Ageing Research Institute reports that investment in comprehensive research of family and domestic violence in the context of older victims, and research in relation to abuse against older persons generally, remains lacking.⁵¹

It is widely acknowledged that abuse against older persons, including financial abuse, is significantly under-reported.⁵² The gaps in the research perpetuate a lack of understanding about both the motivations for, and consequences of, abuse of older persons, and highlight serious under-reporting of elder abuse. This was reinforced by the *'Inquiry into the adequacy of existing financial protections for Queensland's seniors'* when it identified the potential failure to identify financial abuse as a crime, and noted that feelings of shame and embarrassment were factors contributing to high levels of underreporting.⁵³ The ALRC has also highlighted that health professionals, banks, and aged care workers have all expressed concerns about disclosing suspicions of elder abuse for fear of breaching confidentiality and privacy laws.⁵⁴

To comprehensively understand the impact that abuse has on an older person, more detailed data collection and analysis is required in terms of victim and perpetrator/actor demographics, perceptions and understanding of and by older people about abuse, reluctance to identify or report abuse, non-discriminatory systemic responses to older persons, and outcomes.⁵⁵

⁵⁰ Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* (Final Report, 28 February 2021) <<https://www.justice.qld.gov.au/initiatives/end-domestic-family-violence/about/not-now-not-ever-report>>; Council of Australian Governments, *National Plan to Reduce Violence Against Women and their Children* (9 August 2019) https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf.

⁵¹ National Ageing Research Institute, *Elder abuse: context, concepts and challenges* (Data Insights, 2019) <<https://www.aihw.gov.au/getmedia/affc65d3-22fd-41a9-9564-6d42e948e195/Australias-Welfare-Chapter-7-summary-18Sept2019.pdf.aspx>> 153.

⁵² Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (Report, 2019) 97; *Inquiry into the adequacy of existing financial protections* (n 42) 137.

⁵³ Communities, Disability Services and Domestic and Family Violence Prevention Committee (Report 2015)101, 103, cited in Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder abuse: Understanding issues, frameworks and responses* (Research Report No 35, 2016).

⁵⁴ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report, May 2017) 413 ('Final Report').

⁵⁵ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (Report, 2019) 153-154.

3. Overview of Current Responses

This chapter provides an overview of the current responses to abuse of older persons in the international, national and State context.

3.1. International Responses

There have been significant developments at the international level in the past decade to raise awareness of abuse of older persons and to consider, on a global level, the drivers of abuse, as well as to identify global response strategies.

3.1.1. World Elder Abuse Awareness Day

Following its resolution 66/127 in December 2011, the United Nations General Assembly officially recognises 15 June of each year as World Elder Abuse Awareness Day ('WEAAD'). WEAAD 'represents the one day in the year when the whole world voices its opposition to the abuse and suffering inflicted to some of our older generations.'⁵⁶ 15 June provides an important advocacy tool for international, national and State bodies to increase awareness of elder abuse. For example, the Queensland Government launched its campaign 'Together we can stop elder abuse' on 15 June 2021 to urge Queenslanders to address elder abuse, injected funding into various State response services, and held an event for older persons in Brisbane.⁵⁷

3.1.2. United Nations Convention on the Rights of Older Persons

In 2010, the United Nations established the Open-Ended Working Group on Ageing to consider how to strengthen the protection of human rights of older persons, including the feasibility of further instruments.⁵⁸ There was limited support for the development of a new United Nations convention on the rights of older persons when the issue was tabled after the formation of the Open-Ended Working Group on Ageing.⁵⁹ The main argument against developing and adopting a convention was that there existed sufficient protections under existing international human rights laws, however the problem was a critical implementation gap:

[i]n their general statements, several countries observed that existing international human rights standards and principles apply to older persons, including the right to health and social security as well as the prohibition of violence and discrimination, and that current deficiencies in the protection of the rights of older persons could be addressed by more effective implementation of the existing mechanisms...⁶⁰

The position shifted in 2014, when the Open-Ended Working Group on Ageing highlighted that the vulnerabilities experienced by older persons 'is sufficiently similar to the position of

⁵⁶ United Nations Department of Economic and Social Affairs, *World Elder Abuse Awareness Day* (Web page) <<https://www.un.org/development/desa/ageing/world-elder-abuse-awareness-day.html>>

⁵⁷ Minister for Seniors and Disability Services and Minister for Aboriginal and Torres Strait Islander Partnerships, 'Campaign urges Queenslanders to unite against elder abuse' (Media Statement, 14 June 2021).

⁵⁸ General Assembly, 65th Session, Follow-up to the Second World Assembly on Ageing, A/RES/65/182, 4 February 2011. For detail about the Convention debate see <<https://social.un.org/ageing-working-group/documents/eighth/TowardsConvention.pdf>>.

⁵⁹ Paul Harpur, 'Old Age is Not Just Impairment: The CRPD and the Need for a Convention on Older Persons' (2016) 37(3) *University of Pennsylvania Journal of International Law* 1027, 1033-4.

⁶⁰ Rapporteur of the Open Ended Working Group on Ageing, Rep. of the Open-ended Working Group on Ageing, U.N. Doc. A/AC.278/2012/1 (Sep. 19, 2012), <<https://undocs.org/A/AC.278/2012/1>>.

persons with disabilities' prior to the adoption of the CRPD; that is, that persons with disabilities have benefitted from the CRPD in a way that a similar convention would protect the rights of older persons.⁶¹ The *United Nations Principles for Older Persons*⁶² and the *Madrid International Plan of Action on Ageing*⁶³ relate to the human rights of older persons, but these international instruments are non-binding.

The Australian Government's position has thus far been that it remains unconvinced that the case has been made for a separate convention for older persons.⁶⁴ Additionally, it is currently unlawful in Australia to discriminate on the basis of age under the *Age Discrimination Act 2004* (Cth). In Queensland, the *Anti-Discrimination Act 1991* (Qld) also prohibits discrimination on the basis of age.⁶⁵

QLS has previously supported the introduction of an international convention on the rights of older persons.⁶⁶ Currently, there is no binding international instrument established for the protection of older persons. While other conventions address the rights of various groups which may overlap, such as migrants, women, or people with disability, older persons require specific recognition and protections due to their unique and complex demographics and vulnerabilities. Not all older people have characteristics which would see their inclusion under these conventions. There are older Australians without any form of disability or minority protections who are being neglected, exploited or abused, and who do not have adequate recognition or protection of their human rights. Examples of the vulnerability of this group were recently highlighted by multiple witnesses during the Aged Care Royal Commission.⁶⁷

QLS and the Public Advocate consider that a convention would have the effect of improving visibility and recognition of a vulnerable group's rights, and can be used to champion the cause of creating and strengthening rights based legislation. Additionally, there is evidence demonstrating that existing international instruments do not comprehensively protect older persons, leaving unacceptable gaps in areas such as health, education, housing, workplace discrimination, access to justice, social security and rights of older women.⁶⁸

The Law Council of Australia has recently adopted an in-principle position in support of the development of an international convention on the rights of older persons, and considers it has an important role to play in informing Australia's own domestic legal and policy frameworks.⁶⁹

3.1.3. World Health Organisation's 2021 Report on Ageism

One underlying societal factor that influences recognition of, and responses to, the abuse of older persons is ageism. Ageism is defined as 'the stereotyping and discrimination of individuals and groups based on age' that leads to 'prejudicial attitudes, discriminatory

⁶¹ Harpur (n 59) 1036.

⁶² *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) annex 1.

⁶³ Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, Madrid, Spain, (8-12 April 2002).

⁶⁴ Linda Belardi, 'Govt rejects international convention for older people' (Ageing Agenda, 5 September 2014) <<https://www.australianageingagenda.com.au/executive/policy/govt-rejects-international-convention-for-older-people/>>.

⁶⁵ *Anti-Discrimination Act 1991* (Qld) s 7(f).

⁶⁶ Queensland Law Society, *Proposed Convention on the Rights of Older Persons* (Submission to Law Council of Australia, 10 March 2020) <<https://www.qls.com.au/getattachment/8017c39a-b7fe-479b-9525-9ef0a21e4a43/2020-4025-proposed-convention-on-the-rights-of-older-persons.pdf>>.

⁶⁷ Systemic abuses of older persons in institutional settings are discussed further in Chapter 8.

⁶⁸ Bill Mitchell, 'Towards a Convention on the Rights of Older Persons' (Speech, ADA Australia National Conference, 23-24 March 2017) <<https://social.un.org/ageing-working-group/documents/eighth/TowardsConvention.pdf>>.

⁶⁹ Law Council of Australia, *International Convention on the Rights of Older Persons* (Media Release, 9 October 2020) <<https://www.lawcouncil.asn.au/media/news/international-convention-on-the-rights-of-older-persons>>.

practices or institutional policies and practices that perpetuate negative stereotypical beliefs'.⁷⁰ Academics highlight that ageism includes 'distinct but interrelated aspects: attitudes and beliefs, behavioural discrimination and formalised policy and practices'.⁷¹ Discussions about the demography of ageing and the interests of older persons remain ageist and perpetuate negative social constructions. For example, policy statements still refer to the 'problem' or 'challenges' of ageing.⁷² Negative stereotypes and perceptions of ageing are pervasive and increasing in prevalence.⁷³ In short, ageing is often seen as undesirable and burdensome, and older persons' contributions are often undervalued. In this way, ageism can present a societal risk factor for abuse of older persons.

The WHO describes ageism as one of the major barriers to the full enjoyment by older persons of their human rights.⁷⁴ It is both a manifestation of age discrimination and an important cause of violations of the human rights of older persons in many fields. It appears in interactions between individuals, at the level of legislative and policymaking processes and in how systems "act" and how services are delivered.⁷⁵

The WHO's 2021 *Global Report on Ageism* is the most comprehensive treatment of this structural inequality since the phenomenon was first described by Robert Butler in 1969.⁷⁶ The WHO reports the impact of ageism, including its links to abuse:

Ageism has serious and far-reaching consequences for people's health, well-being and human rights. For older people, ageism is associated with a shorter lifespan, poorer physical and mental health, slower recovery from disability and cognitive decline. Ageism reduces older people's quality of life, increases their social isolation and loneliness (both of which are associated with serious health problems), restricts their ability to express their sexuality and may increase the risk of violence and abuse against older people.⁷⁷

The report identifies three key strategies to tackle ageism on a global scale: first, investment in evidence-based strategies to prevent and respond to ageism, including implementing policies and laws to prohibit age discrimination and foster the equal rights of all persons regardless of their age; second, improving data and research to gain a better understanding of ageism and how to reduce it; and third, building a movement to change the narrative around age and ageing, including encouraging governments to convene and coordinate national and local

⁷⁰ Blundell et al (n 9) 58.

⁷¹ S Malta and C Doyle, 'Butler's three constructs of ageism' (2016) 35(4) *Australian Journal of Ageing* 232, 232; T Nelson, 'The Age of Ageism' (2016) 27(1) *Journal of Social Issues* 191, cited in the Benevolent Society, *The Drivers of Ageism* (September 2017), <<https://www.benevolent.org.au/about-us/professional-resources/ageing>>, 9.

⁷² For example, Piggott refers to the "challenges of an ageing demographic": John Piggott, 'Population ageing in Australia – National policy challenges and future directions' in Hal Kendig, Peter McDonald, John Piggott (eds) *Population Ageing and Australia's Future* (ANU Press, 2016) 47, 49. The Productivity Commission also refers to the 'policy challenges presented by an ageing population': Productivity Commission, *An Ageing Australia: Preparing for the Future* (Research Paper, November 2013) 3.

⁷³ *The Drivers of Ageism*, The Benevolent Society, September 2017, <https://www.benevolent.org.au/about-us/professional-resources/ageing>, p16.

⁷⁴ The World Health Organization has also recognised both the human rights and health implications of ageism in society leading to the launch of its Global Anti-Ageism Campaign: see A Officer and V de la Fuente-Núñez, 'A global campaign to combat ageism', [2018] 96 *Bulletin of the World Health Organization* 299-300; Alana Officer et al, 'Editorial: Valuing older people: time for a global campaign to combat ageism' [2016] 94 *Bulletin of the World Health Organization* 710-710A.

⁷⁵ Office of the High Commissioner for Human Rights, United Nations, 'Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons' (Working Paper, March 2021) <<https://social.un.org/ageing-working-group/documents/eleventh/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>> 13-16.

⁷⁶ World Health Organisation, *Global report on ageism* (2021) <<https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>>.

⁷⁷ Ibid xvi. However, the report also acknowledges that 'although it is possible that ageism increases the risk of violence against older people, empirical evidence for the link between the two remains limited: 54.

multi-sector and multi-stakeholder coalitions to prevent and respond to ageism, along with campaigns that challenge ageism and age based stereotypes.⁷⁸

3.2. National Responses

Laws relating to elder abuse exist across Commonwealth, State and Territory jurisdictions.⁷⁹ The Commonwealth has the power to make laws relating to financial institutions, social security, superannuation and aged care.⁸⁰ Laws relating to guardianship and administration, powers of attorney and most criminal laws, lie with the Australian States and Territories. The House of Representatives Standing Committee on Legal and Constitutional Affairs has described the elder abuse legal landscape in the following way:

Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.⁸¹

Traditionally, it has been the responsibility of Australian States and Territories to provide the frameworks in which to coordinate responses to abuse of older persons.⁸² More recently, however, national attention on the issue has driven a number of responses at the Federal Government level.

3.2.1. Inquiry into Protecting the Rights of Older Australians from Abuse

In 2016, the ALRC was tasked with undertaking an *Inquiry into Protecting the Rights of Older Australians from Abuse*. The inquiry considered existing Commonwealth laws and frameworks which seek to safeguard and protect older persons from misuse or abuse, and explore the interaction and relationship of these laws with state and territory laws.⁸³ The scope of the inquiry was broad, covering aged care, enduring appointments, family agreements, superannuation, wills, banking, guardianship and administration, health and the National Disability Insurance Scheme, social security, criminal justice responses and safeguarding adults at risk.

⁷⁸ Ibid 154-160.

⁷⁹ Rosalind F Croucher AM and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' (2018) 18 *Macquarie Law Journal* 5, 10.

⁸⁰ The Commonwealth's power in relation to financial institutions, social security and superannuation arise from the banking, social welfare and superannuation powers in the *Australian Constitution*: s 51(ii), (xii), (xiii), (xxiiiA). While the Commonwealth has no power to legislate in relation to the welfare of adults generally, its powers to make laws relating to aged care arise from its legislative power to make laws regulating corporations providing aged care, funding programs administered by States and Territories, and its powers relating to age pensions, carer pensions and other welfare regimes: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 102.

⁸¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, 20 September 2007) [1.7]. Although, note that the Australian Capital Territory has recently introduced discrete criminal offences relating to abuse of older persons.

⁸² Chesterman, 'The Abuse of Older Australians' (n 41) 381.

⁸³ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report 131, May 2017) <https://www.alrc.gov.au/wp-content/uploads/2019/08/elder_abuse_131_final_report_31_may_2017.pdf> 5 ('ALRC Final Report').

The final ALRC Report made 43 recommendations to combat elder abuse in Australia. Importantly, the ALRC framed its recommendations within a rights-based framework based on two key principles: dignity and autonomy; and protection and safeguarding.⁸⁴ This framework emphasises that elder abuse should be responded to in such a way that prioritises an older person's autonomy and independence, their fundamental right to make decisions that affect their lives, and their right to enjoy a self-determined life according to their personal circumstances.⁸⁵ The ALRC recognises that '[a]utonomy and protection are sometimes seen as opposing considerations that need to be balanced or traded off against each other, particularly when issues of whether and how to intervene to protect a person from abuse arise. However, protecting older people from abuse can be seen to support and enable their ability to live autonomous and dignified lives.'⁸⁶

The ALRC Report's recommendations are discussed further in various parts of this paper.

3.2.2. National Plan to Respond to the Abuse of Older Australians (the National Plan)

A capstone recommendation of the ALRC Report was the development of a national plan to combat elder abuse.⁸⁷ The ALRC Report focused on recommendations for legal change and development, but highlighted that a national planning process provides the Australian Government with the opportunity to develop strategies to combat elder abuse beyond legal reforms, including: national awareness and community education campaigns; training for people working with older people; elder abuse helplines; and future research agendas.⁸⁸

The Council of Attorneys-General subsequently released a National Plan in March 2019 to provide a national framework for action to respond to elder abuse.⁸⁹ Developed in consultation with State and Territory governments, the National Plan identifies five priority areas. They include:

- increasing government understanding of abuse of older persons, so that responses can be targeted appropriately;
- building community awareness to create the momentum for change;
- continuing to strengthen service responses;
- helping people better plan for their future; and,
- strengthening safeguards for vulnerable older people.

The National Plan also recognises that each State and Territory responds to the abuse of older persons differently because each jurisdiction has its own particular laws, institutions and frameworks.

3.2.3. National Service Responses

While most of the relevant laws and service responses exist, or are organised, at the individual State and Territory level, some peak advocacy bodies do have an increasingly

⁸⁴ Ibid 50 [2.83].

⁸⁵ Ibid 50-51.

⁸⁶ Ibid 51-52 [2.92].

⁸⁷ Ibid 59 [3.1].

⁸⁸ Ibid [3.2].

⁸⁹ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (19 March 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>>.

strong national presence,⁹⁰ including: Elder Abuse Action Australia ('EAAA'); Older Persons Advocacy Network ('OPAN'); and, Council on the Ageing ('COTA').

EAAA is the national voice for action to eliminate elder abuse through systemic advocacy and policy development, best practice and research, and education and capacity building. EAAA was formed after participants at national elder abuse conferences advocated the need for a national and collegiate approach to working on elder abuse. EAAA includes co-founders from Community Legal Centres Queensland ('CLCQ') and provides a national focus on violence, abuse and neglect to give a national voice to ending elder abuse.⁹¹ EAAA's website, 'Compass – Guiding Action of Elder Abuse' provides a national knowledge hub including a resources and support directory.⁹²

OPAN is a national network comprised of nine State and Territory organisations that deliver advocacy, information and education services to older people in metropolitan, regional, rural and remote Australia. OPAN is funded by the Australian Government to deliver the National Aged Care Advocacy Program, which supports consumers and their families and representatives to access and interact with Commonwealth funded aged care services.⁹³

COTA (previously known as Council on the Ageing) has a number of State and Territory entities, whose role is to promote, improve and protect the wellbeing of older people in Australia as citizens and consumers.⁹⁴ COTA receives Australian Government funding through the Health System Capacity Development Fund and is also funded by levies on each State and Territory COTA affiliate organisations. COTA is an advocacy organisation which lobbies for action at a national level on issues affecting older persons. State and Territory affiliates provide assistance for specific issues.

3.2.4. Royal Commission into Aged Care Quality and Safety

The Royal Commission into Aged Care Quality and Safety ('Aged Care Royal Commission') was established on 8 October 2018 after reports of neglect and poor conditions in residential aged care facilities. The Aged Care Royal Commission's final report, *Care, Dignity and Respect* was released on 26 February 2021; it highlighted the prevalence of abuse and neglect in residential aged care settings and made 148 recommendations to reform Australia's aged care system.⁹⁵ The four main findings of the report were: first, Australia needs a rights-based *Aged Care Act* to underpin the aged care system as opposed to the current ration-based consumer style framework; second, the aged care system needs stronger governance, including regulation of the quality of care and an independent price setting mechanism; third, the system must improve aged care workforce conditions and capability; and fourth, a proposed new funding model is required to secure Australia's aged care system into the future. The recommendations of the Aged Care Royal Commission are discussed further in Chapter 8 of this paper.

⁹⁰ Chesterman, 'The Abuse of Older Australians' (n 41) 382.

⁹¹ <https://eaaa.org.au/>

⁹² <https://compass.info/>

⁹³ <https://opan.org.au/>

⁹⁴ <https://www.cota.org.au/>

⁹⁵ Royal Commission into Aged Care Quality and Safety, *Care, Dignity and Respect* (Final Report, 26 February 2021).

3.3. Queensland Responses

Responses to the abuse of older persons at the State level occur across government and non-government organisations.

3.3.1. Not Now, Not Ever

The Special Taskforce on Domestic and Family Violence in Queensland was established in 2014 to examine Queensland's DFV support systems and make recommendations to the Queensland Government on how the system could be improved and how future incidents of DFV could be prevented.⁹⁶ In its report, 'Not Now, Not Ever', the taskforce made recommendations to the Queensland Government in relation to elder abuse, including that it commission a specific review into the prevalence and characteristics of elder abuse in Queensland to inform the development of integrated responses and a communications strategy for older victims of DFV.⁹⁷

In response to this recommendation, the Queensland Government commissioned the '*Review into the Prevalence and Characteristics of Elder Abuse in Queensland*' by Curtin University,⁹⁸ which provides a snapshot of the current context and evidence base to better understand the prevalence and characteristics of elder abuse in Queensland (discussed in Chapter 2 above). Additionally, the Queensland Government Statistician's *Elder Abuse* report includes an examination of existing data and data collections held by Queensland Government agencies and funded services.

The Queensland Government's response to the Curtin University report outlines a number of actions that the Government is undertaking on issues such as: definitional complexity; legislation; education, training and information; characteristics and risk factors of elder abuse; prevalence and data collection issues; and, service and system interventions and responses.⁹⁹ For example, the Queensland Government's '*Queensland: An Age-Friendly Community Action Plan*' incorporated feedback received from stakeholders to identify ways that Queensland could be more age-friendly.¹⁰⁰ The action plan committed the Government to expanding the Elder Abuse Prevention Unit's ('EAPU') Elder Abuse Helpline and Seniors Legal and Support Services ('SLASS') (discussed below).¹⁰¹

3.3.2. Human Rights Act 2019 (Qld)

Depending on the circumstances in which it occurs, abuse of older persons can also constitute a violation of fundamental human rights. Everyone is entitled to enjoy their human rights without distinction or discrimination of any kind, including older persons.

A significant development in the legal landscape since the release of this paper's first edition is the enactment of the *Human Rights Act 2019* (Qld) ('*HR Act*'). The *HR Act* places obligations on public entities to act and make decisions compatibly with human rights, and to

⁹⁶ Department of Justice and Attorney-General, *Special Taskforce* (Web page) <<https://www.justice.qld.gov.au/initiatives/end-domestic-family-violence/about/special-taskforce>>.

⁹⁷ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever* (Final Report, 28 February 2015) 138.

⁹⁸ Blundell et al (n 9).

⁹⁹ Department of Communities, Disability Services and Seniors, *Queensland Government update* (September 2018) <<https://www.publications.qld.gov.au/dataset/end-domestic-and-family-violence-our-progress/resource/a24f9453-af80-45ce-9b41-de6c29df20de>>.

¹⁰⁰ Queensland Government, *Queensland: an age-friendly community* (Action Plan, June 2016) <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/seniors/age-friendly-community/qaqc-action-plan.pdf>>.

