

Elder Abuse:

How well does the law in Queensland cope?

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External stakeholders – refer to Appendix 1

Disclaimer

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Foreword

This joint paper represents the culmination of work begun by **Michelle Howard**, Queensland Public Advocate from 2006-09, and **Brian Herd** of the Elder Law Section of Queensland Law Society.

The abuse, neglect and exploitation of older Queenslanders is a significant concern. There is a growing recognition, both in Australia and internationally, that the abuse of older persons – whether physical, sexual, financial, psychological, or through neglect – is a fundamental human rights concern. It has serious personal, economic and social ramifications for both individuals and the community. Older persons whose decision making is impaired are particularly vulnerable to abuse, with potentially devastating consequences.

Elder abuse is widespread and under-reported.¹ With a population explosion forecast for Australia over the next 50 years, persons over the age of 65 are predicted to make up one quarter of the nation's population. It is timely to consider this complex issue.

As with all social problems, both legal and non-legal responses are necessary. Both have a role to play in preventing elder abuse and facilitating access to justice for older persons. Our community needs strong legislative safeguards, robust policy frameworks, well-resourced programs and services, and public awareness initiatives.

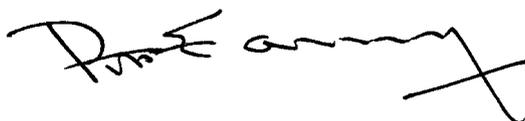
This paper focuses solely on legal issues. Its purpose is to raise awareness of such issues as they relate to elder abuse, to stimulate discussion and debate of these issues, and to advance options for reform. It is an invitation to explore and develop the law for the benefit of vulnerable older people.

The paper encompasses a broad scope of issues: those relating to both civil and criminal law, guardianship, reporting requirements, older persons as victims of crime, the arena of law enforcement, domestic violence protection orders, aged care complaints mechanisms, and access to legal assistance for older persons.

We commend the paper to you for your consideration.



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Queensland Law Society (Elder Law Section)

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

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

Queensland Law Society is the peak professional body for Queensland's legal practitioners.

The Society assists legal practitioners to continually improve their services, while monitoring their practices to ensure they meet the high standards set for the profession in Queensland.

A key function of Queensland Law 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 Office of the Public Advocate

The Public Advocate is an independent statutory officer established by the *Guardianship and Administration Act 2000* (Qld) to provide systems advocacy for adult Queenslanders with impaired decision-making capacity.² Adults with impaired capacity may include people with a mental illness, intellectual or developmental disability, acquired brain injury, or dementia. The role of the Public Advocate is to:

- promote and protect the rights of adults with impaired capacity for a matter;
- promote the protection of the adults from neglect, exploitation or abuse;
- encourage the development of programs to help the adults to reach the greatest practicable degree of autonomy;
- promote the provision of services and facilities for the adults; and
- monitor and review the delivery of services and facilities to the adults.³

1 Background and scope

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

The issue of elder abuse has attracted significant global attention from government, community and the legal sectors over the past few decades. This may be attributed to the rapidly increasing proportion of older people in society. Many issues and challenges for society accompany this phenomenon, prompting the international community to take action to promote and protect the rights and interests of older persons.⁴

In recent years the State of Queensland has experienced a rapid increase in population. In 2007 approximately 12.2% of the State's population and 13% of the Australian population was aged 65 or older.⁵ Projections suggest that by 2056, persons over 65 will constitute between 23% and 25% of the Australian population.⁶ It is estimated that approximately 258,000 Queenslanders and 1.13 million Australians will have dementia by 2050.⁷ As the population expands, and average life-expectancy increases, a higher proportion of older people are likely to develop impaired decision-making capacity. This population is particularly vulnerable to elder abuse.

It is widely accepted that elder abuse is under-reported.⁸ The World Health Organisation has identified that prevalence rates in selected developed countries range from one to ten percent.⁹ Some Australian research suggests approximately three to seven percent of people over the age of 65 are affected.¹⁰ This number is likely to escalate as the population ages.

Elder law is a relatively recently recognised phenomenon in Australia.¹¹ Concern about elder abuse is not confined to the legal profession, but involves multiple sectors of society. When elder abuse occurs there needs to be a range of responses available to address the issues.¹² Ideally recourse to legal interventions would be a last resort. Not only are changes to the law imperative to address this complex issue, but reform to policy, service and legislative systems is essential. Many of the areas requiring reform are not within the scope of this paper, which instead focuses on the protection of the rights and interests of older people through civil and criminal law.

This paper is not a scholarly exploration of issues about elder abuse. Rather, it is an information paper which briefly identifies and explores relevant legal issues, with the aim of stimulating discussion and consideration of law reform. The paper focuses on how the legal system can be an agent of change to lead a response to elder abuse. Accordingly it does not seek to address issues in concurrent systems which may administer the law, such as the policing system.

It is hoped that the paper will inform the general public, rally interested stakeholder groups, and assist both policy and law makers to formulate appropriate changes to improve access to justice for older persons who experience abuse.

After a two-month consultation period with key stakeholders, Queensland Law Society and the Office of the Public Advocate will refer its recommendations on changes to the law to Government for consideration.

2 'Elder' persons

2.1 How is 'elder' defined?

The concept of 'elder' is difficult to define and is subject to contention. *The Australian Concise Oxford Dictionary* definition of elder includes 'persons of greater age or seniority', 'persons venerable because of age' and 'a person advanced in life'.¹³

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

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

- The age pension age criteria is 65 years and over for men, and between the ages of 60 and 65 for women (depending on year of birth).¹⁴
- The preserved component of superannuation can only be accessed for people above the age of 55-60, depending on the person's year of birth.¹⁵
- An assault constitutes a serious assault if committed against a person aged 60 years and older.¹⁶

In 2002, the World Health Organisation's World Report on Violence and Health examined elder abuse.¹⁷ The report recognised that a person is usually considered of older age in developed countries at 60 or 65 years, and that this was related to the social construct of retirement.¹⁸ There is no agreed age established by the United Nations.¹⁹

The Federal Government's 2007 report *Older People and the Law* uses the term 'older Australians' when referring to persons aged 65 years or over.²⁰ It acknowledged that adopting an age lower than 65, such as 50 years or over, may be better practice in the case of Indigenous Australians.²¹ Arguably, this approach may also be appropriate in the case of people with a physical or intellectual disability, who may age prematurely.

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

- The use of chronological age is a practice in many developed countries. This may not be the case in developing countries, such as many African nations, where time has 'little or no importance' when determining who is of old age.²²
- 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 'elderly' may span upwards of 40 years for a large number of people. This is a very significant portion of time for a person to be considered in the elder years of life.

- Some Australians (for example, those in indigenous communities), may experience some of the characteristics and vulnerabilities of being 'elderly' earlier than the broader general Australian community as they are more susceptible to experiencing ill health, disability and death at a younger age.²³
- It is not desirable to perpetuate ageist attitudes.

It is therefore doubtful that chronological age alone is an appropriate criterion in determining who is an 'elder'. In arriving at an appropriate age, and in considering the concept of being elderly, a consideration of the varying individual characteristics of older persons is necessary. Other criterion in addition to chronological age that, when considered as a whole, might assist in defining an 'elder' may be a person's:

- ability to understand the nature and effect of decisions
- ability to make decisions freely and voluntarily
- ability to communicate decisions
- ability to report abuse
- mobility
- frailty of the body or mind, and
- life expectancy.

2.2 Elder persons and the notion of vulnerability

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

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

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

A complicating factor is the nature of capacity.²⁴ A person may have capacity for some matters and not for others. A person's level of capacity may also fluctuate. For example, an individual in the early stages of dementia may be completely lucid at times, but confused at others.

A further necessary consideration is whether different legal entitlements should be available to different categories of older people. People with impaired capacity are, for obvious reasons, especially vulnerable and hence they deserve special arrangements to protect them from abuse, neglect and exploitation. This has already been recognised in Queensland through the guardianship regime, although notably this was developed for the benefit of adults with impaired capacity, not older people in general.

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

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

2.3 Conclusion

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

3 What is elder abuse?

The concept of 'elder abuse' varies broadly in legal and academic literature, and no universal definition exists. It can be said that elder abuse generally involves 'all types of mistreatment or abusive behaviour towards older adults'.²⁵ The difficulties in developing a standard definition are exacerbated by the wide variety of complex situations which may constitute elder abuse.²⁶ Certain aspects of abuse are particularly difficult to define. Some situations are easy to identify as abusive. In other cases, the distinction between financial abuse, ignorance, an unwise decision, or an exchange for care may not be so clear. This section of the paper will examine existing definitions of elder abuse and some of the complexities to consider when developing a definition.

3.1 Accepted definitions of elder abuse

The Toronto Declaration on Global Prevention of Elder Abuse²⁷ defines elder abuse as:

... A single or repeated act, or lack of appropriate action, occurring within a relationship where there is an expectation of trust which causes harm or distress to an older person. It can be various forms: physical psychological/emotional, sexual, financial or simply reflect intentional or unintentional neglect.²⁸

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

Elder abuse is any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse can be physical, sexual, financial, psychological, social and/or neglect.²⁹

The Elder Abuse Prevention Unit in Queensland adopts similar terminology.³⁰

Most definitions do not include self-neglect as constituting elder abuse because it falls outside an 'act occurring in a relationship'.³¹ Similarly, the concept of abandonment is often not included.³²

3.2 Essential elements of elder abuse

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

Elder abuse generally:

- 1 occurs within a relationship where there is a relationship of trust between the perpetrator and victim,³³ and
- 2 results in harm to the older person.

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

- Feelings of shame when abuse has occurred.³⁴ For example, this may occur when a son or daughter has been physically violent to an older parent to coerce money from them.
- Fear of inciting further violence, or of being punished or abandoned.³⁵
- The consequences of reporting may be undesirable. If the violence of an adult child to an older parent occurs in the context of the parent residing with the adult child, then the parent may be concerned that reporting will lead to placement in residential aged care.³⁶ The parent may have complicated feelings about implicating the perpetrator particularly if the person is their spouse, adult child or carer.

