

# THE NEED FOR AUSTRALIAN CRIMINAL LAW REFORM TO PROTECT ELDERLY AUSTRALIANS AGAINST ABUSE

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*The Australian Bureau of Statistics have reported that Australia's population is ageing at an incremental rate, and a recent National Prevalence Study into elder abuse found that a significant proportion of those older Australians are experiencing abuse. While it is important to recognise that older people are not inherently vulnerable, it is equally important to acknowledge the fact that many instances of abuse are falling through the cracks. Older people with distinct vulnerabilities, are at particular risk, and it is the right of every older Australian to age with dignity, respect, and to be afforded adequate protection from abuse. Despite the existence of criminal laws applicable to abuses including physical, social, psychological, and financial, very few matters relating to abuse of older people are prosecuted.*

*This paper provides an overview of the legal framework in which abuse of older adults currently operates in Australia. It proposes that discrete criminal offences should be introduced to protect older adults who are reliant on others for their care, and who have a distinct vulnerability.*

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## I INTRODUCTION

Australia’s population is ageing. The Australian Bureau of Statistics (‘ABS’) have reported that within the 20-year period between 1999 and 2019, the proportion of people aged 65 years or older increased from 12.3% to 15.9%.<sup>1</sup> By 2066, it is projected to increase by around 20%, to more than a third of the nation’s population.<sup>2</sup> Statistically, the prevalence of elder abuse in Australia is difficult to

<sup>1</sup> Australian Bureau of Statistics, *Australian Demographic Statistics* (Catalogue No 3101.0.0, 19 December 2019).

<sup>2</sup> Australian Bureau of Statistics, *Populations Projections, Australia, 2017 (base) - 2066* (Catalogue No 3222.0, 22 November 2018).

accurately assess,<sup>3</sup> although the recent *National Elder Abuse Prevalence Study 'Prevalence Study'*<sup>4</sup> found that nearly one in six older Australians (15%) reported experiencing abuse in the twelve months prior to the study.<sup>5</sup> What cannot be denied, is that older people are experiencing abuse,<sup>6</sup> and that the rights of older Australians are being increasingly discussed and addressed in line with this concern.<sup>7</sup>

In 2017, the Australian Law Reform Commission ('ALRC') released the *Elder Abuse: A National Legal Response Report* ('ALRC Report').<sup>8</sup> The report made many recommendations, including a national plan to combat elder abuse, the introduction of safeguarding regimes for vulnerable adults in each state and territory, and the regulation of Enduring Powers of Attorney ('EPOA').<sup>9</sup> However, the ALRC concluded that the existing criminal laws in Australia are satisfactory in enabling victims of elder abuse to access an effective pathway to justice.<sup>10</sup>

Conversely, this paper proposes that criminal laws in Australia are, for the most part, ineffective in addressing abuse of older people. On the face of the various state and territory legislation, existing generic laws appear applicable to many instances of abuse, including physical, social, sexual, psychological, financial, and neglect. The reality, however, is that, to date, few matters are prosecuted due to

<sup>3</sup> Adam Dean, 'Elder Abuse, Key Issues and Emerging Evidence' (Child Family Community Australia Research Paper No 51, Australian Institute of Family Studies, June 2019) 1; Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse, Understanding Issues, Frameworks and Responses* (Australian Institute of Family Studies Research Report No 35, 2 November 2018) 5-7; Australian Institute of Family Studies, *Key Issues and Emerging Evidence CFCA Paper No. 51* (June 2019) <<https://aifs.gov.au/cfca/publications/cfca-paper/elder-abuse/prevalence-elder-abuse>>.

<sup>4</sup> Lixia Qu et al, *National Elder Abuse Prevalence Study: Final Report* (Research Report for Australian Institute of Family Studies, December 2021) 32 ('Prevalence Study').

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (Publication, 8 July 2019) 10; Kaspiew et al (n 3) 35.

<sup>8</sup> Australian Law Reform Commission ('ALRC'), *Elder Abuse: A National Legal Response* (Final Report No 131, 1 May 2017) 282 ('ALRC Report').

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 364.

various concerns such as the abuse being regarded as a 'family' matter,<sup>11</sup> that older people do not want to pursue legal action against family members,<sup>12</sup> and where the older person does want to proceed, they may not make a convincing witness, or there is an absence of proof.<sup>13</sup> The lack of criminal cases proceeding, even in notorious cases,<sup>14</sup> demonstrates that the existing law is not utilised so as to ensure that older Australians can feel empowered, and supported by the law in the face of abuse.<sup>15</sup>

Whilst it is important to recognise that older people are not inherently vulnerable, it is equally important to acknowledge the fact that many instances of abuse are falling through the cracks. There is much to be learned by looking at international legislative responses concerning abuse of older people, particularly in the United States of America ('US'), to inform the Australian approach.<sup>16</sup> US laws directed at elder abuse call attention to improper conduct and behaviour, and target people who seek to take advantage of older people with distinct vulnerabilities within a wide range of contexts.<sup>17</sup>

Recently, the Australian Capital Territory ('ACT') introduced new laws that serve to protect older vulnerable people in a criminal law context. This paper provides an overview of the legal framework in which elder abuse currently operates in

<sup>11</sup> This used to be an issue in the domestic and family violence space. State and territory domestic violence laws were only introduced relatively recently in Australia: *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic and Family Violence Protection Act 1989* (Qld); *Domestic Violence Act 1994* (SA); *Family Violence Act 2004* (Tas); *Family Violence Protection Act 2008* (Vic); *Restraining Orders Act 1997* (WA); *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT).

<sup>12</sup> Carolyn Dessin, 'Financial Abuse of the Elderly' (2000) 36(2) *Idaho Law Review* 203, 211.

<sup>13</sup> Helene Love, 'Seniors on the Stand: Accommodating Older Witnesses in Adversarial Trials' (2019) 97(2) *Canadian Bar Review* 240; Helene Love, 'Aging Witnesses: Exploring Difference, Inspiring Change' (2015) 19(4) *The International Journal of Evidence & Proof* 210, 216.

<sup>14</sup> See, eg, the case of Cynthia Thoresen, an 88-year-old woman who died whilst in the care of her daughter: Stephanie Small, 'Death of Elderly Woman Prompts Calls to Punish Cruel Carers', *ABC News* (Adelaide) 29 May 2013). <[https://www.abc.net.au/news/2013-05-29/death-of-elderly-woman-prompts-calls-to-punish-cruel-carers/4720718?utm\\_campaign=abc\\_news\\_web&utm\\_content=link&utm\\_medium=content\\_share&utm\\_source=abc\\_news\\_web](https://www.abc.net.au/news/2013-05-29/death-of-elderly-woman-prompts-calls-to-punish-cruel-carers/4720718?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_share&utm_source=abc_news_web)>.

<sup>15</sup> Kaspiew et al (n 3) 6-7.

<sup>16</sup> Ibid 39-41.

<sup>17</sup> Nina Kohn, 'Elder (In)Justice: A Critique of the Criminalisation of Elder Abuse' (2012) 49(1) *American Criminal Law Review* 1, 8-13.

Australia, and discusses some of the possible issues behind why instances of elder abuse are falling through the gaps. It postulates that reform akin to those recently introduced into the criminal legislation in the ACT,<sup>18</sup> may accommodate more matters to successfully proceed in other states and territories across Australia, and also disincentive against elder abuse.

## II THE INEFFECTIVENESS OF CURRENT LAW PROVISIONS TO PROTECT OLDER PEOPLE FROM ABUSE: IDENTIFYING THE GAPS

### A *Rights of Older Australians*

In Australia, the age of 65 is often used as an indicative number which assists in determining whether a person may be classified as being older (for example, the ABS).<sup>19</sup> However, there is no bright line approach in measuring what age correlates with possible susceptibility to elder abuse, and many people in their sixties and seventies would not consider themselves to be in any way vulnerable. A person should not be denied a right to take advantage of their universal human rights and freedoms on the basis that they meet a definition of 'older'. Additionally, assumptions or stereotypes should not interfere with an older person's right to have their choices respected.<sup>20</sup>

Acknowledging this, there is, sadly, a growing body of research indicating that older Australians are being abused across a multitude of areas, ranging from assault, and neglect, to financial abuse, and fraud, and the factors influencing this are varied and complex.<sup>21</sup> Though there is not a one size fits all solution, what cannot be disputed is that a good response will ultimately always centre around the needs of the older person themselves. This paper posits that older Australians with

<sup>18</sup> *Crimes Act 1900* (ACT) ss 36A, 36B, 36C.

<sup>19</sup> Australian Institute of Health and Welfare, 'Older Australians', *AIHW Reports and Data* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/summary>>.

<sup>20</sup> *ALRC Report* (n 8) 393; Australian Human Rights Commission, 'Elder Abuse is Everybody's Business', *Aged Rights Advocacy Service World Elder Abuse Awareness Day Conference* (Keynote Address, 15 June 2018) <<https://humanrights.gov.au/about/news/speeches/elder-abuse-everybodys-business>>; Rosalind Croucher and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' (2018) 18 *Macquarie Law Journal* 5, 5-18.

<sup>21</sup> Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and The Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 122; Kaspiew et al (n 3) 6-7; Brian Herd, 'Elder Abuse Criminal Laws: It's Time' (2019) 39(4) *The Proctor* 24, 24-5.

distinct vulnerabilities, who are at particular risk,<sup>22</sup> have a fundamental right to live a life free from abuse and neglect, and some of those abuses warrant a criminal justice response.

## B Criminal Laws

### 1 Physical and Fault Elements

The small number of prosecutions arising from reported cases of elder abuse,<sup>23</sup> demonstrates there is an evident gap in the current criminal laws in Australia,<sup>24</sup> as they are not sufficiently empowering law enforcement to bring a successful proceeding, even in cases where evidence is able to be attained.<sup>25</sup> One possible reason for this, is that criminal offences in Australia have elements relating not only to the act, but also to intent.<sup>26</sup> Elements of criminal offending constitute both physical elements (actus reus, meaning the act or omission)<sup>27</sup> and fault elements, which are internal to the defendant (mens rea).<sup>28</sup> For example, if a person caused another's death, and there is evidence of a physical act, but they had no intention to cause that death, then the fault elements of murder cannot be successfully made out, and they cannot be convicted.<sup>29</sup>

Meeting strict evidentiary thresholds to demonstrate the existence of internal fault elements such as intention, recklessness, knowledge, belief, or negligence, in the

<sup>22</sup> Explanatory Statement, Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020 (ACT) 11 ('*Explanatory Statement*').

<sup>23</sup> Kaspiew et al (n 3) 6-7.

<sup>24</sup> *Criminal Law Consolidation Act 1935* (SA); *Crimes Act 1900* (ACT); *Crimes Act 1958* (Vic); *Criminal Code Act 1913* (WA); *Crimes Act 1900* (NSW); *Criminal Code Act 1924* (Tas); *Criminal Code Act 1899* (Qld).

<sup>25</sup> Explanatory Statement (n 22) 7; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 May 2020, 951 (Gordon Ramsay, Attorney General).

<sup>26</sup> David Caruso et al, *South Australian Criminal Law and Procedure* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2016) 40.

<sup>27</sup> *Ibid* 35.

<sup>28</sup> *Ibid* 40.