¹⁰¹ Ibid 23.

give proper consideration to human rights relevant to its decisions.¹⁰² It also requires laws to be interpreted in a way that is compatible with human rights,¹⁰³ and for new laws to be scrutinised for their compatibility with human rights.¹⁰⁴ The requirement to interpret laws compatibly with human rights may impact the way laws that limit the rights of older persons are interpreted, for example in relation to Queensland's guardianship and administration system. However, human rights are not absolute and can be limited if the limitation is provided under law, and is legitimate, necessary, and proportionate according to the criteria set out in the *HR Act*.¹⁰⁵

Conduct constituting abuse of older persons, which can include physical violence, neglect and emotional, psychological, social, sexual and financial exploitation, may breach one or more the rights protected by the *HR Act*, including:

- the right to equality;¹⁰⁶
- the right to life;¹⁰⁷
- the right to protection from torture and cruel, inhuman or degrading treatment;¹⁰⁸
- the right to protection of family and privacy;¹⁰⁹
- cultural rights;¹¹⁰ and,
- the right to health services.¹¹¹

The *HR Act* protects against interference with these rights by public entities, but also might impose positive obligations on public entities to protect those rights. The *HR Act* distinguishes between core public entities and functional public entities. Core public entities are Queensland Government entities that have obligations under the *HR Act* in all actions and decisions. Core public entities include, for example: the Public Advocate; Public Guardian; Public Trustee; Government owned hospital and health services; along with, Government ministers, departments and local councils.

Other organisations that provide services to older persons may be functional public entities. Functional public entities are only considered public entities when they are performing a function of a public nature on behalf of the State Government.¹¹² Functional public entities include non-government organisations, private companies or government owned corporations funded by the Queensland government to provide public services.¹¹³ The *HR Act* specifically provides that National Disability Insurance Scheme (NDIS) service providers, when performing functions of a public nature in Queensland, are public entities.¹¹⁴ Depending on how they are funded, residential aged care facilities in Queensland may be core or functional public entities.

A person may make a complaint to the Queensland Human Rights Commission ('QHRC') if they believe a public entity has breached their obligations under the *HR Act*. The QHRC uses conciliation processes to try and resolve the complaint.

¹⁰² *Human Rights Act 2019* (Qld) s 58.

¹⁰³ *Ibid* s 48.

¹⁰⁴ *Ibid* Pt 3 Div 1.

¹⁰⁵ *Ibid* s 13. However, the onus is generally on the entity limiting rights to justify that limitation.

¹⁰⁶ *Ibid* s 15.

¹⁰⁷ *Ibid* s 16.

¹⁰⁸ *Ibid* s 17.

¹⁰⁹ *Ibid* s 26.

¹¹⁰ *Ibid* ss 27-28.

¹¹¹ *Ibid* s 37.

¹¹² *Ibid* s 10.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* s 9(5).

A person may also ‘piggy-back’ a breach of human rights allegation on to existing court or tribunal proceedings. For example, a person alleging age discrimination against a public entity under the *Anti-Discrimination Act 1991* (Qld) in a proceeding in the Queensland Civil and Administrative Tribunal (‘QCAT’) can also allege a breach of one or more of their human rights. In certain cases, a court or tribunal may have to apply human rights in making a decision, and in all cases must interpret legislation compatibly with human rights.

3.3.3. Statutory Responses

There are a number of statutory agencies which have the power under legislation to protect older persons who are victims of abuse, violence or neglect. The activities of Queensland’s various statutory agencies include: investigation; prosecution; determination of capacity; appointment of substitute decision-makers; and, substitute decision-making services.

3.3.3.1. Queensland Human Rights Commission

The QHRC (formerly the Anti-Discrimination Commission Queensland) is an independent statutory authority established by the *Anti-Discrimination Act 1991* (Qld), which promotes the understanding, acceptance and public discussion of human rights; provides a free State-wide telephone service; information in print, online and in other formats; training about discrimination and human rights; and a free and impartial complaint resolution service.¹¹⁵ It also uses conciliation processes to resolve complaints made under the *Anti-Discrimination Act 1991* (Qld) and the *HR Act*.

3.3.3.2. Office of the Public Guardian

The Office of the Public Guardian¹¹⁶ (‘OPG’) is an independent statutory office established to protect the rights, interests and well-being of adults with impaired decision-making capacity.¹¹⁷ The *Public Guardian Act 2014* regulates the OPG’s legislative functions and powers, and the *Powers of Attorney Act 1998* regulates how adults can appoint substitute decision-makers.

The OPG’s functions include:

- protecting adults with impaired decision-making capacity from neglect, exploitation or abuse;
- providing a community visitor program to protect the rights and interests of adults residing at a ‘visitable site’;
- investigating complaints and allegations against attorneys, guardians or administrators or others acting or purporting to act under a power of attorney, AHD or tribunal order;
- mediating and conciliating between attorneys, guardians or administrators and others to resolve an issue;
- acting as attorney for a personal matter if appointed by instrument or QCAT;
- acting as guardian (of last resort, making decisions for a person in relation to personal matters) if appointed by QCAT;
- approving the use of a restrictive practice in relation to a person;
- seeking help for a person with impaired decision-making capacity; and,

¹¹⁵ <https://www.qhrc.qld.gov.au/>

¹¹⁶ <https://www.publicguardian.qld.gov.au/>

¹¹⁷ *Public Guardian Act 2014* s 10.

- providing community education and undertaking research into the operation of the guardianship and administration system.¹¹⁸

In 2019-20, the OPG had 1,115 new people receive an appointment of the OPG as their guardian for a matter/s, with a total of 3,590 receiving decision-making support from OPG.¹¹⁹ Appointments for guardianship are made by a QCAT order following either an urgent or interim application. Importantly, appointments of the OPG as a guardian for a matter/s are considered last resort appointments.¹²⁰

The OPG also has the power to investigate claims of abuse, exploitation, neglect, and decision-making arrangements for adults with impaired capacity. In 2020, the OPG saw an increase in the need for investigations into abuse, exploitation, and neglect of adults with impaired decision-making capacity. During 2019-20, 294 investigations were started and 66% of these were in relation to adults aged 65 or older.¹²¹

The OPG can suspend an attorney's power if it suspects on reasonable grounds that the attorney is not competent;¹²² and act as the person's attorney for personal matters during the suspension.¹²³ The OPG can also take action to protect property, including claiming and recovering possession of the property or money of the adult when it is being wrongfully held, detained or converted.¹²⁴

3.3.3.3. *Public Trustee of Queensland*

The Public Trustee of Queensland ('PTQ')¹²⁵ is established under the *Public Trustee Act 1978* (Qld) and provides a range of financial services to the Queensland public, including financial administration and estate planning services. The PTQ provides independent services as administrator or attorney and can assist in managing financial matters for an individual, ensuring correct income is received, accounts are paid and a budget is maintained. The PTQ can also be appointed as a financial administrator for a person with impaired decision-making capacity by QCAT, as a substitute decision-maker for financial matters. In 2019-20 the PTQ had 10,071 financial management customers, comprised of: 9,316 adults with impaired decision-making capacity, under QCAT financial administration appointments; 253 customers for which they act as a financial attorney; and 502 prisoner estates.

In performing its financial administration role, the PTQ is required to act in its client's interests and safeguard their assets. This can include ensuring clients receive all pensions and other allowances to which they are entitled, securing their entitlements as beneficiaries, paying their expenses, and maintaining their property and assets. The PTQ charges fees for its administration services, however, some fee rebates are available for eligible clients.

3.3.3.4. *The Public Advocate*

The Public Advocate is a statutory position established under Chapter 9 of the *Guardianship and Administration Act 2000* (Qld) to undertake systemic advocacy to promote and protect the rights and interests of adults with impaired decision-making capacity. The Public Advocate advocates for changes to policies, programs, services and legislation across government and

¹¹⁸ Ibid s 12(1).

¹¹⁹ Office of the Public Guardian, *2019-20 Annual Report* (Report, 23 October 2020) 5.

¹²⁰ Ibid 16.

¹²¹ Ibid 18.

¹²² Ibid s 34.

¹²³ Ibid s 35(2).

¹²⁴ Ibid s 33.

¹²⁵ <https://www.pt.qld.gov.au/>

private sectors.¹²⁶ The functions of the Public Advocate include advocating to protect vulnerable adults from neglect, exploitation or abuse and promoting and reviewing the provision of services and facilities to them.¹²⁷

3.3.3.5. *Queensland Civil and Administrative Tribunal*

Established under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), QCAT's powers include: determining decision-making capacity; issuing and revoking orders appointing guardians and administrators; making orders for compensation; hearing applications and giving directions relating to enduring documents; and, making decisions about health care and special health care matters.¹²⁸ Before appointing a decision-maker for a person, QCAT must be satisfied, among other things, that there is a need for a decision to be made for the person or there could be an unreasonable risk to the person's health, welfare or property and without an appointment the person's need or interests will not be adequately met or protected.¹²⁹

The Supreme Court also has the power to appoint a guardian or administrator for a person who is found to have impaired decision-making capacity, and can make a formal declaration or finding of capacity for a person.¹³⁰

3.3.3.6. *Queensland Police Service*

The mandate of the Queensland Police Service ('QPS') is broader than the above services, and may be the first point of contact for older persons, or representatives of older persons, who are experiencing violence, abuse or neglect. Many forms of elder abuse constitute criminal offences, as outlined in Chapter 6. QPS can act to protect and support victims of elder abuse, including through applying for a protection order under the *Domestic and Family Violence Protection Act 2012* (Qld) ('Protection Orders'), investigating criminal offences, and referring the victim and the offender to support services.

The QPS' Community Safety and Crime Prevention Branch has introduced new policies and task forces, including the Seniors Task Force, and provides information to all QPS employees on best-practice approaches to communicating with older people, particularly when they are victims of crime. QPS has also recently developed an Elder Abuse Aide Memoir for police officers attending incidents. The QPS is working with community advocates to develop a "community policing" response to one of the common situations of elder abuse that police face, being an older person wanting to peacefully remove an adult relative living with them without wanting to apply for a Protection Order. The Queensland Police Referrals Service (Redbourne) is tasked with referring older persons experiencing abuse to community services.

The QPS elder abuse brochure also provides information on the signs that indicate elder abuse is taking place, and what to do if a person experiences or witnesses elder abuse.¹³¹

3.3.4. **Support Services**

There is no specialist investigative body that exists for older Queenslanders who have decision-making capacity. The Queensland Government has made a long-term investment in community support services which respond to allegations of elder abuse. These services

¹²⁶ <https://www.justice.qld.gov.au/public-advocate>.

¹²⁷ *Guardianship and Administration Act 2000* (Qld) s 209.

¹²⁸ 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 s 83 (Powers); Schedule 2 Types of matters.

¹²⁹ *Guardianship and Administration Act 2000* s 12.

¹³⁰ *Ibid* s 240.

¹³¹ Queensland Police Service, *Keeping Older People Safe: Understanding, recognising and preventing elder abuse* (Brochure, 2019) <<https://www.police.qld.gov.au/sites/default/files/2019-08/QPS%20Elder%20Abuse%20brochure.pdf>>.

work with the older person to address the abuse in ways which promote the older person as the rights holder who determines what supports they need to be safe from abuse. These support services include legal advice and assistance, telephone support lines, and assistance with creating safety plans.

3.3.4.1. Elder Abuse Prevention Unit

The Elder Abuse Prevention Unit ('EAPU') is a Queensland-wide program provided by UnitingCare Community and funded by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATSIP). The EAPU:

- manages the Elder Abuse Helpline, which provides free confidential advice, support and referral to anyone experience abuse, suspecting or witnessing abuse of an older person;
- provides training for service providers and tertiary students;
- raises awareness and runs information sessions for community groups to raise awareness of elder abuse and promote preventative strategies;
- runs a Peer Support Network for rural and remote workers; and
- provides network participation and support for service providers in communities and multicultural groups seeking to address elder abuse.¹³²

3.3.4.2. Seniors Legal and Support Services

There are five Seniors Legal and Support Services ('SLASS') located in community legal centres in Brisbane, Hervey Bay, Ipswich-Toowoomba, Townsville and Cairns. Lawyers and social workers in these services work collaboratively with older people to address situations of abuse. Legal advice and representation is provided to persons who have legal capacity to instruct a lawyer. Other legal services include providing advice about EPOAs, assistance with obtaining Protection Orders, help negotiating retirement village contracts, and advice on the recovery of assets. Social work supports and advocacy services include counselling and developing safety plans which aim to reduce the risk of abuse. Services provide a variety of service delivery options, including centre-based appointments, telephone support, house visits or via a rural/remote outreach service.

3.3.4.3. Elder Abuse Prevention and Support Service

There are six Elder Abuse Prevention and Support Services operated by Relationships Australia at the Gold Coast, Sunshine Coast, Mackay, Gladstone, Bundaberg and Rockhampton. These services offer: case management services; development of safety plans; referral to legal practitioners; referral to counselling or mediation; referral to other community services; and, community education and information regarding elder abuse prevention strategies.

3.3.5. Advocacy and Information Services

There are also a number of advocacy and information services focused on advancing the rights and interests of older persons throughout Queensland. Advocacy services can assist older persons in addressing and exercising their rights, resolve conflicts with service providers, and support other people through formal hearings, such as QCAT proceedings.¹³³ Information services can provide information about abuse of older persons, including details of

¹³² UnitingCare Community, *Elder Abuse Prevention Unit* (Brochure) <<https://www.police.qld.gov.au/sites/default/files/2019-08/EAPU%20Brochure.pdf>> ('Elder Abuse Prevention Unit').

¹³³ Blundell et al (n 9) 71.

their rights, and can also educate service providers about elder abuse and provide broader community education and training materials.¹³⁴

For example, ADA Australia (and its new community legal centre ADA Law) advocate for older Queenslanders, regardless of their decision-making capacity, experiencing abuse in the context of aged care; and QCAT guardianship and administration applications. Caxton Legal Centre also provides the Queensland Retirement Villages and Parks Advice Service for anyone entering, residing in, or exiting a village or park. Anyone can make a referral to these free services.

Other services include the Australian Pensioners' and Superannuants' League, the Council on the Ageing Queensland, and Older People Speak Out. A range of other agencies do not specifically focus on the abuse of older persons but assist or support people experiencing abuse, and provide legal, financial, counselling, advocacy, complaints, health and aged care services, as well as culturally specific services for Aboriginal and Torres Strait Islander Peoples and people from culturally and linguistically diverse backgrounds.¹³⁵

3.3.6. Health Justice Partnership

As part of the National Plan, Queensland receives funding for Caxton Legal Centre's Health Justice Partnership with Metro South Health.¹³⁶ This program embeds two lawyers and a social worker in four hospitals in the South East Queensland region to educate health professionals and respond when they make a referral of an inpatient or outpatient who is at risk of or experiencing elder abuse or who requires support with decision-making and advocacy in the context of guardianship and administration applications. Health professionals and aged care workers are often the first noticers of abuse. Under this partnership, they are trained to notice the red flags of elder abuse and work with elder abuse services to put supports in place to reduce the risk of ongoing abuse.

3.3.7. The Private Legal Profession

The private legal profession is typically involved in preventing or responding to financial abuse of older Queenslanders, and assisting them with advance care planning documents. They advise on and prepare family agreements that document financial and co-living arrangements. They provide remedial advice, and negotiate and litigate when family arrangements have resulted in financial detriment to the older person. Additionally, lawyers specialising in elder law provide assistance to older persons navigating the complex guardianship, retirement and aged care sectors.

¹³⁴ Ibid.

¹³⁵ Ibid 73.

¹³⁶ Currently being expanded to Metro North Health and to regional and remote areas.

4. Victims and Perpetrators of Abuse

This chapter sets out the characteristics of victims and perpetrators of abuse, and explores the relationships between them, as well as factors that increase a person's risk of abuse.

4.1. Victims of Abuse

Individual factors or life circumstances can increase an older person's vulnerability and/or influence their risk of experiencing violence, abuse or neglect.¹³⁷ The ALRC Final Report identifies that '[t]he nature and dynamics of abuse experienced by older people may be influenced by their being part of one or more particular communities.'¹³⁸

4.1.1. Aboriginal and Torres Strait Islander Persons

There is limited research available in relation to the abuse of older Aboriginal and/or Torres Strait Islander people.¹³⁹ However, there are some recognised differences between Indigenous and non-Indigenous understandings and experiences of abuse of older persons.¹⁴⁰ Firstly, Aboriginal and Torres Strait Islander people generally have a shorter life expectancy than non-Indigenous Australians.¹⁴¹ In light of this, older Aboriginal and Torres Strait Islander peoples are typically defined as 45-50 years and older. Secondly, there are differences in terminology relating to the term "elder". As discussed earlier, the term "elder" in some Aboriginal and Torres Strait Islander communities is a title reserved for community leaders. Additionally, differences in cultural understandings and relationships of trust, obligations to family and community members, and family structures mean that risks associated with the abuse of older adults in some Aboriginal and Torres Strait Islander contexts may be different from non-Indigenous contexts.

A research report completed by the AIFS concluded that 'substantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially among different groups in different circumstances, given the diversity among Aboriginal and Torres Strait Islander communities'.¹⁴² A Western Australian study has suggested that most concerns about abuse in Aboriginal and Torres Strait Islander communities relate to taking advantage of an older person's financial resources.¹⁴³ However, cultural norms relating to kinship structures, as well as sharing, reciprocity and expectations around communal property may complicate the way in which abuse is experienced and understood in those communities.¹⁴⁴

¹³⁷ Elder Abuse Prevention Unit, *Year in Review 2019-20* (Report, 2020) 17.

¹³⁸ ALRC Final Report (n 83) 45 [2.64].

¹³⁹ Adam Dean, 'Elder abuse: Key issues and emerging evidence' (Child Family Community Australia, Paper No 51, 2019) <https://aifs.gov.au/cfca/sites/default/files/publication-documents/51_elder_abuse_0.pdf> 16.

¹⁴⁰ Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities* (Report, 2005) <https://www.publicadvocate.wa.gov.au/files/Mistreatment_older_aboriginal.pdf>.

¹⁴¹ For Aboriginal and Torres Strait Islander people born between 2015-17, life expectancies were approximately eight or nine years lower than non-Indigenous Australians: 71.6 years for Indigenous males and 75.6 years for Indigenous females: Department of the Prime Minister and Cabinet, *Closing the Gap* (Report, 2019).

¹⁴² Rae Kaspiw, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 12 ('Understanding Issues').

¹⁴³ Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities* (Report, 2005) <https://www.publicadvocate.wa.gov.au/files/Mistreatment_older_aboriginal.pdf>.

¹⁴⁴ Ibid 25.

The Aged Care Royal Commission also commented on the experience of Aboriginal and Torres Strait Islander people in the aged care system. It was concerned that, despite a lower entry age, Aboriginal and Torres Strait Islander people 'do not access aged care at a rate commensurate with their level of need' and that a 'combination of factors creates barriers to Aboriginal and Torres Strait Islander people's access to the aged care system. These arise from social and economic disadvantage, a lack of culturally safe care, and the ongoing impacts of colonisation and prolonged discrimination. Access issues are further compounded by Aboriginal and Torres Strait Islander people's additional vulnerability arising from higher rates of disability, comorbidities, homelessness and dementia.'¹⁴⁵

The Aged Care Royal Commission recommended that Aboriginal and Torres Strait Islander people who require care are, and should continue to be, eligible for aged care from the age of 50 years because they experience earlier onset of ageing-related conditions and disability compared to the rest of the population.¹⁴⁶ It also highlighted that the current aged care system does not ensure culturally safe care for Aboriginal and Torres Strait Islander people where, unless circumstances change, the system will be unable to meet the growth in demand that will accompany the increase in the eligible population.¹⁴⁷

4.1.2. Culturally and Linguistically Diverse Communities

Australia's older population reflects significant cultural diversity. In 2016, 37% of people aged 65 and over were born overseas.¹⁴⁸ 20% of people aged 65 and over were born in a non-English speaking country.¹⁴⁹

Various factors can increase vulnerability to abuse for older persons belonging to culturally and linguistically diverse (CALD) communities. These factors include a lack of awareness of services, language barriers for those whose primary language is not English, increased social dependence on family members, social isolation, unwillingness to disclose abuse because of stigma, and differing cross-generational expectations of care.¹⁵⁰ Some studies suggest that the prevalence of elder abuse in CALD communities is similar or higher than whole-population estimates.¹⁵¹ Cultural expectations relating to family responsibilities may also complicate the way in which abuse is experienced and responded to in CALD communities.¹⁵²

The Aged Care Royal Commission highlighted that the existing aged care system is not well equipped to provide care that appropriately acknowledges, respects and values people's diverse needs. Staff are often poorly trained in culturally safe practices, with little understanding of the additional needs of people with diverse backgrounds.¹⁵³ In this context, the Aged Care Royal Commission highlighted the importance of volunteers and free interpreter services within the aged care system providing the same language as older persons from CALD backgrounds.¹⁵⁴ It also recommended employees in the aged care

¹⁴⁵ Royal Commission into Aged Care Quality and Safety (n 95) 67.

¹⁴⁶ Ibid 108.

¹⁴⁷ Ibid 108.

¹⁴⁸ ABS, 2071.0 – *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (23 October 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Ageing%20Population~14>>

¹⁴⁹ Ibid.

¹⁵⁰ Kaspiew, Carson and Rhoades, 'Understanding Issues' (n 142) 12.

¹⁵¹ Office of the Public Advocate, Western Australia, *Care and respect: Project to research elder abuse in culturally and linguistically diverse communities* (Report, 2006) <https://www.publicadvocate.wa.gov.au/files/Report_on_Elder_Abuse_in_CALD_communities.pdf>.

¹⁵² ALRC Final Report (n 83) 45 2.66].

¹⁵³ Royal Commission into Aged Care Quality and Safety (n 95) vol 1, 67.

¹⁵⁴ Ibid 110.

system undertake regular training about cultural safety and trauma-informed service delivery.¹⁵⁵

4.1.3. Persons with Disability

In 2015, it was estimated that people over 65 years comprised 15% of the population but experienced 33% of the overall national impact of ill health.¹⁵⁶ This is unsurprising given that older persons generally experience higher rates of chronic illness. However, the presence of chronic health conditions does not equate to disability, with many conditions well managed by people as they age.

The rate of disability increases with age making it more complex to understand the intersections between violence, disability and elder abuse.¹⁵⁷ Due to small sample sizes, the data on older people with disability tends to be unreliable because it cannot necessarily be said to be representative of the wider population of older persons living with disability, particularly given the heterogeneity of disability. Nonetheless, disability is more common among older people. More than 80% of people aged 85 years or over have some disability. Almost one third of people aged 75 years or over have 'severe or profound core activity limitations.'¹⁵⁸ The ALRC has identified that persons with cognitive impairment or other forms of disability are 'more vulnerable to experiencing elder abuse. Where a person has a disability, this will often be correlated with other risk factors: the need for support and assistance, as well as an increased likelihood of social isolation and lower socioeconomic resources.'¹⁵⁹ One study shows that older women with a disability, as compared to older women without a disability, are more likely to experience physical or sexual violence, intimate partner abuse, emotional abuse and/or stalking.¹⁶⁰

4.1.4. Women

Research indicates that women experience higher levels of elder abuse than men.¹⁶¹ The EAPU reported in 2019-20 that there were more than twice as many female victims as male victims.¹⁶² Older women are subject to both gender inequality and ageism. Inequalities faced by older women include financial inequalities, which contribute to financial insecurity for women and in turn exacerbate their experience of violence.

