

Older Persons
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The law does not provide sufficient protection...

In June of this year, the Queensland Law Society (QLS) and the Office of the Public Advocate (OPA) in Queensland issued a joint paper entitled 'Elder Abuse: How Well Does the Law in Queensland Cope?'ⁱ The aim of the paper was to assess "the adequacy of Queensland law regarding elder abuse."ⁱⁱ The paper identifies a number of shortcomings in the law which make it difficult for elderly persons who have been the victims of abuse to seek redress. A recurring theme throughout the paper is that the law does not provide sufficient protection for vulnerable older people. The protections that are in place are at best piecemeal and haphazard. Thus the answer to the question posed in the title of the paper may be answered: 'Not very well.'

The law as it relates to older people is underdeveloped...

Part of the problem is that there is as yet no statute in force which comprehensively provides for the protection of older people from abuse. Instead, there are a myriad of laws and legal remedies to which older people may have recourse in statutes, at common law and in equity. This fact renders the whole area of elder law more complex than it has to be. Despite the growing recognition of elder abuse as a societal problem, governments have been slow to initiate a systematic legal response. It is about time that politicians got serious about protecting out elderly population.

The purpose of this article is to provide a summary of the findings of the QLS and OPA joint paper. References will also be made to relevant journal articles, especially one about elder abuse in the context of the American legal system.ⁱⁱⁱ The reason for this is that the law in America is similarly ill-equipped to handle elder abuse and therefore many of the conclusions and observations in that article are directly applicable to the Australian situation. It appears that since ageing populations are a recent phenomenon, the law as it relates to older people is underdeveloped. As the number of elderly people in our population is continually on the increase, it is important for governments and the legal system to make the necessary adaptations to ensure that older people who are in a position of vulnerability are given access to appropriate legal remedies.

The QLS and OPA begin their discussion of the law as it relates to older people by focusing on financial abuse. It is observed that "older people with impaired capacity are particularly vulnerable to financial abuse".^{iv} However, it is also pointed out that "old age does not create any special legal status of vulnerability attracting the special protection of the law."^v This is not the case in the state of Illinois in the United States, which "recognises a separate crime for financial exploitation of an elderly person, and also includes the age of the victim as a special classification under its abuse laws."^{vi}

Harder for older persons to qualify for a legal remedy...

Alarming, the law in Queensland often makes it *harder* for older persons to qualify for a legal remedy. An example of this is the presumption of advancement. The QLS and OPA define this concept as follows:

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 the transfer no gift was intended (for example, by proving that undue influence occurred).^{vii}

Another example is the removal of exemplary, punitive or aggravated damages as a remedy for actions pursued under the *Personal Injuries Proceedings Act 2002*. As the QLS and OPA point out:

Prior to [this change in the law] 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....For an 85 year-old person who may have impaired capacity and / or personal injuries as a result of an act of abuse...the most significant element of recompense has been removed...^{viii}

The final observation of the QLS and OPA in this matter is telling:

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*.^{ix}

This state of affairs hardly sits comfortably with the notion that the elderly are especially vulnerable and thus worthy of special protection under the law. As Jane A. Black says of the American situation: "our system fails to recognise the especially egregious nature of such crimes against a population who is, arguably, the least likely to defend themselves."^x

A further weakness of Queensland law derives from the rules surrounding litigation guardians. Currently under the law an older person who lacks capacity "can only commence or defend proceedings by way of a litigation guardian."^{xi} The

litigation guardian is liable for solicitors' fees and also for the legal costs of the other party if the action is unsuccessful. While the litigation guardian is entitled to an indemnity from the person they represent, if the older person has limited funds or assets then this will be of no help to the litigation guardian. The law as it stands therefore creates a significant disincentive for litigation guardians to seek legal redress for older persons. As the QLS and OPA explain:

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 has been made. This effectively denies access to justice for older persons with an impaired capacity in those circumstances.^{xii}