<sup>29</sup> *Ibid* 43.

context of elder abuse presents some challenges.<sup>30</sup> Sometimes, perpetrators of elder abuse go out of their way to keep their intentions hidden.<sup>31</sup> Also, sometimes it may seem like consent has occurred authorising a specific action, whereas in reality the intentions of the perpetrator are not in the best interests of the victim. For example, in a case of financial abuse, where letters issued to a bank authorising large withdrawals are created without the knowledge of the account owner.<sup>32</sup> Another aspect to consider, is the context in which these abuses are taking place, for instance in an aged care facility, or in the family home. The World Health Organisation ('WHO') has described abuse against older people as one that has always been 'societally hidden'.<sup>33</sup>

A preferred method is to look at the overall conduct, and general behaviour of the abuser in cases of abuse of older people. That approach would more accurately capture cases of abuse that are being hidden from view.<sup>34</sup>

Of all states and territories in Australia, the ACT is the only territory that has undertaken a first step in creating criminal offences into the *Crimes Act 1900* (ACT) that may capture abuse of older people, with the inclusion of provisions such as: 'abuse of a vulnerable person',<sup>35</sup> as well as a 'failure to protect a vulnerable person from a criminal offence',<sup>36</sup> or to 'neglect a vulnerable person'.<sup>37</sup> These apply to all people over the age of 18 years, however, importantly, the *Crimes Act*

<sup>30</sup> Kaspiew et al (n 3) 31-2; Interview with Robert Critchlow on Policing and Prevention (Ellen Fanning, *The Abuse of Older People: Insights and Perspectives*, 4 September 2018) <<https://www.youtube.com/watch?v=dHDXZZCCcy4>>; Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies – It's Time to Face the Facts!' (2013) 7 *Elder Law Review* 1, 15-17.

<sup>31</sup> World Health Organisation, 'Missing Voices: Views of Older Persons on Elder Abuse (Research Report, Ageing and Life Course Unit, 2002) 2 <<https://apo.who.int/publications/i/item/missing-voices-views-of-older-persons-on-elder-abuse>>.

<sup>32</sup> For example, in the case of Janet Mackozdi, letters were written to her bank authorising large withdrawals. In reality, Ms Mackozdi did not have capacity to legally enable her consent; Record and Investigation into Death of Janet Louis Mackozdi (With Inquest) (Coroner's Court, 22 September 2017, Tasmania) '*Janet Mackozdi Inquest*' 30 [132].

<sup>33</sup> World Health Organisation (n 31) 2.

<sup>34</sup> See, eg, financial abuse taking place through misuse of an enduring power of attorney; Wuth (n 30) 15-17.

<sup>35</sup> Ibid.

<sup>36</sup> *Crimes Act 1900* (ACT) s 36B.

<sup>37</sup> Ibid s 36C.

1900 (ACT) embraces within its definition of ‘vulnerable’ a person over 60 years of age, who also has a distinct listed vulnerability.<sup>38</sup>

## 2 Distinguishing Aggravated Offences

It’s important to distinguish a discrete offence from an offence being categorised as an aggravated offence. As an example of what this means, in South Australia the *Criminal Law Consolidation Act 1935* (SA) section 5AA(1)(f) may denote the creation of an aggravated offence if the offender knew the victim was over the age of 60 years at the time of the offence. Nonetheless, it is still required that an offence is made out before it can be deemed to be ‘aggravated’, and elements contained within offences such as assault, theft, and neglect, even if inflicted upon a ‘vulnerable person’<sup>39</sup> require strict physical and fault elements to be met. This process can offer distinct challenges within the scope of abuse to an older vulnerable adult, because attaining evidence can be challenging if the abuse has taken place in a context that is hidden from view.<sup>40</sup>

Another perceived challenge to proving elements of criminal offences, is an older person’s ability to present as a witness.<sup>41</sup> However, presenting older witnesses can in fact be an evidentiary strength often overlooked by prosecutors.<sup>42</sup> As noted by Greenwood, older people can have significant, and genuine jury appeal.<sup>43</sup> If they display forgetfulness, this barrier can be overcome by refreshing memory, or

<sup>38</sup> Within the *Crimes Act 1900* (ACT), vulnerable person is defined as an adult who (a) has a disability; or (b) is at least 60 years old and – (i) has a disorder, illness or disease that affects the person’s thought processes, perception of reality, emotions or judgment or otherwise results in disturbed behaviour; or (ii) has an impairment that – (A) is intellectual, psychiatric, sensory, or physical in nature; and (B) results in a substantially reduced capacity of the person for communication, learning or mobility; or (iii) for any other reason is socially isolated or unable to participate in the life of the person’s community.

<sup>39</sup> The *Criminal Law Consolidation Act 1935* (SA) s 13B defines ‘vulnerable adult’ as a person aged 16 years or above who is significantly impaired through physical disability, cognitive impairment, illness, or infirmity.

<sup>40</sup> It can be difficult to prove a persecutor’s intent in an abuse context which has been hidden from view, for instance there are family agreements involving asset transfers: Kylie Louise, ‘Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7(4) *Elder Law Review* 1.

<sup>41</sup> Helen Love, ‘The Vulnerable Subject on Trial: Addressing Testimonial Injustice in the Rules of Evidence’ (2019) 12(14) *Elder Law Review* 1, 2.

<sup>42</sup> Interview with Paul Greenwood, Page Ulrey, and Kathy Van Olst (Wanda Jackson, Elder Justice Initiative, February 2010) <<https://www.youtube.com/watch?v=qBvzlQXVeo4>>.

<sup>43</sup> Ibid.



bringing in external evidence from a bank teller, financial manager, or neighbour.<sup>44</sup> Where there are cognitive impairment issues, medical experts can counteract that by providing evidence that consent was not possible due to lack of capacity.<sup>45</sup> Also, notably, as posited by Greenwood, the goal should be to show a profile of the complainant, and to contrast that profile with prior frugal behaviour, or with (possibly) lavish spending that occurred on behalf of the complainant, after interaction with the defendant.<sup>46</sup>

This analysis is in acknowledgement that, gaining evidence of intent in cases of neglect, psychological abuse, or sexual abuse may prove more challenging, especially in cases where an older witness does not want to come forward.

### 3 *Financial Abuse and Enduring Powers of Attorney*

#### (a) *Identifying the Abuse Issue*

Financial abuse to an older person can be dealt with via statutory property offences, for example theft,<sup>47</sup> fraud,<sup>48</sup> or misappropriation of property.<sup>49</sup> However, as previously established, attaining evidence to prove these offences occurred can be problematic when the theft has taken place in a familial setting, or within a relationship of trust, because the victim may have a desire to maintain a relationship with the perpetrator.<sup>50</sup>

A common method adopted by older people in Australia, is to appoint an EPOA. The appointment of a EPOA does not remove a donor's powers to manage and make decisions about their legal and financial affairs, it simply entrusts a delegated person to act on their behalf. A defining feature of an EPOA, is that the document continues to operate after a person loses capacity. To be legally incapacitated,

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> *Criminal Law Consolidation Act 1935* (SA) s 134; *Crimes Act 1900* (ACT) s 308; *Crimes Act 1958* (Vic) s 72; *Criminal Code Act 1913* (WA) s 378; *Crimes Act 1900* (NSW) s 117; *Criminal Code Act 1924* (Tas) s 226; *Criminal Code 2002* (NT) s 209(1); *Criminal Code Act 1899* (Qld) s 398.

<sup>48</sup> *Criminal Law Consolidation Act 1935* (SA) ss 134, 139; *Crimes Act 1900* (ACT) s 326; *Crimes Act 1958* (Vic) ss 72, 191; *Criminal Code Act 1913* (WA) s 409; *Crimes Act 1900* (NSW) s 124; *Criminal Code Act 1924* (Tas) s 255; *Criminal Code 2002* (NT) s 227; *Criminal Code Act 1899* (Qld) s 408C.

<sup>49</sup> *Crimes Act 1900* (ACT) s 326; *Crimes Act 1958* (Vic) s 81(1).

<sup>50</sup> Lacey (n 21) 106-8, 112.

means that someone is unable to understand the nature, and effect, of a legal document.<sup>51</sup> This factor poses obvious issues: authority may be exercised recklessly, without care and diligence, or even criminally, where a person's money or assets are used in a way that is detrimental to the donor, without their knowledge or consent.

Pursuant to the *Powers of Attorney and Agency Act 1984* (SA) section 7, the general duty of an enduring power is that the donee must exercise his powers as attorney, with reasonable diligence to protect the interests of the donor. Yet, if an EPOA abuses their position, the older person without capacity might not be aware. Further, if they are made aware of financial abuse that has taken place under the guise of an EPOA, they are left to navigate a fragmented, and bewildering legal landscape should they wish to pursue legal action, whether via criminal or civil means.<sup>52</sup>

(b) *R v Kerin: Junction between Misuse of an EPOA, and the Offence of Theft*

There is an interesting cross section between the misuse of an EPOA, and the offence of theft, and factors such as honesty and consent come front and centre in determining whether an offence of theft has been committed. This can be seen in the case of *R v Kerin* [2013] SASCFC 56, a South Australian appeal against convictions of theft. The defendant transferred monies from an account of the donor (an elderly woman of almost 100 years, suffering from advanced dementia),<sup>53</sup> into an investment account to support share trading for a corporate entity the appellant had a personal interest in.<sup>54</sup>

The root of the appellant's case, was that the prosecution had not properly directed the jury as to the elements of theft.<sup>55</sup> Specifically, whether section 134(3)(b) of the *Criminal Law Consolidation Act 1935* (SA) (being that a person may commit theft of property by the misuse of powers given to them as an agent), *substitutes* a usual element of 'lack of consent', even in a case where the appellant may have misused their powers as an EPOA. In other words, utilising section 134(3)(b),<sup>56</sup> (which does

<sup>51</sup> 'Loss of Legal Capacity', *Legal Services Commission of South Australia* (Web Page, 15 December 2016) <<https://lawhandbook.sa.gov.au/ch02s01s01.php>>.

<sup>52</sup> Wuth (n 30) 9-12.

<sup>53</sup> *R v Kerin* [2013] SASCFC 56, [12] (Gray J).

<sup>54</sup> Ibid.

<sup>55</sup> Ibid [61] (Gray J).

<sup>56</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(3)(b).

not mention the terms ‘consent’ or ‘lack of consent’) should not negate from meeting the elements of theft spelled out in section 134(1) of the *Criminal Law Consolidation Act 1935* (SA).<sup>57</sup>

Therefore, was it acceptable for the prosecution to direct the jury, and for the primary judge to accept a direction, that the elements of theft (relevant to the facts of that particular case) were, to deal with property: dishonestly; through misuse of powers vested in him (in place of ‘without the owner’s consent’)<sup>58</sup>; and intending to make a serious encroachment on the owner’s proprietary rights?<sup>59</sup>

It was held by Peek and Nicholson JJ that the primary judge erred in directing the jury that misuse of powers under a power of attorney, rather than a lack of consent, constituted an element of theft, because an intentional fault element of non-consent is always required.<sup>60</sup> Gray J dissented, holding that:

*To my mind, it was open to the jury to conclude beyond reasonable doubt that, in these circumstances, there has been a misuse of power, and that [the donor] did not consent to the transfer of her property to [the investment fund]. Not only do I consider that this conclusion was open, I go further; the prosecution case on this element of the offence was overwhelming.*<sup>61</sup>

Upon the upholding of the appeal,<sup>62</sup> the subsequent new trial before a judge alone (Blue J) sharply analysed the significance of the execution of a power of attorney in relation to the matter of consent. The accused contended that the power of attorney document authorised him to do anything the donor could have done personally, and that the scope of that authority is not bound to whether he was acting in the interests or for the purposes of the donor.<sup>63</sup>

This argument was rejected by Blue J, echoing the sentiments of Gray, Peek, and Nicholson JJ from the preceding appeal.<sup>64</sup> Namely, that ‘the significance of the execution of a power of attorney in relation to the matter of consent is not to be

<sup>57</sup> *R v Kerin* [2013] SASCFC 56, [160] (Peek J).