In addition to intergenerational abuse, older women can experience intimate partner violence which may or may not be a continuation of a long-term abusive relationship. Social structures around gender roles may affect whether an older woman who is a victim of intimate partner violence feels able to report violence. Older women may not report abuse for a variety of reasons, including financial dependence on the abuser, a lack of alternative accommodation options, fear of retaliation, or feelings of shame.

Sexual abuse of older women also often goes underreported, partly due to prevailing ageist and sexist attitudes. There is limited understanding of sexual abuse against older women,

¹⁵⁵ Ibid.

¹⁵⁶ Australian Institute of Health and Welfare, *Australia's health 2020 data insights* (2020) 258.

¹⁵⁷ Centre of Research Excellence in Disability and Health, *Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia*, 2021, 16.

¹⁵⁸ ALRC Final Report (n 83) 18 [1.4].

¹⁵⁹ ALRC Final Report (n 83) 47 [2.73].

¹⁶⁰ Centre of Research Excellence in Disability and Health (n 157) 34.

¹⁶¹ Seniors Rights Victoria, *Elder Abuse, Gender and Sexuality*, <<https://seniorsrights.org.au/wp-content/uploads/2018/05/Elder-Abuse-Gender-and-Sexuality.pdf>>.

¹⁶² Elder Abuse Prevention Unit (n 132) 18.

which can lead to disbelief when it is reported.¹⁶³ The Aged Care Royal Commission's Final Report noted that the estimated number of alleged incidents of unlawful sexual contact in 2018 to 2019 could be as high as 2520, or almost 50 per week.¹⁶⁴

4.1.5. LGBTI Communities

Older LGBTI+ people experience unique forms of discrimination, including abuse related to their sexual orientation and gender identity. Older LGBTI+ people face a number of barriers to disclosing or reporting abuse to others and service providers, including fear of discrimination and distrust of the health, care and justice systems, which may be based on past and ongoing experiences of discrimination.¹⁶⁵

Additionally, older LGBTI+ people may not enter residential aged-care facilities because 'they fear encountering hostility and being pushed back "into the closet"'.¹⁶⁶ The Aged Care Royal Commission identified a lack of inclusive practices in aged care. The Commission noted the importance of LGBTI+ volunteers for people from LGBTI+ communities receiving aged care, to assist in reducing experiences of isolation and maintaining their connection to LGBTI+ identity and communities.¹⁶⁷ Despite these challenges, there have been notable improvements in the aged care space for LGBTI+ communities. For example, Australia's largest faith-based aged care provider, Uniting, became the first large operator to receive "Rainbow Tick accreditation" from Gay and Lesbian Health Victoria, which recognises safe and inclusive service delivery for LGBTI+ people, for its policies.¹⁶⁸ The first Queensland LGBTI+ aged care facility opened in 2019 on the Gold Coast, and aims to be an inclusive space for those 'who have been impacted by years of discrimination'.¹⁶⁹

Ultimately, the experiences of older LGBTI+ people are poorly understood. Further research is required to foster a greater understanding of the types of abuse experienced by LGBTI+ older people, and their experiences interacting with service providers in this space.

4.1.6. Carers

Approximately 475,000 Queensland carers provide unpaid (informal) care for family or friends.¹⁷⁰ Older persons (65 years +) make up 35% of all carers,¹⁷¹ and typically provide informal care for parents, partners, adult children, grandchildren and other family members. More than 75,000 Queensland carers live outside of Queensland's major cities.¹⁷² Most studies focus on abuse experienced by individuals who are being cared for, and little research has examined the experience of abuse on the mental health and well-being of carers that have experienced abuse.¹⁷³ One study that surveyed 305 carers in Queensland highlighted

¹⁶³ Compass, *Sexual Abuse of Older Women: A Compass Guide* (Guide, June 2020) <https://compass.info/sites/default/files/2020-12/Compass_guides_sexualabuseofolderwomen_2.pdf> 9.

¹⁶⁴ Royal Commission into Aged Care Quality and Safety (n 95) vol 1, 140.

¹⁶⁵ ALRC Final Report (n 83) 46 [2.71-2].

¹⁶⁶ Gloria M. Gutman, Claire Robson, and Jennifer Marchbank, 'Elder Abuse in the LGBT Community' in Amanda Phelan (ed), *Advances in Elder Abuse Research* (Springer, 200) 149, 153.

¹⁶⁷ Royal Commission into Aged Care Quality and Safety (n 95) vol 1, 105.

¹⁶⁸ Norman Hermant, 'Gay people face "horrible" ordeal of coming out again in aged care, former High Court judge says' (ABC News, online, 3 March 2016) <<https://www.abc.net.au/news/2016-03-03/lgbt-people-face-coming-out-all-over-again-in-aged-care/7217260>>.

¹⁶⁹ Gemma Sapwell, 'LGBTI aged care home opens on Gold Coast, first in Queensland' (ABC News, online, 13 November 2019) <<https://www.abc.net.au/news/2019-11-13/lgbt-aged-care-home-opens-on-gold-coast-first-in-queensland/11700240>>.

¹⁷⁰ Carers Qld Quality of Life Audit 2019 <<https://carersqld.com.au/wp-content/uploads/Quality-of-Life-Audit-2019.pdf>>

¹⁷¹ Australian Bureau of Statistics Survey of Disability, Ageing and Carers (Web Page, 2018) <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/2018>>

¹⁷² Ibid.

¹⁷³ Patricia Obst, Kate Murray, Sarah Walbank, Rachel Kelly, Danielle Brazel, 'Experiences of abuse in Australian family carers and predictors of mental health and well-being' [2020] *Health and Social Care in the Community* 1-12, 1.

that over 40% of these carers report experiences of abuse (verbal, physical, property, threatened harm and financial) in their caring relationships.¹⁷⁴ Abuse was more frequently reported in older carers.¹⁷⁵ Some of these carers will be caring for older people with difficult behaviours (e.g., dementia) that have so far been the subject of this paper. While limited studies focus on carers as victims of abuse, one Canadian study discusses the effect of policies that encourage older adults to age at home, recognising that the ageing-in-place movement has 'had unintended negative consequences for family members who care for seniors.'¹⁷⁶ More research is required into the prevalence of carer abuse of older persons in Australia.

4.2. Perpetrators of Abuse

As knowledge about the abuse of older persons has increased in recent years, so too has our knowledge of those who perpetrate the abuse. For example, the overwhelming majority of perpetrators of elder abuse are the victim's adult children, followed by a spouse, partner or other relative, and then to a lesser extent informal or paid carers.¹⁷⁷ However, Chesterman argues that there remains an undue focus on the vulnerability of the victims of abuse:

When it comes to responses to elder abuse, the strategies seem to focus unduly on vulnerability. In part this may be a result of the complex causes of elder abuse. ... Indeed the focus on vulnerability is a criticism that can be levelled at the name, and indicative focus, of the "elder abuse" policy realm, which by definition is directed at current and potential victims, rather than perpetrators or even settings in which abuse commonly occurs.¹⁷⁸

Some studies have proposed a continuum of perpetrator culpability, to highlight the range of underlying perpetrator motivations (as shown in Figure 1 below): "bad actors" commit deliberate actions; "exploiters" take advantage of unexpected opportunities; "reluctant" perpetrators may exploit opportunities due to mixed motivations, including caregiver stress; "inappropriate" perpetrators may act somewhat consistently with the older person's wishes, although inappropriately; and "unintentional" perpetrators are those who legitimately do not understand that their actions constitute abuse.¹⁷⁹

Figure 1



¹⁷⁴ Ibid.

¹⁷⁵ Ibid 7.

¹⁷⁶ Meredith B. Lilly, Carole A. Robinson, Susan Holtzman, and Joan L. Bottorff, 'Can we move beyond burden and burnout to support the health and wellness of family caregivers to persons with dementia? Evidence from British Columbia, Canada' (2011) 20(1) *Health & Social Care in the Community* 103, 103.

¹⁷⁷ Blundell et al (n 9) 51.

¹⁷⁸ John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115, 117.

¹⁷⁹ S L Jackson and T L Hafemeister, 'Theory-based models enhancing the understanding of four types of elder maltreatment' (2016) 22(3) *International Review of Victimology* 289.

4.2.1. Informal and Paid Carers

As discussed above, older persons who are carers may themselves be victims of abuse. They may also be perpetrators of such abuse. Carers Australia ACT notes that some informal carers may be at risk of committing abuse when they:

- are sleep deprived;
- in poor physical and mental health (including suffering from anxiety and depression);
- lack confidence that they can provide appropriate care for the person;
- are reluctant to access carer or other services because they think they should be able to cope;
- the person they care for refuses to receive services or to use alternate care to provide a break for their carer;
- have a low household income and unreliable or inadequate employment that leads to financial stress and housing insecurity;
- are unaware of what elder abuse involves, including financial, physical, social abuse and neglect; and/or,
- become isolated and do not receive sufficient practical and emotional support from family members or friends, and service providers and health professionals.¹⁸⁰

Other factors known to contribute to caregiver stress in both the residential and family care context, include: decreasing satisfaction with the work; long hours; low pay; physical demands; staff shortages and increased workload; and, low levels of education and training.¹⁸¹ Staff and carers may also experience abuse from the person they are caring for, creating the potential for retaliation.¹⁸²

Anecdotal evidence suggests that some informal carers who are receiving a Centrelink Carer Allowance and/or Carer Payment do not provide care for the older person.¹⁸³ An extreme example of carer neglect is found in the case of Cynthia Thoresen, who died in Queensland in 2009. An inquest was convened into Cynthia's death after she was admitted to hospital with a fractured femur that was the result of a fall three weeks earlier. Ambulance officers reported she had been lying in bed for three weeks.¹⁸⁴ On examination in hospital, it was observed that Cynthia was covered in faecal matter, had multiple pressure areas and very poor skin integrity, her right leg was twisted, shortened and swollen, and she was dehydrated.¹⁸⁵ When hospital staff questioned Cynthia's carer, her daughter Marguerite, she said that she had not accessed a general practitioner for her mother in over 18 months.¹⁸⁶ Deputy State Coroner, Christine Clements, observed:

In a time of an ageing population and pressure on access to services to care for the elderly, there is likely to be an increase in circumstances where families take on the care of their elderly relatives. The responsibility can be a difficult challenge for a family. Our society acknowledges and supports the efforts of

¹⁸⁰ Blundell et al (n 9) 54.

¹⁸¹ Ibid 52.

¹⁸² Ibid 52.

¹⁸³ Ibid 54.

¹⁸⁴ *Inquest into the death of Cynthia Thoresen* (Coroner's Court of Brisbane, Deputy State Coroner Christine Clements, 13 May 2013) 3.

¹⁸⁵ Ibid 4-6.

¹⁸⁶ Ibid 8.

family by providing carer's benefit to provide some limited assistance to the carer in discharging their responsibilities.

It is important to note an elderly person may be entirely dependent upon their family for provision of physical and medical care. This was the reality in Cynthia Thoresen's case.

The evidence in this inquest was that after acceptance of the initial application for the carer's benefit, the carer was not required to submit any further regular documentation evidencing the medical status of the person being cared for.¹⁸⁷

Accordingly, Coroner Clements suggested that a recipient of the Centrelink Carer Allowance should be required to 'submit an annual independent medical review of the person being cared for' to assist in preventing neglect of older persons.¹⁸⁸ In response, the then Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services) stated that a medical review was required every two years, but was not required where the person being cared for has a disability or medical condition that is permanent and not improving.¹⁸⁹ It has since been suggested that abuse of older persons by their carers could be further prevented through providing training and information about carer roles and responsibilities, and a requirement for more regular, mandatory medical assessments.¹⁹⁰

4.3. Relationships between the Victim and the Perpetrator

As highlighted earlier, the definition of abuse of older persons captures situations where there is an expectation of trust and/or where there is a power imbalance between the parties.¹⁹¹ The ALRC reports that elder abuse is often committed by the victim's adult children, but also the victim's spouse or partner.¹⁹² As such, the characteristics of elder abuse in some situations are similar and may even overlap with the experience of family and domestic violence between partners or family members,¹⁹³ and this is discussed further in Chapter 6. While elder abuse is not as gendered as family and domestic violence, the ALRC notes that it is suffered more often by women than men, and policies to prevent elder abuse may learn from response frameworks to family violence.¹⁹⁴

4.4. Risk Factors for Abuse

There are a wide range of risk factors for elder abuse, from systemic issues such as ageism and the digital divide, to individual factors such as inheritance impatience and living arrangements. One study conducted in Victoria analysed elder abuse alerts at a Melbourne hospital over a five-year period.¹⁹⁵ That study highlighted a number of risk factors for abuse, including: isolation; history of family violence; mental health diagnosis; and substance use.¹⁹⁶

¹⁸⁷ Ibid 14.

¹⁸⁸ Ibid.

¹⁸⁹ Blundell et al (n 9) 55.

¹⁹⁰ Ibid 55-56.

¹⁹¹ See above p 15.

¹⁹² ALRC Final Report (n 83) 20.

¹⁹³ Rosslyn Monro, 'Elder abuse and legal remedies: practical realities?' (2002) 81 *Reform* 42.

¹⁹⁴ ALRC Final Report (n 83) 20.

¹⁹⁵ Collins et al, 'Elder Abuse Identification by an Australian Health Service: A Five-Year, Social Work Audit' (2020) 73(4) *Australian Social Work* 462.

¹⁹⁶ Ibid 469.

The EAPU highlights that living with the perpetrator is also an established risk factor for abuse.¹⁹⁷

The increasing shift towards online interactions for banking, social security and aged care transactions and applications has also left some older Queenslanders unable to bridge the digital divide and thereby excluded. Without the skills and confidence to use technology for socialising, accessing important services or conducting personal business, older Queenslanders are further isolated and can struggle to maintain control over their finances and other important decisions. Increasingly, services are being offered to older persons through digital means. Government services such as myGov and the My Aged Care system are accessed online and rely on individuals having access to computers and the internet, as well as the knowledge to use them. Similarly, the post-COVID-19 world is increasingly reliant on measures that seek to ensure safe distancing, such as telehealth and the remote execution and witnessing of legal documents.

These system advances bring risks of digital exclusion for older persons. According to the *2020 Australian Digital Inclusion Index 'Measuring Australia's Digital Divide' Report*, people aged 65 and over remain Australia's least digitally included age group.¹⁹⁸ Further, digital inclusion diminishes as age increases.¹⁹⁹ The report concludes that many older Australians are not able to use the internet as an alternative to face-to-face interactions.²⁰⁰

Alongside excluding some older people, digital processes may be open to, or create, opportunities for exploitation, or they may fail to identify violence, abuse and neglect. For example, modified arrangements for wills and enduring documents during the COVID-19 pandemic made it more difficult for a witness to confirm whether the Principal was free from duress or coercion when they witnessed the execution of an EPOA remotely using video-link. Similarly, it is more difficult to assess whether a person is competent to execute a legal document in a remote setting and perhaps more importantly, to maximise and support capacity in decision-making processes that require legal capacity.

4.4.1. Risk factors in community and institutional settings

The risk of abuse in community and institutional settings has been the subject of considerable research over time.²⁰¹ This includes risk factors for both victims and perpetrators of abuse.²⁰² These global studies have provided a very broad set of risk factors. For older persons in community and institutional settings, risk factors for abuse include:

- functional dependence and disability;
- poor physical health and frailty;
- cognitive impairment;
- poor mental health;
- low income;
- gender (women are more likely than men to experience elder abuse);

¹⁹⁷ Elder Abuse Prevention Unit (n 132) 35.

¹⁹⁸ Roy Morgan, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2020* (Report, 2020) 18.

¹⁹⁹ Ibid.

²⁰⁰ Ibid 7.

²⁰¹ See, for example Adam Dean, 'Elder abuse: Key issues and emerging evidence' (Child Family Community Australia, Paper No 51, 2019) <https://aifs.gov.au/cfca/sites/default/files/publication-documents/51_elder_abuse_0.pdf>; Yon et al, 'The prevalence of elder abuse in institutional settings: a systematic review and meta-analysis' (2019) 29(1) *European Journal of Public Health* 58.

²⁰² Centers for Disease Control and Prevention, 'Violence Prevention' (Web Page, 12 May 2020) <https://www.cdc.gov/violenceprevention/elderabuse/riskprotectivefactors.html>.

- age;
- financial dependence;
- social isolation
- geographic location; and
- race or ethnicity.

The intersection of several risk factors can affect how an older person experiences abuse. Relationships can also be relevant, including the existence of a victim-perpetrator relationship and marital status, as outlined above. Within community settings and institutional settings, social isolation of caregivers and older persons, and the ensuing lack of social support, is another risk factor for abuse of older persons.

5. Civil Law Remedies

This chapter considers some of the civil law remedies available in response to the two most common situations of elder abuse; psychological and physical abuse.

5.1. Psychological abuse

The most common type of abuse reported in the 2019-20 financial year by the EAPU was psychological abuse, which made up 75.6% of reports (or 1,137 calls).²⁰³ In Queensland, emotional or psychological abuse can constitute “domestic violence under the *Domestic and Family Violence Protection Act 2012* (Qld) (*DFV Act*)”. Remedies available under criminal law (including under the *DFV Act*) are discussed further in Chapter 6.

Where an older person has sustained an injury as a result of psychological, or physical, abuse, the person may have an action for damages under the *Personal Injuries Proceedings Act 2002* (Qld). However, older people face difficulties in sustaining civil actions for psychological abuse. Such actions are lengthy to resolve, and there are issues with calculating damages for psychological (and physical) injuries where lost earnings are not at issue. The *Civil Liability Act 2003* (Qld) (*CLA*) restricts the damages that a plaintiff can claim, effectively abolishing the heads of damages that would typically have been awarded to an older person (for example, aggravated, exemplary and punitive damages, which are now only awarded in limited circumstances). The *CLA* also restricts the general damages component of a personal injuries claim (which includes compensation for pain and suffering, and loss of amenities)²⁰⁴ through the use of injury scale values which apportion a value to all injuries. Other heads of damages, including loss of income and future economic loss, are generally less relevant to an older person in such actions. Thus, even where an older person can commence and sustain a civil personal injuries action, the damages that would be awarded in such cases would likely be nominal when weighted against the length of proceedings and the likelihood of success and an adverse costs finding.

5.2. Financial abuse

In the 2019-20 financial year, the EAPU reported 1,030 cases of financial abuse to the Elder Abuse Helpline in Queensland.²⁰⁵ 68.5% of victims were subject to some form of financial abuse, making it the second most prevalent form of reported abuse in Queensland.²⁰⁶ Financial abuse of older persons can take numerous forms. For example, financial abuse may include:

- non-contribution towards household expenses;
- failure to repay loans and unprotected exposure to debt under personal guarantees;
- failure to honour assets-for-care, granny flat or other co-living financial arrangements (otherwise known as Family Agreements);
- activities by an attorney in violation of their powers, duties and responsibilities under an EPOA, such as failing to pay the Principal's financial obligations;
- misappropriation of money, valuables or assets;

²⁰³ Elder Abuse Prevention Unit (n 132) 52.

²⁰⁴ *Civil Liability Act 2003* (Qld) Ch 3.

²⁰⁵ Elder Abuse Prevention Unit (n 132) 52.

²⁰⁶ *Ibid.*

- forging signatures on cheques;
- denial of access to personal assets;
- accessing a person's funds electronically; and/or,
- forced or unauthorised changes to legal documents.²⁰⁷

Depending on the circumstances, there are remedies based in equity, contract and/or tort law available for persons who have been the victim of financial abuse arising from improper or inappropriate dealing with the person's assets and financial resources (for example, undue influence, unconscionable conduct and negligence).²⁰⁸ These remedies can be pursued as stand-alone proceedings in State courts or as a third party in family law proceedings for property settlement adjustment between separating parties where a parent has made financial contributions to the parties' assets.

5.2.1. Undue influence

While older people with impaired decision-making capacity are particularly vulnerable to financial abuse, someone without such an impairment may still succumb to the influence and power of close family or associates.²⁰⁹ The law of undue influence developed in the 19th century in an era when people generally had a shorter life expectancy than today, and less often became financially and physically dependant on others as they aged. Today, a larger proportion of older persons have substantial financial assets. What was once a modest home may now present as an attractive opportunity for financial advancement to a third party with self-serving intentions. Longer life expectancy and divorce has resulted in family financial relationships and accommodation arrangements being more complex or ambiguous. Informal arrangements around financial contributions by older people, often parents, to the purchase or improvement of homes of other family members are often viewed as an appropriate way to provide for an older person's accommodation and support needs within the family, especially where government-funded aged care is unsuitable or unavailable. These social and demographic changes have increased the potential for undue influence. In Queensland, the law holds that where there is an enduring power of attorney in existence, whether enacted or not, there is a presumption of undue influence,²¹⁰ and the onus falls to the attorney to rebut the presumption.²¹¹

Currently, where financial abuse has occurred, older age does not create any particular legal status of vulnerability attracting the special protection of the law. Additionally, certain anomalies exist in the law which create higher thresholds for older people to satisfy to establish undue influence (than is the case in other situations). For example, the legal notion of the presumption of advancement establishes that a transfer of an asset from a parent to a child is a gift, unless the older person can rebut the presumption of advancement by

²⁰⁷ Darzins et al, *Financial abuse of elders: a review of the evidence* (Report, Monash University, June 2009), <<https://www.statetrustees.com.au/wp-content/uploads/2015/05/Financial-elder-abuse-report-1-review-of-evidence.pdf>>; 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.

²⁰⁸ Rosslyn Monro, 'Elder abuse and legal remedies: practical realities?' (2002) 81 *Reform* 42; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2019) 12 *Elder Law Review* 1.

²⁰⁹ Mary Joy Quinn, 'Undoing Undue Influence' (2000) 24(2) *Generations* 65. See also, Adam Dean, 'Elder abuse: Key issues and emerging evidence' (Child Family Community Australia, Paper No 51, 2019) <https://aifs.gov.au/cfca/sites/default/files/publication-documents/51_elder_abuse_0.pdf>;

²¹⁰ *Powers of Attorney Act (Qld)* 1987, s87.

