SELECT COMMITTEE INTO ELDER ABUSE

INQUIRY INTO ELDER ABUSE

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 26 MARCH 2018

SESSION FOUR

Members

Hon Nick Goiran, MLC (Chair)
Hon Alison Xamon, MLC (Deputy Chair)
Hon Matthew Swinbourn, MLC
Hon Tjorn Sibma, MLC

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Hearing commenced at 2.00 pm

Ms MEREDITH BLAKE
Associate Professor, University of Western Australia School of Law, sworn and examined:

Professor WENDY LACEY
Dean and Head of School of Law, University of South Australia, sworn and examined:

Dr EILEEN WEBB
Professor of Law, Curtin University Law School, sworn and examined:

Ms TERESA SOMES
Lecturer, Macquarie University, sworn and examined:

The CHAIRMAN: This is the fourth hearing that the committee has had today, and we have the Australian Research Network on Law and Ageing, which is an Australia-wide network of legal scholars who are experts in the field.

On behalf of the committee, I would like to welcome you to today's meeting. Before we begin I must ask whether you will take the oath or affirmation?

[Witnesses took the oath or affirmation.]

The CHAIRMAN: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The WITNESSES: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard and broadcast on the internet. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them and ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Before we proceed with the questions that we have for you today, would any of you like to make an opening statement to the committee?

The WITNESSES: No.

The CHAIRMAN: If not, we will move straight into the questions that we have. I just indicate to you that, as has become the custom and practice of this committee, we will move through each of the terms of reference. Thank you for the submission that you have provided to the committee, which is publicly available. The first term of reference deals with the appropriate definition of elder abuse. The consistent evidence before the committee is that the World Health Organization's definition is the preferable definition to be used. I invite comment from any of the witnesses on that.

Prof. LACEY: Generally speaking, the WHO definition is the one that is commonly referred to. It generally means an act or series of repeated acts or omissions that constitute harm in a relationship of trust. In some respects, that is the common definition used by a range of different disciplinary groups. However, if you wanted to approach it from a rights-based perspective, you could actually refer to elder abuse as the denial or restriction of a person's basic rights and freedoms—removing a person's power to make decisions for themselves and the like. I probably tend towards a broader definition. I think it should be inclusive rather than exclusive, and I think that the five broad categories of abuse that are commonly used—physical, sexual, financial, neglect and psychological abuse—they are the five main categories, but you will find that throughout Australia some jurisdictions actually provide different definitions. For example, in South Australia we refer to chemical or substance abuse as a separate category, so in South Australia they have six categories. That is because the key stakeholder groups and agencies believe that the use of medication or drugs as a form of restraint, or to at least keep the person being cared for cooperative and compliant, is becoming so prevalent that it needs to be treated separately. You will find that there are differences even throughout the Australian states and territories.

The CHAIRMAN: That particular category could presumably also fit under physical abuse.

Prof. LACEY: Or a form of neglect—depending on the circumstances, it could come under either.

Hon ALISON XAMON: One of the areas that has been fleshed out has been this issue of a relationship of trust, because of course one of the things that has come to the attention of the committee is that often the abuse occurs where there is not a recognised relationship of trust. Do you have any thoughts on that?

Prof. LACEY: I do, and I think that is one of the reasons why we need to think broadly about elder abuse. You need to think of opportunistic crime, scamming and the like, which can often leave a person destitute in their older age, and we see that commonly throughout the world. I think other jurisdictions outside of Australia deal with this much more rigorously; so, for example, they have specialist prosecutorial agencies in areas like San Diego, but you also have a number of pieces of legislation overseas that focus very much on a relationship of trust, so they look at mainly familial types of relationships within a family, or extended family, or carer-type relationships. I do not know if anyone else wants to add to that.

Dr WEBB I would just like to add that I am actually quite uncomfortable with this restriction in relation to a relationship of trust. Indeed, with the World Health Organisation, in their definition of elder financial abuse, it is not limited to people in a relationship of trust; it is actually much broader, and that picks up the scammers and the misappropriation and so on that Wendy referred to. I think we should be careful about this relationship of trust. Yes, predominantly that is where elder abuse occurs, but I think it is dangerous to exclude these other people, if you like, who are not in a relationship of trust but their actions do amount to elder abuse, and I think we need to be mindful of that. They have picked it up in relation to financial abuse; I think perhaps we should start looking at that in the other forms of abuse as well.

Ms SOMES: I think there is also a problem, when you have a definition like that, that there are some instances where it is going to obviously be within a definition, but you are going to have those grey areas. For instance, if you do have carers, which initially you would say were not in a relationship of trust, but can become so within that relationship, so it is a matter of where you draw the line—who is and who is not.

Ms BLAKE: I will also just add a couple of things with respect to the importance of respecting the autonomous wishes of older people, and of being excluded from their decision-making process. That, I think, needs to be contemplated in some instances that can constitute a form of abuse where

an older person is sidelined, and there are no attempts to get that person's views or preferences or wishes—no attempt to ascertain those—and therefore that entire exclusion of the person from the decision-making process can be very harmful.

[2.10 pm]

Prof. LACEY: One thing that you may not be aware of is that the federal government has funded a national study looking into definitions of elder abuse. The Australian Institute of Family Studies, which is a federal statutory authority, is leading that research, which is currently underway. I believe that their priority is identifying a robust yet comprehensive definition for the purposes of research in Australia.

The CHAIRMAN: Yes. It probably leads neatly into the second term of reference on prevalence, because I think that that body also has the task of doing the mysterious job of trying to identify the prevalence of elder abuse. We do not have a particular round of questions for you on this term of reference, but just inviting any comment you might have on the issue of prevalence.