Older people with impaired capacity are unlikely to report abuse for other reasons. In particular, they may be unable to recognise certain behaviour as abuse, and even if they do, they may be unable to articulate their experiences or understand how to report the abuse.³⁷

3.3 Dependence

The definitions of elder abuse do not explicitly contemplate dependence of the older person on the party perpetrating the abuse. However, in many relationships where elder abuse occurs, the older person is vulnerable by virtue of their dependence on, and trust placed in, the perpetrator, whether for physical or psychological/emotional assistance, or for assistance with financial management. Clearly, if an older person depends on another to shower, to eat, to have medical needs met, or for companionship, there is an imbalance of power in the relationship, leading to vulnerability. Accordingly, it is suggested that some level of dependence will be a common feature of elder abuse.

3.4 Defining elder abuse: what is the answer?

The definition of elder abuse is an important issue for consideration and needs to be thoroughly explored in order to obtain clarity. This is a complex issue that, in light of the subtleties of individual circumstances, presents inherent difficulties in arriving at a definition. However, a common definition is essential to ensure consistency, to properly identify behaviour which constitutes elder abuse, to provide improved protection at law, and to develop appropriate multi-disciplinary responses.

Law reform should be focused on the essential elements of elder abuse, with the phenomenon of dependency warranting specific consideration. However, it is acknowledged that a myriad of definitions may exist within the community.

4 Queensland law

This section of the paper considers civil and criminal law mechanisms in Queensland, in particular statutory provisions which apply to situations of elder abuse. This section does not contain an exhaustive list of provisions relevant to older persons, but is intended to cover areas in which they most commonly experience abuse, and require special protection by the law. Although beyond the scope of this paper, one relevant issue is the prosecution of perpetrators of elder abuse, and the capacity and willingness of enforcement authorities to pursue prosecution, particularly where the abuse has occurred within the family. Evidentiary hurdles are a clear barrier to this occurring, and in some cases the preferred course of action by police is to seek a protection order.

This section will cover the following areas:

- civil law
- guardianship
- reporting requirements
- criminal law
- victims of crime
- law enforcement
- domestic violence and peace and good behaviour orders.

4.1 Civil law

4.1.1 Financial abuse

Conservative estimates put the size of the problem at \$14 million per annum in Queensland. More realistic figures are well over \$1 billion per annum.

In the 2007-08 financial year the Elder Abuse and Prevention Unit (EAPU) received reports that over \$14 million was inappropriately obtained from older Queenslanders through financial abuse.³⁸ EAPU estimates suggest that a more accurate figure of financial abuse is in the order of \$1.8 to \$5.8 billion.³⁹ In the absence of mandatory reporting obligations in Australia, the true prevalence of financial abuse of older persons cannot be accurately determined.⁴⁰ However, notwithstanding this, the size of the problem is significant.

Financial abuse may include:

- activities by an attorney in violation of their powers, duties and responsibilities under an Enduring Power of Attorney (EPA)
- misappropriation of money, valuables or assets
- forging signatures on cheques
- denial of access to personal assets
- accessing a person's funds electronically and/or
- forced or unauthorised changes to legal documents.⁴¹

Financial abuse may also occur where a person takes advantage of an older person who has already lost (or is losing) capacity, by coercing or arranging for the older person to sign an EPA in circumstances where the older person is unable to understand the nature and effect of the document. This raises questions about the actions of witnesses to EPAs.⁴²

Older people with impaired capacity are particularly vulnerable to financial abuse, however those with decision-making capacity may still succumb to the influence and power of close family or associates.⁴³

Currently, where financial abuse has occurred:

- 1 old age does not create any special legal status of vulnerability attracting the special protection of the law, and
- 2 anomalies exist in the law which create higher thresholds for older people to satisfy in order to establish undue influence (than is the case in other situations), for example, the legal notion of the **presumption of advancement**. This is the legal presumption that a transfer of an asset from a parent to a child is a gift unless the older person can rebut the presumption by demonstrating that at the time of transfer no gift was intended (for example, by proving that undue influence occurred).⁴⁴

Otherwise, the same remedies as may be available at common law or in equity for financial abuse arising from improper or inappropriate dealing with any person's assets and financial resources may be available to an older person. In Queensland, remedies based in contract, equity and tort law – such as unconscionable conduct, undue influence and negligence – are available to older persons who experience financial abuse.⁴⁵ Equity, through the mechanism of the constructive trust, can provide relief in some circumstances to vulnerable older persons.⁴⁶

However, the law of undue influence does not adequately provide for situations of elder abuse. Undue influence developed in the 19th century in an era when people generally had a shorter life expectancy than in modern times, and less often became financially and physically dependant on others. Today, a larger proportion of older persons have substantial assets, especially given the significant increase in real estate values over the last decade. What was once a modest home, may now present as a golden nest egg to an avaricious third party. Longer life expectancy has resulted in the regular formation of complex or ambiguous family financial relationships. These 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 cannot, or is unavailable. In light of these factors, the potential for undue influence has increased significantly.

In addition to mechanisms for the control of an older person's assets available under the Queensland Guardianship regime (refer to section 4.2 below), a Family Agreement is also available. This involves an arrangement between an older person and another party (usually family members or carers) for an older person to transfer a benefit or property, or pay compensation to the other party, in exchange for a promise of continuing or lifelong care.⁴⁷

Such agreements provide an avenue for safeguarding older people, particularly where 'granny flat' arrangements exist.⁴⁸ However, Family Agreements are fraught with difficulties. Many agreements are vague, informal and undocumented, creating contention as to their terms and conditions, as well as problems in enforcing and recognising the agreements at law.⁴⁹ In the absence of specific legislation to govern and regulate Family Agreements, a review of the law is necessary to adequately protect the rights of older persons who wish to enter into such agreements.⁵⁰

*'It is unfortunate that the incidence of elder abuse, particularly financial abuse, is increasing in our community.'*⁵¹

Some reports note an increasing prevalence of financial abuse in Queensland.⁵² This 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 provide a deterrent for financial abuse in the first instance. Further, the current remedies available do not properly compensate for the pain and suffering endured by victims of financial abuse, nor provide appropriate monetary recompense.

Accordingly, further consultation at a multi-disciplinary level (engaging the legal profession, financial sector, community, older persons advocacy groups and law enforcement bodies) is necessary to formulate appropriate policy and legislative responses to financial abuse, with a focus on both prevention and civil law remedies.

4.1.2 Physical, sexual and psychological abuse; and neglect

The EAPU reported that in the 2007-008 financial year an estimated 14,000 to 43,000 older Queenslanders experienced emotional distress, physical trauma, sexual, financial and social abuse, or neglect.⁵³ It further estimated that elder abuse admissions resulted in an estimated additional \$9.9 million to \$30.7 million in costs being incurred to Queensland's hospitals during that period.⁵⁴ These figures emphasise the significant economic and social impact of elder abuse, and the need for laws to protect older persons and deter perpetrators.

There are no special remedies available at common law or equity to address the neglect and physical, sexual, or psychological abuse of older people. Rather, remedies will generally be available to older persons under tort law for injury suffered as a result of abusive conduct. However, as discussed below, statutory changes to Queensland's personal injuries regime some seven years ago may have diminished the ability of older people to obtain appropriate compensation.

4.1.3 Remedies available in tort

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

The amount of damages available is governed by the provisions of the *Civil Liability Act 2003* (CLA).⁵⁵ Section 52 of the CLA (with some limited exceptions in respect of unlawful intentional acts and unlawful sexual assaults/misconduct) effectively abolishes the award of punitive, exemplary or aggravated damages in personal injuries claims.

Prior to the enactment of the CLA, one of the largest components of damages that might ordinarily have been awarded to an older person in a personal injuries claim was exemplary, punitive or aggravated damages.⁵⁶ Other heads of damage (for example, past loss of income and future economic loss) which might be significant for a younger person are generally of little relevance for an older person. For an 85 year-old person who may have impaired capacity and/or personal injuries as a result of an act of abuse, albeit negligent, the most significant element of recompense has been removed by the CLA.

The CLA also restricts the general damages component of personal injuries claims (i.e. compensation for an individual's pain and suffering, and loss of amenities⁵⁷) through the introduction of injury scale values which apportion a value to all injuries, and thereby limit the damages available to a plaintiff.⁵⁸

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

4.1.4 Equitable remedies

Relevant equitable remedies include constructive trust, account of profits, tracing, rescission, and specific performance. On a preliminary point, equity requires clean hands, which requires an opening of the applicant's mind to the Court. Where dementia or other memory loss-inducing illness is affecting an individual, they may have difficulty meeting this term should a contrary allegation be raised. The vast majority of family agreements are concluded without paperwork, so the elder person's equitable claim is limited to their recall and understanding of the history.

The Seniors Legal and Support Service has provided some examples of the types of problems that occur:

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 sub-divisible. The son now denies the arrangement, and claims his father invested in his horticultural business which was conducted on the property and has failed. The parent has surrendered to the son his financial records and cannot recall any details of the arrangement in time or place. The parent continues to retain affection for the son, can recall no detail, and is unable to prove his version of the story.

Specific performance

An Enduring Power of Attorney is created that places all financial responsibility in the hands the children, on the basis the parent will be kept in their own home for the remainder of their life. As property values increase, the children decide to sell the home, and they subsequently place their mother in an aged care facility. Specific performance ordinarily would be available, but the mother has no written arrangement in place. Further, since completing the EPA, she has developed dementia and has an unreliable recall.

Constructive trust/laches

An Attorney, appointed under an EPA, might dissipate the principal's credit card on incidental items. If the Principal has no recall or independent record, or if they cannot leave their harm due to physical infirmity, they are largely reliant solely on the Attorney acting honestly. Over several years, this can amount to a substantial impost on a person, to the extent where the Age Pension becomes their only income. If the attorney decides to cut corners with their food and medication, the elder person may be unaware due to dementia, or unable to raise the alarm due to physical inability or the fear of loss of caring services, or may not be aware of their rights to have those monies held on trust for them. Their delay in raising a complaint opens the defence of laches, or delay.