<sup>58</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(1)(b).

<sup>59</sup> *R v Kerin* [2013] SASCFC 56, [142] (Peek J).

<sup>60</sup> *Ibid* [178] (Peek J).

<sup>61</sup> *R v Kerin* [2013] SASCFC 56, [64] (Gray J).

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid* [275] (Blue J).

<sup>64</sup> *Ibid* [278] (Blue J).

addressed by reference to the mere words of the document alone'.<sup>65</sup> Further '[i]t will be necessary to have regard to the precise nature of the fiduciary relationship in the particular case to delineate the precise content of the duty'.<sup>66</sup> As observed by Gray J:

*[i]t is to be accepted that the defendant, by the power of attorney, had the power to sell property of [the donor]. It does not follow that the defendant had ... consent to exercise that power in an uncontrolled manner so as to abuse her interests or misuse her property.*<sup>67</sup>

Accordingly, as held by Blue J, 'if the accused was acting in breach of his fiduciary duties by acting in the interests or for the purposes of himself or others and not those of [the donor], he was acting without ... consent'.<sup>68</sup>

These cases bring light to the fact that misuse of power under an EPOA can be closely aligned with offences of theft. However, to prove theft one is still bound to show an absence of consent, which, as postulated in both the appeal<sup>69</sup> and the new trial in the case of *R v Kerin*,<sup>70</sup> flows from an extent to which a donee has contravened fiduciary duties embodied within an instrument of trust. Also, the importance of Blue J's observation that section 134 of the *Criminal Law Consolidation Act 1935* (SA) 'is enacted in the context and assumes the application of the general law which comprises both common law and equity',<sup>71</sup> which enabled a finding that a breach of fiduciary duty in line with section 7 of the *Power of Attorney and Agency Act 1984* (SA), can fulfill the element of 'without consent' within an offence of theft.<sup>72</sup>

This analysis reflects the complexity of the juncture of laws between misuse of EPOA documents, and offences of theft, even in cases where there is overwhelming evidence of a severe violation of an older person's wealth, and a

<sup>65</sup> *R v Kerin* [2013] SASCFC 56, [149] (Peek J); *R v Kerin* [2014] SASC 19, [278] (Blue J).

<sup>66</sup> *R v Kerin* [2013] SASCFC 56, [149] (Peek J); *R v Kerin* [2014] SASC 19, [278] (Blue J).

<sup>67</sup> *R v Kerin* [2013] SASCFC 56, [63] (Gray J); *R v Kerin* [2014] SASC 19, [278] (Blue J).

<sup>68</sup> *R v Kerin* [2014] SASC 19, [279] (Blue J).

<sup>69</sup> *R v Kerin* [2013] SASCFC 56.

<sup>70</sup> *R v Kerin* [2014] SASC 19; *R v Kerin* [2013] SASCFC 56.

<sup>71</sup> *R v Kerin* [2014] SASC 19, [277] (Blue J).

<sup>72</sup> *Ibid* [279] (Blue J).

clear misuse of powers vested by an EPOA via section 7 of the *Power of Attorney and Agency Act 1984* (SA).

(c) *Context: Not Just a Family Matter*

It is important to consider the context in which a wrongdoing has taken place, and how this may affect an ability to make out an offence. If the abuse has taken place within a family setting, then this offers obvious challenges in that most people are deterred by the idea of suing a family member, or by reporting a family member.<sup>73</sup> The notion that a family member may be, or indeed *should* be able to be found guilty of committing an offence within the ambit of financial abuse, is a relatively contentious one.<sup>74</sup> Though, much like criminal laws in Australia have evolved in the area of sexual abuse, to ensure that allegations of rape can be made between spouses,<sup>75</sup> or within domestic violence laws that aim to protect against acts of violence in a spousal or domestic relationship,<sup>76</sup> laws should also evolve so that older people with distinct vulnerabilities, have a clearly delineated path to follow should they wish to take legal action.

C *Civil Law Challenges*

1 *Distinguishing Civil from Criminal*

Civil law actions are pursued to attain financial redress for the victim in the form of monetary compensation. This can be distinguished from a criminal proceeding because it is a private legal matter between parties, and not a matter for the state. As such, it presents different challenges, generally involves negotiating theoretical and complex principles of law, and requires a high standard of proof.<sup>77</sup> Further, the process of litigation is inherently expensive and time consuming. Factors such as language barriers, cognitive impairments, and absence of support networks (for example, people living in aged care facilities), can strategically and financially

<sup>73</sup> Wuth (n 30) 8-13.

<sup>74</sup> Interview with Brian Herd (Ellen Fanning, *The Abuse of Older People: Insights and Perspectives*, 4 September 2018) <<https://www.youtube.com/watch?v=7sJxy9XKT8Y>> ('Fanning Interview with Brian Herd').

<sup>75</sup> *Criminal Law Consolidation Act Amendment Act 1976* (SA); *Criminal Law Consolidation Act 1935* (SA) s 48.

<sup>76</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

<sup>77</sup> Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Financial Elder Abuse Through Assets for Care Arrangements?' (2016) 22(1) *Canterbury Law Review* 120, 125-35 ('Combatting Elder Abuse'); Wuth (n 30) 14.

limit an applicant, minimising their chances of success. Older people face a plethora of distinct challenges should they choose to pursue legal action, and these challenges are exacerbated in the context of civil matters. Namely, the complexity of law, the limitation of some older people to travel to the offices of a legal practitioner, the cost of engaging with a lawyer, and the costly nature of litigation especially if the older person has suffered abuse concerning their wealth and assets.<sup>78</sup>

Sadly, even family members with good intentions, can place their older parents at risk. Holding the appointment of EPOA does require at least a basic understanding of financial management, and sometimes adult children will take on this role despite not knowing how to diligently manage their parent's financial affairs. This is especially the case where the adult child feels pressure to volunteer 'their expertise for the common cause', being their parents, irrespective of their experience, and unfortunately can lead to mismanagement that can result in significant financial losses for the older adult.<sup>79</sup>

## 2 Dependencies Can Change with Age

Though age itself should not be directly correlated with vulnerability,<sup>80</sup> certain older adults are more vulnerable if they must rely on others for their care. That is a listed purpose of the Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020 (ACT) ('the Bill').<sup>81</sup> In fact, the ACT's action to create specific offences for vulnerable people, is anchored in a commitment to prevent abuse of those with disabilities, and certain older people who are reliant on others for care or assistance.<sup>82</sup> Non-vulnerable adults are not as susceptible to abuse that may result from a power imbalance within a relationship of care, and therefore are not covered in the ambit of the Bill. This makes sense, given the Bill's primary purpose is to protect the *most* vulnerable people in our communities.

<sup>78</sup> Wuth (n 30) 14.

<sup>79</sup> Brian Herd, 'The Parent Trap, Denis's Disaster is an Object Lesson for All of Us' (2020) 40(3) *The Proctor* 36, 37; Nola Ries, 'When Powers of Attorney Go Wrong: Preventing Financial Abuse of Older People by Enduring Attorneys' (2018) 148 *Precedent* 9, 9-13.

<sup>80</sup> Harriet Gresham, 'Who is Vulnerable?: The Sentencing of Elder Abuse Offences and the Case of 'Katsis v The Queen' (2018) 18 *Macquarie Law Journal* 131, 131-5; Lacey (n 21) 108, 128.

<sup>81</sup> Explanatory Statement (n 22).

<sup>82</sup> *Ibid* 7.

The *ALRC report*<sup>83</sup> into elder abuse heard many cases of abuse by family members acting as carers.<sup>84</sup> In one such case, an 80-year-old woman lost her spouse, but remained financially secure. She had no cognitive impairment, and managed her own affairs. Unfortunately, she suffered a bad fall, and broke her arm and leg which resulted in long stays in hospital. The long time spent in hospital with few visitors, resulted in her losing confidence in her ability to care for herself. When her son made her an offer to live with him and his family, she accepted. The offer depended on her selling her home, residing in a granny flat, and living solely off Centrelink payments. She was denied the right to independent legal advice regarding the financial arrangement, and sadly, after the arrangement transpired, the promised care and support was never provided, and the flat resulted in being utterly unsuited to her needs.<sup>85</sup>

Therefore, it is important to recognise that abuse against older people is complex, and vulnerability can take many forms. This story captures the breadth of abuses that can take place, and the fact that the law needs to be nuanced enough to be able to capture abusive conduct occurring within a wide range of settings. An adult child offering physical care to their older parent, should not feel a sense of entitlement over their financial assets.<sup>86</sup>

#### D *Aged Care Facilities and the Coronavirus Pandemic*

The pandemic has thrust into focus the importance of the rights of older people living within aged care facilities who may inherently be more susceptible to illness,<sup>87</sup> particularly because they rely on others to care for their physical needs.<sup>88</sup>

<sup>83</sup> *ALRC Report* (n 8).

<sup>84</sup> *Ibid* 229.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Somes and Webb, 'Combatting Elder Abuse' (n 77) 123.*

<sup>87</sup> Jennifer Storey and Michaela Rogers, 'Coronavirus Lockdown Measures May be Putting Older Adults at Greater Risk of Abuse', *The Conversation* (Web Page, 11 May 2020) <<https://theconversation.com/coronavirus-lockdown-measures-may-be-putting-older-adults-at-greater-risk-of-abuse-137430>>; Jeffrey Kluger, 'A Coronavirus Guide for Older Adults (And Their Family Advocates)', *Time Magazine Online* (Web Page, 4 March 2020) <<https://time.com/5794374/coronavirus-seniors/>>.

<sup>88</sup> Peter Lazenby, '3.8 Million Elderly Who Live Alone Are at Great Risk From Coronavirus', *Morning Star Online UK* (News Article, 5 March 2020) <<https://morningstaronline.co.uk/article/b/38-million-elderly-who-live-alone-are-great-risk-coronavirus/>>.

As an example, in Victoria, the state government imposed severe limitations on the entire state during the years of 2020, and 2021.<sup>89</sup> When stage-four lockdowns were in place, no visitors at all were permitted into aged care facilities.<sup>90</sup> Non-essential workers and contractors were completely banned from visiting.<sup>91</sup> In fact, Victoria continues to impose limitations on the number of visitors permitted to attend aged care facilities, restricting it to five per resident, per day, requiring that each visitor return a negative rapid antigen test before entering.<sup>92</sup> If there are no rapid antigen tests available, this limit becomes further restricted to two visitors per resident.<sup>93</sup>

Undeniably, there is a need to ensure that people living in aged care facilities are afforded adequate protection from COVID-19.<sup>94</sup> Yet, the pandemic has placed older adults within these facilities in a powerless position. Aged care facility workers, who must comply with strict PPE requirements, intensive testing regimes, COVID-19 outbreaks, and short staffing, are being pushed to their limits. This raises genuine questions as to the wellbeing of those workers, and whether they are receiving adequate support.<sup>95</sup> The sector is currently struggling to attract and retain workers, and this is partly due to the fact that the pay received by aged care workers

<sup>89</sup> Crystal Wu, 'Melbourne Passes Buenos Aires' Record as the World's Most Locked Down City', *Sky News* (New Article, October 4 2021) <<https://www.skynews.com.au/australia-news/coronavirus/melbourne-passes-buenos-aires-record-as-the-worlds-most-locked-down-city/news-story/c59ca9114ea99c930eca57568cd2df35>>.