Prof. LACEY: I think that most of the studies point to somewhere between two and 10 per cent of people over the age of 65 having experienced some form of abuse, but we know that it is underreported, so the statistical data that we do have is probably unreliable. I was involved in conducting or leading a research project into the prevalence of elder abuse in South Australia. That involved two stages. Stage 1 involved semi-structured interviews with key stakeholders and the key agencies responsible for being on the front line of dealing with elder abuse in SA. The second stage involved interviewing, through a therapeutic interviewing style, victims of elder abuse or those who had seen it firsthand with relatives. We did not get a huge amount of uptake with participants in stage 2, but we did have a considerable amount of support from the key agencies in South Australia. The problem we found is that, whether they are real or perceived barriers to actually gathering data, for the large part, most of the information is buried in case files. Whether it is domiciliary care, Legal Services Commission, which is subject to legal professional privilege, there are not a lot of ways of extracting that data in a de-identified manner. There is no obligation on any agency to collate that data in such a manner or to share it with the Office for the Ageing, which is the responsible agency in SA Health. You find that although they have information, most of it is anecdotal and there is no simple way of extracting that data in a form that could be used by government for intervention strategies, particularly early intervention. To actually access prevalence data is really difficult and complex and would require a change in attitude within government agencies and even non-government agencies that are tasked or funded with addressing elder abuse. In South Australia, it is the Aged Rights Advocacy Service, which runs a hotline. It is funded jointly by federal and state money.

Hon ALISON XAMON: Would that be similar to Advocare over here?

Prof. LACEY: Yes, I imagine it would fulfil a very similar function. It is like the Elder Abuse Prevention Unit in Queensland as well. Even when you look at those agencies that have the funds and responsibility of collating data, it is collated at what I would argue is a very superficial level. They find out about the age, the gender, the gender of the perpetrator, what type of abuse it was, but it does not collate data in a way that you could try to put factors together. For example, are you considerably more at risk if you are an older female living with an adult son who has a drug problem and is unemployed? We do not know, because we simply do not gather that level of sophisticated data; and, if we did, I think government would be in a position to develop more targeted strategies for early intervention and prevention. But because we are not actually collating that data and the data that we do collect is done at a very superficial level, we simply do not have the information

that we need. I suspect that the Australian Institute of Family Studies will find exactly that in its outcome.

Dr WEBB: Can I just add to that?

The CHAIRMAN: Yes, please.

Dr WEBB: What I am going to say here should not reflect on any of my colleagues here. I am totally done with prevalence studies; I am sorry. I have been involved in one—Barbara Blundell and her team did one in WA. I have just been involved in one in Queensland. Wendy has spoken about the study in South Australia. The thing is, we know there is a serious problem with elder abuse. The figures that we get from the various prevalence studies both in Australia and internationally, we can sort of pick ballpark percentages as to the number of older people who we assume are affected by a particular type of abuse. I do not think there is any issue about that. It just seems that the knee-jerk reaction is, "Oh, let us do a prevalence study." I am thinking, "Well, what more information do you need?" Good luck to the Australian Institute of Family Studies—and they will do a great job—but, as Wendy has mentioned, they will probably come up with the same figures that we have come up with on several previous occasions. We need to do something concrete and constructive now, rather than sitting around and waiting for another prevalence study. As I said, this should not reflect on my colleagues, but there is a certain amount of frustration, and it is not just me who is feeling it. We just seem to be waiting to do something. We know there is a problem. Let us do something constructive about dealing with it.

Prof. LACEY: I would agree with that.

The CHAIRMAN: Thank you for the frankness of the evidence because it is something that comes across my mind every time I hear about this issue of prevalence.

Dr WEBB: Nobody will ever die without knowing what I think!

Hon ALISON XAMON: We have to even quantify it before we contemplate doing something.

Prof. LACEY: That is why I think that quantitative research projects do not give you the lived experience of older people who have actually experienced elder abuse, so qualitative studies are just as powerful for informing government policy. Even though, for example, in the study that we did we only interviewed six victims of elder abuse, the richness of the data we actually gain through qualitative studies is sometimes even more powerful than a set of figures.

Ms BLAKE: Yes. I would second that. In the study that I have been involved with, where we interviewed people with dementia, the richness of the data that we secured from that—we had a good a number of people with their carers and their relatives to give data and not specifically on elder abuse, but just the nature of the stories and the lived experience and how the people themselves felt about their relationships with their carers and their relatives and the sorts of roles they thought were appropriate—was really insightful. I agree that, done properly, qualitative research is extremely valuable.

Hon TJORN SIBMA: Just for clarity's sake and in terms of dealing with the rest of this hearing and interpreting the rest of the submission, none of the actions or recommendations proposed within the body of your submission are therefore contingent on that data work being undertaken by the Australian Institute of Family Studies or indeed any further or finer, more granular datasets. What you are proposing here applies with knowledge as we have it now and might be refined, but there is no reason to withhold action, is effectively the message I am hearing.

Prof. LACEY: No, not at all.

The CHAIRMAN: I am going to combine terms of reference (c) and (d), which deal with the committee looking at forms of elder abuse and the risk factors. In your submission, pages 16 and 17, can you advise the committee about assets for care arrangements and how they can result in elder abuse and how they differ from other forms of financial elder abuse?