4.1.5 Litigation guardians

Rule 93 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that a person under a legal incapacity can only commence or defend proceedings by way of a litigation guardian. It is settled law that a litigation guardian is liable for the costs incurred by solicitors in conducting an action on behalf of a person with impaired capacity, as well as the other side's costs if the proceedings are unsuccessful.⁵⁹ 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.⁶⁰ Potential liability for costs may therefore discourage litigation guardians from commencing proceedings on behalf of an older person with impaired capacity, particularly where the older person's estate has been dissipated and an adverse costs order is made.⁶¹ This effectively denies access to justice for older persons with an impaired capacity in those circumstances. It also places the other party to the application in a position of considerable advantage in respect of costs.

4.2 The guardianship regime

4.2.1 Overview of Queensland's guardianship regime

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

The guardianship regime is established by the *Powers of Attorney Act 1998* (PAA) and the *Guardianship and Administration Act 2000* (GAA) which are to be read together.⁶² These provide, among other things, for a scheme for substitute decision-making by and for adults with impaired capacity. The guardianship regime enables various statutory guardianship bodies and officers, private attorneys, guardians and administrators to perform functions and make decisions in accordance with prescribed rights-based principles which broadly protect the rights and interests of adults with impaired capacity.

Among other things, some of the primary functions of the Queensland Civil and Administrative Tribunal (QCAT) (formerly the Guardianship and Administration Tribunal) are to determine capacity, appoint guardians and administrators, make orders for compensation in appropriate cases, hear applications and give directions relating to enduring documents, and make decisions about special health care.⁶³

The Adult Guardian protects adults with impaired capacity through investigation of complaints and allegations about neglect, exploitation or abuse or actions by an attorney, guardian or administrator. The Adult Guardian may also be appointed as a guardian (i.e. substitute decision maker for personal matters) for individual adults.⁶⁴ The Adult Guardian can suspend an attorney's power and make an application to the QCAT to protect an older person with impaired decision-making capacity from an attorney who is not acting properly.⁶⁵ The protective powers of the Adult Guardian include the ability to recover property or money wrongfully taken or converted.⁶⁶

Attorneys can be appointed by adults to make decisions for them for financial, personal and health matters, in the event that they lose capacity. Guardians and administrators appointed by the Tribunal can also make these types of decisions.

The Public Advocate performs systemic advocacy which promotes and protects the rights and interests of adults with impaired capacity by identifying areas in need of reform. The Public Advocate advocates for appropriate change in policy, program delivery and legislation across government and private sectors. The functions of the Public Advocate include the protection of adults from neglect, exploitation or abuse; promoting the provision of services and facilities for adults; and monitoring and reviewing the delivery of services and facilities.⁶⁷

The General Principles in the guardianship legislation are as close to a Bill of Rights as the law in Queensland comes.

These principles include that adults are presumed to have capacity, and that adults with impaired capacity have:

- the same human rights as others
- a right to have a valued role and participate in society
- a right to confidentiality, and
- should have their self reliance and judgment recognised.

In making decisions or exercising functions under the guardianship regime, all statutory officers and appointees must apply the General Principles of the legislation, or, for health matters, the Health Care Principle.⁶⁸ These principles are perhaps as close to a bill of rights as the law in Queensland comes. The general principles include that adults are presumed to have capacity; that they have the same human rights as others, a right to have a valued role and participate in society, and a right to confidentiality; and that they should have their self reliance and judgment recognised.⁶⁹ Other duties and responsibilities are imposed on substitute decision-makers under the regime.⁷⁰

Under the *Powers of Attorney Act 1998* there is a presumption of undue influence in a principal's favour where a transaction is entered into between principal and attorney.⁷¹ Only reasonable gifts to relatives or close friends can be made under an Enduring Power of Attorney (EPA)⁷² or by an administrator.⁷³ An attorney may be required by court order to compensate the principal for any loss caused by the attorney's failure to comply with the requirements imposed.⁷⁴ There is a similar provision in respect of compensation from administrators and guardians.⁷⁵

The guardianship system therefore has an important protective function for older people who have impaired capacity, and it provides a mechanism for redress when certain types of abuse have occurred by a substitute decision-maker, provided there are funds available to seek from them by way of recompense. It does not provide remedies more generally following abuse, although the appointment of a substitute decision-maker to make decisions about legal matters provides an avenue for an adult with impaired capacity to seek compensation in other circumstances. However, as discussed in section 4.1.5 of this paper, there are other disincentives to do so, in particular costs ramifications.

4.2.2 Limitations of the guardianship system

Queensland's guardianship regime is limited to the protection of adults with impaired capacity, and does not provide protection for older people who have capacity but who may nevertheless be vulnerable to abuse.

Despite the safeguards currently provided by the system, financial abuse of older persons with impaired capacity by attorneys occurs regularly, whether unintentionally or deliberately perpetrated.⁷⁶ Many attorneys manage their principal's assets appropriately and responsibly. Some, however, through limited education or ignorance of the legislative requirements, inadvertently mismanage their principal's affairs.⁷⁷ Others intentionally misappropriate funds for their own purposes, resulting in deliberate financial abuse.

There are no mandatory reporting requirements in Australia obliging financial institutions to report financial abuse, nor is there a requirement for EPAs to be registered in Queensland⁷⁸. It is relatively easy for the misuse of EPAs to occur undetected, especially in circumstances where the older person lives an isolated life, or has a limited support network. These instruments may therefore be maliciously used to facilitate elder abuse.

An analysis of a sample of the Guardianship and Administration Tribunal's files in May 2006 concluded that EPAs did not protect older persons with impaired capacity from financial abuse, nor prevent the occurrence of such abuse.⁷⁹ In the research sample, family members were strongly linked to financial abuse: EPAs which appointed family members as attorneys were twice as likely to involve suspected financial abuse.⁸⁰ The nature of EPAs is such that the principal will be unable to oversee the attorney's activities once the principal has impaired capacity for financial decision-making.⁸¹ In the absence of requirements for EPAs to be registered and monitored, no accountability mechanisms to monitor the activities of attorneys presently exist.

Further, by the time suspected financial abuse is notified to the Adult Guardian and/or an application to the QCAT is made, the abuse has already occurred. The current guardianship regime is responsive rather than preventative, leaving the older person in a vulnerable and disadvantaged position.⁸²

4.3 Reporting requirements

There is currently no statutory requirement for the mandatory reporting of suspected cases of elder abuse in Queensland. (The exception to this is the reporting provisions of the *Commonwealth Aged Care Act 1997*.) Unlike the field of child care and safety, health professionals and community care organisations are not required to report suspicions of elder abuse.

The Federal Government enacted legislation in 2007 to provide new mechanisms for the protection of older people residing in residential aged care facilities from physical and sexual abuse.⁸³ Under the *Aged Care Act 1997* (ACA), approved residential aged care providers are obliged to report alleged or suspected assaults⁸⁴ in aged care facilities funded by the Commonwealth to the police and to the Commonwealth Department of Health and Ageing.⁸⁵ The ACA is not intended to provide a comprehensive regime for preventing the abuse of all older Australians, and is limited to protecting the recipients of aged care services from physical abuse by approved providers only.⁸⁶ There is therefore no regulation of assaults which occur within aged care facilities which do not receive Federal Government funding.⁸⁷

Mandatory reporting has been the subject of controversy among elder advocacy groups, government and the legal profession, involving competing interests of the autonomy of older persons against the protection of persons vulnerable to abuse.⁸⁸ Criticism of mandatory reporting has arisen primarily due to uncertainty about its effectiveness in reducing and preventing abuse, and protecting those with impaired capacity.⁸⁹ Critics argue that compulsory reporting may undermine the right of older persons to self-determination and autonomy in decision making.⁹⁰ It has also been argued that the funds necessary to establish a reporting service (similar to that of the Adult Protection Service in the USA) could be better allocated to prevention and awareness initiatives, and other resources necessary to address elder abuse.⁹¹

Supporters of mandatory reporting argue that it is essential to protect vulnerable older persons.⁹² It could also be argued that a common law duty of care may require the reporting of elder abuse by persons who observe or suspect such abuse – in particular bank officers (in the case of financial abuse).⁹³

In considering the issue of mandatory reporting, several important issues were identified by the Australian Government in its *Older People and the Law* report:⁹⁴

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

In Australia, banking and financial institutions are not required to report suspicions of financial abuse, although bank officers and lawyers are well placed to recognise and report possible abuse.⁹⁵ Some reasons for the lack of reporting requirements include the absence of uniform monitoring protocols, reluctance by institutions to allocate resources to detect abuse, concerns about confidentiality and privacy, and a desire not to become involved.⁹⁶ In the absence of compulsory reporting and supervision of attorneys, personal representatives and guardians, the banking system is open to the financial exploitation of older persons.

The Queensland legislature has not ignored the issue of reporting as a possible protection against abuse. There are some incentives created in legislation such as the GAA to report abuse, where perpetrated by an attorney under an EPA.⁹⁷ This protection is in the form of whistleblower protection, both civilly and criminally, for those who report suspected abuse which breaches the PAA or GAA.⁹⁸ However, this protection is only available where a report is made that is later substantiated as a breach of either Act. The protection does not extend to a person who makes a report in good faith, in circumstances where it is later found that there was no breach. The requirement for a breach to have occurred undermines the usefulness of this protection and may discourage reporting.

4.4 Criminal law

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

The Code contains a number of provisions for the prosecution of perpetrators of elder abuse. These include particular offences of violence such as assault,⁹⁹ sexual assault,¹⁰⁰ and stalking,¹⁰¹ and property offences such as stealing¹⁰² and fraud.¹⁰³ These offences are applicable to the general population regardless of the age of the victim.

The Code also creates several specific offences where the victim is a person with 'an impairment of the mind'.¹⁰⁴ This is defined as a person who, regardless of age, has an intellectual, psychiatric, cognitive or neurological impairment which substantially reduces their capacity.¹⁰⁵ Arguably, these existing offences already address some aspects of abuse to older people, although they are not specifically offences of elder abuse.