Another area in which there is cause for concern for older people is in relation to enduring power of attorneys (EPAs). The QLS and OPA state that "financial abuse of older persons with impaired capacity by attorneys occurs regularly"^{xiii} and that "it is relatively easy for the misuse of EPAs to occur undetected".^{xiv} This is due to a lack of oversight and monitoring of EPAs. A related issue is the reporting of suspected cases of financial abuse. In relation to the financial dealings of an attorney, banks would be "well placed to recognise and report possible abuse."^{xv} However, there is currently no duty of care or statutory obligation imposed on bank employees "to report suspicions of financial abuse".^{xvi} This state of the law is regrettable and should surely be changed.

No specific offence of elder abuse...

In relation to physical abuse, the QLS and OPA state that "there is currently no requirement for the mandatory reporting of suspected cases of elder abuse in Queensland."^{xvii} The one exception noted is the *Aged Care Act (ACA) 1997 (Cth)*. This statute *does* impose a duty on aged care providers "to report alleged or suspected assaults".^{xviii} However, the Act only applies to government funded aged care facilities and its scope is therefore severely limited. As the QLS and OPA surmise: "The ACA is not intended to provide a comprehensive regime for preventing the abuse of all older Australians."^{xix}

In relation to criminal law, the paper observes that "no specific offence of elder abuse currently exists in the Queensland *Criminal Code*..."^{xx} Instead, offences such as assault, sexual assault, stalking, stealing and fraud are covered in general terms without reference to "the age of the victim."^{xxi} Neglect is also covered by the *Criminal Code*, but there must be some doubt as to its usefulness as to date "no convictions of a person failing to provide necessities to an older person have been recorded in Queensland."^{xxii} The criminal law in Queensland also does allow for age and impaired capacity to be taken into account as aggravating factors when sentencing a perpetrator. However, the QLS and OPA make the following summation of the effectiveness of the Queensland *Criminal Code*, and in doing so raise an important issue:

[The vulnerability of older people] 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.^{xxiii}

Later in the paper the QLS and OPA conclude in similar terms:

...the law fails to address the particular vulnerability of older persons...It is therefore questionable whether Queensland law currently offers adequate protection for older persons from elder abuse...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.^{xxiv}

Resistance to a special category ...

A complicating issue is that there is some resistance to older people being classified as a special category of persons requiring special legal protection. The concern is that this might promote ageist attitudes. Take for example the following comments by the South Australian Council on the Ageing. While acknowledging that "the vulnerability of some older people...warrants particular attention to their legal, justice and safety needs", the council argues that "older people should not...be treated as incapacitated, incapable or infantile by virtue of having lived longer than some others in our community."^{xxv} Further, they argue: "A crime is a crime, irrespective of the victim's age. The law should treat older people as it treats all people. Age of itself should not affect how the law applies or is formulated."^{xxvi}

This problem arises in relation to the issue of mandatory reporting of suspected elder abuse also, as Rosslyn Monro points out. She puts forward the view (not her own) that "the abuse of older people is analogous to child abuse, and that a child protection model of mandatory reporting is a relevant strategy to prevent elder abuse."^{xxvii} She notes that there is "significant resistance" to this idea because it "perpetuates the ageist assumption" that older persons in abusive situations

lack legal capacity.^{xxviii} She states that “those who oppose mandatory reporting argue that older people have the right both to make bad decisions and to have that decision respected by others.”^{xxix}

These views seem to me to be counter-productive. Surely the need to protect older persons who *do* have impaired capacity is more important than running the risk of over-protecting older people who *do not* have impaired capacity. The pride of older persons should take a back seat to the implementation of laws that will help to prevent and redress elder abuse.