Ms SOMES: With the assets for care, it is quite a unique situation, because the actual arrangement itself is not abusive. The actual transferring assets to be looked after can actually be quite a good arrangement. The problem is that the older person in that scenario puts themselves in a vulnerable situation, usually in the context of a relationship of trust because they do not feel that they need to protect itself. So it is not the arrangement itself that is abusive. Not even the breakdown is abusive. It is a bit like divorce. There does not have to be fault. It is the point at which there is a denial of the reciprocity of the agreement and where the older person is left in a legal position where they have very little recourse to get those assets back. So it is that denial that there has been an arrangement that does not get to be contractual, but it is an understanding and that is not honoured in that situation. We often have older people who have transferred their assets to their children on the understanding that they would be able to live with them for the rest of their lives and then they have to go and find other accommodation.

[2.20 pm]

The CHAIRMAN: Yes. That is different from other forms of financial elder abuse where, I suppose, there is a PIN that has been provided or bank transactions and the like.

Ms SOMES: Yes; it is of a different category because we have some more egregious examples of fraud or stealing. They go on a scale, but this is quite a different sort of understanding, and there is quite a tension between the law that supports an elderly person giving their property to their child. It is actually quite encouraged. We assume that money goes from our elderly parents down to the children, but by the same token we have laws, for instance equitable principles, that are meant to protect vulnerable people, and we have a bit of a tension between those two situations. Of course, there are legal avenues that can be taken to regain property but at the moment—I know the ALRC has made some recommendations on this—you really need to go to the Supreme Court. The onus is on the elderly person to commence proceedings to actually get that property back. It is very expensive and it takes a long time, and it is their children.

Hon ALISON XAMON: As you rightly identified, that is all after the fact. I am interested in your comment that that in itself it is not an abusive set-up. I also know people who have entered into these arrangements with great success, so it can work. On that note, bearing in mind that law reform is one of the areas that we look at, what would you recommend as the types of legal remedies that can be contemplated before entering into these arrangements, that with some community education might help to mitigate the possibility of things going awry?

Ms SOMES: I think initially an awareness of what can go wrong. I think when people think of these arrangements, they do not anticipate perhaps what could happen down the track. You might have a child that thinks, "I'll be able to look after my parent, but they have not anticipated what might happen in 10 or 15 years' time if the parent needs a lot more care or, for instance, maybe the adult child gets divorced, so there is an issue with division of property. I know a situation in which an elderly woman has lived with her son and daughter-in-law but her son predeceased her, so she is left with her daughter-in-law, who then did not want to look after her mother-in-law. She had legal title to the house, so she sold it. There was no recompense at all. I think, first of all, an awareness to move beyond the initial, "This is a great arrangement" and perhaps, "What is going to happen if circumstances change?" I think there is a lot of talk about having a standard-form contract. You can run into problems with having contracts because then you are bound to the contract. But there is

leeway to be able to sort of anticipate other events and things like that. I think, from the start, to sort of prevent this happening, but then there are a lot of situations where people just will not do it. It is a bit like a prenup agreement—you do not want to have to think about having to get assets back. That can cause problems in itself, particularly if there is an imbalance of power within the relationship, so then you have to think about things to do if the relationship breaks down.

The CHAIRMAN: It is tense enough in a business arrangement trying to work out how this is going to end badly and to protect each party, let alone in a family situation. It is really not odd or peculiar that elderly people might be reluctant to even be going there. As you say, it is one thing for it to be quite natural for people to be resistant; it is another thing for us as a group of lawmakers to bring this to their attention, to the forefront of their mind and say, "Look, just in case."

Ms SOMES: It can be quite offensive to people to be told, "You need to protect yourself against your own family."

The CHAIRMAN: Because your son or daughter might end up in a divorce or your son or daughter might die.

Ms SOMES: Or they might decide that you are just too much trouble—any of those things. It is very, very difficult. There is not an easy answer to it. I think, initially, public education about it to have people at least be aware that these sorts of things might happen.

Prof. LACEY: You also need to get these matters out of the Supreme Court. That is not an effective form of redress for anyone, particularly if you are towards the end of your life and it is a complex family matter. I think for me it is a similar scenario to seeing an abuse of a power of attorney, which most commonly happens with respect to older people by their children. The same thing—to get a power of attorney set aside, you have to go to the Supreme Court when we know that that is expensive and time consuming, and often is not the remedy that you really want. I think in a number of these matters, the Supreme Court should not be the forum where you are actually trying to seek legal redress.

The CHAIRMAN: Has some work been done to identify the criteria of matters that should be carved out of the Supreme Court and given to the State Administrative Tribunal? Perhaps "carved out" is the wrong term because I probably would prefer that people had the option of the forum they decide to have. Plainly, it cannot be every case involving someone over the age of 60 goes to the State Administrative Tribunal. Has some work been done on that criteria?

Prof. LACEY: If you look at what has been happening around guardianship and administration orders, they are already exercising that jurisdiction. Many of the civil and administrative tribunals around the country are already doing that. Because there is a general reluctance to prosecute, to take criminal action against your son or daughter, or family member or carer, we need to recognise that people need a more timely and appropriate forum to take such matters. It would not need to be necessarily done immediately. You could actually start with a small jurisdiction. If you look overseas, there are plenty of examples where similar type bodies, like county courts in the US, exercise jurisdiction that is specifically tailored towards what they do in Illinois, for example. In Cook County, they have a specialist courtroom designed for older people. They have ramps, the microphones are set slightly higher, they take regular breaks so that people can go to the bathroom or have a glass of water. There are plenty of examples we could point to to identify a more appropriate legal setting for older people to seek legal redress.

The CHAIRMAN: I hear that, but I am still keen to know what criteria should apply for a case to warrant State Administrative Tribunal intervention compared to the Supreme Court. For example, would it be every dispute that involves a family member of an older person, however defined?