There is no specific offence which deals with financial abuse or exploitation. Consequently financial abuse is commonly prosecuted as misappropriation of property and fraud.¹⁰⁶ In the absence of discrete criminal offences which specifically protect older Queenslanders from elder abuse, the closest that the Code comes to criminalising such behaviour is through making a person liable to imprisonment for serious assault if they assault a person who is 60 years old or more.¹⁰⁷

One aspect of elder abuse, namely neglect, is addressed in the Code offences of 'duty to provide necessaries'¹⁰⁸ and 'failure to supply necessaries'.¹⁰⁹ These offences impose a duty on someone who has charge of another person who is unable to provide themselves with the 'necessaries of life' to provide those necessaries. This duty only arises where a person has the 'charge' of another (for example, where a person is the primary carer of an older person). Hence these provisions, while technically applicable to the neglect by a carer of an older person, will not have any application to other types of abuse. No convictions of a person for failing to provide necessaries to an older person have been recorded in Queensland. It appears that the offence has largely been relied upon to prosecute parents for failing to provide the necessaries of life to their children, particularly in relation to medical treatment.¹¹⁰

The *Penalties and Sentences Act 1992* (Qld) does not specifically refer to the advanced age of a victim, or the impaired capacity of a victim, as a consideration which a court must have regard to when sentencing an offender.¹¹¹ Instead, the circumstance of an older person or a person with impaired capacity as the victim tends to be an aggravating factor which the courts take into account when sentencing. For example, the fact that older female householders were targeted for housebreaking and stealing offences has previously been considered a 'particularly abhorrent feature of the crimes',¹¹² and was relevant to sentencing. Similarly, reference was made to the 'strong demands of deterrence and community protection'¹¹³ in the determination of the sentence where an older woman died of a heart attack after her home was invaded and she was assaulted.

In summary, Queensland's criminal law recognises abuse of older persons as a significant aggravating feature for sentencing purposes. However, if older people (regardless of their capacity) are considered generally vulnerable, this has not translated into the creation of specific offences to criminalise their abuse, neglect, or exploitation. In contrast, special provisions have been enacted for other groups of vulnerable people, such as children and people with intellectual impairment. Although controversial, the question should be asked about whether the 'vulnerability' of older persons generally is not viewed as seriously as that of other groups of vulnerable people. In the absence of specific protections in criminal law, is elder abuse given moral value equivalent to other forms of abuse?

4.5 Victims of crime

4.5.1 Compensation for victims of crime

From late 1995, compensation for victims of crime in Queensland was regulated by the *Criminal Offence Victims Act 1995* (Qld) (COVA). Under the COVA, any person who suffered direct harm as the result of a criminal offence could apply to the court for an order that the person who committed the offence pay compensation for the injury suffered because of the offence. Or, if the offender was never found or was unable to stand trial, the victim could apply to the Department of Justice and Attorney-General for an ex gratia payment.¹¹⁴ The amount of compensation a victim was entitled to receive was dependent upon the nature of the injuries sustained by the victim and the monetary amount assigned to those injuries pursuant to the Compensation Table detailed in the COVA.¹¹⁵ In making an order, the Court was limited to the amounts detailed in the Compensation Table, and was not able to award additional amounts based on the circumstances of the offence, or the characteristics or circumstances of the victim.

A new financial assistance regime for victims of crime commenced on 1 December 2009, governed by the *Victims of Crime Assistance Act 2009* (Qld), commenced. The vulnerability of older victims, and the significant effects of crime upon older people, are expressly recognised under the new regime.

The financial assistance¹¹⁶ granted to a victim may consist of a number of components, including a component for special financial assistance for an act of violence perpetrated against a person over the age of 60.¹¹⁷ Special financial assistance for persons over 60 are available only in certain circumstances, with the amount payable dependent on the nature of the crime and the severity of the injuries sustained by the victim.¹¹⁸ The maximum special financial assistance payable is \$10,000.¹¹⁹ The *Victims of Crime Review Report* describes the special financial assistance as 'a gesture of recognition by the State of the significant effects on the victim of the serious violent act'.¹²⁰

4.5.2 Support for victims

In Queensland there are no specific provisions for the support and protection of older victims who provide evidence in court proceedings. However, s21A 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.¹²¹ 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.¹²²

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.¹²³ It is therefore open for a Court to declare a person a special witness by virtue of a person's age, and to make certain 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 old age.¹²⁴

4.6 Law enforcement

Some responses relevant to elder abuse have been initiated by the Queensland Police Service (QPS).

Through its 'special needs' policy, the QPS has implemented special measures for dealing with vulnerable persons, either as suspects, complainants or witnesses.¹²⁵ The *QPS Operational Procedures Manual* defines 'special need' as inclusive of 'persons who, because of any condition or circumstance, have a reduced capacity to look after or manage their own interests'. It recognises that a person's age, infirmity (including early dementia or disease) or impaired capacity may render an adult a person with special needs.¹²⁶

The policy requires that, prior to interviewing a complainant or witness, police officers consider whether a special need exists. Police are then required to take appropriate measures for persons with special needs. These measures include obtaining the assistance of an independent person (such as a support person) to ensure that the person being interviewed is not disadvantaged.¹²⁷

Elder abuse is primarily handled by police in the context of domestic violence complaints. General training is provided to guide officers' interactions with persons who have special needs, and the QPS is in the process of developing training specifically in relation to elder abuse.¹²⁸ The QPS also offers developmental training to officers in disability and mental health issues as part of the Competency Acquisition Program and Mental Health Intervention Project.

The Crime Prevention Branch provides information to all QPS employees about elder abuse, and internet referral options through the 'Confident, Safe and Secure Handbook' for seniors. Community service announcements target Aboriginal, Torres Strait Islander and other cultural and linguistically diverse communities.

It is also understood that the Branch has produced a training DVD which offers information on how to effectively communicate with seniors, especially when they are a victim of crime. Additionally, the Branch is also developing the Supporting Our Seniors Program which will in part train police and volunteers in policing to identify elder abuse and provide referral options.

4.7 Domestic violence protection orders and peace and good behaviour orders

In some situations, the attributes of elder abuse can be compared to those of domestic violence between partners,¹²⁹ rather than abuse of other vulnerable categories of persons such as children and people with a cognitive impairment. In a significant proportion of cases of elder abuse, the older person may not lack capacity, but cannot address or report abuse because of power dynamics, shame, loyalty to family members and/or fear of reporting.¹³⁰ In other cases, the older person has impaired capacity and is unable to independently obtain protection.

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

4.7.1 Domestic violence protection orders and elder abuse

The *Domestic and Family Violence Protection Act 1989* (Qld) provides that a person subject to actual or threatened physical violence within a spousal, intimate, family, or an informal care relationship may apply for a Protection Order to prevent the offending behaviour from reoccurring.¹³¹

The inclusion of family relationships and informal care relationships in the domestic violence legislation is of particular relevance for elder abuse. An informal care relationship is defined as a relationship in which one person is dependent upon another who helps them with an activity of daily living.¹³² However, the definition is narrowed as follows:

- It does not include care provided by a third party entity or employer such as an in-home community-based care entity, whether that care is provided on a voluntary or paid basis.¹³³
- Irrespective of whether the carer belongs to a care organisation, if a fee is paid, it is not an informal care relationship, unless the fee is the consequence of threatened or actual violence, damage to property or intimidation and harassment.¹³⁴
- The definition requires that the relationship is a consequence of a person's disability, illness or impairment.¹³⁵ This is likely to cover many, but not all categories of dependence by older persons on others for assistance in daily living.
- An informal care relationship between child and parent is not covered, but would be captured by the family relationship category.¹³⁶

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

4.7.2 Applying for a protection order

To obtain a Protection Order, an aggrieved person must show that one of the following types of violence has occurred: injury, damage to property, intimidation or harassment, indecent behaviour, or a threat to commit any of those actions.¹³⁷ A relevant example of 'intimidation and harassment' captured by the definition of domestic violence is '*regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque*'.¹³⁸

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

4.7.3 Who may apply for an order

An 'authorised person' or the police can apply for a Protection Order.¹³⁹ However, many older persons, regardless of their capacity to exercise such rights, may be reluctant to report abuse or to pursue legal remedies. Further, an 'authorised person' who may apply for an order on behalf of the aggrieved, includes an appointed guardian, administrator or attorney. If this person is perpetrating the abuse, it will render it impossible from a practical perspective for the older person to access the relevant protections. This limitation is equally relevant to all victims of domestic violence, not just older people.

4.7.4 Peace and good behaviour orders

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

The Queensland Magistrates Court can make a PGB Order if satisfied a complainant has been threatened with physical injury or with damage to property by a person who has care or charge of the complainant.¹⁴⁰ The essential requirement is that the complainant is in fear of the perpetrator due to the behaviour threatened.¹⁴¹

As with a Domestic Violence Protection Order, the availability of a PGB Order is limited in that only the complainant can make a complaint, or a person with the 'care or charge' of another.¹⁴² In circumstances where an older person is suffering abuse at the hand of a carer or guardian, it may be impossible for a complaint to be made, particularly in the absence of adequate support.¹⁴³ 'Care or charge' is not defined, leading to uncertainty as to who may make a complaint on a behalf of another.¹⁴⁴ These orders therefore depend on the person having the knowledge, willingness and relevant support to make the complaint.

4.7.5 Some limitations

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

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

5 The aged care complaints regime

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

Some incidences of elder abuse may be reported to and investigated by the Australian Government's Aged Care Complaints Investigation Scheme (CIS)¹⁴⁵ and, in certain circumstances, reviewed by the Office of the Aged Care Commissioner (ACC).

The CIS investigates complaints regarding service providers in the aged care industry. The complaint must relate to an approved provider's responsibilities under the Act or the Aged Care Principles.¹⁴⁶ The primary consideration in investigations is whether or not the relevant provider has breached its responsibilities under the Act or Principles, rather than an investigation of the alleged abuse or neglect itself.¹⁴⁷

In addition to other functions, the ACC, a statutory appointment independent of the CIS, is able to review and examine decisions made by the CIS.¹⁴⁸ However, the CIS is not obliged to implement the recommendations, and instead may confirm, vary or set aside the examinable decision, and substitute a new decision.¹⁴⁹

There exist a variety of issues and limitations in relation to the protection afforded to older persons by the CIS, and the ACC. It is not within the scope of this paper to fully examine these matters. It is however important to note that the CIS may only investigate complaints concerning an Australian Government-subsidised aged care service.¹⁵⁰ Therefore, abuse which occurs in aged care facilities which do not receive Australian Government funding fall outside the ambit of the investigative powers of the CIS.