<sup>90</sup> Australian Government Department of Health Victorian Aged Care Response Centre, 'Updated Advice to Aged Care Providers in Victoria', *Australian Government Department of Health* (Subscriber Announcement, 15 February 2021) <<https://www.health.gov.au/news/announcements/updated-advice-to-aged-care-providers-in-victoria>>.

<sup>91</sup> Ibid.

<sup>92</sup> Victorian Department of Health, 'Guidance on COVID-19 Risks for Residential Aged Care Facilities' *Victorian State Government Department of Health* (Web Page, 1 December 2021) <<https://www.health.vic.gov.au/covid-19/guidance-on-covid-19-risks-for-residential-aged-care-facilities-racfs-word>>.

<sup>93</sup> Ibid.

<sup>94</sup> Nigel Stobbs, 'Compassion, the Vulnerable and Covid-19' (2020) 45(2) *Alternative Law Journal* 81, 81.

<sup>95</sup> Melissa Davey, 'Budget Does Not Do Enough for Covid Fatigued Health System and Aged Care Workforce Crisis, Peak Body Says', *The Guardian* (online, 30 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/30/budget-does-not-do-enough-for-covid-fatigued-health-system-and-aged-care-workforce-crisis-peak-bodies-say>>.



does not reflect the critical and demanding role they perform in the Australian community.<sup>96</sup> In addition, it is unclear whether minimum staffing levels will be maintained as COVID-19 numbers continue to rise.<sup>97</sup>

Even prior to the COVID-19 outbreak and the related pressures it has put on the aged care sector, The Royal Commission into Aged Care ‘The Commission’,<sup>98</sup> shone some light on stories of neglect:

*We have been told about people who have walked into an aged care residence, frail but in relatively good spirits and mentally alert, only to die a few months later after suffering from falls, serious pressure injuries and significant pain and distress. We have seen images of people with maggots feeding in open sores and we have seen video and photographic evidence of outright abuse.*<sup>99</sup>

The Commission also highlighted a number of common negligent practises within certain aged care facilities, including inadequate prevention of management of wounds, sometimes leading to septicaemia and death, poor continence management, often leaving distressed residents sitting or lying in urine or faeces, dreadful food, nutrition, and hydration, as well as insufficient attention to oral health leading to widespread malnutrition, excruciating dental and other pain, and secondary conditions.<sup>100</sup>

Undoubtedly, the pandemic has resulted in further instances of abuse within aged care facilities, due to residents’ restricted access to the outside world. Thus, it should be a priority to instigate new investigations into elder abuse within these facilities in light of the pandemic, and also consider the introduction of new laws that will serve to combat these issues.<sup>101</sup>

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> *Royal Commission into Aged Care Quality and Safety* (Interim Report: Neglect, October 2019) vol 1.

<sup>99</sup> Ibid 4-5.

<sup>100</sup> Ibid 6.

<sup>101</sup> Ibid.

### III ALIGNING VULNERABLE OLDER PEOPLE WITH OTHER ESTABLISHED VULNERABLE GROUPS

In the second reading speech introducing the Bill that amended the ACT's criminal laws to encapsulate offences relating to abuse of vulnerable adults,<sup>102</sup> Gordon Ramsay, Attorney-General remarked:

*This Bill responds to the community's desire to better protect vulnerable adults – the elderly and those with disabilities. The measures shine light into dark places where abuse and neglect can thrive through isolation, manipulation and fear...The understanding of abuse [within this Bill] captures a broad range of manipulative and controlling behaviours which are directed at vulnerable people and which, until now, have not had adequate remedy in our criminal laws.*<sup>103</sup>

There is certainly a pressing need for all states and territories to follow the ACT's lead and recognise that Australian criminal laws are inept in their ability to protect vulnerable adults, including older vulnerable adults, from abuses, and this is particularly pertinent for institutional care settings.

Recognising that, evidence suggests that abuse of older people often takes place in family settings,<sup>104</sup> and as such, physical elder abuse is closely related to family violence.<sup>105</sup> The Royal Commission into Family Violence Report ('*Family Violence Report*'),<sup>106</sup> includes recommendations highlighting that family violence perpetrated against older people tends to be under-reported.<sup>107</sup> Moreover, that 'older people face... a reluctance to report the violence because of shame [and] fear of not being believed', and factors such as 'financial reliance on the perpetrator, a desire to preserve family relationships, [and] fears about who will care for them', can detract from an older person's desire to come forward and report abuse. The *Family Violence Report* asserts that preventing violence against older

<sup>102</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 May 2020, 951 (Gordon Ramsay, Attorney-General).

<sup>103</sup> *Ibid* 951-2.

<sup>104</sup> *ALRC Report* (n 8) 392.

<sup>105</sup> *ALRC Report* (n 8) 40.

<sup>106</sup> *Royal Commission into Family Violence: (Victoria), Report and Recommendations* (Report, March 2016), vol 1-5, 52 ('*Royal Commission into Family Violence: Report*').

<sup>107</sup> *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) vol 1, 33-4 ('*Royal Commission into Family Violence: Summary and Recommendations*').

people, requires greater community awareness, and a cultural shift away from ageism.<sup>108</sup>

As observed in the Explanatory Statement to the ACT's Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020,<sup>109</sup> there is a comparison to be drawn from the range of existing criminal, and non-criminal laws in place [in the ACT] that target abuse and/or exploitation of children.<sup>110</sup> All states and territories in Australia have legislative provisions pertaining to child abuse,<sup>111</sup> and some have provisions relating to failure to report child abuses.<sup>112</sup> In comparison, those distinct provisions are lacking for older vulnerable adults, and there are more reporting opportunities for children given their mandatory school attendance.<sup>113</sup> The same reporting opportunities may not exist in settings where an older person is being cared for by an individual, or an organisation.<sup>114</sup>

In 2018, the World Health Organisation ('WHO') reported that approximately one in six people aged sixty years and older experienced some form of abuse in community settings during the past year.<sup>115</sup> It was also noted that this is an issue that is predicted to increase in countries experiencing rapidly ageing populations.<sup>116</sup>

There is no doubt that Australia's population is ageing at a swift rate.<sup>117</sup> Introducing laws such as those in the ACT, may offer 'the least restrictive measure' for 'detering serious human rights abuses, protecting the most vulnerable members of

<sup>108</sup> Ibid.

<sup>109</sup> Explanatory Statement (n 22).

<sup>110</sup> Ibid 7.

<sup>111</sup> For example, the *Criminal Law Consolidation Act 1935* (SA) s 50 (unlawful sexual relationship with a child), s 80 (abduction of a child under 16 years);

<sup>112</sup> See, eg, Queensland recently introduced a new offence of Failure to Report Belief of Child Sexual Offence Committed in Relation to a Child within their *Criminal Code 1899* (Qld) s 229BC.

<sup>113</sup> Explanatory Statement (n 22) 7.

<sup>114</sup> Ibid.

<sup>115</sup> World Health Organisation, 'Elder Abuse' (Fact Sheet), 15 June 2018, 1.

<sup>116</sup> Ibid.

<sup>117</sup> Australian Bureau of Statistics, *Populations Projections, Australia, 2017 (base) - 2066* (Catalogue No 3222.0, 22 November 2018) <<https://www.abs.gov.au/ausstats/abs@.nsf/0/5A9C0859C5F50C30CA25718C0015182F?OpenDocument>>.

our society from inhuman or degrading treatment', and also 'sends a strong message to the community that this type of behaviour will not be tolerated'.<sup>118</sup>

Elder abuse should be treated as seriously within the law as abuse of other vulnerable groups, such as children.<sup>119</sup> It is important to educate people about the fact that abuse of older people is occurring, and encourage a culture where the dignity, rights, and freedoms of older people are celebrated and protected.<sup>120</sup>

#### IV EXISTING PROTECTIVE PROVISIONS IN AUSTRALIA

##### A *Fundamental Role of the Criminal Law*

The primary focus of the criminal justice system is prosecution, rather than seeking a remedy for the victim, with the exception of potential crimes compensation.<sup>121</sup> It is worth recognising that for some people, seeking 'justice' transcends monetary compensation. One of the fundamentals of criminal law, is that it serves as a deterrent against criminal activity.<sup>122</sup> Though this may sound like an obvious statement, it is important to note the distinction between the role of the criminal law, and that of civil law. The criminal law occupies a distinct role to discourage criminal behaviours that encroach on a fundamental right to protection and safety, and therefore assists in preventing abuses from occurring in the first place.

##### B *Domestic Abuse Laws*

One of the primary objects of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ('*Intervention Orders Act*') is to assist in preventing domestic and non-domestic abuse, and one key mechanism to enable this is through the generation of intervention orders.<sup>123</sup> Abuse is defined as including physical, sexual, emotional, psychological, or economic abuse.<sup>124</sup> This is, however, limited to specific types of relationships. Approaching the legislation through the lens of abuse of older vulnerable adults, it does recognise a relationship as either through blood, or

<sup>118</sup> Explanatory Statement (n 22) 3.

<sup>119</sup> *Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018* (SA) s 13B(1). See also Inquest into the Death of Cynthia Thoresen (Coroner's Court, Christine Clements, 22 May 2013) Brisbane, 2009/3, 22 May 2013) 14 ('*Coroner's Inquest into the Death of Cynthia Thoresen*').

<sup>120</sup> Fanning Interview with Brian Herd (n 74).

<sup>121</sup> Kaspiew et al (n 3) 32.

<sup>122</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10(i).

<sup>123</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5.

<sup>124</sup> *Ibid* s 8(1).

marriage, or a domestic partnership.<sup>125</sup> So, this could include a relationship between an adult child and their older parent. It also includes a relationship of ‘in some other form of intimate personal relationship in which their lives are interrelated and the action of one affects the other’.<sup>126</sup> Further, it includes a carer relationship via that meaning within the *Carer’s Recognition Act 2005* (SA) ‘*Carer’s Act*’.<sup>127</sup> Unfortunately, however, the meaning of ‘carer’ within *Carer’s Act* does not include a person who provides care or assistance under a contract for services.<sup>128</sup> It does include informal care relationships,<sup>129</sup> but states that the role of carer exists in this capacity, if, because of frailty, a person requires assistance with the carrying out of everyday tasks.<sup>130</sup> Certainly, there could be many instances of abuse taking place against older people who are not frail, but who still rely on assistance to execute everyday tasks.

In comparison, the *Domestic and Family Violence Protection Act 2012* (Qld), is quite broad in its description of inclusive relationships. It incorporates ‘relatives’ (the South Australian legislation only includes relatives by blood),<sup>131</sup> and similarly takes into account informal care relationships.<sup>132</sup> A relative can be a person who is understood to be connected to the person by blood, or marriage, and is defined as encapsulating a relationship with a child over the age of 18 years.<sup>133</sup> It defines the meaning of an informal care relationship as one person being dependant on the other person for help in an activity of daily living.<sup>134</sup> For example, as usefully listed within the statute: dressing, personal grooming, shopping, or telephoning a specialist to make a medical appointment.<sup>135</sup> However, like the South Australian statute, it does not include relationships under a commercial arrangement. This is unfortunate, as, for example, a routine visit by a nurse to attend to an older person

<sup>125</sup> Ibid s 8(8)(i).