Prof. LACEY: I think you could start with specific areas like powers of attorney. You could look to the Powers of Attorney Act and see what legal remedies are provided there. At the moment, as far as I understand it, your only form of redress to get a power of attorney set aside is to go to the Supreme Court. It always comes down to the mental capacity of the individual concerned. You can use guardianship and administration legislation if they lack mental capacity. But at the end of the day, I think each area needs to be looked at in accordance with what the current legal framework is in place and consider the most appropriate forum. I do not think it is a matter of just carving up jurisdiction and saying that all of this stuff should go into the tribunal. I think it is a matter of looking at concrete areas of the law and identifying which is the most appropriate forum. For example, in many cases of elder abuse where the state wants to prosecute, they may not have a willing participant in terms of the victim but there will be extreme cases of fraud and the like where the state will want to take them through the criminal courts. I guess it really depends. I have not given great thought as to exactly what would fully go into the State Administrative Tribunal, but I really think do not look at it across the board and say everything involving a person over the age of 65 should go to the tribunal. I do not think that is the appropriate manner in which to approach this. I really think you should look at discrete areas of where the law intersects with older people in a particular way and identify where the current legal avenues for redress are inadequate.

[2.30 pm]

Ms BLAKE: Can I just make a couple of points? Firstly, I think the point about not problematising—this is just a generic problem of elder abuse—is really important because this is a social problem. We know that it happens. We do not have these studies that seem to produce consistently the same sorts of results, yet we still know that there is under-reporting.

But to be honest, there is a different level of public interest in certain areas of abuse. For example, if we look at the physical abuse of older people, or indeed I would say of vulnerable adults more generally, there is a different public interest in that to other sorts of context. So public interest is a significant factor in, I suppose, what level we would go to. In terms of criminal law, which is my area, we would say that it is not an issue of not having particularly the laws, although I say that there are some things we could do around that, but it is a question of the process. So I think that public interest is something that we need have as some sort of measure here, but also making sure that we identify that in the general social point of view, these are discrete areas which have specific laws surrounding them, and that somebody who is the victim of a scam—a vulnerable adult could be the victim of a scam just as much as somebody who is over the age of 65—whereas there are particular issues associated with frailty, particularly where there is reduced capacity, that attract the attention of other laws and become another sort of a problem. So I think we need to be careful not to be too generic about this and say that these are all raising the same legal problems, because they are not.

Prof. LACEY: There is also an issue, I think, about seeing litigation as the last resort. There are many other methods for resolving disputes, whether that is mediation. I actually think they are the types of remedies that we should be looking at to resolve many of these situations, particularly if they are involving family members. The criminal law is often the last area of the law that many victims want to turn to, but they just want the abuse to stop. So trying to come up with a forum which supports the older person to maintain that relationship but to at least see an end to the abuse, or a better understanding from the carer or the family member who is perpetrating that abuse. I think alternative forms of dispute resolution need to be looked at.

Dr WEBB: I am particularly harking back now to the assets-for-care stuff, and I see it as a critical access to justice issue at the moment. I did some work with Fran Ottolini up at Northern Suburbs, who no doubt you have spoken to. Basically, all their work is taken up with assets-for-care

arrangements that go wrong and enduring powers of attorney that go wrong. At the moment you just would not consider it the legal path. You probably do not have the time, you probably do not have the health, you probably have not got the money, and who wants to do that in relation to your family? The ALRC suggested bringing assets-for-care arrangements, or dealing with assets-for-care arrangements, into the tribunals. There are issues of bringing these equitable principles and so on through, and Teresa knows far, far more about that than me and I will stop in just a sec. But the thing is, I really think that something needs to be done to give older people who have one of these agreements that goes wrong, to have some kind of legal pathway. At the moment it really is not realistic. I feel personally that SAT would be ideal for that. They already have the elder mediation programs going. They are experienced within the guardianship administration stream, and they are very experienced with dealing with older people and family conflict and so on. To me I feel it would be a good fit, and there are structures in place already. At the moment, "What are you going to do? Okay, you've been ripped off", so on and so forth, "Oh well, now you can go to the Supreme Court." It is just not going to happen. So they are being denied justice in a way.

Ms SOMES: Yes. I think the problem is that it definitely needs to move to a different forum—a tribunal, if not something else. I think that is quite important. The thing is, with all due respect I think the ALRC did not go quite far enough because they talked about moving forums, but they are moving the same law into the forums. What essentially ends up primarily being an issue of indefeasible title has to be argued somewhere. I think there needs to be some sort of structure where you do start with mediation and those sorts of more gentle problem-solving mechanisms, but at the end of the day you need a forum that is able to redistribute property, because when you take everything away, it is a property issue. You have someone who is holding a legal title to property that you want to redistribute to someone else.

The CHAIRMAN: We talked earlier today in one of the other hearings about the possibility of creating a specific caveatable interest to deal with this scenario. Is that something that has been discussed in your work and the research?

Ms SOMES: Yes.

Dr WEBB: We are writing an article on it.

Hon ALISON XAMON: Good. When is the article due?

The CHAIRMAN: It is a work in progress.

Hon ALISON XAMON: We are presenting in September: will it be done?

Ms SOMES: Without going into too much detail, the problem is that there is no interest there until a court says there is. Because you have transferred property to someone absent any sort of duress or anything like that, they have the title. I am always interested in when practitioners talk about having a caveatable interest because the courts have very specifically said, "You need a proprietary interest to do that", and you do not have one until the court actually says you do and it is redistributed. So you are in a bit of an awkward circle.

The CHAIRMAN: There is talk of a specific family law–type caveatable interest being created. Is it therefore not the same thing where the registered proprietor is not you, but you claim, in your mind at least anyway, an interest in this property for whatever the history behind it was, and therefore by the creation by statute of an interest you whack on a caveat?