6 Accessing legal assistance

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

- Pursuing civil legal remedies through litigation requires an older person to have the funds to pay for legal fees. The vulnerable financial situation in which some older persons find themselves may preclude them from securing legal assistance or initiating civil actions, which are generally expensive and time-consuming.¹⁵¹
- Older persons may be reluctant to implicate family members in legal processes through initiating civil action or reporting criminal behaviour, particularly where a person is dependent upon family members for accommodation, care and support.¹⁵²
- Some older persons with impaired capacity may be unable, as a result of their condition or social isolation, to access legal services without appropriate support.¹⁵³ Further, their lack of 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.¹⁵⁴ Older people may also fear being placed in a retirement home or other aged care facility as a result of reporting abuse.¹⁵⁵
- There may also be concerns about declining health and well-being, particularly where litigation is likely to be lengthy.¹⁵⁶
- Some older persons may be physically unable to attend a legal service.¹⁵⁷
- There are limited legal and community resources available for older people, particularly those with impaired capacity. In Queensland, there are several community legal centres and advocacy services which specialise in providing legal advice, advocacy and support services to older persons, including the Seniors Advocacy Information and Legal Service,¹⁵⁸ the Seniors Legal and Support Service,¹⁵⁹ and the Queensland Aged and Disability Advocacy Inc.¹⁶⁰ Other services, located in regional centres, may provide advice about elder law issues.¹⁶¹ However these services may be unable to assist clients who are incapable of providing instructions.¹⁶² Further, in many cases, representation is only available in specific limited circumstances.
- The level of proof required to secure an equitable remedy is often beyond the evidence available. This is particularly the case where the only person witness to the abuse is the older person, who may lack either the capacity or 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 urgent need for law reform to develop and implement appropriate prevention and deterrence mechanisms in order to reduce the incidence of elder abuse in Queensland.

7 Legal responses in international jurisdictions

Some international jurisdictions, particularly the USA, have been proactive in their responses to elder abuse, incorporating civil and criminal protection for older persons into legislation. This section will briefly review some of these responses. The following is neither a comprehensive analysis, nor an examination of non-legal responses in other jurisdictions. The examples are provided to merely stimulate discussion and generate thought.

7.1 The United States of America

At a federal level, the *Older Americans Act of 1965* addresses the issue of elder abuse at a systemic and resource level. It provides definitions of elder abuse and authorises the use of federal funds for research at the National Centre on Elder Abuse, and to fund elder abuse awareness and coordination activities at State and local community levels.

Over the past year, greater legislative attention has been focused on elder abuse. The *Elder Abuse Victims Act of 2009* was recently introduced, with the purpose of protecting older persons from elder abuse through establishing prosecution and research programs. If passed, the new legislation will also provide training on elder abuse to prosecution and law enforcement agencies, and provide emergency crisis response teams to combat abuse.¹⁶³

The *Elder Justice Act of 2009* was also introduced in February 2009 to:

enhance the social security of the Nation by ensuring adequate public-private infrastructure and to resolve to prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation, and for other purposes.¹⁶⁴

Among other areas, it addresses key issues relating to elder abuse at a federal level, including funding and resources to combat abuse, victim assistance, training, prosecution of offenders, and research and data collection.¹⁶⁵

By 1985, all 50 states in the USA had legislation authorising the provision of Adult Protective Services (APS) which respond to elder abuse. In essence, the APS is a system for the reporting and investigation of elder abuse and for the provision of social services to support or assist the victims.¹⁶⁶ State statutes vary significantly as to the age and circumstances in which a person is eligible for assistance, the definition of abuse, types of abuse, neglect and exploitation that are covered, whether the abuse is classified as criminal or civil, reporting obligations and the remedies for abuse.¹⁶⁷

7.1.1 Criminal law

In the USA legislative responses for victims of elder abuse and their families have been developed through the enactment of public welfare laws, special provisions in the *Older Americans Act of 1965*, and the introduction of multiple crime bills. Many states have passed laws that provide criminal offences and penalties for various forms of elder abuse.¹⁶⁸

For example, s15656(a) of the *California Welfare and Institutions Code*, provides as follows:

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

Further, subsection (c) provides that:

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

'Elder' is defined to mean any person over the age of 65 years.¹⁶⁹ 'Caretaker' means any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult.¹⁷⁰ Interestingly, s15657 allows for the institution of civil proceedings for similar conduct and for the awarding of punitive damages.

The California *Penal Code* also contains specific provisions for crimes against older people (aged 65 and over) or dependent adults and extends the maximum penalty for some crimes where they have been committed against older people.¹⁷¹

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

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

In California, sentences for people convicted of specific crimes against older persons have also been increased. If a person is convicted of specific financial crimes against an older person, restitution (in addition to a term of imprisonment) may be ordered. If a person inflicts great bodily harm on a person 70 years of age or older, the sentence is increased by five years.¹⁷²

Consistent with this approach, California's *Financial Elder Abuse Reporting Act of 2005* mandates the reporting of elder abuse by certain organisations. This legislation renders Californian banks and other financial institutions liable if they fail to report suspicions of financial elder abuse, and represents a trend by US state governments to extend reporting obligations to third parties.¹⁷³

South Carolina's legislature has also implemented legislation to deter elder abuse by changing elder neglect from a misdemeanour to a felony.¹⁷⁴ Penalties for elder abuse ranged from five to 30 years imprisonment.¹⁷⁵

7.1.2 Prosecution of elder abuse

Across the USA, several jurisdictions have developed initiatives to investigate and prosecute cases of abuse of older persons, including specialised laws and training.¹⁷⁶ For example, under Florida law, if the victim is aged 60 or older and suffers from the infirmities of ageing (through advanced age or organic brain damage, or other physical, mental or emotional dysfunction resulting in impairment of ability to adequately care for or protect themselves) special prosecution mechanisms apply.¹⁷⁷

In California, there is statutory provision to prioritise and expedite cases where an older person is the victim of an offence. In prescribed criminal actions involving persons aged 70 or over, or a dependent adult as a witness or a victim, the case is given precedence in the order of trial, and the trial must be commenced within 30 days after arraignment, except in exceptional circumstances.¹⁷⁸

7.1.3 Training of law enforcement staff

It is understood that some states are providing specialist training on elder abuse, ageing and investigation. Increasingly, prosecutors are trained in dealing with elder abuse cases, and specialised courses have been offered in various states.¹⁷⁹

7.1.4 Support for victims

Some law enforcement agencies have created specialised units which receive complaints and work with older vulnerable adults. Several agencies have specialised investigators to manage elder abuse cases.¹⁸⁰ Some prosecutors also undertake vertical prosecution, whereby one attorney manages a case and the victim from beginning to end.¹⁸¹

7.1.5 Taking evidence of vulnerable witnesses

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

The victim (or witness) is examined before a judge who rules on evidentiary matters.¹⁸² The proceedings may take place at a venue which suits the victim, including at a private residence, hospital, or nursing home.¹⁸³ The testimony (provided under oath) is transcribed by a court reporter, and may be videotaped, so that if the person is later unavailable at trial, the recording is used instead of live court testimony.¹⁸⁴

Some states including Illinois, California, Oregon, Florida and Delaware permit the use of out-of-court hearsay statements, particularly where the victim may later be unable to testify due to illness, disability, memory problems, or death.¹⁸⁵ However, the constitutional validity of these provisions has been challenged. In Florida, the Supreme Court ruled that the elder victim hearsay exception was unconstitutional due to the sixth Amendment, which provides that in criminal proceedings the accused has a right to be confronted with the witnesses against him.¹⁸⁶

7.1.6 Mandatory reporting

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

For example, in Florida it is mandatory to report suspected abuse, neglect or exploitation of a vulnerable older person to a state central abuse hot-line.¹⁸⁷ The hot-line is run by Adult Protective Services within the Florida Department of Children and Families, and investigators are available on a 24-hour basis.¹⁸⁸ Other states encourage reporting, but it is not mandated.¹⁸⁹

In the banking arena, while most jurisdictions have made financial abuse a reportable form of elder abuse, relatively few states require banks to report.¹⁹⁰ This is due primarily to concerns about legal liability.¹⁹¹ In 1995, Oregon passed legislation giving immunity from liability to banks when reporting suspected financial abuse of older persons, however this does not constitute a mandatory reporting law.¹⁹²

7.1.7 Civil law

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

Alabama's *State Code* contains a provision to revoke transfer of property which may be the subject of family agreements in certain circumstances.¹⁹³ There has been criticism of the right to revoke however, essentially due to the potential for mischief and unfairness.¹⁹⁴

In California, the *Civil Code* provides for the imposition of discretionary fines, penalties, or other remedies in actions brought by, on behalf of, or for the benefit of, senior citizens or disabled persons, which involve unfair or deceptive acts or practices, or unfair methods of competition.¹⁹⁵

Further, under the Californian *Welfare and Institutions Code*, where there is convincing evidence of a defendant's liability for abuse or neglect of an elder or dependent adult, and where the defendant has been guilty of recklessness, oppression, fraud or malice, the elder or dependent adult is entitled to certain enhanced remedies such as punitive damages, reasonable legal costs and a claim for pain and suffering which survives the victim's death.¹⁹⁶

In Maine, the *Maine Revised Statutes* address undue influence and dependant elders. A presumption of undue influence can arise where an older dependant person has transferred real estate or undertaken a major transfer of personal property or money for less than full consideration.¹⁹⁷ The transfer may be set aside or other remedies made available to the elder in certain circumstances.¹⁹⁸ This legislative scheme demonstrates that it is possible to apply the law of undue influence in a manner that accurately reflects and is responsive to modern day realities.