<sup>126</sup> Ibid s 8(8)(c).

<sup>127</sup> Ibid s 8(8)(k).

<sup>128</sup> *Carer’s Recognition Act 2005* (SA) s 5(2)(a).

<sup>129</sup> Ibid s 5(1)(c).

<sup>130</sup> Ibid s 5(c).

<sup>131</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 19(2).

<sup>132</sup> Ibid s 13.

<sup>133</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 19(2).

<sup>134</sup> Ibid s 20(1).

<sup>135</sup> Ibid.

each day, operates under a commercial agreement between the person receiving the care, and the nurse's employer.<sup>136</sup>

The *Domestic and Family Violence Protection Act 2012* (Qld) also refers to economic, emotional, and psychological abuse.<sup>137</sup> This includes withholding of medication, as well as keeping a person from maintaining connections with friends and family.<sup>138</sup> This is well delineated to allow older people experiencing abuse to utilise the legislation.

The South Australian *Intervention Orders Act* similarly includes an abuse of withholding medication, or prevention of the person to access medical treatment.<sup>139</sup> It additionally includes an act of abuse that may result in an unreasonable and non-consensual denial of financial, social or personal autonomy, including to sign a power of attorney, sign a contract of guarantee, or exercising an unreasonable level of control and domination over the daily life of the person.<sup>140</sup>

Despite the existence of these provisions, the question remains: can the *Intervention Orders Act* afford older vulnerable people adequate protection? Certainly, if an older person is experiencing domestic abuse, whether it be physical, psychological or financial, and they would like an intervention order issued, they may find a way through the *Intervention Orders Act*. However, the *Intervention Orders Act* seems more geared (and importantly so) toward preventing domestic abuse within intimate relationships. A relationship defined as 'through marriage' is not clear in indicating whether this may include a relationship between an older parent and their son or daughter in law.<sup>141</sup> Importantly, there is an obvious issue in that older people with inherent vulnerabilities, may be reluctant to apply for an intervention order from a person they rely on for their care. This is a significant factor to consider, given that when an intervention order is issued in respect of an intimate domestic relationship between two younger adults, generally speaking, both those adults maintain financial earning capability. Conversely, older adults with inherent vulnerabilities may be fearful to separate themselves from a relationship of abuse, if they feel they might not secure adequate ongoing financial

<sup>136</sup> *Domestic and Family Violence Protection Act 2012* (Qld) ss 20(1), (3).

<sup>137</sup> *Ibid* s 11.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(m).

<sup>140</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 8(5)(e)(iii)-(vi), 8(h),(i).

<sup>141</sup> *Ibid* s 8(8)(i).

support, or might not be able to find suitable housing after the order has been issued.

*C Financial Abuse of Older Vulnerable Adults: Current Criminal Legislative Deterrents*

1 *The General Offence of Theft*

As previously identified, to successfully find someone guilty of theft beyond reasonable doubt in Australia, strict elements need to be met.<sup>142</sup> For example, and as previously delineated through an analysis of *R v Kerin* [2013] SASCF 56, in South Australia a person may be found guilty of theft if they deal with property dishonestly, without the owner's consent, and with the intention to deprive the owner permanently of the property.<sup>143</sup>

However, even in a setting where an older person's finances are being used indecorously by an adult child, the intimate family space in which theft is potentially occurring, makes these elements tricky to prove.<sup>144</sup> For instance, if an adult child asks to borrow, say, \$1,000 from their older parent, and promises to pay them back (but they never do), was it their intention to permanently deprive them of that wealth? If an older person trusts their adult child to draw money from their bank account on their behalf every week, and their child habitually takes some for themselves, is this without consent?

Cases of minor, and sometimes, major theft, can be incremental and pervasive. Thus, even if an elderly person's child is clearly engaged in theft, the process of gathering evidence to prove a possible offence akin to those just described, can be very difficult.<sup>145</sup>

<sup>142</sup> *Criminal Law Consolidation Act 1935* (SA) s 134; *Criminal Code 2002* (ACT) s 308; *Crimes Act 1958* (Vic) s 72; *Criminal Code Act 1913* (WA) s 378; *Crimes Act 1900* (NSW) s 117; *Criminal Code Act 1924* (Tas) s 226; *Criminal Code 2002* (NT) s 209(1); *Criminal Code Act 1899* (Qld) s 398.

<sup>143</sup> See, eg, *Criminal Law Consolidation Act 1935* (SA) s 134(1).

<sup>144</sup> Interview with Justice Sarah Derrington and Matt Corrigan (Ellen Fanning, *The Abuse of Older People: Insights and Perspectives*, 4 September 2018) <<https://www.youtube.com/watch?v=zyrvaDDy3oY>>.

<sup>145</sup> Office of the Public Guardian, Submission No 83 to Australian Law Reform Commission, *Inquiry into Elder Abuse* (March 2017) 5-12 ('*Office of the Public Guardian Submission to ALRC's Inquiry into Elder Abuse*').

## 2 Financial Advantage by Deception and Exploitation of Position of Advantage

The *ALRC Report* into elder abuse acknowledged the strict evidentiary thresholds that exist in Australian criminal law.<sup>146</sup> Interestingly, it also concluded that despite Victoria and Queensland having discrete criminal offences in respect of abuse of EPOA,<sup>147</sup> that they were unaware of any prosecutions existing under those provisions at that time.<sup>148</sup> Only the provision in Victoria,<sup>149</sup> makes it an offence to act dishonestly while appointed as an EPOA,<sup>150</sup> whereas the Queensland provisions focus on dishonest obtaining, or revocation of an EPOA document.<sup>151</sup>

Yet, it is worth noting that Victoria,<sup>152</sup> and the ACT,<sup>153</sup> both provide a separate offence for dishonestly obtaining a financial advantage by deception.<sup>154</sup> It was observed by Alex Steel,<sup>155</sup> that data collected by the Court Services at the Victorian Department of Justice, showed that between the years of 2002 and 2005, there were 1,004 convictions (including attempts) in respect of ‘obtaining by deception’ offences.<sup>156</sup> This demonstrates that this offence, is one that has been significantly used by prosecutors, though it is not clear what proportion of those people were older.<sup>157</sup>

In South Australia, there is an offence of dishonest exploitation of position of advantage.<sup>158</sup> An offence is committed if a person in a position of advantage (whether physically, mentally, or both), exploits that position to their benefit, or

<sup>146</sup> *ALRC Report* (n 8) 366.

<sup>147</sup> *Powers of Attorney Act 1998* (Qld) ss 26, 61; *Powers of Attorney Act 2014* (Vic) ss 135, 136.

<sup>148</sup> *ALRC Report* (n 8) 365.

<sup>149</sup> *Powers of Attorney Act 2014* (Vic) ss 135, 136; *Powers of Attorney Act 1998* (Qld) ss 26, 61.

<sup>150</sup> *Powers of Attorney Act 2014* (Vic) s 135(3)(a)-(b).

<sup>151</sup> *Powers of Attorney Act 1998* (Qld) ss 26, 61.

<sup>152</sup> *Crimes Act 1958* (Vic) s 82(1).

<sup>153</sup> *Criminal Code 2002* (ACT) s 332.

<sup>154</sup> *Crimes Act 1958* (Vic) s 82(1); *Criminal Code 2002* (ACT) s 332.

<sup>155</sup> Alex Steel ‘Money for Nothing, Cheques for Free? The Meaning of ‘Financial Advantage’ in Fraud Offences’ (2007) 31(1) *Melbourne Law Review* 201, 207.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Criminal Law Consolidation Act 1935* (SA) s 142.



causes detriment to the other.<sup>159</sup> This is a good provision, however, it does not get to the heart of addressing instances of abuse, for instance theft, where the older person does not have a mental or physical disability, but simply entrusts another person with their money.

Despite financial elder abuse being a prevalent issue,<sup>160</sup> criminal laws are rarely utilised in instances of abuse of older vulnerable adults<sup>161</sup> and many older people experiencing financial abuse that could be categorised as criminal, are largely left with only civil legal remedies to pursue.<sup>162</sup>

### 3 *Current Approaches to Redress Financial Elder Abuse in a Civil Law Context*

#### (a) *Common Law Actions*

Pursuing an action in civil law does not serve as a viable alternative to criminal law, because the focus is on seeking a remedy for the client, rather than prosecution of the perpetrator.<sup>163</sup> Further, the onus is on the person affected to bring an action at their own cost, which is not always feasible given the high expense of accessing the legal system.<sup>164</sup> Mainly, it does not serve to disincentivise a culture of elder abuse, and does not provide any reinforcement to protect elderly citizens from being financially exploited.<sup>165</sup>

If an elderly person believes they have been forced into a transaction that has placed them in a financially detrimental position, then a common law action may be sought. This requires considering factors that could ‘vitiating’ any agreement made,

<sup>159</sup> Ibid s 142(2)(a)-(b).

<sup>160</sup> Lixia Qu et al, ‘Prevalence Study’ (n 4) 32.

<sup>161</sup> *Office of the Public Guardian Submission to ALRC’s Inquiry into Elder Abuse* (n 84) 5-12.

<sup>162</sup> Katerina Pieros and Christine Smyth, ‘Elder Abuse – It’s Criminal!’ (2018) 53(4) *Taxation in Australia* 215, 215-6; Standing Committee on Legal and Constitutional Affairs, Parliament of Australia House of Representatives, *Submission Inquiry into Older People and the Law* (Parliamentary Paper No 71, 22 November 2006) 5. In September 2002, Advocare Incorporated conducted a two week long state wide elder abuse telephone survey. The results showed that financial abuses being experienced by elderly complainants, were rarely being reported to police.

<sup>163</sup> Kaspiew et al (n 3) 32.

<sup>164</sup> Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2020) 12(1) *Elder Law Review* 1, 26.

<sup>165</sup> Ibid 10-15.

which means to invalidate, or make legally defective.<sup>166</sup> For example, unconscionable conduct,<sup>167</sup> and undue influence,<sup>168</sup> are both vitiating factors that if successfully proven, can result in a court determining a contract between two parties to be invalid.

(b) *The Presumption of Advancement*

A significant asset which is sometimes the target of adult children, is an older person's home.<sup>169</sup> This issue of adult children attempting to capitalise on the wealth embodied in such a valuable asset, is exacerbated by the presumption of advancement.<sup>170</sup> In Australia, the general legal rule is that where a property is transferred between parties, it gives rise to a resulting trust, in favour of the donor (the person transferring the property).<sup>171</sup> In spite of this, Australian law dictates that if there is a relationship between the parties (specifically from parents to their children) that the presumption of advancement will apply.<sup>172</sup> Under this rule, the recipient is 'presumed' to be the legal owner, rather than a mere trustee of the property upon its transfer, and thus the property is considered to be a 'gift'.<sup>173</sup>

Rebutting this long-standing legal presumption, is a significant legal challenge. Hence, the introduction of specific offences in respect of dishonest, and reckless use of an EPOA, seem necessary to address exploitation of the rule of advancement, and discourage dishonest transferring of gifts, assets, and wealth in general.<sup>174</sup>

<sup>166</sup> *Lexis Nexis Concise Australian Legal Dictionary* (5<sup>th</sup> ed, 2015) 'vitate'.