Ms SOMES: Yes, and you could do that through legislation. You could actually create that. Centrelink recognises these granny flat interests. They actually say on their website you have an interest in the property, which is not entirely true; you do not.

Hon ALISON XAMON: Centrelink are happy to give you an interest for the purposes of cutting your income, but otherwise you do not have any sort of legal redress. I will just clarify that.

Ms SOMES: Yes. It is an interesting sort of policy thing because they want to encourage this because it means that the transfer of any more than $10 000, if it is in this assets-for-care arrangement, will not sort of cap that and they will say, "This is fine. You can do that and, yes, this is called a granny flat interest." So you could take that one step further and have that legally recognised because at the moment it is not, despite what Centrelink is saying about it. There is also the question that Eileen talked about—access to justice. I do not see any point in uplifting all that complex equitable law and putting it into a tribunal. I actually think there needs to be a statutory cause of action that recognises and says we know this is here, we can see what this is and therefore we can bypass all that, and that can go into a tribunal and go through mediation. Then if necessary that tribunal would have the jurisdiction to redistribute property.

The CHAIRMAN: This goes back to my earlier question about the criteria that would be necessary in order to trigger that jurisdiction. What does the applicant look like and what criteria do they need to meet? I presume the other person is the respondent, and what criteria do they have to meet?

Ms SOMES: Yes, I think it does not necessarily have to be a tick box. I think when judicial officers have to decide whether there is a de facto relationship, for instance, they have a number of things that they can look at, and they can say, "None of those exist, but I still think it's a de facto relationship." I think you could have a similar sort of thing, where you look at the relationship and say, "Has there been a transfer? Has there been a promise? What's going on here", and use that sort of holistic approach.

Dr WEBB: Even the granny flat interest, that could be a good start in relation to the criteria. But it is really quite broad. It does not cover everything, but it is really quite broad. It could be a starting point, and that is already there.

[2.40 pm]

The CHAIRMAN: Just on that, I did say in a previous hearing, when we talked about this, that whatever you did, you would not call it a granny flat interest; you would come up with some other kind of name. I am interested in the fact that it sounds as though Centrelink actually is using that terminology.

Ms SOMES: They call it a granny flat interest. I just found it quite interesting that on their webpage they say that this is a legal interest.

The CHAIRMAN: In the world of political correctness, it surprises me that that has been allowed! Nevertheless, I think the spirit of it is quite right and it needs to be picked up on.

Members, as is typical for us, we are running out of time. Term of reference (e) is to assess and review the legislative and policy frameworks. We have started talking about that. I would particularly be interested to get comments from the witnesses about the potential disadvantages of creating a national register for powers of attorney.

Hon ALISON XAMON: Because everybody else is saying they think it is a great idea!

Prof. LACEY: The only state in Australia or jurisdiction in Australia which actually registers interests is where there is transfer of land, basically. In New South Wales, they are the only things that are registered. I remember when I was giving evidence before the NSW inquiry, you can actually have a lot more money or assets built up in superannuation than you may do in land. So the idea that you only focus on one type of interest, I do not see any disadvantages, other than, obviously, the complexities of maintaining a register. I was on the advisory committee for the ALRC and this was

robustly debated at that committee level, but there were considered to be very few negatives, other than the administration that goes along with maintaining a register. There were so many examples cited to the ALRC of multiple powers of attorney, for example, where you just did not know which one was the right one, whether it was actually signed when the person had mental capacity to do so, and the complexities involved in disputes within families where you have got those types of complexities require us to do something much more rigorous in this space. I think that having a national register has so many more advantages than disadvantages.

The CHAIRMAN: To the extent that a register currently exists in Australia, there is a form of register in New South Wales?

Prof. LACEY: Only for land, not for other types of interest. I think having a register of powers of attorney would certainly scale it, because every power of attorney act at the state and territory level has an offence within that act. If you abuse or misuse a power of attorney, you can be an charged with an offence under the act. To have a national register would carry much greater weight in saying it is a registrable interest and we are going to keep an eye on it. I think it is in everyone's interests that we have a national register.

The CHAIRMAN: I do not suppose you know what the cost is of maintaining the New South Wales register?

Prof. LACEY: No, I have no idea whatsoever. You would have to speak to your counterparts.

The CHAIRMAN: That is a line of inquiry for our committee.

Hon ALISON XAMON: We know that a national register is likely to be quite some time off, particularly for, I suppose, WA witnesses. Do you think there is merit in establishing a state-based one in the interim, or would that be perhaps unhelpful?

Prof. LACEY: You have to remember that people travel as well.

Hon ALISON XAMON: I am just wondering whether something is better than nothing, or whether we should be holding out until we have a national scheme?

Dr WEBB: I do not think anything is wrong with making a start now and getting our house in order, and then if it goes national, we are ready to go. Personally, I feel that it is a significant problem. It is a problem in Western Australia, and given that registration does seem to be the most appropriate course, I do not see any reason not to start now.

Ms BLAKE: That could go beyond, of course, powers of attorney to enduring powers of guardianship and advance health directives—those sorts of things. We do not have registers for those. When I say people travel, that is the problem, and that is why, of course, this appeal for a national kind of system.

Hon ALISON XAMON: Would you have any privacy concerns around a register?

Ms BLAKE: In terms of?

Hon ALISON XAMON: People being able to access it and being privy to information about who is under a power of attorney or a power of guardianship?