²¹¹ *PF v OPG & RD* [2017] QCATA.

demonstrating that no gift was intended at the time of transfer (for example, by proving that undue influence occurred).²¹²

5.2.2. Family Agreements

Family Agreements may provide an avenue to safeguard older people from financial abuse. As Brian Herd writes:

In the new millennium ... with our ageing demographics, limited available places in aged care facilities, our general distaste for the 'homelike' environment of institutional care, rationed community care packages and a Government encouraging people to stay at home as they age, new pressures are arising for families to retain the caring role within the family once again in circumstances where adult children may have to give up their job or their business to do so. ... This is the genesis of the family agreement – the transformation of a cultural duty into a compensable, contractual obligation of care.²¹³

A Family Agreement involves an arrangement between an older person and another party (usually family members or carers) for the 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.²¹⁴ Such agreements provide an avenue for safeguarding older people, particularly where “granny flat” arrangements exist. This often involves the construction of a residence for the older person on the property of the other party (for example, an extension to the house of an adult child) using the proceeds from the sale of the older person’s previous home.²¹⁵

There are many positive aspects to Family Agreements, including social, individual and economic benefits as well as intangible rewards like quality and choice of care, independence and cost containment.²¹⁶ Carers Queensland has identified that Family Agreements ‘provide an avenue for people to discuss and consider their, often previously unstated, expectations and assumptions regarding the provision and receipt of future care’.²¹⁷ Importantly, as contractual agreements, Family Agreements allow the older person who is a party to a Family Agreement to commence civil action for breach of contract in cases where the person believes the agreement has been breached by the other party.²¹⁸

There has been some encouragement of formal written agreements by the Federal Government, including a capital gains tax (‘CGT’) exemption for ‘granny flat’ arrangements where there is a formal written agreement.²¹⁹ As of 1 July 2021, CGT does not apply to the creation, variation or termination of a formal written granny flat arrangement providing accommodation for older Australians or people with disabilities.²²⁰

However, there is potential for problems and disputes to arise where such agreements are vague, informal or undocumented, creating contention as to their terms and conditions, which

²¹² *Shephard v Cartwright* [1955] AC 431. See also the relevant Centrelink gifting rules.

²¹³ Brian Herd, ‘The Family Agreement: A collision between love and the law?’ (2002) 81 *Reform* 23.

²¹⁴ *Ibid*; ALRC, Discussion Paper (n 31) 145.

²¹⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs (n 81) 136 [4.5].

²¹⁶ *Ibid* 140 [4.18].

²¹⁷ *Ibid* [4.19].

²¹⁸ *Ibid* 139 [4.15].

²¹⁹ *Treasury Laws Amendment (2021 Measures No. 4) Act 2021* (Cth) sch 3.

²²⁰ Australian Taxation Office, *Supporting older Australians – exempting granny flat arrangements from capital gains tax* (Web page, 6 July 2021) <[Queensland Law Society | The Public Advocate | Elder Abuse Joint Issues Paper](https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-on-capital-gains/Supporting-older-Australians---exempting-granny-flat-arrangements-from-capital-gains-tax/#:~:text=In%20the%202020%20Budget%2C%20the,or%20those%20with%20a%20disability.>.”>>.</p></div><div data-bbox=)

can result in problems in enforcing and recognising such agreements at law.²²¹ Caxton Legal Centre illustrates the problems that can arise with Family Agreements:

...the biggest problem faced by most of our clients entering into family agreements is that the terms of any purported agreement are never reduced to writing and evidence is lacking. Even if something is reduced to writing, other family members may well turn around and argue that there was never any intention for the agreement to be legally binding or the payment was a gift etc.²²²

The Victorian Government has also identified a number of possible scenarios where an older person can suffer detriment or financial abuse in relation to a Family Agreement, including where a family member:

- uses the opportunity presented by living with the older family member to take financial advance of the older family member;
- gains access (as nominee) to the older family member's Centrelink payments and does not account for their use;
- gains unrestricted access to and misuses the older family member's bank account and/or other assets;
- obtains rent-free accommodation by living in the home of the elderly person, but without providing any benefit in return; and
- arranges the sale of the older family member's home contrary to their best interests, forcing them to live elsewhere.²²³

When things do go wrong, the main form of redress is currently by way of civil litigation. The Law Council of Australia notes that, where parties are able to access the courts, they are generally effective in resolving complex cases. Doctrines and remedies, particularly in equity, have developed to respond to varied circumstances in which a person may suffer loss.²²⁴ The available equitable actions include: resulting trust; undue influence; unconscionable conduct; remedial constructive trusts; and, equitable estoppel.

However, there are access to justice issues for older persons who suffer financial abuse as a result of a failed Family Agreements. Pursuing litigation is costly, lengthy and stressful, and there are often problems of proof in such cases.²²⁵ In an attempt to alleviate these issues, the ALRC has recommended that State and Territory tribunals be given jurisdiction to resolve family disputes involving residential property under a Family Agreement (or "assets for care" arrangement).²²⁶

5.2.3. Equitable Remedies

The increasing prevalence of elder financial abuse²²⁷ may indicate that the common law has not developed sufficiently quickly to provide realistic, accessible and appropriate remedies for elder abuse victims, and does not act as a deterrent to financial abusers in the first instance. It has also been argued that the current remedies do not adequately compensate for the pain

²²¹ ALRC, Discussion Paper (n 31) 147.

²²² House of Representatives Standing Committee on Legal and Constitutional Affairs (n 81) 141 [4.23].

²²³ Ibid 142 [4.27].

²²⁴ ALRC Final Report (n 83) 207 [6.19].

²²⁵ Ibid 207 [6.20].

²²⁶ Ibid 214.

²²⁷ *Inquiry into the adequacy of existing financial protections* (n 42) 20 - 21.

and suffering endured by victims of financial abuse, nor provide appropriate monetary recompense.²²⁸

Some examples of the difficulties that can occur when seeking equitable remedies for financial elder abuse are outlined below.

5.2.3.1. Account of profits

An ageing father agrees to build a home on his son's land. They see an opportunity to make a profit as the land is able to be subdivided. After the house is built, the son denies the arrangement, and claims his father invested in his horticultural business which was conducted on the property and had failed. The father gave his son his entire financial records and is now unable to recall any details of the arrangement in terms of time or place. The father is unable to prove his version of the story.

5.2.3.2. Specific performance

An older woman completes an EPOA giving her children all responsibility over her financial affairs on the basis that she will be supported to live in her own home for the remainder of her life. As property values increase, the children decide to sell the home, and place their mother in an aged care facility. Ordinarily, the remedy of specific performance would be available, but the mother has no written arrangement in place and since completing the EPOA, she has developed dementia and has an unreliable recollection of the arrangements.

5.2.3.3. Constructive trust/laches

An attorney, appointed under an EPOA, has extensive powers over the financial affairs of the Principal. While attorneys are obligated to comply with their fiduciary obligations and any conditions stipulated in an EPOA, the EPOA gives the attorney significant powers to deal with the Principal's money and property. Lawyers dealing with financial abuse of older people see many cases where the attorney has used the Principal's credit card to purchase incidental items. If the Principal cannot leave their home due to physical impairments, they are largely reliant on the attorney acting honestly. The Principal's vulnerability and reliance on the attorney is exacerbated if they have no independent record of their arrangements with the attorney and their memory is affected by dementia or other conditions. Over several years, this whittling away of the Principal's funds on incidentals can deplete the Principal's cash assets.

If the Principal is unaware of what is occurring due to dementia, or they are unable to leave the house or raise the alarm due to physical impairment or the fear of loss of care services, a significant amount of time may elapse before any formal complaint is made. Where a plaintiff has delayed in raising a complaint about the conduct of someone in these circumstances, the other party can raise the defence of laches or delay.

There are, however, some case examples of the effective use of constructive trusts in providing relief to older persons for financial abuse.

Sweetenham 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*

²²⁸ See generally Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2019) 12 *Elder Law Review* 1; Kelly Purser et al, 'Alleged Financial Abuse of Those under an Enduring Power of Attorney: An Exploratory Study' (2018) 48 *British Journal of Social Work* 887; *Inquiry into the adequacy of existing financial protections* (n 42);

(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.

***Peterson v Hottes* [2012] QCA 292**

This case involved the mother providing to her daughter \$70,000 to purchase a home, on the promise that the daughter would allow the mother to live with her. The Court of Appeal found that monetary compensation would be insufficient and the most suitable remedy would be a constructive trust in the amount of the mother's initial contribution. In assessing whether the constructive trust was appropriate, the Court considered the purpose of why the mother, in that case, contributed \$70,000. The Court placed weight on the fact that at the time, the mother wanted to secure her future accommodation in a caring environment close to her daughter and grandchildren to see out the remainder of her life and also ensure her daughter (and grandchildren) had secure accommodation.

***Jones v Jones* [2014] QDC 150**

In this case the mother provided \$100,000 to her son in exchange for being able to live in his home for the rest of her life. There was evidence of both psychological and physical abuse of the mother by the son at the time the payment was made. There was further evidence that the mother entered into the arrangement to benefit her granddaughter as part of an arrangement with the son to be the full-time carer for her granddaughter. After 6 years when the granddaughter was old enough to leave home, the son forced the mother to vacate and the property was sold. The court held that the mother held a life interest in the property and that it would be unconscionable if the loss of that interest was not compensated by way of monetary payment.

***Buchan v Young* [2020] QDC 216**

In this case the mother, who was relocating from the UK, transferred money to her son and daughter-in-law to purchase a property for them all to live in. The arrangement broke down shortly after the property was purchased. The District Court, following Peterson's case, found that payments made in order to secure a continuing arrangement to reside with the son and daughter-in-law and in the nature of a conditional gift sufficed to rebut the presumption of advancement. It was concluded that it was unconscionable for the mother to be denied recognition of an equitable interest in the property given her contribution and an order was made for a monetary payment secured by way of declaration of a beneficial interest in the property to that value.

6. Criminal Law Remedies

This chapter sets out the criminal justice response framework for elder abuse.

6.1. Criminal Offences

The *Criminal Code Act 1899* (Qld) ('*Criminal Code*') contains several offences that may apply to situations of elder abuse, including: assault,²²⁹ sexual assault,²³⁰ stalking,²³¹ and property offences such as stealing²³² and fraud.²³³ In relation to financial abuse, there is a circumstance of aggravation for the offence of stealing, where the maximum penalty is doubled if the theft occurs where the offender obtains the property by virtue of a power of attorney.²³⁴ *R v Naidu*²³⁵ also provides a case example of financial abuse being prosecuted under the offence of fraud. 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.

There are also offences relating to the preservation of human life and neglect. Section 285 of the *Criminal Code* imposes a duty to provide necessities on someone who has charge of another person:

It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessities of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessities of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.²³⁶

Section 324 makes it an offence for a person who, charged with the duty of providing for another the necessities of life, fails to do so.²³⁷ While this offence may be used to prosecute situations of neglect of an older person, it has largely been used to prosecute parents for failing to provide the necessities of life for their children, particularly in relation to medical treatment.²³⁸

Additionally, there are several specific offences that relate to victims with 'an impairment of the mind',²³⁹ defined as a person who, regardless of age, has an intellectual, psychiatric, cognitive

²²⁹ *Criminal Code Act 1899* (Qld) s 245.

²³⁰ *Ibid* s 352.

²³¹ *Ibid* Ch 33A

²³² *Ibid* Ch 36.

²³³ *Ibid* s 408C.

²³⁴ *Ibid* s 398, 'Punishment in special cases – 8 Stealing by agents etc'.

²³⁵ [2008] QCA 130.

²³⁶ *Criminal Code Act 1899* (Qld) s 285.

²³⁷ *Ibid* s 324.

²³⁸ 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.

²³⁹ See for example *Criminal Code Act 1899* (Qld) s 216 'Abuse of persons with an impairment of the mind', s 217 'Procuring young person etc. for carnal knowledge', and various offences under Ch 22A (Prostitution).

or neurological impairment which substantially reduces their capacity.²⁴⁰ These offences also address some situations of elder abuse, where the older person has a relevant impairment.

6.1.1. The Victim's Age

The *Criminal Code* provides only one offence that directly criminalises a situation of abuse based on the age of the victim. Section 340 provides that a 'serious assault' takes place where a person unlawfully assaults any person who is 60 years or older.²⁴¹ There are otherwise no specific offences of elder abuse contained in the *Criminal Code*.

The *Penalties and Sentences Act 1992* (Qld) does not specifically refer to the age of a victim, or the impaired capacity of a victim, as a matter which a court must consider when sentencing an offender.²⁴² Instead, the courts can consider the victim's age or impaired capacity as an aggravating factor when sentencing. For example, the fact that older female householders were targeted for housebreaking and stealing offences has been considered a 'particularly abhorrent feature of the crimes',²⁴³ and was relevant in sentencing.²⁴⁴ Similarly, in a case where an older woman died of a heart attack after her home was invaded and she was assaulted, reference was made to the 'strong demands of deterrence and community protection' in the determination of the sentence.²⁴⁵

6.1.2. Discrete Offences

As discussed, the *Criminal Code* contains offences that criminalise many situations of elder abuse, and the law also recognises abuse of older persons as an aggravating factor for sentencing purposes. The difficulty with the Queensland law's current treatment of elder abuse is that it is 'often committed privately, within a family group, and behind closed doors where the only witnesses are frightened, isolated or lacking the capacity to make or sustain a complaint.'²⁴⁶

Nonetheless, there is a divergence of views as to whether discrete criminal offences for elder abuse should be considered in Queensland. A new offence should only be created to address conduct which is not already an offence and ought to be. There are concerns that specific criminal offences for elder abuse may capture conduct which should not be the subject of criminal sanction. For example, whilst the *Criminal Code* does not contain a specific offence dealing with financial abuse, there would be difficulties in drafting an offence in such a way that it only captures conduct which is dishonest. There are also risks in the criminal law being prescriptive about how older persons with capacity should make decisions and in assuming, in this context, that recipients of financial benefits or gifts have acted improperly. Creating specific offences which are broad, ill-defined or lack clarity as to their scope may result in uncertainty for carers, aged care institutions, older persons, the police and the courts.

It has, however, been suggested that specific elder abuse offences would support 'effective criminal justice pathways for victims of elder abuse'; act as a deterrent; recognise the increased vulnerability of older persons; and serve an educative function to increase

²⁴⁰ *Criminal Code Act 1899* (Qld) s 1.

²⁴¹ *Ibid* s 340.

²⁴² The principles to which the courts must have regard in sentencing offenders are outlined in the *Penalties and Sentences Act 1992* (Qld) s 9.

²⁴³ *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.

²⁴⁴ *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.

²⁴⁵ *R v Sinden* [2005] QCA 414, 5.

²⁴⁶ Christine Smyth and Katerina Peiros, 'Elder abuse – it's criminal!' (2018) 53(4) *Taxation in Australia* 215, 216.

awareness of the issue.²⁴⁷ For example, neglect offences could more clearly criminalise duty of care breaches involving failure to adequately care for older persons.²⁴⁸ Offences that criminalise dishonestly obtaining, revoking or misusing an enduring power of attorney²⁴⁹ enable a crime to be established without waiting for evidence of theft, which serves to improve 'access to justice for victims of financial elder abuse because it is well-known that financial crimes have low prosecution rates'.²⁵⁰

To date, there has been no enactment of specific criminal offences for elder abuse in Queensland and there are differing views as to whether discrete elder abuse offences would address the issues identified. The ALRC recommended against the creation of new offences for elder abuse, recommending instead that the States and Territories consider the following small changes to existing laws:

- **Offences for misusing powers of attorneys** – Civil and administrative tribunals be given a power to order compensation for the misuse of a power of attorney, and in relation to an attorney's failure to comply with their obligations.²⁵¹
- **Neglect offences** – Carers who do not have the 'necessary skills, capacity or knowledge to address the needs of the person being cared for, or the resources to access education, support and training in support of their caring role' should be provided with support in those circumstances, where criminal prosecution for neglect should be reserved for the 'most grievous instances'.²⁵² A broader review of neglect offences might 'consider whether it is appropriate to deem a causal link between the failure to provide the requisite care and the harm caused'.²⁵³
- **New offences** – Rather than creating new offences, other initiatives such as the establishment of specialist elder abuse units by police and improvements in support for vulnerable witnesses may achieve criminal justice outcomes. However, this must be coupled with initiatives to enhance community awareness of elder abuse.²⁵⁴

6.1.3. Victims of Crime

The financial assistance scheme for victims of crime is governed by the *Victims of Crime Assistance Act 2009* (Qld). The vulnerability of older victims, and the significant effects of crime upon older people, are expressly recognised under the regime.²⁵⁵

The financial assistance²⁵⁶ granted to a victim of crime may include a number of components, including special financial assistance for an act of violence perpetrated against a person over the age of 60.²⁵⁷ Special financial assistance for people over 60 is available only in certain circumstances, with the amount payable is dependent on the nature of the crime and the

²⁴⁷ ALRC Final Report (n 83) 364 [13.6].

²⁴⁸ Office of the Public Advocate (Vic), *Submission to the Australian Law Reform Commission in Response to the Elder Abuse Discussion Paper 83* (February 2017) 8.

²⁴⁹ For example, those enacted in Victoria.

²⁵⁰ Office of the Public Advocate (Vic), *Submission to the Australian Law Reform Commission in Response to the Elder Abuse Discussion Paper 83* (n 248) 8.

²⁵¹ ALRC Final Report (n 83) 366 [13.13].

²⁵² *Ibid* 366 [13.16].

²⁵³ *Ibid* 368 [13.24].

²⁵⁴ *Ibid* 369 [13.27].

²⁵⁵ Where a person over 60 years of age is included in both "category B circumstances" and "category C circumstances".

²⁵⁶ *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* (November 2008) 4.

²⁵⁷ *Victims of Crime Assistance Act 2009* (Qld) s 39(h), Sch 2(1) and (3).

severity of the injuries sustained by the victim.²⁵⁸ The maximum special financial assistance payable is \$10,000,²⁵⁹ which is considered to be 'a gesture of recognition by the State of the significant effects on the victim of the serious violent act'.²⁶⁰

In Queensland, there are no specific provisions for the support and protection of older victims who provide evidence in court proceedings. However, s 21A of the *Evidence Act 1977* (Qld) enables a court to make an order or direction in relation to "special witnesses" providing evidence in court proceedings.²⁶¹ A special witness includes a person who would:

- as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
- be likely to suffer severe emotional trauma; or
- be likely to be so intimidated as to be disadvantaged as a witness.²⁶²

Significantly, a "relevant matter" for a person includes the person's age, relationship to any party to the proceeding, and any other matter the court considers relevant.²⁶³ It is therefore open for a court to declare a person a special witness by virtue of a person's age, and to make orders and directions in relation to an older witness providing evidence. It is unknown whether, to date, a witness has been declared a special witness on the basis of older age.²⁶⁴

6.2. Domestic and Family Violence

Perpetrators of abuse of older people are frequently the adult children of the victim.²⁶⁵ This relationship can contribute to the reluctance of an older person to seek help or report the abuse to police. Victims may experience shame and stigma around reporting abuse by their own children, with their bond and sense of loyalty to their children preventing them from speaking to others about the abuse and acting on advice, or they may be fearful of the adverse consequences for their child.²⁶⁶ In cases where police have declined to take action on a report of family violence or where the older person has impaired capacity, they may have difficulties taking the necessary steps to obtain protection. Relief from some forms of elder abuse are available to older people through the domestic and family violence, and peace and good behaviour order regimes.

Some situations of elder abuse may constitute "domestic violence" for the purposes of the *DFV Act*, and the Act expressly recognises older persons as particularly vulnerable to domestic violence.²⁶⁷ "Domestic violence" is defined as behaviour by a person (the **first person**) towards another person (the **second person**) with whom the first person is in a relevant relationship that –

²⁵⁸ Ibid.

²⁵⁹ Ibid Sch 2(2).

²⁶⁰ Department of Justice and Attorney-General Queensland, *Victims of Crime Review* (Report, November 2008) 31.

²⁶¹ *Evidence Act 1977* (Qld) s 21A. The directions a Court may make include that the person charged be excluded from the room or be obscured from the view of the witness, that the witness provide evidence in a location outside the courtroom, that evidence be video recorded, and that an approved person be present while the witness gives evidence in order to provide emotional support: *Evidence Act 1977* (Qld) s 21A(2)(a)-(f).

²⁶² *Evidence Act 1977* (Qld) s 21A(1).

²⁶³ Ibid.

²⁶⁴ There are no reported cases in Queensland on this issue.

²⁶⁵ Data from Queensland's Elder Abuse Prevention Unit suggests that most cases of elder abuse occur within families. Of the 1,780 notifications of abuse in 2018-19, 72% of perpetrators were sons or daughters. See Communities Queensland, *Elder abuse and the COVID-19 pandemic* <<https://www.communities.qld.gov.au/resources/campaign/know-the-signs/fact-sheet-elder-abuse-and-covid19-accessible.pdf>>.

²⁶⁶ B Dow et al, 'Barriers to Disclosing Elder Abuse and Taking Action in Australia' (2020) 35 *Journal of Family Violence* 853; Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* 94.

²⁶⁷ *Domestic Violence and Family Violence Protection Act 2012* (Qld) s 4(2)(d).

- (a) is physically or sexually abusive; or
- (b) is emotionally or psychologically abusive; or
- (c) is economically abusive; or
- (d) is threatening; or
- (e) is coercive; or
- (f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.²⁶⁸

A "relevant relationship" includes the following:

- (a) an intimate personal relationship (which includes a spousal relationship, engagement relationship or couple relationship); or
- (b) a family relationship; or
- (c) an informal care relationship.²⁶⁹

The inclusion of family relationships and informal care relationships as relevant relationships is important for older people. An informal care relationship exists between two persons if one of them is, or was, dependent on the other person for help in an activity of daily living.²⁷⁰

However, the definition excludes some relationships:

- An informal care relationship does not exist between a child and a parent of a child but would be covered under the family relationship.²⁷¹
- An informal care relationship does not exist between two people if one person helps the other person in an activity of daily living under a commercial arrangement.²⁷²
- A commercial relationship may exist even if the person does not pay a fee for the help under the arrangement.²⁷³
- An arrangement is not considered commercial if one person receives a pension or allowance, or reimbursement for the purchase price of goods for the help provided under the arrangement.²⁷⁴
- A relationship is also not considered commercial if the fees paid under the arrangement are because of family and domestic violence committed by the other person.²⁷⁵

Accordingly, any actions that would amount to domestic and family violence under the *DFV Act* that occur in the context of a formal or commercial care arrangement will not be regarded as domestic and family violence for the purpose of that Act.

6.2.1. Protection Orders

The *DFV Act* provides that a person subject to actual or threatened domestic and family violence within an intimate personal, family or informal care relationship may apply for a Protection Order to prevent the offending behaviour from occurring.²⁷⁶

²⁶⁸ Ibid s 8.

²⁶⁹ Ibid s 13.

²⁷⁰ Ibid s 20(1).

²⁷¹ Ibid s 20(2).

²⁷² Ibid s 20(3).

²⁷³ Ibid s 20(4)(a).

²⁷⁴ Ibid s 20(4)(b).

²⁷⁵ Ibid s 20(4)(c).

²⁷⁶ Ibid ss 8-12, 13, 23.