7.2 United Kingdom

A non-legal approach is taken to elder abuse in the United Kingdom. Elder abuse has no legal status and the term is not recognised by English law.¹⁹⁹ Recourse to generic common law and statutory remedies is therefore the major source of relief available for victims of elder abuse. Both the UK and Canada have developed extensive service system responses to elder abuse.²⁰⁰

7.3 South Africa

In South Africa, the *Older Persons Act 2006* has been introduced to maintain and promote the status, well-being, safety and security of older persons; and to combat the abuse of older persons.²⁰¹ Importantly, the physical, sexual, psychological and economic abuse of an older person is an offence,²⁰² and any abuse of an older person during the commission of a crime or offence is an aggravating factor in sentencing.²⁰³ An older person, in the case of a male, is 65 years or older and, in the case of a female, is 60 years or older.²⁰⁴ Conduct or lack of appropriate action within a relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person, constitutes abuse.²⁰⁵

7.4 Canada

Each Canadian State and six Canadian provinces have enacted legislation to protect vulnerable older adults from abuse.²⁰⁶ Under Part 48 of the *Charter of Human Rights and Freedoms*, 'every aged person and every handicapped person has a right to protection against any form of exploitation'.²⁰⁷

While not a legal measure, in Canada older persons have begun authorising their banks to monitor their accounts for unusual transactions.²⁰⁸ The bank may then raise its concerns with the account holder, and can warn against fraud.²⁰⁹ It is at the discretion of the account holder as to whether they have regard to the warnings provided.²¹⁰

8 Conclusions

This paper has argued that, although Queensland legislation and the common law provide some protection against certain forms of elder abuse, the law fails to address the particular vulnerability of older persons where there are circumstances such as dependence, frailty, immobility and impaired capacity. It is therefore questionable whether Queensland law currently offers adequate protection for older persons from elder abuse.

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

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

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

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

In light of these shortcomings, a holistic, multi-agency approach is needed to examine these issues and consider legal reform where appropriate, in order to address the needs of older Queenslanders. Government is urged to establish a mechanism for this to be done.

Specific recommendations are beyond the scope of this paper, which is designed to stimulate discussion and thought. However, some general observations and recommendations follow.

8.1 Defining elder and the concept of 'elder abuse'

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

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

8.2 Civil law

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

Consideration should be given to whether these recourses are adequately responsive to elder abuse (in particular, financial abuse), or if they should be re-examined. For example, the higher threshold that applies for older people to establish undue influence should be reconsidered to determine whether this is justified.

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

8.3 The presumption of advancement

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

8.4 The *Civil Liability Act 2003*

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

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

8.5 The guardianship regime

Under the current guardianship regime, there is some abuse of older persons by attorneys appointed under EPAs, and there is also no regulation or monitoring of attorneys.

8.6 Mandatory reporting

This vexed issue has not been examined in any depth in this paper. However, as elder abuse is significantly under-reported, the question of whether reporting should be mandated is likely to be of interest in some quarters.

As discussed above, there is considerable debate about the utility of mandatory reporting, and in particular its effectiveness as a tool to reduce and deter elder abuse. This issue requires careful consultation with relevant stakeholders at a state and national level to determine the best approach.

Alternatives to mandatory reporting could include an extension or bolstering of the current whistleblower provisions contained in the *Powers of Attorney Act 1998* (PAA) and the *Guardianship and Administration Act 2000*. Currently, protection will only be afforded if the report proves to be true and can be substantiated as a breach of the relevant legislation. There does not appear to be any protection for a report made in good faith which, while reasonable in the circumstances, may not ultimately prove to be a breach of an alleged offender's duties.

8.7 Criminal law

Given the often subtle nature of elder abuse involving older people with impaired capacity,²¹¹ there is a strong argument for discrete criminal offences regarding elder abuse.

One option would be to amend the penalty provisions of conventional offences to incorporate incapacity or old age as an aggravating feature. Specific offences could also be incorporated into substitute decision-making legislation such as the PAA and the GAA.

However, consideration should also be given to the introduction of specific elder abuse offences, reflecting the legal approach taken in the USA. This might also encompass the adoption of new language to describe offensive conduct reflecting that of the offences referred to in the USA legislation.²¹²

There should also be a review of the current provisions in the Queensland *Criminal Code* concerning the duty to provide the necessaries of life. Consideration should be given to whether a duty to provide necessaries is one that should be imposed on, for example, adult children in relation to their dependent parents.

It may also be important to examine whether any criminal offences should be accompanied by a concomitant civil recourse.

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

8.8 Support for victims of crime

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

8.9 Domestic violence and peace and good behaviour orders

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

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

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

8.10 Other considerations for reform

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

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

Appendix 1 – Stakeholder contributions

This document represents the views of the Public Advocate (Qld) and Queensland Law Society. However, a number of other agencies and individuals made contributions to the development of this paper. The Acting Public Advocate and Queensland Law Society would like to acknowledge the following:

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Professor Jeff Giddings, Griffith Law School, Griffith University.

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Notes

- 1 United Nations Second World Assembly on Ageing, *Elder abuse widespread and unreported, says new report by Secretary-General* (March 2002) <<http://www.globalaging.org/waa2/articles/elderabuse.htm>> at 27 January 2010.
- 2 *Guardianship and Administration Act 2000* (Qld) s209.
- 3 *Guardianship and Administration Act 2000* (Qld) s209.
- 4 See for example, the World Health Organisation's *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf> at 10 July 2009.
- 5 Australian Bureau of Statistics, *Population by Age and Sex, Australian States and Territories* (June 2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/008FDCD8258C9991CA2574740015C9A8?opendocument>> at 15 July 2009; Australian Bureau of Statistics, 'One in four Australians aged 65 years and over by 2056: ABS' (Media Release, 4 September 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Media%20Release12006%20to%2010?opendocument&tabname=Summary&prodno=3222.0&issue=2006%20to%20101&num=&view=>> at 10 October 2009.
- 6 Australian Bureau of Statistics, 'One in four Australians aged 65 years and over by 2056: ABS' (Media Release, 4 September 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3222.0Media%20Release12006%20to%2010?opendocument&tabname=Summary&prodno=3222.0&issue=2006%20to%20101&num=&view=>> at 10 October 2009. House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.1]. In order to explore the adequacy of Australia's legal system in addressing the needs and protection of older Australians, the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs conducted a twelve month inquiry culminating in the release of its report *Older People and the Law*. The report canvasses issues including fraud, financial abuse, general and enduring powers of attorney provisions, family agreements, discrimination and barriers to older Australians accessing legal services, and provides key recommendations.
- 7 Access Economics, *Keeping dementia front of mind: incidence and prevalence 2009-2050* (August 2009) 3 <<http://www.alzheimers.org.au/content.cfm?infopageid=6012>> at 15 October 2009.
- 8 See for example Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 1; Pamela Kinnear and Adam Graycar, 'Abuse of Older People: Crime or Family Dynamics?' (No 113, Australian Institute of Criminology, 1999) 3; D Rabiner, J O'Keefe and D Brown 'A conceptual framework for financial exploitation of older persons' (2004) 16(2) *Journal of Elder Abuse and Elder Neglect* 53-73; World Health Organisation, Prevention of Elder Abuse <http://www.who.int/ageing/projects/elder_abuse/en/> at 1 July 2008.
- 9 World Health Organisation, *Prevention of Elder Abuse* <http://www.who.int/ageing/projects/elder_abuse/en/> at 9 July 2009.
- 10 The Australian Pensioners' and Superannuants' League of Queensland, *The Strategic Plan for the Prevention of Elder Abuse in Queensland* (2001) 4; Les Jackson, 'Elder Abuse and Queensland legislation' (2003) 2 *Elder Law Review* 2.
- 11 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.14-1.16].
- 12 See Elder Abuse Prevention Unit website at <www.eapu.com.au/ElderAbuse/Intervention.aspx>.
- 13 Bruce Moore (ed), *The Australian Concise Oxford Dictionary* (4th ed) (2004) 447.
- 14 *Social Security Act 1991* (Cth) s43; Centrelink, *Eligibility* <http://www.centrelink.gov.au/internet/internet.nsf/payments/age_eligible.htm> at 20 October 2009.
- 15 Australian Taxation Office, *Super and your retirement* (2007) <<http://www.ato.gov.au/content/downloads/spr116101n71040.pdf>> at 14 July 2009.
- 16 *Criminal Code 1899* (Qld) s340(1)(g).
- 17 World Health Organisation, *World Report on Violence and Health* (2002) <http://www.who.int/violence_injury_prevention/violence/world_report/en/> at 1 July 2008. See in particular Chapter 5 entitled 'Abuse of the Elderly'.
- 18 *Ibid.*, 125.
- 19 World Health Organisation, *Definition of an older or elderly person* (2009) <<http://www.who.int/healthinfo/survey/ageingdefolder/en/print.html>> at 6 June 2008.
- 20 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.26].
- 21 *Ibid.* The Report identified several reasons for preferring such an approach, including:
 - (a) there are not clear chronological ages by which to identify an older Indigenous person;
 - (b) premature aging due to health, environmental and lifestyle factors; and
 - (c) the Federal Government's practice of using population estimates when planning services for the elderly.
- 22 World Health Organisation, *Definition of an older or elderly person* (2009) <<http://www.who.int/healthinfo/survey/ageingdefolder/en/print.html>> at 6 June 2008.
- 23 The statistics regarding Indigenous health, disability and life expectancy are discussed in the Human Rights and Equal Opportunity Commission, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs regarding Inquiry into Older People and the Law* (December 2006) <http://www.hreoc.gov.au/legal/submissions/2006/ADA_200612/older_people_and_the_law_dec06.html> at 14 July 2009.
- 24 The *Guardianship and Administration Act 2000* (Qld) sch 4 defines capacity:

Capacity, for a persons for a matter, means the persons is capable of –

 - (a) Understanding the nature and effect of decisions about the matter; and
 - (b) Freely and voluntarily making decisions about the matter; and
 - (c) Communicating the decisions in some way.
- 25 Rosalie Wolf, 'The Nature and Scope of Elder Abuse' (Summer 2000) 24(2) *Generations* <<http://www.generationsjournal.org/generations/index.cfm?page=gen-24-2/Gen-24-2-toc.html>> at 14 July 2009.
- 26 Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 39.
- 27 The World Health Organisation's *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf> at 10 July 2009. The World Health Organisation, in collaboration with the International Network for the Prevention of Elder Abuse (INPEA) and the University of Toronto (Canada) made a commitment to the Declaration, which calls for the prevention of Elder Abuse. It was based on the recommendations of the United Nations International Plan of Action adopted by all countries in Madrid, April 2002.
- 28 *Ibid.*
- 29 The Australian Network for the Prevention of Elder Abuse, *Preventing elder abuse in an aging world is everybody's business* (2007) <<http://agedrights.asn.au/pdf/ANPEA%20Brochure%20June%2007.pdf>> at 1 July 2008.
- 30 Elder Abuse Prevention Unit, *Elder Abuse* (2008) <<http://www.eapu.com.au/ElderAbuse.aspx>> at 15 July 2009. This definition was endorsed by all Australian states and territories in December 2000 through the Healthy Ageing Taskforce.