Ms BLAKE: There are ways of regulating access. Of course, we do not have privacy legislation in Western Australia, and the national privacy legislation is only of limited relevance because it is a commonwealth act. But I think that, as with anything, we have got freedom of information legislation. It is all premised upon an idea that even with access to databanks and to information held by other institutions, there is no right of freely accessing that information. I think that you could subscribe the terms upon which this could be accessed, and police it as well. I do take the point that

there are important private interests, particularly if that involves health and finances But this is not a new problem; it is not a new issue. If we are going to create some sort of register, we can administer, regulate it and police it appropriately. Although we do not have that protection of an individual state privacy legislation as other states and jurisdictions do, I do not think that is going to be particularly problematic if we are creating a register from scratch. I do agree that having something in place that can provide some certainty as to what the situation is and who the appropriate person is, what the terms of any directives are, that they can be found somewhere, and that there can be some certainty attached to them, will help to resolve those questions when they arise, rather than scratching around trying to find out where that bit of paper is—is it under the bed, is it in a drawer, is it stuck in a safe somewhere. All these things are time consuming, and some of these decisions need to be made and some of these issues need to be resolved very quickly. As I said, it will not resolve it if somebody else happens to be in another state, but at least it might start to take a precedential step in changing that culture of really regarding it is as not important. It seems to me that if we are going to have these powers and we are going to have advance health directives and enduring powers of guardianship, that they are there to provide certainty, but if we do not follow through and have the institutions and the organisations that can deliver the information quickly and efficiently, it seems to be not the most effective way to proceed.

Prof. LACEY: I think privacy law is all too frequently used to justify inaction on elder abuse. Provided that any form of regulation is about empowering older people to self-protect, you have the right momentum behind it, which is why I am constantly referring to endorsing a rights-based approach, where you avoid paternalism and ageism, and it should be about enhancing a person's capacity to exercise their rights and freedoms for as long as possible and as fully as possible.

The CHAIRMAN: Presumably, the people who can access the register is anyone with the consent of the person, and, secondly, any person who has been asked to be involved in a transaction that involves an enduring power of attorney, for example. If I am the bank manager and I am being asked to transfer these funds pursuant to an EPA, I want to be able to access the register and make sure it is the current one.

Hon ALISON XAMON: Exactly. Of course, that does not address where there might be a child who is very concerned that a sibling has taken advantage of a parent and been granted a power of attorney and wants to find out if that has actually occurred.

Prof. LACEY: But that is a much wider problem. That is a not confined to an issue about a register. That is a much broader problem that you can visit in a number of different contexts across the spectrum, really. I do not think we would use that. I agree. I think that one of the first things that is thrown up is what about the privacy interests. Just by way of what is now currently anecdotal evidence, but what we are building upon, is the research that we are doing in this space that older people are recognising the benefits of the relationships that they are in and the trust that they have with other people and do not want necessarily to do everything on their own.

We can get to the point where we overemphasise that to the detriment of what the older person actually wants and prefers. I think it is important that we model into whatever it is we construct recognition of how older people feel about these sorts of things. We can collect that through qualitative research quite easily.

[2.50 pm]

The CHAIRMAN: Members, I am going to move to term of reference (g), "the capacity of the Western Australia Police to identify and respond to allegations of elder abuse". At page 27 of your submission, you say the following and I quote —

> It is suggested that introducing a specific criminal statutory duty on those who have the care of older persons may be an effective way to *penalise* the abuse of older persons, where that has resulted in physical and psychological harm.

The committee would just invite a discussion on the potential creation of new crimes to prosecute elder abuse.

Prof. LACEY: We need to recognise that not all forms of abuse constitute a criminal act. Based on the elements of a crime, you may not have the sufficient evidence to sustain a conviction. I think that there are some misconceptions around the quality of evidence provided by older people. I think that that is totally a misconception. I think they make often very good, reliable witnesses in a court of law. My concern is that at the moment too many people are falling through the cracks because the threshold for actually bringing a prosecution is very high. I think that the exercise of both prosecutorial and coronial discretion means that a lot of cases are put down to death by natural causes where abuse results in the death of a person. Even where there is really detailed medical evidence to indicate that criminal neglect took place, we see very few prosecutions being brought. Through some research that I have engaged in, a number of the cases that are proven in a court of law involve often a very dysfunctional family environment where the child has been the victim of abuse through most of their childhood, where the parent was often the abuser in the relationship and where the child was actually reluctant or hesitant to disobey their parent's orders and, as a consequence, they have admitted to failing to take proper care of their parent. These people were imprisoned for four to seven years, yet they had the most dysfunctional child rearing imaginable. Yet you see cases like the Cynthia Thoresen case coming out of Queensland in 2009 where the medical evidence was so convincing, yet police prosecutors declined to exercise their discretion to prosecute in that case.

I think that the criminal law is capturing cases where early intervention should have played a role and I think that too many people are probably getting off criminal convictions or are not even being prosecuted in the first place. I think that criminal law certainly needs to be looked into, and Meredith probably has more to say on this particular issue. For me, it is not just waiting for a crime or for sufficient evidence to be found so that you can actually base a prosecution and take someone to court; it is about the early intervention and prevention strategies that we currently do not have and that the criminal law does not address. Even with intervention orders or AVO legislation, we see them largely dominated by the domestic violence sector. So the intervention orders, which you can seek to safeguard a vulnerable person, are largely directed at a domestic violence scenario and you see very few provisions of such legislation actually aimed at addressing and safeguarding vulnerable adults more generally. By that, I include not just older people who are vulnerable; I include any vulnerable adult—anyone living with a disability over the age of 18. I think that we need legislation which kicks in after the children's protection acts stop operating and we need to be able to protect all vulnerable adults. The criminal law should be an avenue of last resort in my opinion, but Meredith, who is the criminal lawyer, may have something more specific to say.