Barriers to older people

The QLS and OPA also identify a range of barriers to older people accessing legal services. One of the most common barriers is a lack of financial resources. As Rosslyn Monro explains:

The inherent difficulty with common law and equitable remedies is that they require the older person to have a sufficient level of funds available to them in order to seek legal assistance. If the older person has lost their only asset in the process of being abused, the risk of unsuccessful legal action is often too great to enter into.^{xxx}

Where an older person has been the victim of criminal activity, such as fraud or assault, the complications of the perpetrator being a family member make it difficult for the older person to seek help. As Monro says: “Making a complaint to the police and pressing charges is a highly confrontational strategy for an older person and...one that few older people will elect to pursue, particularly against a family member...”^{xxxi} These and many other barriers lead Monro to conclude that “for many older people it is not a question of whether there is a legal remedy but whether the legal remedy can be pursued as a practical reality.”^{xxxii}

Laws...need to be updated and improved

Some of the major recommendations of the QLS and OPA are that the presumption of advancement be reviewed, and that “consideration be given to the availability of exemplary damages for older people.”^{xxxiii} They also suggest that “specific elder abuse offences” be inserted into the Queensland *Criminal Code*, following the lead of certain states in the USA.^{xxxiv} More generally, they recommend that “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.”^{xxxv}

To conclude, it is obvious that the laws in Queensland relating to elder abuse need to be updated and improved. The current system has many flaws and fails to provide adequate protection. I will give the final word to Jane A. Black, who makes the following plea in relation to American laws. As I have argued, her criticisms are directly applicable to our own situation:

Without immediate action by lawmakers...there is no indication that...exploitation of the elderly will subside...the day has passed where the American legal system can fail to recognise elder abuse as a widespread attack on the most vulnerable members of our population. To combat these abuses, federal and state legislatures need to enact uniform laws and sanctioning mechanisms to create a legal system with a hard stance against abuse of the elderly.^{xxxvi}



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- ⁱ Office of the Public Advocate (Qld) and Queensland Law Society, *Elder Abuse: How well does the law in Queensland cope?* (June 2010). Available as a PDF download from the QLS web site.
- ⁱⁱ *Ibid.*, 1.
- ⁱⁱⁱ Jane A. Black, "The Not-so-golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing A Vulnerable Population," *St. John's Law Review* 82 (1), (2008): 289-295.
- ^{iv} Note 1, 8.
- ^v *Ibid.*
- ^{vi} Note 3, 292.
- ^{vii} Note 1, 8.
- ^{viii} Note 1, 9.
- ^{ix} *Ibid.*, emphasis added.
- ^x Note 3, 293.
- ^{xi} Note 1, 11.
- ^{xii} *Ibid.*
- ^{xiii} Note 1, 12.
- ^{xiv} Note 1, 13.
- ^{xv} Note 1, 14.
- ^{xvi} *Ibid.*
- ^{xvii} Note 1, 13.
- ^{xviii} *Ibid.*
- ^{xix} *Ibid.*
- ^{xx} Note 1, 14.
- ^{xxi} *Ibid.*
- ^{xxii} Note 1, 15.
- ^{xxiii} *Ibid.*
- ^{xxiv} Note 1, 26.
- ^{xxv} House of Representatives, Standing Committee on Legal and Constitutional Affairs, *'Older people and the law'* (Canberra: Commonwealth of Australia, September 2007), 5-6.
- ^{xxvi} *Ibid.*, 6.
- ^{xxvii} Rosslyn Monro, "Elder abuse and legal remedies: practical realities?" *Australian Law Reform Commission* 81 (2002): 42, <http://www.austlii.edu.au/cgibin/sinodisp/au/other/alrc/publications/reform/reform81/10.html?stem=0&synonyms=0&query=%20Monro>.
- ^{xxviii} *Ibid.*
- ^{xxix} *Ibid.*
- ^{xxx} *Ibid.*
- ^{xxxi} *Ibid.*
- ^{xxxii} *Ibid.*
- ^{xxxiii} Note 1, 27.
- ^{xxxiv} Note 1, 28.
- ^{xxxv} Note 1, 29.
- ^{xxxvi} Note 3, 295.