6.2.1.1. When a Protection Order May be Issued

A Protection Order may be issued by the court where it is satisfied that:

- a relevant relationship as defined under the *DFV Act* exists between the aggrieved person (the victim) and the respondent (perpetrator);²⁷⁷
- the aggrieved has experienced one of the types of violence defined in the *DFV Act*, which includes physical, sexual, emotional, psychological or economic abuse, or behaviour that is threatening, coercive or controlling;²⁷⁸ and
- the order is necessary or desirable to protect the person from violence.²⁷⁹

In considering whether a Protection Order is necessary or desirable, the court is required to take into account the principles for administering the *DFV Act*, which include the characteristics that may make people particularly vulnerable to domestic and family violence, including if the aggrieved is “elderly”.²⁸⁰

6.2.1.2. Who May Apply for a Protection Order?

The aggrieved, an authorised person, a police officer²⁸¹ or a person acting under another Act for the aggrieved can apply for a Protection Order.²⁸² An authorised person for an aggrieved includes an adult authorised in writing by the aggrieved, or, an adult whom the court believes is authorised by the court to appear on behalf of the aggrieved, even if the authority is not in writing.²⁸³ Where the person with authority to make the application for an order on behalf of the aggrieved, such as a person’s attorney, is also the perpetrator of the abuse, it is difficult for the older person to access the relevant protections. However, these circumstances would not prevent a police officer from making an application for an order, and this issue is equally relevant to all victims of domestic and family violence, not just older people.

6.2.1.3. The Types of Protection Offered

A court can make orders requiring the perpetrator of elder abuse to be of good behaviour and not commit acts of domestic and family violence. No contact and no approach conditions can also be made. An ouster condition can require the perpetrator to vacate the older person’s home. An intervention order can be made requiring the perpetrator to attend a behavioural change program, noting however that there are no specific programs for perpetrators of elder abuse. A court can also include other conditions that address economic abuse and abandonment of chattels, including conditions that provide for the return of ATM cards, return of money and removal of chattels from an older person’s home.

However, enforcement of these conditions can be at issue, where the full ambit of the court’s powers to make conditions relevant to the circumstances of domestic and family violence has yet to be tested.

6.2.2. Police Protection Notices

Section 101 of the *DFV Act* provides the police with the power to issue a police protection notice (‘PPN’) against a person. A PPN is made when police attend a place where domestic violence is occurring or has occurred. If the perpetrator is present, the police can issue a PPN

²⁷⁷ Ibid s 37(1)(a).

²⁷⁸ Ibid ss 8-12.

²⁷⁹ Ibid ss 37(1).

²⁸⁰ Ibid ss 37(2) & 4(d).

²⁸¹ Ibid s 100(2)(a).

²⁸² Ibid s 25(1).

²⁸³ Ibid s 25(2).

to the perpetrator, which immediately requires the perpetrator to be of good behaviour towards the aggrieved and not commit domestic violence. If the attending officers believe it is reasonable and necessary to protect the aggrieved from domestic violence, a PPN may include:

- a no-contact condition, which requires the perpetrator to not locate the aggrieved's whereabouts if unknown to the perpetrator;²⁸⁴ and/or
- an ouster condition, which prohibits the respondent from approaching or entering the stated premises.²⁸⁵

6.2.3. Peace and Good Behaviour Orders

A Peace and Good Behaviour Order ('PGB Order') can be made under the *Peace and Good Behaviour Act 1982* (Qld). These orders offer an alternative to Protection Orders and PPNs under the *DFV Act*, because they do not require the existence of an intimate, family or informal care relationship.

A magistrate can make a PGB Order if they are satisfied that the complainant has been threatened with physical injury or damage to property, and is in fear of the person being complained against.²⁸⁶

Unlike a Protection Order, only the complainant/victim, or a person with the 'care or charge' of that person,²⁸⁷ can make an application for a PGB Order. In circumstances where an older person is suffering abuse at the hands of a carer, attorney or guardian, it may be impossible for a complaint to be made. 'Care or charge' is also not defined in that act, which results in some uncertainty as to who can make a complaint on behalf of another person.²⁸⁸ Access to a PGB Order therefore depends on the person/complainant having the knowledge, willingness and relevant support to make the complaint.

If the person who is subject to the PGB Order does not abide by it, their actions may constitute a breach of the PGB Order. There are penalties associated with breaching a PGB Order, including a maximum of 1 year imprisonment or a fine.²⁸⁹

6.2.4. Limitations of Queensland's Family and Domestic Violence Response Framework

While older persons who are subject to abuse may choose to use the Queensland family and domestic violence response framework, there are limitations to its usefulness in the context of elder abuse. Specifically, Protection Orders do not cover formal care relationships as these types of relationships will not constitute "domestic violence" under the legislation, and do not apply to some situations of neglect.

Arguably, this is reasonable on the basis that it is not appropriate to treat formal or commercial care relationships in the same way as relationships covered by the *DFV Act*. In the context of formal or commercial relationships, the Aged Care Royal Commission identified significant problems with the funding, resourcing, training and quality of staff working in the aged care

²⁸⁴ Ibid s 107A.

²⁸⁵ Ibid s 107B. A return condition allows the perpetrator under police supervision to return to the premises to recover personal property: s 107C.

²⁸⁶ *Peace and Good Behaviour Act 1982* (Qld) s 5(1).

²⁸⁷ *Domestic Violence and Family Violence Protection Act 2012* (Qld) s 5.

²⁸⁸ Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982* (Qld) (Report No 63, December 2007) [6.32].

²⁸⁹ *Peace and Good Behaviour Act 1982* (Qld) s 11.

sector.²⁹⁰ In any event, it may be preferable that an aged care worker who abuses a client is charged with a criminal offence leading to termination of their employment, as opposed to being the subject of a Protection Order. The current legislative framework as regards formal care relationships holds perpetrators of abuse to the same thresholds of criminal liability as other victims of crime.

While PGB Orders may be used to address abuse in relationships not covered by the *DFV Act*, they do not offer the same flexibility, in terms of who can make a complaint, and are limited to circumstances where a person has threatened physical injury against the older person or damaged the older person's property. Thus, PGB Orders are limited in their practical usefulness as they cannot be made where actual violence has occurred.

6.2.5. Police Responses to Cases of Family and Domestic Violence

In 2020-21, there were 28,797 domestic violence orders initiated in Queensland courts.²⁹¹ In 2021-22, there have been 4,546 applications initiated up to 31 August 2021.²⁹² These orders encompass Protection Orders and Temporary Protection Orders (being Protection Orders that are considered early by a magistrate and will be in place until such time as a magistrate can decide an application for a full Protection Order). The majority of these orders are lodged by police, as opposed to private applicants (e.g., an aggrieved, authorised person for an aggrieved etc.).²⁹³ The Queensland Courts' family and domestic violence statistics are not aggregated by age. However, there are some other statistics that are relevant to this report. For example, while 72.2% of applications initiated thus far in 2021-22 year to date are reported as being an intimate personal relationship, 27.6% (comprising 1,254 applications) are listed as a family relationship and 0.2% (comprising 10 applications) are listed as an informal care relationship.²⁹⁴

The ALRC highlights that key concerns around police responses to abuse of older persons include that police do not always respond appropriately to what is deemed "low level" abuse, including neglect or financial abuse; and that ageist perceptions of older persons can affect police dealings, including that older people do not make reliable or competent witnesses.²⁹⁵ One UK study found that persisting societal stereotypes around an older person's ability to reliably provide evidence adversely influences police officers' willingness to engage with older witnesses.²⁹⁶ Thus, ageist attitudes within QPS may result in incidences of elder abuse not being fully investigated.

As discussed earlier at 3.3.3.6 the QPS has recently developed an Elder Abuse Aide Memoir for police officers responding to incidences of elder abuse, and the QPS' Community Safety and Crime Prevention Branch has introduced new policies and task forces, including the Seniors Task Force. The QPS is working collaboratively with community advocates to develop a "community policing" response to one of the main scenarios of elder abuse that police encounter, namely an older person wanting to peacefully remove an adult relative living

²⁹⁰ Royal Commission into Aged Care Quality and Safety (n 95).

²⁹¹ Queensland Courts, *Queensland Courts' domestic and family violence (DFV) statistics* (Web page, 13 September 2021) <<https://www.courts.qld.gov.au/court-users/researchers-and-public/stats>>.

²⁹² Ibid.

²⁹³ Queensland Courts statistics website highlights the split is approximately 80% lodged by police, and 20% lodged by private applications: Ibid.

²⁹⁴ Ibid.

²⁹⁵ ALRC, Discussion Paper (n 31).

²⁹⁶ A Wright and R Holliday, 'Police officers' perceptions of older eyewitnesses' (2005) 10(2) *Legal and Criminological Psychology* 211, cited in *NSW Equity Before the Law Benchbook*, 11.5.1.1.

with them without having to apply for a Protection Order. The QPS regularly refer older persons experiencing abuse to community services.

6.2.6. Developments around the issue of coercive control

Coercive control is a pattern of behaviour involving threats, assaults and intimidation which intends to harm, punish, degrade, frighten or humiliate a victim.²⁹⁷ Evidence of coercive controlling behaviours perpetrated towards an older person by family members and informal carers provides the basis for obtaining a Protection Order under Queensland's domestic violence legislation. It can be difficult to distinguish coercive control from genuine care, particularly where behaviour is viewed in isolation or where well-intentioned concerns becomes overbearing behaviour. Circumstances of vulnerability and dependence can create particularly apt conditions under which coercive control may be perpetrated. In addition, individual acts of coercive control rarely satisfy the elements of an existing criminal offence. This makes coercive control not only difficult to detect, but difficult to respond to.

In Australia, there has been significant debate on whether coercive control should be criminalised and whether criminalisation would assist in preventing or reducing violence, particularly against women.

In early 2021 the Queensland Government announced that an independent taskforce will examine coercive control. The Women's Safety and Justice Taskforce will consider the scope and construction of potential legislative amendments to address coercive control as a form of family and domestic violence, having regard to the suitability of Queensland's existing law, in providing first responders and courts with the powers necessary to respond to domestic and family violence.

While the Taskforce will primarily focus on intimate partner relationships, if a coercive control offence is created in Queensland, there may be scope for the offence to extend to any relationship where there is a pattern of behaviour which intends to control, establish power, or cause fear, by one person in an intimate, family or carer relationship against another. This may capture circumstances where an older person is being abused by a family member.

The Taskforce is expected to report in 2022.

6.3. Removal of Perpetrator from Older Person's Home

Living with perpetrators is an established risk factor for elder abuse.²⁹⁸ Perpetrators of elder abuse who are invited into or who move into an older relative's home and who later refuse to leave may be adult children, grandchildren, other relatives or family friends. There are many different types of living arrangements that can become problematic, and the law governing each type varies. Removal of a perpetrator of elder abuse who is living in an older person's home can occur through various legal avenues including an action for trespass, tenancy laws, laws around boarders and lodgers, and the legal avenues discussed above in circumstances where domestic and family violence can be established. However, in practice, these avenues may not be obvious or easily accessible nor desirable to older persons.

²⁹⁷ Women's Aid Federation of England, 'What is coercive control?', *Women's Aid* (Web Page) <<https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>>.

²⁹⁸ ALRC Final Report (n 83).

6.3.1. Boarding and Lodging Arrangements

Many older people allow family members to move into their home on the basis that they pay nominal board. Sometimes relatives will be, or will have been, paying money in exchange for accommodation and meals²⁹⁹ or other services as boarders³⁰⁰ and they will not enjoy full possession of the property – instead being subject to the resident owner’s control of the premises. Sometimes payment is made in exchange simply for provision of accommodation³⁰¹ involving a bedroom and access to shared bathroom and kitchen without any other benefits (such as food)³⁰² being included in the arrangement and subject to the resident owner’s overarching possession and control of the overall premises. This will generally be considered to be a lodging arrangement.³⁰³ These parties also only have a mere licence³⁰⁴ to use and occupy the premises, which can be withdrawn by the owner, subject to any terms that were agreed by the parties.

Section 32 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (*‘RTRAA’*) excludes boarders and lodgers from coverage under the *RTRAA*. The common law applies to boarders and lodgers and requires the home-owner to give reasonable notice to boarders and lodgers to leave. However, there is no definition of what constitutes reasonable notice. Once a boarder or lodger’s licence to reside in the home is withdrawn by the older person, the boarder or lodger becomes a trespasser. Section 277 of the *Criminal Code* specifically acknowledges that the home-owner can use reasonable force to remove someone from their property who has no lawful basis for being there; however, older persons may not be physically capable of removing an unwanted boarder or lodger.

6.3.2. Residential Tenancy Agreements

Sometimes adult children, grandchildren or other relatives are paying a set amount of rent in exchange for accommodation at their older relative’s home in accordance with a duly documented residential tenancy agreement. As such, these arrangements are covered by the *RTRAA*. In other cases, there will have been only a verbal agreement between the parties, and an abuser may refuse to leave the property, forcing the older person to go through the process of obtaining and actioning a warrant of possession under the *RTRAA*. The *RTRAA* provides that although a tenancy agreement under that Act is required to be in writing, a verbal agreement is still a residential tenancy agreement.³⁰⁵ Strict requirements are set out under the *RTRAA* for terminating leases, obtaining QCAT orders and recovering possession. While an older person undertakes this lengthy process the abuser remains living in the home.

Older persons who do not own their own home may themselves be renting property under a residential tenancy agreement. Where abusive family members are co-tenants with the older person under an acknowledged lease, Queensland’s tenancy laws provide specific relief for the termination of tenancies in situations of damage, injury or excessive hardship.³⁰⁶ QCAT also has power to hear urgent applications in these cases.³⁰⁷ Family and domestic violence must be considered by QCAT when dealing with cases relating to termination of a tenancy for

²⁹⁹ *Olney v Commissioner for ACT Revenue* (Administrative Review) [2019] ACAT 122.

³⁰⁰ *Noblett v Manley* [1952] SASR 155; *Kesteven and Commissioner for ACT Revenue* [1999] ACTAAT 35.

³⁰¹ *Smart v Trebilcock* [2019] SACAT 19.

³⁰² *Porter v Busch* [1974] 1 NSWLR 593.

³⁰³ P Butt, *Land Law* (Law Book Company, 6th ed, 2010).

³⁰⁴ *Marks-Vincent v The Queen* [2015] VSCA 54.

³⁰⁵ *Evans v Ramsay* [2011] QCAT 199.

³⁰⁶ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 310, 312, 343, 344.

³⁰⁷ *Ibid* s 415.

injury and damage.³⁰⁸ Police can also assist with the enforcement of appropriate orders made under the *RTRAA* by QCAT.

6.3.3. Trespass

Relatives may also live at an older person's residence, effectively as guests. They may have asked to stay with the owner on a temporary basis or have been invited to stay on a temporary basis, but later ignore or actively resist requests by the home-owner to move out. Guests are only able to lawfully remain on the premises for as long as the owner consents. As soon as consent is withdrawn, they become trespassers, irrespective of the family relationship.

If police are called and a trespasser, which can include a family member, refuses to follow a police direction to leave an older person's home, they may be charged both with trespass under s 11 of the *Summary Offences Act 2005* (Qld), and also with disobeying a police direction under s 791 of the *Police Powers and Responsibilities Act 2000* (Qld). However, anecdotally, often police will not intervene to enforce a direction or an expired notice to leave, instead treating the matter as a civil law issue between family members. This form of response can undermine the protections for older persons, potentially putting them at increased risk of abuse.

Trespass under the criminal law is a matter the police can handle, and a person convicted of trespass can face jail (suspended or actual time), community service, probation, fines or bonds. However, depending on the circumstances, courts may not (and do not routinely) record convictions for trespass. A civil claim in trespass must be pursued by the owner by commencing proceedings in the appropriate civil court. Damages in civil trespass claims can be awarded by the court, but a civil trespass action is complex and potentially costly to run.

The *DFV Act* can also be used to remove a perpetrator through a Protection Order containing an ouster order. Although the definition of family violence encompasses economic abuse, coercive behaviour and emotional and psychological abuse,³⁰⁹ the older person is less likely to have an abusive family member physically removed (along with their possessions) from the older person's home where physical violence is not present.

If a trespasser is removed from an older person's property or if an ouster order is made requiring a family member to vacate the home, the perpetrator's personal property is often left behind. Under common law, a bailment arises when one person (the bailee) is voluntarily and knowingly in possession of the goods of another (the bailor) upon an express or implied promise that the goods will be redelivered or dealt with in a stipulated way. Belongings of the perpetrator being left behind at the older person's home has the inadvertent effect of making the older person an involuntary bailee.

The issue of what to do with a perpetrator's belongings left behind once ousted becomes particularly problematic if the older person needs to move into a retirement village or nursing home and they need to empty their home ready for sale. If the older person wrongfully disposes of, or sells, the property, they will commit a trespass to chattels and can be sued for damages in conversion. Conversion is where a person deals with goods they do not have legal title over, for their own benefit; for example by selling, lending or giving away the property of another. Where there is a bailment relationship and the bailee either refuses to return or cannot return the property to the bailor, the bailor may have an action in detinue. Detinue is an action for the recovery of goods wrongfully detained. While these options are

³⁰⁸ Ibid ss 312, 343.

³⁰⁹ See above p 15.

available to older persons in dealing with certain types of abuse, they are generally unrealistic when considered in the context of court costs versus the value of the goods.

6.4. Victims of Crime Compensation

The *Victims of Crime Assistance Act 2009 (Qld)* can be used by victims of elder abuse who have experienced a physical or psychological injury to claim financial assistance. A person can only apply for financial assistance if:

- (a) they were directly injured (physically or psychologically);
- (b) it was caused by an “act of violence”;
- (c) it happened in Queensland; and
- (d) it was reported to a relevant person.

An “act of violence” is defined as:

- (1) a crime or series of related crimes, whether committed by 1 or more persons, that –
 - (a) are committed in Queensland; and
 - (b) directly resulted in the death of, or injury to, 1 or more persons, irrespective of where the death or injury happened.
- (2) An “act of violence” also includes domestic violence, or a series of related acts of domestic violence, that –
 - (a) is committed in Queensland; and
 - (b) directly results in the death of, or injury to, 1 or more persons, irrespective of where the death or injury happened; and
 - (c) is not an act of violence under subsection (1).³¹⁰

Generally, to be eligible for financial assistance the person must have reported the incident to police.³¹¹ However, older persons will fall within the category of “special primary victim” if: the offender was in a position of power, authority or trust; the person was the victim of a sexual offence; the act of violence was domestic violence; the person has or had an impaired capacity; or, the person is being or has been threatened or intimidated by the offender or someone else.³¹² In such instances, the person must report the act of violence to: a police officer; the person’s counsellor, psychologist or doctor; or, a domestic violence service.³¹³

Once an application for assistance is made, the scheme manager must choose an appropriately qualified government assessor to deal with the application.³¹⁴ The government assessor must, in deciding an application for assistance, observe the principles of natural justice and act as quickly as the requirements under the Act and a proper consideration of the application permit.³¹⁵ In deciding how to assess an application for assistance, the government assessor can take into account a range of factors.³¹⁶

³¹⁰ *Victims of Crime Assistance Act 2009 (Qld)* s 25(1)-(2).

³¹¹ *Ibid* s 81(1)(a)(i).

³¹² *Ibid* s 81(2).

³¹³ *Ibid* s 81(1)(a)(ii).

³¹⁴ *Ibid* s 62.

³¹⁵ *Ibid* s 63.

³¹⁶ *Ibid* Pt 12.

Where an application is approved, urgent and immediate expenses can be claimed (other than accommodation). Other expenses, for example counselling, medical, legal, report or loss of earnings expenses can be claimed.

7. The Guardianship and Administration Framework

This chapter sets out how the guardianship regime is applicable to older persons with impaired decision-making capacity.

7.1. Queensland's Guardianship and Administration Framework

Queensland's guardianship and administration system provides a scheme of substitute decision-making for adults with impaired decision-making capacity and includes additional mechanisms that can be used to protect older people with impaired decision-making capacity from violence, abuse and neglect. The system comprises the:

- Queensland Civil and Administrative Tribunal;
- Office of the Public Guardian;
- The Public Advocate; and
- Office of the Public Trustee.

The guardianship and administration system 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.³¹⁷ The framework provides for statutory guardianship and administration agencies and their officers, private attorneys, guardians and administrators to be appointed to make health, personal and/or financial decisions on behalf, and protect the rights and interests of, adults with impaired decision-making capacity.

7.2. Supported and Substitute Decision-Making

All decision-makers appointed under these Acts must apply the 'General principles' ('General Principles') or the 'Health care principles' ('Health Care Principles') contained in the GAA whenever they make a decision, perform a function or exercise a power under the Acts.³¹⁸

The General Principles and Health Care Principles are similar to a "bill of rights" for people with impaired decision-making capacity, and operate independently of the *HR Act*. They are based on the rights outlined in the United Nations *Convention on the Rights of Persons with Disabilities*.³¹⁹

The General Principles recognise the presumption that all people have capacity.³²⁰ They also recognise that adults with impaired decision-making capacity have:

- the same human rights and fundamental freedoms as other members of the community (including non-discrimination in the provision of healthcare without regard to a person's capacity);³²¹
- the right to be encouraged and supported to perform social roles valued in society, participate in society and to become as self-reliant as practicable;³²²

³¹⁷ *Guardianship and Administration Act 2000* (Qld) s 8; *Powers of Attorney Act 1998* (Qld) s 6A.

³¹⁸ *Guardianship and Administration Act 2000* (Qld) ss 11B(1) and 11C(1).

³¹⁹ See Second Reading Speech by the Hon Y D'Ath, Attorney-General and Minister for Justice, for the Guardianship and Administration and Other Legislation Amendment Bill 2018, Queensland Parliament, Hansard, 15 February 2018, 105.

³²⁰ *Guardianship and Administration Act 2000* (Qld) s 11B General principle 1.

³²¹ *Ibid* s 11B General principle 2.

³²² *Ibid* s 11B General principle 3(b)(i)-(iii).

- the right to privacy;³²³
- the right to maximum participation in decisions affecting their lives;³²⁴ and,
- the right to make their own decisions, to the greatest extent practicable, and to have their views, wishes and preferences recognised and taken into account whenever a decision is made for them.³²⁵

The General Principles emphasise the importance of 'supported- decision making alternatives to substitute decision-making (where one person is empowered to make decisions for another).'³²⁶ For example, General Principle 7 requires that:

- (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life;
- (b) to the greatest extent practicable, for exercising a power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
- (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.³²⁷

QLS and the Public Advocate consider that supported decision-making take place whenever possible. QLS has also recommended that relevant third parties who seek to rely on documents or orders that give a person the power to make decisions on behalf of another (for example, financial institutions, health services and other service providers) should be provided with training on the distinction between supported decision-making and substitute decision-making.³²⁸

Where supported decision-making is not possible, the General Principles establish that the principle of substituted judgment:

must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.³²⁹

Any action must be taken in a way consistent with the adult's proper care and protection.³³⁰ In this way, the principle of substituted judgment 'privileges what the person would have wanted, rather than simply making a decision that they believe to be in the person's best interests.'³³¹

While supported decision-making should take place whenever possible, it is important to acknowledge that at some point capacity may be lost entirely (as opposed to being diminished or fluctuating). Consequently, it is not possible to eliminate substitute decision-making entirely. QLS has suggested that protecting Principals from abuse may require further consideration of how the protections in article 12 of the *Convention on the Rights of Persons with Disabilities* can be guaranteed on an equal basis and without discrimination.³³²

³²³ Ibid s 11B General principle 6.