Ms BLAKE: It is such a complex problem actually. The association with domestic violence is particularly insightful. The point has been made that we were at a point with recognising domestic violence as a social problem and then recognise it as a certain form of harm and the orders that are associated with that. We are kind of now kind of addressing elder abuse as this sort of social problem and the question is: where do we go to from here? So we are kind of back in that "Do we recognise it as a specific sort of harm and have specific legal measures?" With the prosecution within the criminal law, not in terms of property offences—this is where I think that a distinction does need to be made—there is an issue of, firstly, invisibility. Invisibility means the detection. Whilst children go to school, things can be picked up there, and while adults are at the workplaces, absences and things

can be noticed there. Often they are not with an older person who is at home. We start with that place. So I do not think it is any coincidence that when we are looking at prosecution for criminal neglect under the Criminal Code in Western Australia, for example, most of those cases concern children. They concern the abuse by parents of children because that has been noticed and there is mandatory reporting, at least of suspected sexual abuse. We have that specific set of laws and regulations around minors who are regarded as inherently vulnerable. Older people are not inherently vulnerable, but they may be vulnerable because of the process of ageing. I do not think for a minute we say that we copy that model, but I do think that we recognise that because of this invisibility issue and because of the associated issues with family care and the familial kind of complexities, a multiagency approach is the appropriate way to go, recognising that, at the end of the day, criminal prosecution must remain as an accessible option for those cases which demonstrate the worst kind of conduct and which we need to mark out not only for deterrence, but also for the array of justifications which the criminal law system is in place for.

We cannot just, I think, dismiss the important medical evidence—for example, as there was in the Thoresen case—just on the basis that we do not think the likelihood of a successful prosecution is there. I think actually making the statement that this is important enough; this is serious enough; this is criminal conduct. It has crossed the line; it is clearly criminal conduct. A point needs to be made about utilising the criminal law in those sorts of cases. It is a very, very important declaratory kind of function that the criminal law can play and to say that this is criminal conduct. This is an older person; that does not detract from the fact that it is criminal conduct and it is neglect of the worst kind. I think that we need to also remember that the criminal law is largely there to protect people who are vulnerable and that is one of the reasons that it is there. I think that by not prosecuting the sorts of cases that really should be prosecuted, we are not, as a society, doing the right thing.

Dr WEBB: Can I just add to that, Meredith. When we were doing this project in Queensland, I think there are a couple of things to take away here. Firstly, the police at the front line—now, a lot of this is anecdotal, obviously—often do not tend to treat the matter seriously and I think that comes back to the whole issue of domestic violence 20 years ago: "It is a family matter" and so on and so forth. There does seem to be a disconnect between the police on the front line and a very good elder abuse unit which is within the WA Police Force, and that was a similar comment that was made in Queensland. Also, too, in relation to Queensland, the Law Society in, I think, 2011 had come out with a proposal basically saying, "We have got criminal laws that most certainly will cover these instances, but the fact is that in relation to elder abuse, they are not being used."

What is our next step? The question then was: do we look at more test cases and encourage those police on the front line to really look carefully and educate them to pick up what we may think should be obvious but perhaps it is not in those circumstances. The other thing they did, they had a three-step process. First, it was looking at the laws they already had and encouraging police to look at them and use them. The second thing was to amend the Criminal Code in such a way that there were specific examples given within the code to say, "Okay, this circumstance could apply to blah, blah, blah." So rather than making a specific offence in relation to elder abuse and effectively carve that out of what is in the Criminal Code already, put something which explains and may alert people to that as well. That idea has not flown in Queensland. There seems to be some resistance to that. I quite like it.

Ms BLAKE: I have seen that in some Queensland legislation, not in relation to that, but actual examples given in relation to advance care planning where we have seen specific examples given, and I think that is a very helpful step.

The CHAIRMAN: That is really a drafting technique.

Dr WEBB: Yes.

Prof. LACEY: I would just make two comments with regard to police. One is that we know that the most common form of elder abuse is financial elder abuse. What they have done in some jurisdictions in the US, and Seattle is one example I can think of off the top of my head, they actually train detectives in forensic accounting so that they know what evidence to look for when they are looking at financial records. They have seen the number of successful prosecutions jump as a consequence of providing police with appropriate training. The other thing that I think is a big problem for Australia is that only police agencies at the state and territory level currently have the power to conduct an investigation, to seek entry into premises, to actually lead an elder abuse investigation from start to finish, but often what you need—the last thing that you need, is a uniformed police officer coming to the front door. What you need is often a lawyer and a social worker coming to provide the necessary support and services to try to get to the bottom of an allegation or a suspected case of elder abuse. We need to both harness the expertise and better inform the expertise of what the police agencies can do around the country, but we also need to recognise that uniformed police officers are often the last person that a victim of elder abuse wants to see at their front door. I think recognising that we need agencies other than just the police agencies with the capacity to conduct an investigation is a really important one that we need to look at. At the moment the only compulsory reporting of elder abuse happens in aged-care residential facilities and that is because the Aged Care Act federally requires both sexual and physical harm to be mandatorily reported. In South Australia, in all the research that we have undertaken with key stakeholders, they do not want mandatory reporting. What they do want is a mandatory response from the system if there ever is a report made. I think that position needs to reflect the fact that we have commissioners or commissions against corruption. If there is systemic covering up of elder abuse like what happened at Oakton, then the system will kick in at some point if people fail to report it in the public health system, for example. But I do think it is that notion of having a mandatory response and a multidisciplinary or multiagency response, that is the significant gap that is operating at state and territory levels at the moment.

The CHAIRMAN: On that point in the submission on pages 23 and 24 there is talk about introducing mandatory reporting of suspected sexual or physical elder abuse.

Hon ALISON XAMON: By medical professionals.

