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Standing Committee on Legal and Constitutional Affairs
Inquiry into older people and the law

Following appearance before the Committee on 23 March 2007, the Australian Institute of Criminology was asked to provide further information with respect to the following two matters:

1. You point out that not all financial exploitation is criminal, and indeed the intent may not be to defraud, but poor financial decision making may lead to an older person suffering significant financial disadvantage. Are there any factors that help identify when a situation is abusive (e.g. degree of coercion/pressure etc)?

2. On page 8 of your submission you indicate that 'specific legislation may need to be enacted to proscribe some of the more blatant deceptive practices which target older persons and which are insufficiently regulated at present'. Can you identify the areas where legislation may be deficient at present?

The Australian Institute of Criminology wishes to make the following further submission in response to these questions.

1. Identification of abusive situations

There is currently no definition of financial abuse of older persons in Australian legislation. Others have, however, delineated the parameters of such financial abuse. Kurrle, Sadler & Cameron (1992), for example, considered financial abuse to include making improper use of an older person's property or money without his or her knowledge or permission, forcing older persons to change their wills to benefit specific individuals such as health care providers or relatives, and denying older persons access to their money or preventing them from controlling their assets. It is sometimes difficult to distinguish abusive conduct from well-intentioned but insensitive behaviour. On some occasions, conduct which began as being in the older person's best interests may end by being abusive. For example, family members may initially offer helpful advice regarding financial investments, but as the older person's mental faculties decline, they may take over the entire management of that person's affairs and misappropriate funds for themselves. Determining the exact point at which abuse occurs is a matter of great difficulty and the circumstances may be unclear and evidence impossible to gather.

Generally, a test of whether any given situation is abusive is whether or not the conduct is in the older person's best financial interests. A secondary consideration is whether or not the older person has given informed consent to the transaction in question taking place. Where the older person's mental functioning is seriously impaired (to the extent that there is an inability to form an intention to create legal relations), it should be presumed that consent is not present, in which event a legally appointed agent would need to consent on the older person's behalf. Where, however, abuse is being perpetrated by such an agent, other indications of abuse need to be examined. These relate to the traditional ways in which fraud is able to be discovered.

A variety of factors may be indicative of financial exploitation of older persons being imminent or likely to occur. These tend to arise out of the three conventional factors which underlie the commission of financial crime generally, namely, a supply of motivated offenders; the presence of a prospective victim or target (or available opportunities for offending); and the absence of capable guardians who could prevent or detect the illegality from taking place (see Grabosky & Duffield 2001). In the context of fraud against older persons, these could include the following considerations.

Motivated offenders
• the extent to which the older person has provided funds to those who manage their affairs;
• the presence of personal disputes or disagreements between the older person and those who manage their affairs;
• the terms of testamentary dispositions, and whether beneficiaries are aware of provision having been made for them, or the absence of such provision;
• the poor financial circumstances of those involved in the management of the older person's affairs; and
• the presence of anomalies in the financial circumstances of those managing the financial affairs of an older person (sudden or unusual spending, or changes in lifestyle in appropriate for the level of the person's income).

Targets & opportunities
• the value of the older person's assets that are being managed by relatives or friends;
• the extent to which the older person needs access to their funds or assets on a day-to-day basis;
• the extent of mental deterioration of the older person;
• the onset of physical disabilities which may restrict the person's ability to meet with friends, relatives, or advisers;
• the level of education of the older person, particularly concerning business matters;
• the adequacy of the English language skills of the older person, and the need to rely on relatives to translate documents;
• the period of time during which the older person has been mentally or physically incapacitated – abusive situations may tend to arise after the older person's affairs have been managed by others for longer periods of time; and
• the extent to which the older person's computer access passwords, bank account PINs, or other personal information are known or used by trusted friends, relatives or professional advisers.

Absence of guardians
• the absence of independent professional advisers involved in the management of the older person's financial affairs;
• the absence of effective regulation of professional advisers by regulatory agencies;
• the absence of friends or relatives who can oversee the management of the older person's financial affairs;
• inadequate corporate governance of residential accommodation facilities in which the older person resides;
• a change in an older person's professional medical or financial advisers, including lawyers, from those who have acted for many years in the past to new professionals; and
• the place of residence of the older person and the visibility of the older person's property and assets.