³²⁴ Ibid s 11B General principle 8.

³²⁵ Ibid s 11B General principle 10.

³²⁶ John Chesterman, 'The future of adult safeguarding in Australia' (2019) 54 *Australian Journal of Social Issues* 360, 363.

³²⁷ *Guardianship and Administration Act 2000* (Qld) s 11B General principle 7(3).

³²⁸ Queensland Law Society, 'Enduring Power of Attorney Law Reforms' (Submission to Law Council of Australia, 30 August 2021) 4.

³²⁹ Ibid s 11B General principle 7(4).

³³⁰ Ibid s 11B General principle 7(5).

³³¹ Chesterman, 'The future of adult safeguarding in Australia' (n 327) 363.

³³² Ibid.

In relation to informal versus formal decision-making, QLS and the Public Advocate recognise that supported decision-making can work well without an “extra” legal framework being imposed. Imposing formal legal mechanisms for supported decision-making (for example, beyond the General Principles already included in Queensland legislation) may add additional layers of cost and complexity for those who would otherwise avail themselves informally of supported decision-making.³³³

7.3. Litigation Guardians

Rule 93 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that a person under legal incapacity can only commence or defend proceedings by way of a litigation guardian. The law provides that a litigation guardian is liable for the costs incurred by solicitors in conducting an action on behalf of a person with impaired capacity, as well as the other side’s costs if the proceedings are unsuccessful.³³⁴ The litigation guardian is, however, entitled to an indemnity from the estate of the person they represent, provided the costs were properly incurred for the benefit of that person.³³⁵ The potential liability for costs may discourage people from agreeing to take on the role of litigation guardian and commence proceedings on behalf of an older person with impaired capacity. This is particularly the case where the older person’s estate has been dissipated.

Understandably, a prospective litigation guardian is unlikely to be prepared to accept the risk of an adverse costs order in such circumstances, with the consequent effect being that people with impaired capacity, many of whom are older members of the community, are unable to secure a litigation guardian to support them with their claim.

7.4. Changes to Queensland’s Guardianship and Administration Framework

On 30 November 2020, important changes to the law underpinning Queensland’s guardianship framework came into effect.

7.4.1. EPOA, General Power of Attorney and Advance Health Directive Forms

New EPOA, General Power of Attorney and Advance Health Directive (‘AHD’) forms were introduced in Queensland. These forms reflect the legislative changes made by the *Guardianship and Administration and Other Amendment Bill 2018*, and the impetus to make the system more user friendly.³³⁶ The forms were redesigned, the first time in 16 years, with the objective of simplifying and clarifying the process. The forms are accompanied by new explanatory guides.³³⁷

³³³ Ibid.

³³⁴ This is because the solicitor’s client is the litigation guardian, not the person with impaired capacity: *Stephenson v Geiss* [1998] 1 Qd R 542, 557.

³³⁵ Ibid, 558.

³³⁶ Queensland Government, ‘Changes to guardianship laws and reforms’ (Web Page) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/guardianship-changes>>.

³³⁷ Ibid.

7.4.2. Capacity Assessment Guidelines

New *Queensland Capacity Assessment Guidelines 2020*³³⁸ ('Capacity Guidelines') are also in effect as of 30 November 2020. The release of the Capacity Guidelines was a significant development for the Queensland guardianship and administration system. While there has been no change to the presumption of capacity under Queensland law,³³⁹ the new Capacity Guidelines provide helpful information about undertaking assessments of a person's capacity and the legal tests of capacity,³⁴⁰ which can assist legal practitioners, medical practitioners, attorneys and informal supporters of people who may be experiencing impaired capacity. The amendments also clarify the capacity requirements to make enduring documents, being that the Principal must both understand the nature and effect of the document and be capable of making it freely and voluntarily.³⁴¹

While QLS supported the introduction of Capacity Guidelines to assist in undertaking capacity assessments, the Society highlighted the difficulties with the attempt to make the guidelines a 'one size fits all' document and the need for differentiation between audiences.³⁴² Specifically, QLS is concerned that the guidelines present as a "how to" document for members of the public to "assess" capacity rather than an opportunity to help relevant persons recognise when they may need professional advice/assistance in relation to capacity issues.³⁴³

7.4.3. Amendments to the *Powers of Attorney Act 1998* (Qld)

Under the *PAA*, a person with the requisite capacity can appoint an attorney to make decisions for them for financial, personal and/or health matters, in the event that the person loses decision-making capacity. Guardians and administrators appointed by QCAT can also make these types of decisions.

Substitute decision-makers such as guardians, administrators and attorneys have significant duties and responsibilities under the guardianship and administration regime.³⁴⁴ These include acting honestly and with reasonable diligence,³⁴⁵ avoiding conflict transactions in financial matters,³⁴⁶ and consulting with other guardians, administrators or attorneys if there is more than one for the adult.³⁴⁷

The *PAA* also presumes undue influence by the attorney where a transaction is entered into between a principal and his or her attorney.³⁴⁸ There are limits on the gifts that an administrator or financial attorney can give to a third party in the name of the Principal. Only gifts the person would have given when they had capacity and that are reasonable in both their nature and value can be given by an attorney or administrator.³⁴⁹ An attorney may be required by a court or tribunal to compensate the Principal for any loss caused by the

³³⁸ Queensland Government, *Queensland Capacity Assessment Guidelines* (2020).

³³⁹ *Ibid* Section 3.

³⁴⁰ *Ibid*.

³⁴¹ *Ibid* 42.

³⁴² Queensland Law Society, 'Guardianship Implementation Project – second round of feedback on capacity guidelines' (27 November 2019) 1.

³⁴³ *Ibid*.

³⁴⁴ *Guardianship and Administration Act 2000* (Qld) ch 4, pts 1-2; *Powers of Attorney Act 1998* (Qld) ch 5, pts 1-4.

³⁴⁵ *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66.

³⁴⁶ *Guardianship and Administration Act 2000* (Qld) s 37; *Powers of Attorney Act 1998* (Qld) s 73.

³⁴⁷ *Guardianship and Administration Act 2000* (Qld) s 40; *Powers of Attorney Act 1998* (Qld) s 79.

³⁴⁸ *Powers of Attorney Act 1998* (Qld) s 87.

³⁴⁹ *Ibid* s 88; *Guardianship and Administration Act 2000* (Qld) s 54.

attorney's failure to comply with the obligations and duties imposed under the *PAA*.³⁵⁰ There is a similar provision with respect to compensation from administrators and guardians.³⁵¹

Amendments to the *PAA* commenced in late 2020, and raised the eligibility requirements for attorneys. These changes affect attorneys appointed under an EPOA or AHD. In addition to all previously existing requirements, attorneys under an EPOA must have capacity for a matter and must not have been a paid carer for the principal in the previous three years before their appointment.³⁵² Attorneys under an AHD must have capacity for health matters and must not be a service provider for a residential service where the Principal resides.³⁵³

In the case of a breach by an attorney, administrator or guardian, the recent amendments broadened the remedies available to victims of financial abuse. The reforms have clarified that a current attorney, administrator or guardian can be ordered by QCAT to pay compensation for a loss to the victim or the victim's estate caused by the failure to comply with their duties.³⁵⁴ The Supreme Court and QCAT also now have the power to order an attorney or administrator to compensate the Principal or adult who is under administration for loss, or to account for any profits they have accrued as a result of their breach of these duties and obligations.³⁵⁵ The reforms have also clarified the Court and QCAT's power to order an administrator or financial attorney to file records and audited accounts of dealings and transactions conducted on behalf of a person under administration or the Principal in the court for examination.³⁵⁶

7.4.4. Amendments to the Guardianship and Administration Framework

The Queensland guardianship and administration system has an important function to play in protecting the rights and interests of older people with impaired decision-making capacity, as well as providing mechanisms for redress for certain types of abuse by substitute decision-makers. Some additional reforms strengthening Queensland's guardianship and administration framework took effect on 30 November 2020:

- The OPG has been given discretion to investigate a complaint that an adult has been abused, neglected, or exploited even after their death.
- The OPG has been given discretion to provide a copy of a community visitor's report about a visit to a site to a broader range of people. The reform also allows the Public Guardian to limit the information to people entitled to the report.
- The changes acknowledge the role support plays in an adult's capacity.
- Reforms clarifying how the presumption that all adults have decision-making capacity until proven otherwise is applied by QCAT and the Supreme Court have been embedded. If a guardian or administrator has been appointed for an adult matter, then the guardian or administrator do not need to presume the adult has capacity for the matter.
- Changes have been made to the general principles and health care principles underpinning guardianship legislation in Queensland aligning those changes to the

³⁵⁰ *Powers of Attorney Act 1998* (Qld) s 106.

³⁵¹ *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: *Powers of Attorney Act 1998* (Qld) s 107; *Guardianship and Administration Act 2000* (Qld) s 60.

³⁵² *Powers of Attorney Act 1998* (Qld) s 29.

³⁵³ *Ibid.*

³⁵⁴ *Guardianship and Administration Act 2000* (Qld) s 60, *Powers of Attorney Act 1998* (Qld) s 107.

³⁵⁵ *Guardianship and Administration Act 2000* (Qld) s 59, *Powers of Attorney Act 1998* (Qld) s 106.

³⁵⁶ *Guardianship and Administration Act 2000* (Qld) s 153, *Powers of Attorney Act 1998* (Qld) s 122.

United Nations *Convention of the Rights of Persons with Disabilities* and the *Human Rights Act 2019*.

- QCAT powers have been broadened improving the accessibility to compensation for victims of financial abuse by an attorney or administrator who have breached their duty. QCAT can order a former attorney, administrator, or guardian to pay compensation for a loss to an adult or the adult's estate caused by the failure to meet their duty. QCAT is required to seek and consider the views, wishes and preferences demonstrated by the adult, focus on the definition of 'interested person' affecting the people who can initiate certain processed for an adult. QCAT may also replace the Public Guardian appointment for an adult if there is another more appropriate person available. QCAT has also been given jurisdiction to appoint administrators for missing adults.
- In conflict transactions, an administrator or attorney needs to seek authorisation before proceeding, or commencing in the role.

7.5. A National Register of EPOAs for Financial Matters

The guardianship and administration framework operates reactively to protect those with impaired decision-making capacity. In this way, while it does not proactively prevent elder abuse, this approach is consistent with the presumption of capacity and the right of all Queenslanders to exercise their autonomy and agency without interference.

However, the broad powers that can be conferred on an attorney under an EPOA, and the operation of privacy laws, create an environment in which attorneys who are so inclined can misuse their powers without oversight. This is especially so where the Principal has not included a provision in their EPOA for oversight of the attorney by any third party, or where the Principal has a limited social and support network. Once the Principal's decision-making capacity has declined, it is difficult for the Principal to exercise their rights in any areas where they may have decision-making capacity, or where they have fluctuating capacity, and to enforce their rights under the General Principles, or oversee and query the attorney's activities. Unless another attorney or a nominated person is appointed under the EPOA, there is no one with authority who can seek information about the attorney's actions,³⁵⁷ unless they are referred to an elder abuse service, make a complaint to the OPG or make an application to QCAT or another court. In short, in the absence of requirements for EPOAs to be checked and registered, and their use independently monitored, no accountability mechanisms exist to proactively monitor the activities of attorneys or even to ensure that revoked EPOAs are not being relied upon.

The ALRC recognised that EPOAs can be used as a tool for abuse, and made a number of recommendations to improve safeguards:

- adopting nationally consistent safeguards that seek to minimise the risk of abuse of an enduring document;
- giving tribunals jurisdiction to award compensation when duties under an enduring document have been breached; and
- establishing a national online registration scheme for enduring documents.³⁵⁸

³⁵⁷ 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* 20.

³⁵⁸ ALRC Final Report (n 83) 159-60 [5.1-5.3].

In addition to the concerns raised by the ALRC, financial institutions have also highlighted the difficulties they face with EPOAs:

Financial institutions report ongoing concerns with being able to identify if any EPOA can be relied upon to make financial decisions. There is no easily accessible, nationally consistent, source of data which organisations (like banks and health service providers) can use to determine if an EPOA is current and valid: an essential step in determining whether a transaction or decision can be validly made.³⁵⁹

In response, the Council of Attorneys-General agreed to consult on possible arrangements for a national register of enduring powers of attorney for financial matters.³⁶⁰ The purpose of the national register is expressed to:

- assist in determining the existence of EPOAs in relation to financial transactions, and the scope of people's will and preferences under those arrangements; and
- provide additional transparency about the use of those arrangements, in order to assist in the prevention of financial abuse, and to help promote and protect the rights of older Australians.³⁶¹

7.5.1. Benefits associated with a National Register

QLS and the Public Advocate support strategies to reduce the prevalence of abuse of older Australians and acknowledge that a national register of some form could provide certain benefits:³⁶²

- **Mitigating risk of lost documents** - a national register could provide a secure platform for documents to be stored and retrieved by relevant parties (i.e., the Principal, the Principal's legal representatives, the attorney, nominated persons, and courts and tribunals), and could notify and search the register where a person loses decision-making capacity to ascertain whether the person has made an EPOA). This in turn may reduce applications for guardianship and administration in instances where an EPOA may already be in existence. A memorandum of understanding between State and Territory tribunals and the National Register could also be formed to reduce the number of applications and hearings.
- **Promoting legal assistance** - mandatory registration by a legal practitioner or other appropriately qualified person, would facilitate a degree of education and oversight by a legal practitioner, which in turn would ensure that the registration process is undertaken by persons with specialised knowledge.
- **Assist financial institutions** - the creation of a national register could provide an efficient starting point for financial institutions for searches of the existence of an EPOA, particularly where the Principal/attorney is unable to produce the enduring document or the Principal has already lost capacity.

³⁵⁹ Attorney-General's Department, Australian Government, *Enhancing protections relating to the use of Enduring Power of Attorney instruments* (Consultation Regulation Impact Statement, February 2020) 5.

³⁶⁰ Attorney-General's Department, Australian Government, *National Register of Enduring Powers of Attorney* (Public Consultation Paper, April 2021).

³⁶¹ Ibid 5.

³⁶² Queensland Law Society, 'National Register of Enduring Powers of Attorney – Public Consultation paper' (Submission to Law Council of Australia, 15 June 2021) 5-6.

- **Providing assistance where there are competing documents** - the creation of a national register offers an opportunity to clarify document priority in cases where multiple EPOAs exist across different jurisdictions.
- **Identifying possible undue influence and capacity** - it would raise suspicion if several EPOAs were registered for the same Principal in a relatively short period of time.
- **Reduces the risk of reliance on superseded or revoked EPOAs** - a national register could address usage by attorneys on revoked EPOAs, although a national register on its own is unlikely to assist in preventing financial abuse.
- **Provide the Principal with increased control** - a national register could assist adults to have more control over and access to their enduring documents, instead of relying on attorneys or family members to produce it for them.

7.5.2. Challenges Associated with a National Register

While there are a number of benefits associated with a national register of EPOAs for financial matters, there are also significant challenges associated with the register as currently proposed:

- **A limited register of financial EPOAs reduces its usefulness** - the ALRC recommended that a national register should deal with enduring documents as a whole (i.e., that it should have a wider scope than only financial EPOAs), as well as court tribunal appointments of guardians and financial administrators.
- **A register without harmonisation of the law** - there are limitations to the usefulness of a national register without harmonisation of the legal framework and/or a national model enduring document.
- **Potential inconsistencies in the law** - divorcing EPOAs for financial matters from other substitute decision-making arrangements in Queensland may compound inconsistencies in the law.
- **A limited evidence base** - there is currently a limited evidence base to support the introduction of a national register as a way to meaningfully combat and reduce financial abuse against older Australians.³⁶³
- **Addressing the main causes of financial abuse** - much financial abuse of older persons arises from attorneys misusing powers properly granted to them, not because the document is fraudulently or improperly made.³⁶⁴
- **Limited understanding of an attorney's role** – there is limited understanding about the attorney's powers and obligations, which is a primary contributor to financial abuse.³⁶⁵

³⁶³ For example, Tasmania currently requires all EPOAs to be registered, but there does not appear to have been any comprehensive review of the Tasmanian scheme to examine the impact or effectiveness of a mandatory register on the misuse and abuse of enduring documents. On the contrary, the Chief Executive Office of the Public Trustee of Tasmania has previously highlighted that a register has not reduced financial abuse of older persons in that State: Letter from Chief Executive Officer, Public Trustee, Tasmania to Chair, Law Reform Committee, Parliament of Victoria, 3 November 2009, as quoted in Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 228.

³⁶⁴ See for example, *Perpetual Trustee Company v Gibson and Anor* [2013] NSWSC 276; *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380; *Smith v Glegg* [2004] QSC 443; *Anderson v Anderson* [2013] QSC 008; *Moylan v Rickard* [2010] QSC 327; *Western v Male* [2011] SASC 75; *Barkely v Barley Brown* [2009] NSWSC 79; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729.

³⁶⁵ For example, one mixed-method study identified that across all user groups and all methods of data collection, 'the role of the attorney in an EP[O]A was consistently identified as problematic': Tilse et al, 'Enduring Powers of Attorney: Promoting attorneys' accountability as decision makers' (2014) 33(3) *Australasian Journal on Ageing* 195. The study also highlighted that education of attorneys as to their roles and responsibilities is key to reducing financial abuse, and that Principals should

- **Focus should be on the drivers for abuse** - it is important that there is also a focus on understanding why people commit financial abuse against family members or friends when acting as their attorneys, and further research be sought to gain a better understanding of the motivations and likely deterrents for attorneys who commit acts of dishonesty and fraud.
- **Privacy concerns** – it is recommended that the contents of a registered EPOA should only be accessible by certain classes of persons, including the principal, the principal’s legal representative for an approved purpose, the attorney, nominated persons, and courts and tribunals.
- **Register may embolden dishonest attorneys** - there is a risk that the registration of an EPOA on the national register will embolden potentially dishonest attorneys by giving them an increased sense of authority that may make their misconduct more difficult to challenge and stop.

At the time of publication, the proposed national register of EPOAs for financial matters is not yet in force.

7.6. EPOA Law Reforms and a Model Enduring Document

As the Council of Attorneys-General progress a national register of EPOAs for financial matters, QLS is also actively working with the Law Council of Australia and other constituent bodies to advocate for nationally consistent laws regarding EPOAs, to ensure consistency across jurisdictions and simplify the implementation of the proposed national register. QLS has supported in particular:

- increasing national awareness of financial elder abuse arising from EPOA arrangements, and building the public case as to why more consistent laws and a national model enduring document would go some way to addressing such abuse; and
- building consensus on the core essential features of more consistent laws which could be adopted by State and Territory laws and be reflected in a national model enduring document.

However, more nationally consistent laws and a national model enduring document should be resolved prior to the implementation of a national register. QLS also considers that a standardised test for capacity to make an EPOA is important, along with nationally consistent best practice guidelines for assessing capacity.

be advised to put conditions and limitations on the attorney’s authority to act, to provide direction for attorneys and enhance accountability.

8. Abuse in Residential Aged Care Settings

Whilst at any one time, many older Australians do not require aged care services, individually and longitudinally, 80% of Australians will utilise aged care services before they die.³⁶⁶ The aged care system provides a range of programs and services, from low-level support (including assistance with daily living activities such as personal hygiene, cleaning, laundry and shopping) to more intensive services (including accommodation, health care and nursing). Aged care in Australia includes both the delivery of home care and residential aged care. This chapter focuses on abuse in residential aged care settings.

8.1. Regulation of Aged Care

The delivery of aged care services in Australia is regulated by the Commonwealth Government, through the *Aged Care Act 1997* (Cth) ('*Aged Care Act*') and the *Aged Care Quality and Safety Commission Act 2018* (Cth).

The *Aged Care Act* creates the *Quality of Care Principles 2014* (Cth) that together set out providers' obligations and responsibilities. These range from the quality of care that must be provided to residents, residents' rights when receiving care and accountability for the care provided.³⁶⁷

There is also a Charter of Aged Care Rights that providers are required to give to residents receiving care, and help the resident understand their rights.³⁶⁸ The Charter of Aged Care Rights states:

I have the right to:

1. safe and high quality care and services;
2. be treated with dignity and respect;
3. have my identity, culture and diversity valued and supported;
4. live without abuse and neglect;
5. be informed about my care and services in a way I understand;
6. access all information about myself, including information about my rights, care and services;
7. have control over and make choices about my care, and personal and social life, including where the choices involve personal risk;
8. have control over, and make decisions about, the personal aspects of my daily life, financial affairs and possessions;
9. my independence;
10. be listened to and understood;
11. have a person of my choice, including an aged care advocate, support me or speak on my behalf;
12. complain free from reprisal, and to have my complaints dealt with fairly and promptly;
13. personal privacy and to have my personal information protected;
14. exercise my rights without it adversely affecting the way I am treated.

³⁶⁶ Royal Commission into Aged Care Quality and Safety (n 95) vol 1, 11.

³⁶⁷ *Aged Care Act 1997* (Cth) ch 4; *Quality of Care Principles 2014* (Cth).

³⁶⁸ *User Rights Principles 2014* (Cth) ss 9, 11.

8.2. Aged Care Quality and Safety Commission

The Aged Care Quality and Safety Commission ('ACQS Commission') is responsible for protecting and enhancing the safety, health, wellbeing and quality of life for older people receiving services through the Australian aged care system.³⁶⁹

The ACQS Commission's responsibilities include accrediting residential aged care services, monitoring the quality of care and services and handling complaints regarding the responsibilities of providers of aged care services.³⁷⁰ The ACQS Commission conducts audits of aged care providers' compliance with their responsibilities,³⁷¹ and conducts quality reviews of home care services at least once every three years.³⁷²

The ACQS Commissioner has the power to revoke the accreditation of a service following an audit.³⁷³ The ACQS Commissioner must revoke a provider's approval if he or she considers the provider is no longer suitable to provide aged care, or if the provider has not complied with its responsibilities.³⁷⁴ Additionally, the ACQS Commissioner has the power to impose sanctions on providers that have not complied with their responsibilities.³⁷⁵ Sanctions may include:

- revoking, suspending or restricting providers approval;
- revoking, suspending or prohibiting the allocation of places to the approved provider;
- varying conditions about the allocation of places;
- prohibiting provider charging for extra services; and/or,
- requiring refunds paid to the Department of Health or to the person receiving care.³⁷⁶

The decision to impose a sanction is reviewable internally and then externally by the Administrative Appeals Tribunal.³⁷⁷

The ACQS Commissioner can investigate a complaint or undertake a conciliation/mediation process between a person and their provider,³⁷⁸ and can issue directions requiring the provider to take certain actions.³⁷⁹

8.3. The Findings of the Aged Care Royal Commission

The Aged Care Royal Commission found that many people within the aged care system experience substandard care, despite the current regulatory framework. The Aged Care Royal Commission considered the National Ageing Research Institute ('NARI') surveys to be the best direct measure of the experiences of older people who are receiving aged care. According to NARI, the following cohorts believed their care needs were sometimes, rarely, or never met:

- 33% of people receiving residential aged care;

³⁶⁹ *Aged Care Quality and Safety Commission Act 2018* (Cth) s 6.