Prof. LACEY: You could certainly have that. That is a matter for the Parliament to really decide when drafting legislation. I think the fact that people —

Hon ALISON XAMON: We are interested to know if you think it is a good idea.

The CHAIRMAN: I assume yes, because it is in the submission.

Prof. LACEY: People are more comfortable with it because it already exists under the Aged Care Act for residents of residential aged care facilities.

Hon ALISON XAMON: You are talking about GPs now.

Prof. LACEY: That is a huge step down that path.

Ms BLAKE: It is a big step. We in Western Australia were the last to introduce mandatory reporting for suspected sexual abuse of minors. We have to remember that any form of mandatory reporting, of course, penalises the person who is supposed to be doing the reporting, on the understanding that that will then result in some response and protect the person who is the subject of the reporting.

Hon ALISON XAMON: I know there was also a concern in relation to mandatory reporting of child abuse that it would discourage people from coming forward and seeking help. It is not without controversy.

Ms BLAKE: Yes; these are not new arguments. But I have made the point already about children. We feel as a society more comfortable to take these sorts of steps with respect to children, so we have different layers, and scaffolded I suppose, regulatory response to the welfare of children that we just do not have in relation to adults. That is because as a society we regard children as warranting and requiring our protection, and it is much harder to apply that same reasoning to older people, and it should not be.

Hon ALISON XAMON: How does that sit with also ensuring that we are respecting the autonomy and the decision-making of those individuals to perhaps not report?

Ms BLAKE: One of the arguments put forward in the Law Reform Commission report against creating a specific crime is the risk that it would be seen as paternalistic, discriminatory—for those sorts of reasons. Mandatory reporting is a big step for those reasons, because it tends to equate or suggest that that link between older people and children which we do not want to because from a rights-based perspective we are wanting to promote wills and preferences of older people, but also because it involves that very significant step of placing responsibility upon the professionals to do that. Under mandatory reporting, of course, the penalties associated with not doing that will be upon the professionals in question. That is why it is a step that will require great thought and caution. I think if we are not prepared, if we do not see it as appropriate to create a specific offence, then I am not sure that there is going to be an appetite for mandatory reporting. But I do think that we have offences in place that are not being utilised that capture the sort of abuse that took place in Queensland—and Queensland is a code state. There is a specific duty in the Queensland Criminal Code that could apply. They are, in fact, much easier to establish that in common law, so the section was there. That is what it is designed for. In my view, this was a classic case in which it should have been utilised. That is the step that the code jurisdictions have taken, to say that in these instances we recognise that there is a duty of care and if you fail to carry it out and you are grossly negligent or intentional in doing so, that will presume that you have caused that damage. It is even more surprising that did not take place in Queensland. I think we need to address the fact that there are fundamental problems underlying it. It is not that they are not the sections to capture it; it is that we have not got that multiagency response, which, most importantly, would minimise the level of harm that is occurring, so a multiagency approach will pick up on it easy. If it is not the policeman arriving at the front door, there are these sort of scaffolded-type of response, leaving in place the criminal laws and using those criminal laws for the most serious of cases.

The CHAIRMAN: Yes. Is it only WA and Queensland that are code states?

Ms BLAKE: Tasmania; the ACT have codes but they are based upon putting the common law into statutes. The code jurisdictions in Queensland and Western Australia cover the field, so to speak, so that is the first point of reference. The ACT, Tasmania and the Northern Territory have criminal codes, but they are not the same beast. They do not purport to cover the field and to be the primary source of reference for criminal law.

Dr WEBB: With what Meredith and Wendy mentioned about the multidisciplinary approach, one of the things we picked up in Queensland was that there were various agencies that were very good in their own right but they were not actually speaking to each other. Over here, I think we have all the raw material. We have some really good agencies, but, again, everybody needs to talk to each other and I am not convinced that is happening.

Prof. LACEY: They will not unless there is a statutory compulsion to participate and collaborate with other agencies. You need one agency that has the power to conduct investigations and also the power to compel other departments and agencies to provide timely, relevant information.

Just going back to mandatory reporting, as a human rights lawyer I think that having mandatory reporting outside institutionalised care is really dangerous. I think we need to have the presumption of capacity to make decisions for oneself. I think that unless there is a report from a medical practitioner who is expert in determining mental capacity finds that such a person lacks mental capacity, we should always try to maintain the right of an older person to make bad decisions or what others might see as poor decisions for themselves, because just like the rest of us who might like to have a few glasses of wine even though it is not in our best interest, as an older person you should have the right to make bad decisions for yourself.

Ms BLAKE: It is the dignity of risk. Also, from the research we have been doing in conjunction with three major aged-care organisations, is to emphasise that point about actioning the report rather than the report itself. So addressing the problems that have been identified is now recognised in industry as the most important thing, not just to report it, because if we emphasise the reporting, then there is a sense that we have done what we have to do; whereas, actually what we want to be doing is making changes, ensuring that it does not happen again, taking steps to prevent another similar episode, so shifting that kind of focus.

Prof. LACEY: With any law reform you are going to raise community expectations around the official government response, too. So any law reform needs to come with a very well-considered response framework.

The CHAIRMAN: Members, I have allowed things to run over time, as is my wont. I think you will forgive me for allowing it to have gone over, because it has been most beneficial to have these experts before the committee this afternoon. I encourage each of you, if there are any supplementary things that you want to bring to the committee's attention, please do not hesitate to do so, even by way of individual supplementary comment, not necessarily having to be by way of a group.

With those remarks, I want to thank you all for attending the hearing this afternoon. A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. If you want to provide additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence. Thank you very much.

Hearing concluded at 3.13 pm