<sup>167</sup> *Blomley v Ryan* (1956) 99 CLR 362, [8]-[10] (Taylor J), [30] (McTiernan J).

<sup>168</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, [6] (Mason J).

<sup>169</sup> Teresa Somes and Eileen Webb, 'What role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) 33(2) *Law in Context* 24, 26-8 ('Regulating Older People's Financial Arrangements'); Somes and Webb, 'Combating Elder Abuse' (n 77) 120-152.

<sup>170</sup> Somes and Webb, 'Regulating Older People's Financial Arrangements' (n 169) 26-8.

<sup>171</sup> *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ).

<sup>172</sup> *Ibid* [4] (Deane J).

<sup>173</sup> *Ibid*.

<sup>174</sup> Purser (n 164) 20.

(c) *Assets for Care Arrangements*

Some older people may feel compelled to depart with aspects of their wealth due to situational pressures. This does not necessarily occur under the umbrella of undue influence, or unconscionable bargain, it can be a courteous agreement between family members. Yet, it often occurs in the absence of a formal, legal contractual agreement.<sup>175</sup> Asset transfers that are intended as part of an ‘assets for care arrangement’ (where in exchange for an older person’s transfer of property, an adult child may promise to care for them care for life), can place an older person at risk of losing a property investment, or their financial contribution towards a property.<sup>176</sup>

As noted by Somes and Webb:<sup>177</sup>

*An older person, no matter how cognizant and capable of maintaining their own affairs, may be vulnerable to the persuasion of family or in the aftermath of a significant life event such as the loss of a spouse.*

If land is transferred from an older person to an adult child, and the child becomes the registered proprietor, then their interest is indefeasible, unless an exception to indefeasibility applies.<sup>178</sup> This exception could be, for example, fraud, or *in personam*, but both are difficult to establish.<sup>179</sup>

(d) *Online / Telephone Fraud*

Evidence suggests that the COVID-19 pandemic has increased instances of fraudsters targeting older people over the phone, and on the internet, prying on their

<sup>175</sup> Louise Kyle, ‘Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 4(7) 1, 2; Somes and Webb, ‘Regulating Older People’s Financial Arrangements’ (n 169) 28.

<sup>176</sup> Kyle (n 175) 2; Brian Herd, ‘The Family Agreement: A Collision between Love and the Law?’ (2002) 81 *Reform* 23, 25.

<sup>177</sup> Somes and Webb, ‘Regulating Older People’s Financial Arrangements’ (n 169) 28.

<sup>178</sup> *Ibid* 28-31.

<sup>179</sup> *Ibid*.

restricted ability to leave their homes.<sup>180</sup> This demonstrates the need for strong action to be taken to criminalise conduct which seeks to exploit older people, now more than ever.

#### D *The US Prosecution Act: A Focus on Conduct*

In the US, considerable measures have been put in place to address the issue of elder abuse. In 2017, then President Donald Trump signed the *Elder Abuse Prevention and Prosecution Act*.<sup>181</sup> Its object is to enhance awareness of elder abuse through increased data collection.<sup>182</sup> It also endeavours to fund increased training of prosecutors and investigators, and raises penalties for criminals who target older vulnerable adults.<sup>183</sup> It has been reported that the presence of this legislation, enabled the American government to administer a restraining order against a third party, who allegedly facilitated hundreds of millions of ‘robocalls’ in a targeted effort to defraud elderly victims.<sup>184</sup> The law in the US essentially utilises restraining orders, to protect older people against third party fraudsters, as well as against immediate family members, relatives, and care workers.<sup>185</sup>

#### V DISCRETE CRIMINAL LAWS IN THE US THAT TARGET ELDER ABUSE

The US has a long-standing history of being responsive to the needs, and rights of older people. In 1965, American congress passed the Older Americans Act in

<sup>180</sup> See, eg, Amelia Hill, ‘Coronavirus Scammers Targeting Vulnerable Older People, Says Police’ *The Guardian Australia* (News Article 21 March 2020) <<https://www.theguardian.com/society/2020/mar/21/coronavirus-scammers-targeting-vulnerable-older-people-say-police>>; Sara Scarlett, ‘Shameless Fraudsters are Knocking on Elderly People’s Doors and Scamming Them Out of Savings by Pretending to be Officials During Coronavirus Crisis’, *Daily Mail Australia* (News Article 26 March 2020) <<https://www.dailymail.co.uk/news/article-8136999/Shameless-fraudsters-knocking-elderly-peoples-doors.html>>.

<sup>181</sup> *Elder Abuse Prevention and Prosecution Act*, 34 USC § 201 (2017), 115 Pub L No 70, 131 Stat 1208.

<sup>182</sup> *Ibid.*

<sup>183</sup> See, eg, The Sketchley Method, ‘What is the Elder Abuse and Prosecution Act’ *The Sketchley Method* (Webpage, 1 January 2018) <<https://thesketchleymethod.com/elder-abuse-prevention-prosecution-act/>>.

<sup>184</sup> WOWK, ‘West Virginia Woman Indicted in State’s Largest Elderly Fraud Scam’, *Fox 8 News* (News Article, 26 February 2020) <<https://myfox8.com/news/west-virginia-woman-indicted-in-states-largest-elderly-fraud-scam/>>.

<sup>185</sup> *Ibid.*

response to concerns about community social services for older people,<sup>186</sup> and this was the first federal level legislative proposal to provide comprehensive services to older adults. It was re-authorised in 2020, to carry through until the 2024 financial year.<sup>187</sup> Initiatives aim to address aging and disability resource centres,<sup>188</sup> assistive technology,<sup>189</sup> vaccination,<sup>190</sup> and malnutrition,<sup>191</sup> to name just a few. Elder law, and elder abuse, is a topic that is being frequently assessed by the American Bar Association,<sup>192</sup> and many states across the US have legislated to create discrete offences for abuse of older vulnerable adults. This is a summary of some of the major legislation that exists across a selection of states, and is by no means an exhaustive list.

In New York, endangering the welfare of a vulnerable elderly person is an offence.<sup>193</sup> A person can be found guilty of this offence if they, as a caregiver, act with intent to cause physical injury, or cause such, via recklessness or criminal negligence.<sup>194</sup>

In California, elders are identified as a distinct class, along with dependent adults, and persons with disabilities.<sup>195</sup> A person who ‘wilfully causes or permits an elder to suffer, or inflict unjustifiable physical pain or mental suffering upon the elder or dependent adult’, can face one year in county jail, or a \$6,000 fine.<sup>196</sup> There is also an offence of financial abuse of an elder or dependant adult, which can occur if a

<sup>186</sup> Older Americans Act of 1965, 79 Stat. 218 (1965).

<sup>187</sup> Supporting Older Americans Act of 2020, 116 H.R. 4334 (2019).

<sup>188</sup> Ibid § 103.

<sup>189</sup> Ibid § 104.

<sup>190</sup> Ibid § 105.

<sup>191</sup> Ibid § 106.

<sup>192</sup> American Bar Association, ‘Elder Abuse’, *ABA (Resources and Research – Commission on Law and Aging*, March 18, 2022) <[https://www.americanbar.org/groups/law\\_aging/resources/elder\\_abuse/](https://www.americanbar.org/groups/law_aging/resources/elder_abuse/)>.

<sup>193</sup> *Offences Against Marriage, The Family and Welfare Against Children and Incompetents* N.Y. Penal Law § 260.32 (2018); *New York CLS Penal Code* § 260.32 (1965).

<sup>194</sup> Ibid.

<sup>195</sup> Rob Bonta Attorney General State of California Department of Justice, ‘Elder Abuse Laws (Criminal)’ *State of California Department of Justice* (Webpage) <[https://oag.ca.gov/dmfea/laws/crim\\_elder](https://oag.ca.gov/dmfea/laws/crim_elder)>.

<sup>196</sup> Cal Penal Code § 368 (b) (1872).

person assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependant adult for a wrongful use or with intent to defraud, or both.<sup>197</sup>

Comparatively, Indiana has explored financial abuse insofar as criminalising exploitation of a dependent or ‘endangered adult’,<sup>198</sup> with a separate offence for financial exploitation of an endangered adult.<sup>199</sup>

Oregon has extensive laws addressing abuse of older people, including financial exploitation, being the wrongful taking of assets, funds or property belonging to, or intended for, the use of an elderly person, or a person with a disability.<sup>200</sup> Oregon law protects vulnerable people from a broad range of abuses and neglect, and a ‘vulnerable person’ includes a person aged 65 years or older.<sup>201</sup>

In Iowa, there are specific legislative provisions relating to ‘dependant adult’ abuse resulting from wilful or neglectful acts or omissions of a caretaker, including a provision for the deprivation of the minimum food, shelter, clothing, supervision, physical, or mental health, and other care necessary to maintain a dependant adult’s life.<sup>202</sup> It is an offence to neglect, or non-support a dependent adult.<sup>203</sup>

In North Carolina, there is a law targeting conduct around domestic abuse, neglect, and exploitation of disabled, or elder adults.<sup>204</sup> In Illinois, there are provisions pertaining to neglect of an elderly person, or a person with a disability.<sup>205</sup>

In the US, June 15 has been declared ‘World Elder Abuse Day’, and is marked in Washington DC with a Presidential Announcement, in conjunction with the White

<sup>197</sup> Ibid.

<sup>198</sup> 19 Ind Code § 35-46 (1937); *Criminal Law and Procedure*, 35 Ind. Code Ann. § 35-46,1-12.

<sup>199</sup> Ibid.

<sup>200</sup> The Elderly Persons and Persons with Disabilities Abuse Prevention Act Or. Rev. Stat. § 124.050.

<sup>201</sup> Ibid.

<sup>202</sup> Iowa Code § 235B.2.

<sup>203</sup> *Criminal Law and Procedure* Iowa Code § Ann. 726.8.

<sup>204</sup> *General Statutes of North Carolina Criminal Law* N.C. Gen. Stat. § 14-32.3.

<sup>205</sup> *Illinois Code* 720 Ill Comp Stat A § 12-19 (2005).

House Conference on Ageing.<sup>206</sup> Public awareness about elder abuse is seen as an integral factor to shift the culture in the US, away from ageism.<sup>207</sup>

Elder abuse laws are not new in the US.<sup>208</sup> When the White House Select Committee on Ageing released a report in 1981, labelled 'The Hidden Problem Report', the Committee estimated that, in any given year, possibly one in every twenty-five elderly Americans would become victims of elder abuse.<sup>209</sup>

In 1998, the National Centre on Elder Abuse conducted a study on financial abuse of the elderly, and found that of 45,000 reports of many types of elder abuse, approximately 40% of those were of financial abuse.<sup>210</sup> The encouraging prospect of federal funding, led to many states revising their procedures,<sup>211</sup> in particular California, who have initiated multiple laws in respect of elder abuse.<sup>212</sup> The US have made a concentrated effort, to enact criminal laws in response to what occurred in the 1990's.<sup>213</sup>

There are also initiatives being undertaken on a state level. For example, Illinois has supported an extensive public education program to produce 'age awareness' toolkits to educate the public about the importance of minimising elder abuse within their communities.<sup>214</sup>

<sup>206</sup> Leonard Sandler and Brian Kaskie, 'A Protocol for Examining and Mapping Elder Abuse Pathways in Iowa' (2019) 59(27) *Washington University Journal of Law and Policy*, 54.