Although each of these, and other, factors may be a relevant 'red flag' of abusive situations developing, there is little research which has sought to validate their predictive ability, either individually or jointly. Any set of indicators should be subject to rigorous evaluation to assess its predictive validity and not be used as sole evidence of financial abuse being present.

There is a need for further research in this area. Effective preventive strategies would seek to minimise these risk factors from arising, to remove the motivations for misusing older person's assets, to enhance surveillance of the older person's financial affairs by trusted advisers, and to ensure that independent and trusted individuals are available to detect and to prevent dishonest practices from occurring.

Relevant publications include:

Grabosky P and Duffield G 2001. Red flags of fraud. *Trends and issues in crime and criminal justice* no 200, Australian Institute of Criminology, Canberra (http://www.aic.gov.au/publications/tandi/tandi200.html).

Kurrle S, Sadler P & Cameron I 1992. Patterns of elder abuse. *Medical journal of Australia.* 157(10): 673-6.

Smith R G 2000. Fraud and financial abuse of older persons. *Current issues in criminal justice* 11(3): 273-91.

2. Deficiencies in legislation

Although Australian states and territories have a wide range of criminal offences available for use in prosecuting financial crime, there is a continuing need to ensure harmonisation of theft and dishonesty offences across jurisdictions. Implementation of the model provisions developed by the Australian government in each state and territory would be beneficial.

In order to raise awareness of the problem of fraud and financial crimes committed against older persons, and to ensure that cases of dishonesty may be prosecuted effectively, specific legislation could be enacted to proscribe some of the more blatant deceptive practices which target older persons. These include financial crimes involving misuse of identity, online scams (particularly involving fraudulent lotteries), investment fraud, and fraud relating to pre-paid funerals. Although current evidence suggests that older persons may not be at risk to a greater extent than other age groups in the community, and that such conduct is, at present, proscribed under state and territory legislation, the enactment of specific legislation can have the effect of raising awareness of the problem and can also provide legislatures with an opportunity to enact targeted penalty provisions. In the case of sexual offences, for example, Victoria has specific offences dealing with sexual conduct against persons with a cognitive impairment committed by providers of medical or therapeutic services (s. 51 *Crimes Act* 1958 (Vic.)). A specific offence could, for example, be created to deal with crimes of obtaining a financial advantage by deception committed against persons with a cognitive impairment by providers of medical or therapeutic services.

In addition, the enactment of uniform identity fraud offences such as those contained in Part 5A of the *Criminal Law Consolidation Act 1935* (South Australia) may help to ensure that crimes involving the criminal misuse of identity are easily able to be prosecuted in each jurisdiction. While it may not be necessary to have provisions dealing specifically with identity-related crimes committed against older persons or those with a cognitive impairment, there exists a need for uniform identity fraud offences to be enacted in all Australian jurisdictions generally.

Although a number of jurisdictions in the United States have mandatory reporting provisions concerning elder abuse (see Olinger 1991), further research would be needed in Australia to determine whether or not the implementation of mandatory reporting of financial offences against older persons would be effective in reducing the incidence of such crimes through enhanced deterrence or otherwise. Mandatory reporting also requires extensive resources for agencies charged with the responsibility of receiving complaints and processing them.

What may be preferable is for some form of centralised fraud reporting to be established within police and other regulatory agencies with appropriate data-sharing protocols. This could help to ensure that new forms of abuse are easily able to be identified by law enforcement, that official statistics are adequately maintained and shared amongst agencies, and that evidence needed for the development of fraud prevention is gathered uniformly and disseminated widely.

Although the criminalisation of elder abuse helps to publicise the problem, and may enable some cases to be dealt with which might otherwise fall outside the scope of existing criminal laws, the role of criminal law in this area is inevitably limited owing to the impediments which victims and others face in detecting and reporting cases. Evidentiary problems relating to proof of criminal intention may also make the prosecution of such cases difficult.

Relevant publications include:

Olinger J P 1991. Elder abuse: the outlook for federal legislation. *Journal of elder abuse and neglect* 3: 43-52.

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