- 31 Australian definitions have most commonly excluded self-neglect. See for example P Kinnear and A Graycar 'Abuse of Older People: Crime or Family Dynamics?' (1999) 113 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 2. See also Elder Abuse Prevention Unit, *Elder Abuse* (2008) <<http://www.eapu.com.au/ElderAbuse.aspx>> at 15 July 2009.
- 32 Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 1. McCawley recognises that legal sanctions for abandonment are available only in jurisdictions where families are required by law to care for older people.
- 33 Dr Paul Mazerolle and Dr Jennifer Sanderson, 'Executive Summary Literature Review – Elder Abuse' (Key Centre for Ethics, Law, Justice and Governance, Griffith University, 2008) 1.
- 34 Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* <<http://www.aifs.gov.au/institute/pubs/fm1/fm37mj.html>> at 15 July 2009.
- 35 *Ibid.*
- 36 David Cripps, Jenny Biven, Jane Northey, Phillip Rigger, 'Abuse of older people: issues for lawyers' (2002) 1 *Elder Law Review* <<http://www.austlii.edu.au/journals/ElderLRev/2002/8.html>> at 21 July 2009.
- 37 *Ibid.*
- 38 Elder Abuse Prevention Unit, *The Cost of Elder Abuse in Queensland: Who pays and how much* (June 2009) 3.
- 39 *Ibid.* These figures were calculated using population estimates and Elder Abuse Prevention Unit averages.
- 40 Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *Journal of Adult Protection* <http://findarticles.com/p/articles/mi_qa4124/is_200605/ai_n16629535/?tag=content;col1> at 15 July 2009.
- 41 David Cripps, Jenny Biven, Jane Northey and Phillip Rigger, 'Abuse of older people: Issues for lawyers [2002] 8 *Elder Law Review* <<http://www.austlii.edu.au/journals/ElderLRev/2002/8.html>> at 15 July 2009; Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 5.
- 42 See for example *Legal Services Commissioner v Gregory Francis Ford* [2008] LPT 12 where a solicitor was found guilty of unsatisfactory professional conduct for permitting the principal to revoke her original EPA (appointing the principal's daughter-in-law attorney) and to execute a new EPA (appointing the principal's friend attorney) in circumstances where the principal had 'short-term memory loss and substantial cognitive impairment': *Legal Services Commissioner v Gregory Francis Ford* [2008] LPT 12, 21. The Legal Practitioners Tribunal concluded the solicitor '... ought to have known that doubts might be raised about her capacity to sign the documents', and imposed a penalty of a public reprimand and costs: *Legal Services Commissioner v Gregory Francis Ford* [2008] LPT 12, 22.
- 43 Mary Joy Quinn, 'Undoing Undue Influence' (2000) 24(2) *Generations* 65.
- 44 LexisNexis *Australian Encyclopaedia of Forms and Precedents*, 'Gifts – Conditional and Presumed Gifts' <<http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodId=TACGAACAHAAD&refPt=TAAD&pubTreeWidth=23%25>> at 15 July 2009.
- 45 Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.
- 46 *Swettenham v Wild* [2005] QCA 264. This case involved a 'granny flat' scenario in which the appellant purchased a house (which was later transferred to his daughter, the respondent) subject to an arrangement that he reside on the premises in a granny flat and the respondent and her family reside in the house. The relationship subsequently broke down. The Court of Appeal, applying *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137, declared that the respondent's interest in the land was held on a constructive trust in favour of the appellant. The respondent was ordered to repay the appellant the purchase price of the property with interest.
- 47 Brian Herd, 'The Family Agreement: A collision between love and the law?' (2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/06.html>> at 15 July 2009.
- 48 Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 8.
- 49 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [4.11-4.29].
- 50 Recommendation 30 of the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law was that the Standing Committee of Attorneys-General undertake an investigation of legislation to regulate family agreements: see House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [4.45].
- 51 Public Trustee of Queensland, *Annual Report 2008-2009* (2009), 41.
- 52 Public Trustee of Queensland, *Financial Abuse of Elderly Queenslanders on the Rise* (Media Release, 15 October 2009); Rosemary Odgers, 'Elder abuse reports soar', *The Courier-Mail* (Brisbane), 13 June 2008, 7; ABC Radio National, 'Financial Abuse of the Elderly' *Background Briefing*, 22 January 2006.
- 53 Elder Abuse Prevention Unit, *The Cost of Elder Abuse in Queensland: Who pays and how much* (June 2009) 4.
- 54 *Ibid.*
- 55 The CLA was enacted by the Queensland Government in response to a perceived crisis in tort law and apparent pressure on the viability of insurance companies, highlighted particularly by the collapse of insurer HIH.
- 56 'Aggravated Damages' generally refers to:
an award which is increased ... to take account of the defendant's conduct in the commission of the tort and thereafter up to the hearing of the action ... Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like... (J L Davis and R P Balkin, *The Law of Torts* (2009) 822).
- 'Exemplary damages' differ from aggravated damages in that the purposes of exemplary damages:
include punishment of the defendant for a high-handed disregard of the plaintiff's rights, deterrence of the defendant to prevent him or her from reaping a gain from the wrongdoing, assuaging any feelings on the part of the plaintiff to seek revenge for the hurt done, and marking the condemnation of the court for the defendant's conduct. (Davis and Balkin, 824).
- 57 *Ibid.*, 821.
- 58 *Civil Liability Regulation 2003* (Qld) sch 4.
- 59 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.
- 60 *Stephenson v Geiss* [1998] 1 Qd R 542, 558.
- 61 It is understood from anecdotal information that in some cases litigation may not be initiated even where the person with impaired capacity has favourable prospects of success due to concerns about the litigation guardian's liability for costs.
- 62 *Guardianship and Administration Act 2000* (Qld) s8; *Power of Attorney Act 1998* (Qld) s6A.

- 63 See for example *Guardianship and Administration Act 2000* (Qld) ch 3, pt 1 (Appointment of guardians and administrators); ch 3, pt 3 (Changing or revoking an appointment order); ch 5, div 3 (Consent to special health care); and s83 (Powers).
- 64 *Guardianship and Administration Act 2000* (Qld) s174 (Functions).
- 65 *Guardianship and Administration Act 2000* (Qld) s195 9 Suspension of attorney's power).
- 66 *Guardianship and Administration Act 2000* (Qld) s194.
- 67 *Guardianship and Administration Act 2000* (Qld) s209.
- 68 *Guardianship and Administration Act 2000* (Qld) s11, sch 1; PAA ss75-76, sch 1.
- 69 *Guardianship and Administration Act 2000* (Qld) sch 1.
- 70 *Guardianship and Administration Act 2000* (Qld) ss33-55; *Power of Attorney Act 1998* (Qld) ss65-80.
- 71 *Power of Attorney Act 1998* (Qld) s87.
- 72 *Power of Attorney Act 1998* (Qld) s88.
- 73 *Guardianship and Administration Act 2000* (Qld) s54.
- 74 *Power of Attorney Act 1998* (Qld) s106.
- 75 *Guardianship and Administration Act 2000* (Qld) s59. Compensation for loss of benefit in an estate may also be sought from an attorney or an administrator: *Power of Attorney Act 1998* (Qld) s107; *Guardianship and Administration Act 2000* (Qld) s60.
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- 77 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [3.47-3.50].
- 78 Section 25(1) of the *Powers of Attorney Act 1998* (Qld) provides that a power of attorney may be registered, but does not require mandatory registration. The Act is silent as to the registration of enduring documents such as Enduring Powers of Attorney. The issue of registration of enduring documents is currently being considered by the Queensland Law Reform Commission as part of its guardianship review. For further information about the review, see <<http://www qlrc.qld.gov.au/>>.
- 79 Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *Journal of Adult Protection* <http://findarticles.com/p/articles/mi_qa4124/is_200605/ai_n16629535/?tag=content:col1> at 15 July 2009.
- 80 *Ibid.*
- 81 *Ibid.*
- 82 *Ibid.*
- 83 *Aged Care Amendment (Security and Protection) Act 2007* (Cth).
- 84 A reportable assault is defined in the *Aged Care Act 1997* (Cth) s63-1AA(9).
- 85 *Aged Care Act 1997* (Cth) s63-1AA(2).
- 86 *Aged Care Act 1997* (Cth) s63-1AA(9)(b). See also the objects of the *Aged Care Act 1997* (Cth) s2.1
- 87 Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.
- 88 Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* <<http://www.aifs.gov.au/institute/pubs/fm1/fm37mj.html>> at 15 July 2009; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.78-2.92].
- 89 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.85-2.90]; Elder Abuse Prevention Unit, *Position Statement on Mandatory Reporting of Elder Abuse* (March 2006) 4.
- 90 *Ibid.*, 9.
- 91 *Ibid.*, 7
- 92 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.80-2.81].
- 93 Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 41.
- 94 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [2.78]-[2.95].
- 95 Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 41.
- 96 *Ibid.*, 41-43.
- 97 *Guardianship and Administration Act 2000* (Qld) s247.
- 98 *Guardianship and Administration Act 2000* (Qld) s247.
- 99 *Criminal Code Act 1899* (Qld) s245.
- 100 *Criminal Code Act 1899* (Qld) s352.
- 101 *Criminal Code Act 1899* (Qld) ch 33A.
- 102 *Criminal Code Act 1899* (Qld) ch 36.
- 103 *Criminal Code Act 1899* (Qld) s408C.
- 104 See for example *Criminal Code Act 1899* (Qld) s208(1)(c) and (d) (Unlawful sodomy); s216 (Abuse of persons with an impairment of the mind); s217 (Procuring young person etc for carnal knowledge); and various Prostitution offences in ch 22A (Prostitution).
- 105 *Criminal Code Act 1899* (Qld) s1.
- 106 *Criminal Code Act 1899* (Qld) s408C. An example of a recent case where financial abuse was prosecuted as fraud is *R v Naidu* [2008] QCA 130. In that case, the Appellant was convicted at trial of two counts of fraud for receiving over \$370,000 by way of 'gifts' from the victim, who was aged in his late 70s and suffered from dementia. An appeal against conviction was dismissed.
- 107 *Criminal Code Act 1899* (Qld) s340(1)(g).
- 108 *Criminal Code Act 1899* (Qld) s285.