³⁷⁰ *Ibid* ss 18, 19.

³⁷¹ *Ibid* s 59.

³⁷² *Ibid* s 52.

³⁷³ *Ibid* s 77.

³⁷⁴ *Ibid* s 63J.

³⁷⁵ *Ibid* s 63N.

³⁷⁶ *Ibid* s 63R.

³⁷⁷ Royal Commission into Aged Care Quality and Safety (n 95) vol 2, 48.

³⁷⁸ *Aged Care Quality and Safety Commission Rules 2018* (Cth) ss 13-15.

³⁷⁹ *Ibid* s 19.

- 44% of people receiving home care;
- 46% of people receiving respite care; and
- 51% of people using community respite care.³⁸⁰

The Aged Care Royal Commission found that, overall, there was ambivalence and a lack of leadership by successive Australian governments, with insufficient attention to monitoring safety and quality and failing to intervene in a timely way.³⁸¹ Further, the Aged Care Royal Commission concluded that the funding for aged care is 'insufficient, insecure and subject to the fiscal priorities of the Australian Government of the day.'³⁸² It found a failure of the market to adequately deliver services, combined with a government failure to actively manage or shape aged care into a more responsive sector.³⁸³ Essentially, the Aged Care Royal Commission characterised the implementation of the *Aged Care Act* as being more about the funding relationship between the Australian Government and service providers, which is focused on financial restraint, rather than focusing on the rights of older people to receive care that is appropriate to their needs.³⁸⁴

The Aged Care Royal Commission's research on the prevalence of elder abuse in Australian residential aged care facilities was significant.³⁸⁵ Based on an 'any concern'³⁸⁶ measure:

- the prevalence of elder abuse in Australian residential care is estimated to be 39.2% when counting all people who reported experiencing emotional abuse, physical abuse and/or neglect;
- the prevalence estimate for neglect is 30.8%;
- the prevalence estimate for emotional/psychological abuse is 22.6%; and
- the prevalence estimate for physical abuse is 5.0%.³⁸⁷

Findings of abuse (including physical, sexual, use of both chemical and physical restrictive practices) were noted by the Aged Care Royal Commission as 'far from uncommon.'³⁸⁸ It reported that although the rates of reporting of physical and sexual abuse have increased over time, there remains extensive under-reporting, in particular if the alleged perpetrator is another resident with a cognitive impairment and the aged care provider has put arrangements in place to manage the alleged behaviour.³⁸⁹

A KPMG study considered by the Aged Care Royal Commission noted that there were between 27,000 – 39,000 incidences of assault in residential aged care facilities that were not reported, bringing the incidence of assault from around 2 per 100 residents to 13-18 per 100 residents.³⁹⁰ This high rate of alleged assaults is contrasted with the main reason that older people are encouraged to enter aged care, which is for their own safety.³⁹¹

³⁸⁰ Royal Commission into Aged Care Quality and Safety (n 95) vol 2, 149.

³⁸¹ Ibid Vol 2, 73.

³⁸² Ibid Vol 2, 74.

³⁸³ Ibid.

³⁸⁴ Ibid Vol 3B, 629.

³⁸⁵ Royal Commission into Aged Care Quality and Safety, *Experimental Estimates of the Prevalence of Elder Abuse in Australian Aged Care Facilities* (Research Paper 17, December 2020).

³⁸⁶ Ibid 7.

³⁸⁷ Ibid.

³⁸⁸ Royal Commission into Aged Care Quality and Safety (n 95) vol 2, 94.

³⁸⁹ Ibid Vol 2, 160.

³⁹⁰ Ibid.

³⁹¹ Ibid Vol 2, 161.

The Aged Care Royal Commission also identified shortcomings in the ACQS Commission's monitoring and regulation of the aged care system,³⁹² including:

- a poor track record of enforcement;
- a reactive approach to monitoring and compliance;
- lack of transparency, accountability and responsiveness;
- not properly responding to complaints of persons receiving care, reports of serious abuse or assaults, coronial reports and signs of provider financial distress;
- lack of investigations of underlying issues;
- relying upon the assurance of providers regarding their own performance;
- lack of meaningful assessments of provider performance;
- indications that proper sanctions are not being put in place; and,
- not proactively seeking the views of older people receiving services.³⁹³

Many of the Aged Care Royal Commission's recommendations are directed to setting service standards, financing the sector, regulating the sector, having greater integration between aged care and health services, and governance issues more broadly.³⁹⁴ Among its 148 recommendations, the Aged Care Royal Commission identified that the key areas of urgent concern are:

- food and nutrition;
- dementia care;
- use of restrictive practices; and
- palliative care.³⁹⁵

In respect of those residents with dementia, the Commission highlighted:

It is estimated that more than half of the people living in permanent residential aged care in 2019 had a diagnosis of one of the forms of dementia. The real percentage is likely higher, given the prevalence of undetected dementia.

Despite this, our inquiry has revealed that the quality of aged care that people living with dementia receive is, at times, abysmal. We heard time and time again that staff members do not have the time or the skills to deliver the care that is needed. The quality of dementia care in the aged care system needs significant and immediate improvement.³⁹⁶

In addition, the Commission supported the view that '[d]eficiencies in regulation of restrictive practices have been identified as a significant human rights issue in Australia',³⁹⁷ where access to expert assessments and individual plans for behavioural support should be lodged independently and appropriately monitored, as part of the oversight process.³⁹⁸

³⁹² Ibid Vol 2, 4.14.

³⁹³ Ibid 226 – 232.

³⁹⁴ Ibid Vol 1, 205-308 (for the full list of Recommendations).

³⁹⁵ Ibid Vol 1, 92-94.

³⁹⁶ Ibid Vol 1, 92.

³⁹⁷ Ibid Vol 1, 93.

³⁹⁸ Ibid.

8.4. A New Aged Care Act

The Aged Care Royal Commission argued for the replacement of the *Aged Care Act* with a new Act. It emphasised that the objects of the new Act should be to:

- (a) provide a system of aged care based on a universal right to high quality, safe and timely support and care to:
 - i. assist older people to live an active, self-determined and meaningful life, and
 - ii. ensure older people receive high quality care in a safe and caring environment for dignified living in old age
- (b) protect and advance the rights of older people receiving aged care to be free from mistreatment and neglect, and harm from poor quality or unsafe care, and to continue to enjoy rights of social participation accessible to members of society generally
- (c) enable people entitled to aged care to exercise choice and control in the planning and delivery of their care
- (d) ensure equity of access to aged care
- (e) provide advocacy and complaint mechanisms for people receiving aged care
- (f) provide for regular and independent review of the aged care system
- (g) promote innovation in aged care based on research
- (h) promote positive community attitudes to enhance social and economic participation by people receiving aged care.³⁹⁹

Importantly, the Commission recommended a rights-based framework be embedded into the new Act and that the rights specified in the Act must be taken into account in interpreting the Act. The Commission recommended such rights as:

- (a) for people seeking aged care:
 - i. the right to equitable access to care services
 - ii. the right to exercise choice between available services
- (b) for people receiving aged care
 - i. the right to freedom from degrading or inhumane treatment, or any form of abuse
 - ii. the right to liberty, freedom of movement, and freedom from restraint
 - iii. the right of autonomy, the right to the presumption of legal capacity, and in particular the right to make decisions about their care and the quality of their lives and the right to social participation
 - iv. the right to fair, equitable and non-discriminatory treatment in receiving care
 - v. the right to voice opinions and make complaints
- (c) for people receiving end-of-life care, the right to fair, equitable and non-discriminatory access to palliative and end-of-life care
- (d) for people providing informal care, the right to reasonable access to supports in accordance with needs and to enable reasonable enjoyment of the right to social participation.⁴⁰⁰

While the list of rights and principles that informed the Aged Care Royal Commission's recommendations is expansive, they stem the fundamental right enshrined in art 12(1) of the

³⁹⁹ Ibid Vol 1, 205.

⁴⁰⁰ Ibid Vol 1, 206.

International Covenant on Economic, Social and Cultural Rights, being ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁴⁰¹

In its submission to the Law Council of Australia on the Aged Care Royal Commission’s Final Report,⁴⁰² QLS agreed that any legislation drafted to replace the *Aged Care Act* must have a human rights focus that expressly protects and enhances the human rights of older people, in line with international recommendations and protections. QLS and the Public Advocate consider that a consumer rights style protection framework has proven to be inadequate and has produced unacceptable outcomes for people in residential aged care. In particular, the issues affecting people within the aged care sector involve violations of fundamental human rights, including: rights protecting against inequality and discrimination; protection from torture and cruel and inhumane treatment; free exercise of thought and movement; privacy; cultural rights; the opportunity to participate in public life; and, personal security and choice with respect to health care.

A rights-based approach places greater emphasis on the realisation of human rights and is a necessary tool to appropriately define and address concerns within the aged care sector. As highlighted above, the Aged Care Royal Commission’s recommendations were informed by existing instruments including the 1991 United Nations *Principles for Older Persons* and its five key themes of: independence; participation; care; self-fulfilment and dignity. However, the UN Principles are non-binding soft law, and have not had a significant impact on the quality of aged care in Australia in the last 30 years of its operation. While they are valuable aspirational standards, they lack detail and are no longer reflective of contemporary human rights issues in aged care.

While the set of rights recommended by the Aged Care Royal Commission present a good starting point, other rights should also be considered for inclusion to ensure that the rights granted by legislation are contemporary and comprehensive. The rights recommended by the Commission are very limited in scope, narrowly defined and prescribed only in certain situations.

Problematically, the set of rights recommended by the Commission appear to have been constructed without reference to the existing work of the United Nations’ ‘Open-Ended Working Group on Ageing for the Purpose of Strengthening the protection of the Human Rights of Older Persons,’⁴⁰³ or the work of the Office of the High Commissioner for Human Rights.⁴⁰⁴ Consequently, the Commission’s recommendations fall short of reflecting even the rights for older persons that Australia has recognised and ratified to date. It is concerning that the rights in care proposed by the Commission do not provide for rights to privacy and family, which has been a pertinent issue for those in aged care during the COVID-19 pandemic.

Further, while the Aged Care Royal Commission has provided for rights to autonomy, presumption of legal capacity and the right for older persons to make decisions about their care and quality of their lives, this is a trimmed down version of the broader right to equality before the law. Given this, the prescriptive nature of the Commission’s recommendations is

⁴⁰¹ Ibid Vol 1, 79.

⁴⁰² Queensland Law Society, ‘Royal Commission into Aged Care Quality and Safety’ (Submission to Law Council of Australia, 20 April 2021).

⁴⁰³ See United Nations, Open-Ended Working Group on Ageing, established by General Assembly, resolution 65/182 (21 December 2010) <<https://social.un.org/ageing-working-group/>>.

⁴⁰⁴ Office of the High Commissioner for Human Rights, *Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons* (Working Paper, March 2021) <<https://social.un.org/ageing-working-group/eleventhsession.shtml>>.

potentially problematic; human rights should be universally applied to those seeking or receiving aged care or related services.⁴⁰⁵

It is also unclear from the Commission's recommendations whether the rights suggested will have strong enforcement mechanisms. Accordingly, QLS submitted that the rights proposed to be protected under the new legislation must be enforceable by individuals, including on behalf of those with impaired decision-making capacity such as persons with dementia who are subject to restrictive practices.⁴⁰⁶ Enforcement mechanisms should ensure that older persons have access to prompt remedies and redress and which are appropriate, effective and holistic, including rights of appeal, restitution, indemnity, compensation and reparation. The aged care system should be flexible, responsive and free from ageist constructions of older people's needs. A rights-based system would promote flexibility by balancing the older person's rights to autonomy and self-determination against the person's social, emotional and clinical needs and goals.⁴⁰⁷

On 1 March 2021, the Australian Government announced that work has begun on a new consumer-focused *Aged Care Act*.⁴⁰⁸ It is expected that a new *Aged Care Act* will be introduced in 2023.

8.5. Aged Care Reforms in the Wake of the Aged Care Royal Commission

In May 2021, the Australian Government released the 'Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety'.⁴⁰⁹ There have been a number of reforms in the aged care sector since the release of the Royal Commission's final report and the Australian Government's subsequent response.

8.5.1. Serious Incident Response Scheme

Aged care providers must report certain alleged or suspected physical and sexual assaults against residents.⁴¹⁰ However, until 1 April 2021, reporting of these incidents was not required if the alleged perpetrator was another resident with a diagnosed cognitive impairment and the provider put in place arrangements to manage the perpetrator's behaviour.⁴¹¹

On 1 April 2021, a new Serious Incident Response Scheme commenced which increases the obligations on aged care providers to report the following incidents to the ACQS Commission:

- Unreasonable use of force – *for example, hitting, pushing, shoving, or rough handling.*
- Unlawful sexual contact or inappropriate sexual conduct – *such as sexual threats or stalking, or sexual activities without consent.*
- Psychological or emotional abuse – *such as yelling, name calling, ignoring a consumer, threatening gestures, or refusing a consumer access to care or services as a means of punishment.*

⁴⁰⁵ Queensland Law Society (n 403) 2.

⁴⁰⁶ Ibid.

⁴⁰⁷ See Royal Commission into Aged Care Quality and Safety (n 95) vol 1, 206.

⁴⁰⁸ Australian Government, Department of Health, *Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety* (May 2021) <<https://www.health.gov.au/sites/default/files/documents/2021/05/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety.pdf>>

⁴⁰⁹ Ibid.

⁴¹⁰ *Aged Care Act 1997* (Cth) s 63-1AA.

⁴¹¹ *Accountability Principles 2014* (Cth) s 53.

- Unexpected death – *in the event of a fall, untreated pressure injury, or the actions of a consumer result in the death of another consumer.*
- Stealing or financial coercion by a staff member – *for example, if a staff member coerces a consumer to change their will to their advantage, or steals valuables from the consumer.*
- Neglect – *includes withholding personal care, untreated wounds, or insufficient assistance during meals.*
- Inappropriate physical or chemical restraint – *for example, where physical or chemical restraint is used without prior consent or without notifying the consumer's representative as soon as practicable; where physical restraint is used in a non-emergency situation; or when a provider issues a drug to a consumer to influence their behaviour as a form of chemical restraint.*
- Unexplained absence from care – *this occurs when the consumer is absent from the service, it is unexplained and has been reported to the police.*⁴¹²

Importantly, the ACQS Commission must now be notified of all reportable incidents, including those involving another care recipient with a cognitive impairment (such as dementia).⁴¹³ The Serious Incident Response Scheme will be extended to home care and flexible care in a home or community setting commencing 1 July 2022.⁴¹⁴

8.5.2. Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021

The *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* (Cth) made important changes to aged care legislation and commenced on 1 July 2021, amending the *Aged Care Act* and the *Aged Care Quality and Safety Commission Act 2018* (Cth). The Act passed in June 2021 and was the first round of reforms introduced by the Federal Government in response to the Aged Care Royal Commission.

The amendments strengthened the regulation of restraints, renaming them as 'restrictive practices', clarifying the requirements that providers must meet in relation to their use, and aligning the definition of 'restrictive practices' in the *Aged Care Act* with the definition used under the National Disability Insurance Scheme. In particular, providers are prohibited from using restrictive practices unless as set out in the Quality of Care Principles. Providers must only consider the use of restrictive practices:

- as a last resort to prevent harm after alternative best practice strategies have been explored, applied and document, except in an emergency;
- after considering the likely impact of the use of the practice on the care recipient;
- to the extent necessary and proportionate to the risk of harm to the aged care recipient or other persons;
- where the restrictive practice is the least restrictive form, and for the shortest time, necessary to prevent harm to the care recipient or other persons;
- if informed consent to the use of the practice is given;
- in accordance with the Charter of Rights and the Aged Care Quality Standards; and

⁴¹² Aged Care Quality and Safety Commission, 'Serious Incident Response Scheme' (current as at 1 July 2021) <<https://www.agedcarequality.gov.au/sirs#how%20does%C2%A0the%20sirs%20work>>.

⁴¹³ Ibid.

⁴¹⁴ Aged Care and Other Legislation (Royal Commission Response No. 2) Bill 2021.

- if care recipients are monitored whilst the restrictive practice is in use and the use and effectiveness documented.⁴¹⁵

The amendments also provides that a requirement specified in the Principles does not apply if the use of a restrictive practice is necessary in an emergency.⁴¹⁶

From 1 September 2021, approved providers are also required to create behaviour support plans to inform the use of restrictive practices on a care recipient.⁴¹⁷

In October 2021, the Public Advocate released an options paper regarding restrictive practices and the issues regarding the consent model currently used in Queensland.⁴¹⁸ The paper recommends a senior practitioner model as one way to authorise and regulate the use of restrictive practices in Queensland, including in residential aged care facilities.

8.5.3. Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

On 1 September 2021, the Government introduced the second tranche of aged care reforms via the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021. If passed, the Bill will:

- establish nationally consistent pre-employment screening for aged care workers and governing persons of approved providers, as well as a code of conduct for approved providers, workers and board directors, to be enforced by the ACQS Commission with offenders to face civil penalties and new banning orders;
- extend the Serious Incident Response Scheme to home care and flexible care from 1 July 2022;
- increase governance requirements for approved providers, including the provision of an annual statement of their operations that will be made publicly available;
- align regulations across aged care, disability support and veterans' care with increased information-sharing by the aged care regulator;
- implement a new financial and prudential monitoring, compliance and intervention framework for the sector to improve financial accountability and identify providers at risk of financial distress; and
- enable the Independent Health and Aged Care Pricing Authority to provide advice on aged care pricing.

8.6. Deaths in Residential Aged Care

The majority of deaths in Australia occur in hospitals and residential aged care facilities.⁴¹⁹ Most people exit residential aged care via death due to the progress of their illness.⁴²⁰ The Queensland Coroner is responsible for investigating “reportable deaths” that occur in

⁴¹⁵ *Aged Care Act 1997* (Cth) ch 4; *Quality of Care Principles 2014* (Cth) s 15FA.

⁴¹⁶ *Ibid* s 15FA(2).

⁴¹⁷ *Ibid* div 5.

⁴¹⁸ Public Advocate, *Improving the regulation of restrictive practices in Queensland: a way forward* (Reform Options Paper, 5 October 2021) <https://www.justice.qld.gov.au/data/assets/pdf_file/0011/697133/20211005-OPA-Restrictive-Practices-Reform-Options-paper.pdf>.

⁴¹⁹ In 2019, 51% of deaths occurred in a hospital/medical service area, and 29.5% of deaths occurred in residential aged care facilities: Australian Bureau of Statistics, ‘Classifying Place of Death in Australian Mortality Statistics’ (14 April 2021) <<https://www.abs.gov.au/statistics/research/classifying-place-death-australian-mortality-statistics>>.

⁴²⁰ Australian Institute of Health and Welfare, ‘Interfaces between the aged care and health systems in Australia – where do older Australians die?’ (June 2021).

Queensland.⁴²¹ However, the mere fact that a deceased person lived in residential aged care does not automatically make the death reportable under the *Coroners Act 2003* (Qld) ('Coroner's Act').

The death of an aged care resident will be reportable to the Queensland Coroner only if it is a "reportable death", meaning that the death must meet one or more of the following specific criteria:

- the person's identity is not known;
- the death is violent or unnatural or occurred in suspicious circumstances;
- the death is health care related;
- the probable cause of death is not known and a cause of death certified cannot be issued;
- the death occurred "in care";
- the death occurred in custody or in the course of a police operation.⁴²²

The Queensland Government highlights that deaths of aged care residents are most commonly reported because the person died:

- from an "unnatural" cause, for example, traumatic injury (often sustained by a mechanical fall), airway obstruction by food bolus, suicide or the death occurred in suspicious circumstances;
- as the unexpected result of a health care investigation or failure to provide health care, for example inadequate swallow/aspiration risk management or chronic wound/pressure area management, medication error or delayed medical treatment; or
- from an unknown cause.⁴²³

Relevantly, the concept of "death in care" does not automatically apply to residential aged care residents. A coronial investigation of a "death in care" is 'intended to ensure there is independent scrutiny of deaths of certain categories of particularly vulnerable people namely:

- people with a disability with high support needs living in funded supported living arrangements – death in care (disability);
- involuntary mental health inpatients and forensic disability clients – death in care (involuntary treatment); and
- children in care – death in care (child protection) or death in care (adoption).⁴²⁴

While requiring all deaths in residential aged care to be reportable would be unduly onerous, the general exclusion of deaths in residential aged care facilities from the definition of "reportable deaths" means there is no formal process that provides for the forensic investigation of the deaths of older people living in aged care, and the circumstances and quality of care provided to the person that may help prevent similar deaths occurring in the future.⁴²⁵ Although the aged care system is funded by the Australian Government, who is also responsible for aged care quality and safety, there is no Commonwealth Government agency

⁴²¹ *Coroners Act 2003* (Qld) s 3.

⁴²² *Ibid* s 8(3)

⁴²³ Department of Justice and Attorney-General, 'Deaths of aged care residents' (Information sheet).

⁴²⁴ *Ibid*.

⁴²⁵ See generally Bill Mitchell, 'Identifying Institutional Elder Abuse in Australia through Coronial and Other Death Review Processes' (2018) 18 *Macquarie Law Journal* 35.

comparable to the Queensland Coroner that has the power and skills to investigate deaths in aged care.

There is some inconsistency in the approach to the investigation of deaths of older persons depending on their place of residence. For example, the Queensland Coroner conducted an inquest into the death of a 68 year old man who died of heat stroke while resident in a State-regulated residential service at the time of his death.⁴²⁶ However, had he lived in a Commonwealth-regulated residential aged care facility, his death would not have been investigated and the service provider would not have received the same level of scrutiny in relation to its practices and standards of care.

The Aged Care Royal Commission highlighted that '[r]eports by State and Territory coroners can be a source of significant information concerning systemic issues in aged care.'⁴²⁷ Other studies of coronial findings also conclude that coroners' recommendations have the potential to reduce incidence of fatal injury.⁴²⁸ Yet, despite their potential significance, 'there is no system for the implementation of recommendations and findings of coronial determinations relevant to the quality and safety of aged care.'⁴²⁹ Accordingly, the Aged Care Royal Commission emphasised: 'A centralised system that is available to RACS [residential aged care service] providers, that provides the recommendations, along with the responses to what changes have or have not been made along with a one to five year follow-up about whether the recommendation had the intended impact would be valuable.'⁴³⁰ In 2019, an officer of the Australian Department of Health stated that a 'formalised protocol to consider and review Coroner reports is currently being developed by the Department.'⁴³¹

⁴²⁶ *Inquest into the death of Leon Streader* (Queensland Cours) COR 573/04(3).

