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EDITORS’ NOTE

On 14 June 2017 the Australian Law Reform Commission (‘ALRC’) handed down its much anticipated final report ‘Elder Abuse—A National Legal Response.’ The ALRC report demonstrated the urgent need for law reform in the elder sphere and also highlighted the need for further research in relation to elder abuse. This special edition of the Macquarie Law Journal is a response to the need identified by the ALRC’s report, inviting contributions on issues raised by the report and, more broadly, encouraging research on legal issues that directly impact the elderly.

We are delighted with the response we have received from the academic and practitioner communities, which has enabled us to provide readers with a collection of articles addressing important legal issues facing our aging population. The articles in this edition of the Macquarie Law Journal focus on what we consider to be three key challenges for elder abuse law reform: confronting the difficulties of identifying elder abuse; reforming disparate areas of law affected by elder abuse; and exploring the hurdles for legal professionals who are tasked with ensuring that elder abuse is minimised.

In furthering the ALRC’s research on these three key issues, this edition aims to contribute to the ongoing effort by the academic and legal communities to develop solutions, and continue the next stage of analysis in what is unquestionably one of the most pressing socio-legal problems currently facing our society. On a broader level, these conversations implicitly, and sometimes explicitly, question the accepted norms and ageist attitudes that contribute to a culture of elder abuse. This is a crucial process because, without it, many issues affecting older people would remain ‘invisible’ to the general population, and policies and practices that have been shaped by ageist attitudes would remain unchecked.

We are privileged to commence the edition with a submission by Emeritus Professor Rosalind Croucher, who presided over the ALRC’s ‘Elder Abuse—A National Legal Response’ report and Dr Julie MacKenzie, Acting Principal Legal Officer with the ALRC. Professor Croucher and Dr MacKenzie’s paper, titled ‘Framing Law Reform to Address Elder Abuse’, outlines the challenges involved in undertaking the ALRC Elder Abuse inquiry and in framing proposals for a multidimensional issue, particularly in the context of the fragmented legal landscape created by our federal, state, and territory jurisdictions. In particular, Professor Croucher and Dr MacKenzie highlight the difficulties in creating a framework within this context that would achieve adequate protection for the elderly, while still preserving the dignity and autonomy of the individual. This overview of the work completed by the ALRC establishes a point of reference for the subsequent contributions to the journal.

Two articles, the first by Lois Bedson, John Chesterman and Michael Woods, and the second by Bill Mitchell, examine the difficulties that arise in understanding elder abuse in particular contexts, and the complications that plague attempts to measure the causes and prevalence of elder abuse. In considering our first key hurdle of identifying elder abuse, both papers suggest there are serious deficiencies surrounding current practices and approaches to information gathering. Using guardianship case data from Victoria’s Office of the Public Advocate, the first article makes an important contribution to measuring instances of elder abuse among those suffering cognitive impairment, who to date have been omitted from relevant statistics. Titled ‘The Prevalence of Elder Abuse among Adult Guardianship Clients’, it demonstrates that older people with cognitive impairment, such as dementia or intellectual disability, and higher levels of dependency, can be vulnerable to a wider range of elder abuse, and, in particular, are more susceptible than others to financial abuse.

Bill Mitchell’s article, ‘Identifying Institutional Elder Abuse in Australia through Coronial and Other Death Review Processes’, measures a different but equally important aspect of elder...
abuse, that occurring in residential aged care services (RACS). The author proposes methods of enhancing our understanding of institutional elder abuse in residential aged care services by reviewing the systems currently in place for reporting deaths in aged care. The proposed reforms suggest reappraising the processes that generate coronial and death process reviews to allow deaths in RACS to fall within the ambit of those investigations.

Our third and fourth articles concern the second key theme of reforming the law to reduce elder abuse, especially given the diversity of legal circumstances in which such legal abuse can occur. Supporting Professor Croucher and Dr MacKenzie's emphasis on the complexity of elder abuse, the contributions – the first by Professor Eileen Webb and the second by Dr Anne Wand and Professors Carmelle Peisah, Brian Draper and Henry Brodaty – demonstrate the breadth of contexts in which elder abuse can arise. These articles address two disparate areas of the law but both analyse the impact elder abuse has on existing legal structures.