<sup>207</sup> Ibid.

<sup>208</sup> Nina Santo, 'Breaking the Silence: Strategies for Combating Elder Abuse in California' (2000) 31(801) *McGeorge Law Review* 807.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Santo (n 208) 807.

<sup>212</sup> Kaspiew et al (n 3) 40-1.

<sup>213</sup> Senator John B Breaux, 'Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation' (2003) 11(207) *The Elder Law Journal* 222, 222.

<sup>214</sup> Leonard Sandler and Brian Kaskie, 'A Protocol for Examining and Mapping Elder Abuse Pathways in Iowa' (2019) 59(27) *Washington University Journal of Law and Policy* 54, 54.

## VI CRIMINAL LAWS IN AUSTRALIA THAT DISCRETELY TARGET NEGLECT, PHYSICAL, AND PSYCHOLOGICAL ELDER ABUSE

As previously recognised, the ACT is the only territory that has legislative provisions that specifically focus on physical abuse, financial abuse, and neglect of vulnerable people, including those over the age of 60 with a listed vulnerability.

A ‘vulnerable person’, is defined within the *Crimes Act 1900* (ACT) as, for example, someone who has reduced capacity for communication, learning or mobility, or that is socially isolated, or unable to participate in the life of the person’s community.<sup>215</sup> Social isolation is such a pertinent issue when it comes to neglectful treatment of older people in Australia. The inclusion of a socially isolated person into the definition of vulnerable, is a distinguishing feature of recent changes to the *Crimes Act 1900* (ACT).<sup>216</sup> Its inclusion is responsive<sup>217</sup> to the *ALRC Report* on elder abuse,<sup>218</sup> in particular the discovery that certain older people, for example: Culturally and Linguistically Diverse (‘CALD’) people; lesbian, gay, bisexual, transgender and intersex (LGBTI) people; people in family violence situations, and people with a cognitive impairment,<sup>219</sup> are at higher risk of social isolation as they age, which may increase their vulnerability to abuse.

This is important because it signifies a legal recognition, and leap to acknowledge these groups of older Australians who may be at greater risk of abuse.

## VII THE CASE OF CYNTHIA THORESEN

### A *Cynthia’s Story, and the Issue of Isolation*

Cynthia Thoresen was an 88-year-old woman living in Kenmore Hills, Queensland. She lived with her daughter, who received financial payments from Centrelink to act as Cynthia’s carer.<sup>220</sup>

<sup>215</sup> *Crimes Act 1900* (ACT) s 36A(5).

<sup>216</sup> *Coroner’s Inquest into the Death of Cynthia Thoresen* (n 119) Exhibit B7, 4.

<sup>217</sup> Explanatory Statement (n 22).

<sup>218</sup> *ALRC Report* (n 8) 46-7.

<sup>219</sup> *Ibid.*

<sup>220</sup> Tertius Pickard, ‘Cynthia Thoresen, Neglected 88-year-old Australian, Suffers a Brutal Fate Due to Elder Abuse’ *Canadian National Post* (News Article, 20 October 2013) *Canadian National Post* <<https://nationalpost.com/news/cynthia-thoresen-neglected-88-year-old-austalian-suffers-a-brutal-fate-due-to-elder-abuse>>; *Coroner’s Inquest Into the Death of Cynthia Thoresen* (n 119) 1.



Cynthia suffered a fall, which resulted in her causing a severe break to a bone in her leg. When paramedics were called to the house in December 2008, Cynthia was screaming in pain.<sup>221</sup> The Coroner's Inquest into The Death of Cynthia Thoresen (*'Inquest Report'*), transcribed the description on how she presented on arrival at the hospital:

*When Cynthia Thoresen was brought to [the Royal Brisbane and Women's Hospital 'RBWH'], her state of filth, faecal contamination and the existence of numerous pressure sores suggest a severe degree of neglect... The three-week delay between the fall at home and the patient's presentation to RBWH for treatment, during which she was in pain, completely immobile and bed bound, I consider neglectful to the point of cruelty in a distressed, demented and totally dependent patient.*<sup>222</sup>

Despite this neglect occurring while Cynthia was in the care of her daughter, Ms Thoresen was not prosecuted under the *Criminal Code 1899* (Qld) due to a lack of sufficient evidence. Isolation of older people is a persistent and serious issue, and sometimes the reason why victims of abuse are not detected, or reported.<sup>223</sup>

Furthermore, as can be seen from the harrowing case of Cynthia Thoresen, charges are sometimes not laid due to an inability, or a reluctance to attain necessary evidence.<sup>224</sup> A situation can be worsened if there are no witnesses, or if a witness is too frail, or does not want to take part in the proceedings. Nonetheless, it is difficult to not be confused and outraged by the fact that Cynthia's daughter, Ms Thoresen, was not prosecuted.<sup>225</sup>

#### B *Would There Have Been a Different Outcome in the Case of Cynthia Thoresen if Australian Criminal Laws Focused More on Conduct?*

The *Inquest Report* into the death of Cynthia Thoresen, made reference to the investigating police officer on the case.<sup>226</sup> The officer's point of view was that the evidence to bring about a successful prosecution was 'insufficient in the

<sup>221</sup> *Coroner's Inquest Into the Death of Cynthia Thoresen* (n 119) 2.

<sup>222</sup> *Coroner's Inquest into the Death of Cynthia Thoresen* (n 119) Exhibit B7, 4.

<sup>223</sup> Kaspiew et al (n 3) 13; Mel Raassina, 'Elder Abuse: The Journey So Far' (2019) 39(4) *Proctor* 18, 18-21.

<sup>224</sup> *Coroner's Inquest into the Death of Cynthia Thoresen* (n 119) 14.

<sup>225</sup> Lacey (n 21) 99-130.

<sup>226</sup> *Coroner's Inquest into the Death of Cynthia Thoresen* (n 119) Exhibit B7, 4.

circumstances and in the context of the existing law'.<sup>227</sup> A suggestion was made that law reform is necessary and could be 'akin to the offences relating to cruelty to children'.<sup>228</sup>

If New York,<sup>229</sup> or Californian,<sup>230</sup> legislation were to be applied to Cynthia's case, the offender would not have just failed in executing her responsibilities as a carer to avoid the death of her mother, she would have willingly neglected a dependent elderly adult.<sup>231</sup> She permitted an elder to suffer unjustifiable pain and mental suffering.<sup>232</sup> If some of the criminal provisions that exist in the US, and indeed the ACT, were emulated throughout Australia, then Ms Thoresen's possible prosecution under the Australian criminal law, could have served as a strong disincentive for other perpetrators of such crimes.

### C Institutional Safeguarding

In Australia, many people who care for their elderly family members (or relatives and non-relatives) receive a carer allowance from the government.<sup>233</sup> A simple, yet effective way to promote more doctor visits for older people who are potentially isolated, would be to introduce a compulsory reporting requirement. Specifically, that if a person is the recipient of the government allowance, that the person they care for have an appointment with a General Practitioner ('GP'), at least once every six months. Additionally, that a certificate from the GP be uploaded to the Centrelink system. Failure to do so, could result in a loss of the carer's income.<sup>234</sup>

<sup>227</sup> Ibid 14. The *Criminal Code Act 1899* (Qld) does not define elderly as a vulnerable class. See also Eileen Webb, 'The Mistreatment of Older People: Is it Time to Legislate Against Abuse' *The Conversation* (Webpage, 7 June 2013) <<https://theconversation.com/the-mistreatment-of-older-people-is-it-time-to-legislate-against-abuse-14922><https://theconversation.com/the-mistreatment-of-older-people-is-it-time-to-legislate-against-abuse-14922>>.

<sup>228</sup> *Coroner's Inquest into the Death of Cynthia Thoresen* (n 119) 14.

<sup>229</sup> *New York CLS Penal Code* § 260.32 (1965); *Offences Against Marriage, The Family and Welfare Against Children and Incompetents* N.Y. Penal Law § 260.32 (2018).

<sup>230</sup> *Crimes Against Elders, Dependent Adults, and Persons with Disabilities* Cal Pen Code § 368.

<sup>231</sup> See, eg, Californian Law that would have prohibited this: *Californian Penal Code* § 368 (1872); *Crimes Against Elders, Dependent Adults, and Persons with Disabilities* Cal Pen Code § 368.

<sup>232</sup> *Californian Penal Code* § 368 (1872); *Crimes Against Elders, Dependent Adults, and Persons with Disabilities* Cal Pen Code § 368.

<sup>233</sup> Australian Government Services Australia, 'Carer Allowance' (Webpage, 14 March 2022) <<https://www.servicesaustralia.gov.au/carers-allowance>>.

<sup>234</sup> *Coroner's Inquest into the Death of Cynthia Thoresen* (n 119) 13.

The sad and appalling case of Janet Mackozdi, further highlights the importance of adequate institutional safeguarding strategies.<sup>235</sup> Janet Mackozdi was found deceased in a derelict shipping container in Mount Lloyd, Tasmania, in 2010. At the time of her death, she was 77 years of age, weighed 37.9 kilos, and was suffering from advanced dementia. Her daughter, Mrs Anglin (a nurse), and her son in law, Mr Anglin (a disability support worker), put Ms Mackozdi to bed in the shipping container on an evening where the temperature dropped below zero degrees, in absence of adequate clothing and bedding. As a result, Ms Mackozdi suffered from hypothermia which led to her death.<sup>236</sup> Ms Mackozdi lost 28% of her body weight in the 12-month period preceding her death, and despite it being shown that she was clearly in need of regular medical attention, she had very little contact with any independent services.<sup>237</sup>

Ms Mackozdi did have a financial planner, who in testimony, confirmed that financial support provided to Ms Mackozdi's daughter, Mrs Anglin, was influenced by Ms Mackozdi's desire to see her grandchildren.<sup>238</sup> Two years prior to Ms Mackozdi's death, a clearly expressed and fluent letter was received by Ms Mackozdi's bank. It asked that she not be questioned about any recent account transactions.<sup>239</sup> The bank accepted this letter as being written by Ms Mackozdi, when it had in fact been produced by Mr and Mrs Anglin, and Ms Mackozdi's funds were continually withdrawn. In fact, three banks holding the entirety of Ms Mackozdi's funds were almost completely depleted, with withdrawn funds totalling around \$200,000.<sup>240</sup> The money was used by Mr and Mrs Anglin on a wide variety of things from basic living expenses, to luxury items.<sup>241</sup> Mr and Mrs Anglin admitted that they were responsible for the withdrawals, but maintained Ms Mackozdi permitted them that money, because the funds were Mrs Anglin's inheritance, which she believed she was entitled to.<sup>242</sup>

<sup>235</sup> Lise Barry, 'A Tale of Two Inquests: A Vulnerability Analysis of Coronial Inquests in Two Cases of Elder Neglect' (2019) 12(4) *Elder Law Review* Article 4, 11-12.

<sup>236</sup> *Janet Mackozdi* Inquest 30, [1]-[2].

<sup>237</sup> *Ibid* [68].

<sup>238</sup> *Ibid* [24].

<sup>239</sup> *Ibid* [132].

<sup>240</sup> *Ibid* [122].

<sup>241</sup> *Ibid* [124].

<sup>242</sup> *Ibid* [123].