⁴²⁷ Royal Commission into Aged Care Quality and Safety (n 95) vol 3B, 501.

⁴²⁸ *Ibid* 502.

⁴²⁹ *Ibid*.

⁴³⁰ *Ibid*.

⁴³¹ *Ibid*.

9. Comparative Legal Responses

This chapter looks to the elder abuse response frameworks in place in other Australian and international jurisdictions.

9.1. Australia

Generally, Australian State and Territory laws do not provide specific offences for criminal conduct directed at older persons.⁴³² As is the case under Queensland law, most Australian jurisdictions criminalise a range of conduct under various general criminal offence provisions relating to personal violence and property that may be directed at older members of the community. All Australian jurisdictions also have domestic and family violence legislation that broadly provide protective responses to abuse of people in domestic settings, including older people.⁴³³

This part provides a brief outline of some specific laws in other Australian jurisdictions dealing with conduct involving the abuse of older people.

9.1.1. New South Wales

New South Wales has established an Ageing and Disability Commission, to protect older people and adults with disability from abuse, neglect and exploitation.⁴³⁴ The functions of the Ageing and Disability Commission include investigating allegations of abuse of older people and adults with a disability, raising awareness of these issues, providing support and information to those in need and reporting to government on related systemic issues.⁴³⁵ There are, however, difficulties in balancing safeguarding with autonomy, for example in relation to self-neglect, the right to be ill and voluntary or assisted dying.⁴³⁶

The Ageing and Disability Commission can also refer matters to another agency that can more appropriately deal with issues or make applications to courts and tribunals regarding the person.⁴³⁷ Additionally, the Ageing and Disability Commissioner can conduct a public inquiry with similar powers and functions to a Royal Commission.⁴³⁸

9.1.2. Australian Capital Territory

In August 2020, the Australian Capital Territory passed the *Crime (Offences Against Vulnerable People) Legislation Amendment Act 2020* (ACT), amending the *Crimes Act 1900* (ACT) to protect people from abuse in situations where they are receiving care. The intention was to protect both older people and adults with a disability.⁴³⁹ The legislation creates offences that criminalise the conduct of individual carers, as well as the corporations that are responsible for providing the care.⁴⁴⁰

Although the term “elder” or “older person” is not included in these amendments, the term “vulnerable person” has been defined to include an adult who is at least 60 years old and:

⁴³² ALRC, Discussion Paper (n 31) 76.

⁴³³ Ibid.

⁴³⁴ *Ageing and Disability Commissioner Act 2019* (NSW) s 4(1).

⁴³⁵ Ibid s 12(1).

⁴³⁶ See Townsville Community Legal Service Inc, *Safeguarding Models and Human Rights Norms* (March 2019) 7.

⁴³⁷ *Ageing and Disability Commissioner Act 2019* (NSW) s 12(1).

⁴³⁸ Ibid s 19.

⁴³⁹ Explanatory Statement, *Crime (Offences Against Vulnerable People) Legislation Amendment Bill 2020* 2.

⁴⁴⁰ Ibid.

- has a disorder, illness or disease that affects the person's thought processes, perception of reality, emotions or judgement or otherwise results in disturbed behaviour; or
- has an impairment that –
 - is intellectual, psychiatric, sensory or physical in nature; and
 - results in a substantially reduced capacity of the person for communication, learning or mobility; or
- for any other reason is socially isolated or unable to participate in the life of the person's community.⁴⁴¹

Three new offences were created in relation to such a person under care.

The first is a new offence of 'Abuse of vulnerable person' where it is an offence if:

- a person is responsible for providing care to a vulnerable person; and
- the person has engaged in abusive conduct towards the vulnerable person; and
- the conduct results in harm or a financial benefit for the person or someone else associated with the person; and
- the person is reckless about:
 - causing the harm to the vulnerable person; or
 - if they or someone else associated with the person obtains a financial benefit.⁴⁴²

Abusive conduct is defined as conduct:

- that is violent, threatening, intimidating or sexually inappropriate;
- that is directed at the vulnerable person or someone known by the vulnerable person that is reasonably likely to:
 - make the vulnerable person dependent on or subordinate to the abusive person; or
 - isolate the vulnerable person from friends or family; or
 - limit the vulnerable person's access to services needed by the vulnerable person; or
 - deprive or restrict the vulnerable person's freedom of action; or
 - frighten, humiliate, degrade or punish the vulnerable person; and
- is not reasonably necessary for the safe and effective care of the vulnerable person or for the safety of another person.⁴⁴³

The second offence imposes criminal liability for the failure of a care provider institution to protect the vulnerable person from harm.⁴⁴⁴ A person in authority of a relevant institution (that provides services and facilities for vulnerable people) commits an offence if:

- there is a substantial risk that a serious offence will be committed against a vulnerable person in the institution by a person associated or a person in authority in the institution;
- the person in authority is aware of the risk;
- the person in authority can reduce or remove the risk; and

⁴⁴¹ *Crime (Offences Against Vulnerable People) Legislation Amendment Act 2020* s 5.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

⁴⁴⁴ Explanatory Statement, *Crime (Offences Against Vulnerable People) Legislation Amendment Bill 2020* 17.

- the person in authority recklessly or negligently fails to reduce or remove the risk.

The third offence is for the neglect of a vulnerable person. It is an offence if a person responsible for providing care to a vulnerable person recklessly or negligently fails to provide the necessities of life that is part of the care being provided and this causes serious harm to the vulnerable person.⁴⁴⁵

The amendments were passed in August 2020 and were set to commence three months later. However, commencement was delayed until eight months after the legislation was passed on the basis of feedback received from a range of organisations including those providing care to older people.⁴⁴⁶

9.1.3. South Australia

The South Australian model most closely resembles the ALRC Elder Abuse Report's recommendations. South Australia's safeguarding framework incorporates a mix of voluntary reporting, mandatory stepped responses, a lead agency with investigative powers, a non-age-specific focus on vulnerability, and roles for partner agencies. The response model is stated to be weighted towards principles of dignity and autonomy rather than protection.

South Australia has established the Office for Ageing Well, to safeguard the rights of older people and other vulnerable adults.⁴⁴⁷ The *Ageing and Adult Safeguarding Act 1995* (SA) also established the Adult Safeguarding Unit that operates within this office to prevent abuse of older people and vulnerable adults.⁴⁴⁸

The Office for Ageing Well investigates abuse of "vulnerable adults", which is defined as an adult who, by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage is vulnerable to abuse.⁴⁴⁹ Other functions of the Office for Ageing Well include assisting the government in creating policies that affect older people and consulting with older people and other relevant parties for that purpose. The Office for Ageing Well also has functions to monitor and promote government initiatives that affect older persons.⁴⁵⁰

The functions of the Adult Safeguarding Unit include investigating reports of abuse of vulnerable adults, as well as coordinating responses to abuse by various government agencies and others.⁴⁵¹ Any person is able to make a report to the Adult Safeguarding Unit if they suspect a vulnerable adult is at risk of abuse.⁴⁵² However, reporting abuse is not mandatory.⁴⁵³

After investigating a matter, the Adult Safeguarding Unit can refer the matter to another government agency,⁴⁵⁴ report the matter to an appropriate professional body,⁴⁵⁵ or make a complaint to other agencies such as the Ombudsman.⁴⁵⁶ The Adult Safeguarding Unit will generally explore ways to support the adult to stop the abuse occurring or minimise the risk of

⁴⁴⁵ *Crime (Offences Against Vulnerable People) Legislation Amendment Act 2020*, s 5.

⁴⁴⁶ Supplementary explanatory statement, *Crime (Offences Against Vulnerable People) Legislation Amendment Bill 2020* 4.

⁴⁴⁷ *Ageing and Safeguarding Act 1995* (SA).

⁴⁴⁸ *Ibid* pt 3.

⁴⁴⁹ *Ibid* s 3.

⁴⁵⁰ *Ibid* s 9.

⁴⁵¹ *Ibid* s 15.

⁴⁵² *Ibid* s 22.

⁴⁵³ *Ibid* s 22(4)(a).

⁴⁵⁴ *Ibid* s 25.

⁴⁵⁵ *Ibid* s 27.

⁴⁵⁶ *Ibid* s 28.

further abuse. A multi-agency response may also be led by the Adult Safeguarding Unit to provide support to the adult in addressing the abuse.⁴⁵⁷

As noted above, there are difficulties in balancing the safeguarding of older persons with the preservation of their autonomy. Dunn has criticised a safeguarding approach:

When it comes to invoking protective interventions for ‘vulnerable adults’, a need to act seems on occasions to take priority over a need to respect decision-making autonomy when the exercise of self-determination is judged to be threatened. The assessment of threats, by drawing on inherent and situational accounts of vulnerability, is built upon the external and objective identification of the risks posed to an individual’s decision-making autonomy (or to that individual being abused or being unable to give complete, coherent, and accurate evidence).⁴⁵⁸

9.2. International

Similarly to Australia, abuse of older persons has generally not been the subject of specific legislative provisions in other common law jurisdictions. While this part is not intended to provide a comprehensive analysis of legal system responses in other countries to the abuse of older persons, it gives a brief overview of how some similar common law jurisdictions have addressed these issues.

9.2.1. New Zealand

Some provisions of the *Crimes Act 1961* (NZ) are relevant to older persons receiving care. Specifically, amendments to the *Crimes Act 1961* (NZ) in 2012 created a legal responsibility to protect a vulnerable adult from injury. A “vulnerable adult” includes a person who, due to certain conditions including age, sickness or mental impairment, is unable to withdraw themselves from the care or charge of another person.⁴⁵⁹

Every person who has care or charge of a vulnerable adult is under a legal duty to provide the vulnerable adult with necessities and to take reasonable steps to protect that person from injury.⁴⁶⁰

A person who has care or charge of the vulnerable adult or a person who is a staff member of any hospital, institution or residence where the adult resides must not engage in any conduct that is likely to cause suffering, injury, adverse effects to health or any mental disorder or disability to the adult if that conduct is not to the standard of care expected.⁴⁶¹

A person over the age of 18 in the same household of the vulnerable adult or a person who is a staff member of any hospital, institution or residence where the adult resides who has frequent contact with the adult also has a duty to take reasonable steps to protect that adult if they know the adult is at risk of death, grievous bodily harm or sexual assault.⁴⁶²

⁴⁵⁷ South Australian Adult Safeguarding Unit, Code of Practice (September 2019) 25.

⁴⁵⁸ M C Dunn, I C Clare and A J Holland, ‘To empower or to protect? Constructing the ‘vulnerable adult’ in English law and public policy’ (2008) 28(2) *Legal Studies (Society of Legal Scholars)* 234.

⁴⁵⁹ *Crimes Act 1961* (NZ) s 2, definition of ‘vulnerable adult’.

⁴⁶⁰ *Ibid* s 151.

⁴⁶¹ *Ibid* s 195.

⁴⁶² *Ibid* s 195A.

9.2.2. Canada

Laws regarding older persons are dealt with in Canada at the provincial and territorial level. Criminal law is part of Canada's federal jurisdiction. Canada's 13 provincial jurisdictions have various laws that are relevant to elder abuse, responding to the issue in a variety of ways that are similar to Australian jurisdictions and other common law countries.⁴⁶³

Much like Queensland, Canadian laws are generally not targeted specifically at older persons, but target issues such as impaired capacity, family violence and general criminal laws that protect vulnerable people. Most Canadian jurisdictions have some form of adult protection laws that allow government agencies to make protection orders when adults are in danger and have impaired capacity to make decisions.⁴⁶⁴ Examples of these types of laws include Newfoundland and Labrador's *Adult Protection Act* which provides, if an adult who has impaired capacity is found to be a victim of abuse⁴⁶⁵ a court can find that the adult requires further 'protective intervention' and make various orders that are designed to protect the adult from harm.⁴⁶⁶ These orders include the adult continuing to live in their current situation under the supervision of a government agency, being removed from the place they are living and placed in a more suitable location, or be placed under care of a government agency which will make decisions on behalf of the adult.⁴⁶⁷

Some jurisdictions in Canada have legislation to protect adults living in residential care. These laws primarily create a duty to report abuse against those adults.⁴⁶⁸ These duties make reporting abuse mandatory.⁴⁶⁹

All jurisdictions within Canada have enacted human rights legislation acknowledging every person's right to equal treatment without discrimination, including on the basis of age.⁴⁷⁰ Quebec's human rights legislation specifically mentions older persons, stating that 'Every aged person and every handicapped person has a right to protection against any form of exploitation.'⁴⁷¹ A breach of this protection can be investigated by the Quebecois Human Rights Commission ('Commission des droits de la personne et des droits de la jeunesse') which can take various actions including reaching a settlement between parties.⁴⁷²

In 2012, the *Protecting Canada's Seniors Act*⁴⁷³ was passed, with the specific intention to add vulnerability due to age as an aggravating circumstance for sentencing purposes.⁴⁷⁴ It inserted into the Canadian *Criminal Code* an aggravating circumstance that the court must take into consideration when sentencing an offender, 'evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation'.⁴⁷⁵

⁴⁶³ Department of Justice, *Legal Definitions of Elder Abuse and Neglect – Canada* <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p2.html>>.

⁴⁶⁴ See for example, *Adult Protection Act*, SNL 2011, c A-4.01 s 5, *Adult Protection Act*, RSNS 1989, c 2, s 3.

⁴⁶⁵ *Adult Protection Act*, SNL 2011, c A-4.01 s 2. 'Victim of abuse' is defined as serious physical, psychological or emotional harm or substantial damage to or substantial loss of assets.

⁴⁶⁶ *Adult Protection Act*, SNL 2011, c A-4.01 s 22.

⁴⁶⁷ *Ibid* s 22(1)(a).

⁴⁶⁸ See for example, *Protection for Persons in Care Act*, SA 2009, c P-29.1; *The Protection for Persons in Care Act*, CCSM, c P 144; *Protection for Persons in Care Act*, SNS 2004 c 33.

⁴⁶⁹ *Protection for Persons in Care Act*, SA 2009, c P-29.1 s 7; *The Protection for Persons in Care Act*, CCSM, c P 144 s 3; *Protection for Persons in Care Act*, SNS 2004 c 33 s 6.

⁴⁷⁰ See for example, *Human Rights Code*, RSO 1990, c H.19; *Human Rights Code*, RSBC 1996, c 210; *Human Rights Act*, RSY 2002, c 116.

⁴⁷¹ *Charter of Human Rights and Freedoms*, CQLR c C-12 s 48.

⁴⁷² *Ibid* s 71.

⁴⁷³ *Protecting Canada's Seniors Act* S.C. 2012, c 29.

⁴⁷⁴ *Ibid*, c 29, Summary.

⁴⁷⁵ *Criminal Code* R.S.C., 1985, c C-46, s 718.2(a)(iii.1).

9.2.3. United Kingdom

There are no specific offences for the abuse or neglect of older persons in the United Kingdom.⁴⁷⁶ The *Mental Capacity Act 2005* (UK)⁴⁷⁷ and the *Criminal Justice and Courts Act 2015* (UK)⁴⁷⁸ include offences of neglect towards vulnerable persons that would apply to older persons.

It is an offence under the *Mental Capacity Act 2005* (UK) to ill-treat or wilfully neglect a person who lacks capacity.⁴⁷⁹ Under the Act, a person lacks capacity if they are unable to make a decision for themselves in relation to a matter because of an impairment or a disturbance in the functioning of the mind.⁴⁸⁰

Care workers and care providers (including companies that provide care) commit an offence if they ill-treat or wilfully neglect a person to whom they are providing care.⁴⁸¹ Care in this context means most health care and social care (including practical assistance required due to age, illness or disability).⁴⁸²

⁴⁷⁶ Crown Prosecution Service, *Older People: Prosecuting Crimes against* <<https://www.cps.gov.uk/legal-guidance/older-people-prosecuting-crimes-against>>.

⁴⁷⁷ *Mental Capacity Act 2005* (UK).

⁴⁷⁸ *Criminal Justice and Courts Act 2015* (UK).

⁴⁷⁹ *Mental Capacity Act 2005* (UK) s 44.

⁴⁸⁰ *Mental Capacity Act 2005* (UK) s 2.

⁴⁸¹ *Criminal Justice and Courts Act 2015* (UK) ss 20, 21.

⁴⁸² *Ibid* ss 20(3), 21(2).

10. Accessing Legal Assistance

There have been significant advances in awareness of, and responses to, the abuse of older persons internationally, federally and in Queensland since the first edition of this paper was released, which include the following:

- The scope of the definition of “abuse of older persons” has been expanded to cover a broad range of behaviours, including: physical abuse; emotional/psychological abuse; financial/economic abuse; sexual abuse; social abuse; and, neglect. It is also now accepted that the use of restrictive practices, in certain circumstances, can amount to abuse, and that the abuse of older persons can also include chemical abuse. Importantly, it has been recognised that systemic abuse, perpetrated due to organisational or society structures and systems, can constitute abuse of older persons.
- International responses have provided further recognition of elder abuse, for example through World Elder Abuse Recognition Day, and moves to strengthen the protection of human rights of older persons are increasing, including support for an international convention on the rights of older persons. There has also been significant research on and recognition of the impact of ageism on the abuse of older persons.
- At a national level, the ALRC’s *Inquiry into Protecting the Rights of Older Australians from Abuse* was instrumental in driving the *National Plan to Respond to the Abuse of Older Australians* and providing a number of recommendations for the Federal, as well as State and Territory, Governments to consider in responding to elder abuse.
- In Queensland, the *HR Act* was a significant development in the legal landscape and emphasises that conduct constituting abuse of older persons may also breach one or more of the human rights protected by the *HR Act*.
- There are increased advocacy and services available to older persons, for example the Elder Abuse Prevention Unit and dedicated elder abuse hotline.
- Police are provided with specific training on how to deal with situations of elder abuse.
- Research on elder abuse continues to be prioritised and has provided increased insight into victim and perpetrator characteristics and risk factors for abuse. This research recognises that some groups may be more susceptible to experiencing violence, for example: Aboriginal and Torres Strait Islander persons; culturally and linguistically diverse persons; persons with disability; LGBTIQ+ communities; and carers. Recent research also identifies that while carers can be victims of abuse, they may also be perpetrators of abuse due to a range of factors including: lack of support and access to resources; poor mental and physical health; financial stress; and, isolation.
- Encouragement of Family Agreements as a safeguard for older persons from financial abuse has led to a CGT exemption for “granny flat” arrangements.
- Some recent case law has shown how the effective use of constructive trust arguments can provide some relief to older persons who have suffered financial abuse.
- There are situations of elder abuse that will constitute “domestic violence” for the purpose of the *DFV Act*, and the Act expressly recognises older persons as particularly vulnerable to domestic violence, providing an avenue for relief from some forms of violence against older persons.
- The Queensland Government has announced that an independent taskforce will examine the issue of coercive control, and consider the scope and construction of

potential legislative amendments to address coercive control as a form of family and domestic violence. There is scope for the offence, if created in Queensland, to extend to any relationship where there is a pattern of behaviour which intends to control, establish power, or cause fear, by one person in an intimate, family or carer relationship against another. This may capture circumstances where an older person is being abused by a family member.

- Changes to guardianship and administration forms and laws facilitate a supported decision-making framework for older persons with impaired decision-making capacity, and advocacy work is ongoing at both a State and Federal level on harmonisation of the law relating to EPOAs and a national model enduring document.
- The new *Queensland Capacity Guidelines* provide helpful information about undertaking assessment of a person's capacity and the legal tests of capacity, which can assist legal practitioners, medical practitioners, attorneys and informal supporters of people who may be experiencing impaired capacity.
- Amendments to the *PAA* have raised the eligibility requirements for attorneys appointed under an EPOA or AHD, and have broadened the remedies available to victims of financial abuse. For example, QCAT can order an attorney, administrator or guardian to pay compensation for a loss to the victim or the victim's estate caused by the failure to comply with their duties. The Supreme Court and QCAT also now have the power to order an attorney or administrator to compensate the Principal or adult who is under administration for loss, or to account for any profits they have accrued as a result of a breach of their duties and obligations.
- Other changes have strengthened Queensland's guardianship and administration framework, for example by providing the OPG discretion to investigate a complaint that an adult has been abused, neglected, or exploited even after their death.
- The Council of Attorneys-General are working to implement a national register of financial EPOAs to assist in determining the existence of EPOAs in relation to financial transactions, and the scope of people's will and preferences under those arrangements, as well as provide additional transparency about the use of those arrangements in order to prevent financial abuse and help promote and protect the rights of older persons.
- The Aged Care Royal Commission identified significant failings in Australia's aged care system, and highlighted the prevalence of institutional abuse and neglect in residential aged care settings. The Aged Care Royal Commission made 148 recommendations, including: the implementation of a new rights-based *Aged Care Act*, stronger governance and regulation of the quality of care and an independent price setting mechanism; improved workforce conditions and capability; and, a new funding model to ensure the sustainability of the system. The Aged Care Royal Commission has led to a number of important reforms at the Federal Government level, including: work on a new *Aged Care Act*; changes to the Serious Incident Response Scheme; strengthening of the regulations around restrictive practices; establishing nationally consistent pre-employment screening; increased governance requirements for approved providers etc.

While it is important to recognise these advances, it is equally important to recognise that older peoples' ability to access legal advice and services when they fall victim to elder abuse continues to be restricted by physical, personal, economic, social or environmental factors. These barriers, listed in the 2010 edition of this paper, largely continue to persist despite the advances made over the past decade:

- 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 some older persons find themselves may preclude them from securing legal assistance or initiating civil actions, which are generally expensive and time-consuming.
- Older persons may be reluctant to implicate family members in legal processes through initiating civil action or reporting criminal behaviour, particularly where the person is dependent upon family members for accommodation, care and support.
- Some older persons with impaired decision-making capacity may be unable, as a result of their condition or social isolation, to access legal services without appropriate support. Further, their impaired capacity may render it difficult for them to identify situations of abuse.
- Some older persons may have feelings of shame and guilt, or may fear retribution from the perpetrator if they attempt to end the abuse. Older people may also fear being placed in a retirement home or other aged care facility as a result of reporting abuse.
- There may also be concerns about declining health and well-being, particularly where litigation is likely to be lengthy.
- Some older persons may be physically unable to attend a legal service.
- The level of proof required to secure an equitable remedy is often beyond the evidence available. This is particularly the case where the older person is the only witness to the abuse, and/or may have impaired capacity or lack the strength to pursue a claim. The risk of costs is also prohibitive, not just to the litigation guardian but also for adults with capacity who have given a power effective immediately.

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