- 109 *Criminal Code Act 1899* (Qld) s324.
- 110 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.
- 111 The principles to which the courts must have regard in sentencing offenders are outlined in the *Penalties and Sentences Act 1992* (Qld) s9.
- 112 *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.
- 113 *R v Sinden* [2005] QCA 414, 5.
- 114 *Criminal Offence Victims Act 1995* (Qld) ss 5, 24, 32.
- 115 *Criminal Offence Victims Act 1995* (Qld) sch 1, s20. 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.
- 116 The *Victims of Crime Assistance Act 2009* (Qld) establishes a scheme for the payment of 'financial assistance', as opposed to compensation. It replaced the former compensation model with a financial assistance model which aims to assist the victim in recovering from the effects of crime by paying for or reimbursing the costs of goods and services expended by the victim in recovering from the crime: Department of Justice and Attorney-General Queensland, *Victims of Crime Review Report* (Nov 2008) 4.
- 117 *Victims of Crime Assistance Act 2009* (Qld) s39(h), sch 2(1) and (3).
- 118 *Victims of Crime Assistance Act 2009* (Qld) s39(h), sch 2(1) and (3).
- 119 *Victims of Crime Assistance Act 2009* (Qld) sch 2(2).
- 120 Department of Justice and Attorney-General Queensland, *Victims of Crime Review Report* (Nov 2008) 31.
- 121 *Evidence Act 1977* (Qld) s21A. 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) s21A(2)(a)-(f).
- 122 *Evidence Act 1977* (Qld) s21A(1).
- 123 *Evidence Act 1977* (Qld) s21A(1).
- 124 There are no reported cases in Queensland concerning this point.
- 125 Queensland Police Service *Operational Procedures Manual* sections 6.3–6.3.6.
- 126 Queensland Police Service *Operational Procedures Manual* section 6.3.1 (Circumstances which constitute special need).
- 127 Queensland Police Service *Operational Procedures Manual* section 6.3.5 (Role of the independent person).
- 128 This information was provided by the Queensland Police Service.
- 129 Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.
- 130 Marianne James, 'Abuse and Neglect of Older People' (1994) 37 *Family Matters* <<http://www.aifs.gov.au/institute/pubs/fm1/fm37mj.html>> at 15 July 2009.
- 131 *Domestic and Family Violence Protection Act 1989* (Qld) s3A.
- 132 *Domestic and Family Violence Protection Act 1989* (Qld) s12C. Examples of activities of daily living include dressing, preparing meals, shopping, or arranging a medical appointment.
- 133 The explanatory notes to the Domestic Violence Legislation Amendment Bill 2001 (Qld) (which introduced the informal care relationship provision) indicate that the legislation is not intended to cover care provided by Meals on Wheels or Blue Care.
- 134 *Domestic and Family Violence Protection Act 1989* (Qld) s12C(4).
- 135 *Domestic and Family Violence Protection Act 1989* (Qld) s12C(2).
- 136 *Domestic and Family Violence Protection Act 1989* (Qld) ss12B, 12C(5).
- 137 *Domestic and Family Violence Protection Act 1989* (Qld) s11.
- 138 *Domestic and Family Violence Protection Act 1989* (Qld) s11(c)(4).
- 139 *Domestic and Family Violence Protection Act 1989* (Qld) s14. An authorised person includes a person authorised in writing by the person aggrieved, an administrator under the *Guardianship and Administration Act 2000*, the adult guardian, or a person who has an enduring power of attorney: s14(2).
- 140 *Peace and Good Behaviour Act 1982* (Qld) ss4 and 6.
- 141 *Peace and Good Behaviour Act 1982* (Qld) s4.
- 142 *Peace and Good Behaviour Act 1982* (Qld) s4(1).
- 143 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982* (Qld), Report No 63 (December 2007) [6.32].
- 144 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982* (Qld), Report No 63 (December 2007) [6.33].
- 145 The Complaints Investigation Scheme forms part of the Office of Aged Care Quality and Compliance, Department of Health and Ageing.
- 146 *Investigation Principles* (Cth) (made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) s16A.6(1).
- 147 *Investigation Principles* (Cth) (made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) s16A.8(1).
- 148 *Aged Care Act 1997* (Cth) s95A-1 outlines in full the functions of the Aged Care Commissioner.
- 149 *Investigation Principles* (Cth) (made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) s16A.25.
- 150 *Investigation Principles* (Cth) (made under subsection 96-1(1) of the *Aged Care Act 1997* (Cth) ss16A.5, 16A.6(1).
- 151 Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.
- 152 Les Jackson 'Elder abuse and Queensland Legislation' (2003) 2 *Elder Law Review* <<http://www.austlii.edu.au/au/journals/ElderLRev/2003/2.html>> at 21 July 2009.
- 153 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.
- 154 David Cripps, Jenny Biven, Jane Northey, Phillip Rigger, 'Abuse of older people: issues for lawyers' (2002) 1 *Elder Law Review* <<http://www.austlii.edu.au/au/journals/ElderLRev/2002/8.html>> at 21 July 2009.
- 155 *Ibid.*
- 156 Rosslyn Monro, 'Elder abuse and legal remedies – practical realities?' (Spring 2002) 81 *Reform* <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform81/10.html>> at 15 July 2009.

- 157 *Ibid*; Les Jackson 'Elder abuse and Queensland Legislation' (2003) 2 *Elder Law Review* <<http://www.austlii.edu.au/journals/ElderLRev/2003/2.html>> at 21 July 2009.
- 158 The Seniors Advocacy Information and Legal Service (SAILS) is operated by the Caxton Legal Centre in Brisbane. SAILS offers free legal advice, support and in certain circumstances legal representation to older persons in relation to elder abuse and other issues affecting older persons. A list of services offered by SAILS can be viewed at <<http://www.caxton.org.au/sails>>.
- 159 The Seniors Legal and Support Service (SLSS) is funded by the Queensland Department of Communities and provides free legal and support services for older persons affected by elder abuse, mistreatment and financial exploitation. They also offer legal representation in certain circumstances. For further information, see the Department of Communities website at <<http://www.communities.qld.gov.au/seniors/legal-support/about/>>.
- 160 The Queensland Aged and Disability Advocacy Inc is a free legal advocacy service which assists older people. For further information, view their website at <<http://www.qada.org.au/>>.
- 161 For a complete list of Community Legal Centres in Queensland, see Legal Aid Queensland's website at <http://www.legalaid.qld.gov.au/applications/organisations/organisation_results.asp?location=&Range=&SearchParam1=&SearchKey1=&SearchKey2=&SearchKey3=&searchKeyword=community+legal+centres&sort=service&pagenum=1>.
- 162 Office of the Public Advocate Queensland, *Submission to the Standing Committee on Legal and Constitutional Affairs – Inquiry into Older People and the Law* (March 2007) 10.
- 163 This legislation is yet to be passed: See the website of the Library of Congress at <<http://thomas.loc.gov/cgi-bin/Thomas>>.
- 164 This legislation has not yet been passed: The status of this Bill can be viewed at the website of the Library of Congress: <<http://thomas.loc.gov/cgi-bin/bdquery/D?d111:3:./temp/~bdbweB:|/bss/111search.html>>.
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- 168 American Prosecutors Research Institute, *Prosecution of Elder Abuse, Neglect and Exploitation: criminal Liability, Due Process, and Hearsay* (2003) 3.
- 169 CAL Welfare and Institutions CODE § 15610.27 (2009).
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- 171 CAL Penal CODE § 368(2) (2009).
- 172 CAL Penal CODE § 368(3)(d) (2009).
- 173 California State Senate, *Senate Bill No. 1018* <http://info.sen.ca.gov/pub/05-06/bill/sen/sb_1001-1050/sb_1018_bill_20050829_chaptered.pdf> at 17 August 2009.
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- 175 SC CODE ANN § 43-35-85(B)-(D).
- 176 C Heisler, 'Elder Abuse and the Criminal Justice System: New awareness, new responses' (2000) 24(2) *Generations* 52-58, 54.
- 177 *Ibid*.
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- 179 C Heisler, 'Elder Abuse and the Criminal Justice System: New awareness, new responses' (2000) 24(2) *Generations* 52-58, 55. These include California, Arizona, Washington, Minnesota, Wisconsin, Virginia, Delaware, Texas, and Tennessee.
- 180 *Ibid*, 55.
- 181 *Ibid*.
- 182 *Ibid*, 56.
- 183 *Ibid*, 57.
- 184 *Ibid*.
- 185 American Prosecutors Research Institute, *Prosecution of Elder Abuse, Neglect and Exploitation: Criminal Liability, Due Process and Hearsay* (July 2003) <www.ndaa.org/pdf/elder_abuse_web.pdf> at 17 August 2009.
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- 197 ME REV STAT ANN § 1022 (2009).
- 198 ME REV STAT ANN § 1023 (2009).
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211 For example, it may not be possible for the victim to even consent to or oppose the offensive conduct.



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