This case paints a sad, and extreme picture of the extent elder abuse can fester amongst seemingly robust systems of financial accountability. Of course, it is not one individual's responsibility to call out suspicion, but rather it is a collective mission to ensure these types of situations are questioned, reported, and investigated. The coroner who led the inquest into Ms Mackozdi's death made a recommendation that 'the Tasmanian government undertakes a review of legislation to determine whether current components of legislation effectively and efficiently prevent or respond to elder abuse, neglect, or exploitation of older persons'.<sup>243</sup>

D *The Power of Investigation: NSW Ageing and Disability Commissioner*

Much progress has been made in NSW with the introduction of the Ageing and Disability Commissioner Bill 2019 (NSW) 'Ageing and Disability Bill', the object being to protect and promote the rights of adults with a disability, and older adults, and to protect those adults from abuse, neglect, and exploitation.<sup>244</sup> The Ageing and Disability Bill,<sup>245</sup> provides for the appointment of an Ageing and Disability Commissioner, whose functions centre, amongst other things, around review of reported allegations of abuse, and to take action following an investigation into any allegations of abuse.<sup>246</sup>

Significantly, there is a provision in the Ageing and Disability Bill specifying that if the Commissioner is of the opinion that a report may provide evidence of the commission of a criminal offence, the Commissioner *must* refer the report to the Commissioner of Police, or the Director of Public Prosecutions.<sup>247</sup>

Unfortunately, Cynthia Thoresen's isolation from the community meant her neglect went unnoticed. However, these laws in NSW allow people in the community who have grounds to believe an older person may be experiencing abuse, to report it to the Commissioner (without it needing to be in writing)<sup>248</sup> which may result in a formal investigation (*irrespective* of whether the abuse

<sup>243</sup> Ibid [197].

<sup>244</sup> *Ageing and Disability Commissioner Bill 2019* (NSW).

<sup>245</sup> Ibid.

<sup>246</sup> Ibid cl 12(a).

<sup>247</sup> Ibid cl 13(9).

<sup>248</sup> Ibid cl 13(1).

amounts to criminal behaviour or not).<sup>249</sup> This is without doubt, a step in the right direction, because what's clear is that despite an observed increase in the number of reports raising serious concerns over the number of older people, and people with disabilities, experiencing abuse, that previously other agencies did not have the power to investigate those reports.<sup>250</sup>

E *Gaining Further Perspective: South Australia's Adult Safeguarding Unit*

In 2018, the Office for the Ageing (Adult Safeguarding) Amendment Bill 2018 (SA) was passed, a first of its kind in Australia. The Adult Safeguarding Unit is aimed at providing confidential information and advice to callers who may be experiencing elder abuse, as well as respond to reports of suspected, or actual abuse. Once a report has been made, actions to be taken can be to either refer the matter to another relevant service, compile more information about the issue, or work with the person to develop a safeguarding plan.<sup>251</sup> Consequently, this body are working on gaining a clearer picture of the number of elder abuse cases existing in South Australia, and the nature of the reported instances. This, may assist in determining what type of protective legislative provisions may be appropriate in South Australia, to enable victims of elder abuse clearer recourse, and better protection.

VIII MANDATORY REPORTING, AND THE ALRC'S SUGGESTED POA REGISTER

GP's can play a vital role in the identification and prevention of elder abuse. In the US, mandatory reporting laws apply in all states except for New York. The groups of people required to report in circumstances where elder abuse is suspected are extensive. They include doctors, bank employees, dentists, social workers, clergy, and many more (they vary from state to state).<sup>252</sup> The existence of these laws encourages reporting, should it be suspected that a person may be subject to elder abuse. Australia could benefit from mandatory reporting of suspected abuse of older people, particularly physical abuse or neglect. Financial abuse is harder to detect, and therefore mandatory reporting in this area may prove more problematic.

<sup>249</sup> Ibid cl 13(5).

<sup>250</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 May 2019, 1652 (Gareth Ward).

<sup>251</sup> *Adult Safeguarding Act 1995* (SA) s 9(a)-(q).

<sup>252</sup> See, eg, Alaskan General Reporting Laws for Elder Abuse: Alaska Stat. § 47.24.010. See also for Massachusetts: Mass. Gen. Laws Ch.19A § 15.

The ALRC's recommendation to introduce an 'Enduring Power of Attorney Register' to combat financial elder abuse, poses some issues.<sup>253</sup> First, the making of an EPOA document should be seen as a way to safeguard the interests of an older person's financial affairs. The idea of a watchdog keeping tabs on the movements of registered EPOAs, may act as a deterrent against making one in the first place.<sup>254</sup> However, the crux of the issue remains an ageist attitude. The laws that exist at present, make it too easy for perpetrators to rebut charges of theft, or charges that relate to them not acting in the best interests of the older person they are caring for.

## IX CONCLUSION

Though the prevalence of elder abuse is hard to precisely assess, the results of the *Prevalence Report*<sup>255</sup> strongly indicate that abuse of older Australians is occurring. The missing piece of the puzzle, is to understand why these cases of elder abuse are not proceeding in a criminal context. The Adult Safeguarding Unit in South Australia are doing great work to collect data relating to abuse of older people,<sup>256</sup> but without clear criminal disincentives, these abuses will likely persist.

The ALRC's position that the criminal laws in Australia are sufficient to capture instances of elder abuse,<sup>257</sup> irrespective of the lack of cases proceeding, is not a redundant one. Indeed, the law can hold a normative value, and therefore the number of cases proceeding on a particular statutory provision does not necessarily reflect the success of that provision. Provisions can still serve to disincentivise, to counteract, and to prevent instances of abuse, including abuse of older people.

However, acknowledging that the law may serve a normative value through existing criminal offences, means that discrete offences *targeting* abuse of older people can also serve a normative function. Discrete offences can be distinguished

<sup>253</sup> Australian Law Reform Commission, 'Registration of Enduring Documents' (16 December 2016) <<https://www.alrc.gov.au/publication/elder-abuse-dp-83/5-enduring-powers-of-attorney-and-enduring-guardianship/registration-of-enduring-documents/>>.

<sup>254</sup> Fanning Interview with Brian Herd (n 74).

<sup>255</sup> *Prevalence Study* (n 4).

<sup>256</sup> *Adult Safeguarding Act 1995* (SA); Government of South Australia, 'Adult Safeguarding Unit' (Web Page, 3 April 2022) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/Public+Content/SA+Health+Internet/About+Us/Department+for+Health+and+Wellbeing/Office+for+Ageing+Well/Adult+Safeguarding+Unit/Adult+Safeguarding+Unit>>.

<sup>257</sup> *ALRC Report* (n 8) 363.

from a generic body of law that exists to deter abusive behaviours, to specifically discourage abuse of older vulnerable people. Additionally, an offence such as abuse of a vulnerable person (including an older person with a distinct vulnerability), may serve as an extra disincentive, supplementary to the laws general laws that already exist. To juxtapose that position, if the quantity of successful criminal prosecutions of elder abuse were to be used as a metric in assessing the effectiveness of the current criminal provisions, then Australia is clearly failing.

There are some that argue that the creation of a discrete offence of ‘abuse of a vulnerable person’ (including older people), such as that in the ACT, may make instances of elder abuse more difficult to prosecute.<sup>258</sup> Specifically, in line with the view of the ALRC, that these provisions already exist: an assault is an assault, and the creation of a new offence addressing elder abuse may generate higher bars for prosecutors to jump over in proving an offence.<sup>259</sup> Moreover, that if the abuse is against an older person, then that can be considered an aggravating factor in sentencing.<sup>260</sup> This paper conversely concludes, that an offence such as assault does not accurately capture the *conduct* of a person who has, within a relationship of trust, violated that trust to commit the assault, especially in a situation where there is a clear power imbalance between the perpetrator and the victim. Also, for an offence to be aggravated, an offence still needs to be proven, and meeting strict elements for offences can be problematic for older people for a range of reasons outlined in this paper.

It is not acceptable that even in instances of serious neglect of an older person, where there is available evidence, that a case is unable to proceed.<sup>261</sup> Is it also notable and significant, that in a case where a person has clearly used their position as an EPOA to the extreme financial detriment of an elderly person with dementia,<sup>262</sup> that this can result in multiple trials and a complex appeal before arriving at a conviction of theft. It certainly begs the question of whether a discrete

<sup>258</sup> Tom Lowrey, ‘ACT to Criminalise Elder Abuse, Though Some Lawyers Fear It Will Make Prosecutions More Difficult’, *ABC News* (News Article, 7 May 2020) <<https://www.abc.net.au/news/2020-05-07/elder-abuse-will-soon-be-a-crime-of-its-own-in-the-act/12220872>>; *ALRC Report* (n 8) 364-65.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*

<sup>261</sup> *Coroner’s Inquest into the Death of Cynthia Thoresen* (n 119).

<sup>262</sup> *R v Kerin* [2013] SASCFC 56; *R v Kerin* [2014] SASC 19.

offence of misuse of an EPOA can be comfortably distinguished from the offence of theft.<sup>263</sup> As noted by the ALRC, duplication of offences is undesirable.<sup>264</sup> Indeed, to establish theft, it should be that an element of lack of consent should always be present, the law must be robust. Yet, in some instances a person may not be guilty of theft, but instead they may, more appropriately, be guilty of an offence in respect of a misuse of an EPOA, and breach of fiduciary responsibility. In any case, it doesn't seem right, that if there has been some form of consent, that there can be no offence committed, even if it can be shown that a person has dishonestly dealt with another's property to benefit themselves.

Abuse of older people should no longer be hidden away. In the past, it was not illegal for spouses to commit an offence of rape against one another.<sup>265</sup> Additionally, laws relating to domestic violence were introduced relatively recently in Australia, mainly in the 1980's and 1990's<sup>266</sup> in response to the growing recognition that existing legal mechanisms were failing to protect victims, predominantly women, from family violence.<sup>267</sup> Prior to this, family violence was largely brushed aside as being as an intimate family matter, outside the reach of the criminal law.<sup>268</sup> Abuse of older people is not just a 'family matter'. It is a pertinent issue, and in some cases, an insidious issue, and Australians have a collective responsibility to respond. Reforming criminal laws is a first step; however, this needs to be done with a delicate touch. The offence of 'abuse of a vulnerable person' in the ACT, should serve as a beacon of inspiration in determining how reformed criminal offences across Australia should be constructed in updated

<sup>263</sup> ALRC Report (n 8) 365-6.

<sup>264</sup> Ibid.

<sup>265</sup> *Criminal Law Consolidation Act Amendment Act 1976* (SA); *Criminal Law Consolidation Act 1935* (SA) s 48; ALRC, 'History of Activism and Legal Change', *ALRC Family Violence – A National Legal Response* (Web Page, 10 November 2010) <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/24-sexual-assault-and-family-violence-2/history-of-activism-and-legal-change/>>.

<sup>266</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic and Family Violence Protection Act 1989* (Qld); *Domestic Violence Act 1994* (SA); *Family Violence Act 2004* (Tas); *Family Violence Protection Act 2008* (Vic); *Restraining Orders Act 1997* (WA); *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT).

<sup>267</sup> New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, October 2010) 157.

<sup>268</sup> Ibid.



legislation.<sup>269</sup> This could facilitate a more nuanced approach, to an equally nuanced problem.<sup>270</sup>

<sup>269</sup> *Crimes Act 1900* (ACT) ss 36A, 36B, 36C.

<sup>270</sup> *Ibid.*