Professor Webb in her article, ‘Housing an Ageing Australia: The Ideal of Security of Tenure and the Undermining Effect of Elder Abuse’, explains the importance of safe and secure housing for the ageing and examines how elder abuse can deleteriously affect security of tenure and the ontological security of elderly individuals. Through a careful analysis of existing real property law, Professor Webb proposes law reforms to give greater protection to the elderly, with the aim of improving both housing and ontological security.

In an important and thought-provoking article titled ‘The Nexus between Elder Abuse, Suicide and Assisted Dying’, Dr Wand and her team consider the new Victorian legislation that legalises assisted dying. The authors apply their significant combined expertise in psychiatry to identify concerns about the potential for undue influence and abuse to erode the autonomy of decision making of an elderly person in the context of a decision to end one’s life. They stress the need for greater understanding of the factors involved in decision making in end of life decision making to eliminate the potential for Victoria’s new legislation to be co-opted as a means of elder abuse.

This leads to the final theme of our special edition, which relates to obstacles facing the legal profession. It begins with ‘Addressing Elder Abuse: Perspectives from the Community Legal Sector in the ACT’, an examination by Dr John Boersig and Dominic Illidge of the role of the legal aid solicitor, and the key position Legal Aid has in providing legal services to elderly clients at risk of abuse. In line with the recommendations of the ALRC, the authors explain the approach of the ACT Legal Aid office in implementing strategies to improve legal services to elderly clients. They argue that, in the context of developing an appropriate legal strategy, a rights-based approach should be adopted that focuses on the needs and views of the client. Whatever law reforms follow the ALRC’s report to reduce incidences of elder abuse, the role of lawyers will be paramount in giving those reforms effect.

Finally, Margaret Castles’ article, ‘A Critical Commentary on the 2017 ALRC Elder Abuse Report: Looking for an Ethical Baseline for Lawyers’, takes up the theme started by Bedson, Chesterman and Woods in their article on issues concerning the elderly with cognitive impairment, but considers it from the legal practitioner’s perspective. The author raises some intriguing questions concerning a practitioner’s ethical responsibilities when dealing with clients exhibiting signs of mental incapacity, and the potential for these clients to be subject to influence or abuse. She highlights the tension between the duty to protect the human rights of a vulnerable client and a practitioner’s duty of confidence to their client. Castles’ article questions traditional norms of practice and the duties of solicitors in the context of the profession’s dealings with the elderly and matters affecting elderly people. The contributions by Boersig and Illidge, and Castles, to this special addition are a timely reminder that legal practitioners play an integral role in the manner in which law reform is developed and applied.
The special edition is rounded off by two case notes, authored by members of the Macquarie Law School student editorial team. Both cases demonstrate how the interpretation of existing law is being shaped by the heightened awareness of issues concerning the elderly. The case note on *Katsis v The Queen [2018] NSWCCA 9*, by Harriet Gresham, explores the extent to which a court may have the capacity to take the age and vulnerability of a victim into consideration when sentencing offenders. The second, by Mikaylie Page, reviews the decision of *Public Trustee (WA) v Mack [2017] WASC 325*, in which a court extended the forfeiture rule to prevent an accused from indirectly benefiting from his mother’s estate through the death of his brother.

The ALRC’s Report ‘Elder Abuse—A National Legal Response’ has drawn attention to the deficiencies in the law as it affects older people. This special edition of the Macquarie Law Journal represents one step in ensuring these topics become part of the social conversation and contribute to growing awareness throughout the community of elder abuse and its ramifications for society. While the process of revealing the nature and extent of elder abuse is at times confronting, it is ultimately a positive step. The academic and professional interest in exploring the difficult issues surrounding elder abuse, and seeking solutions to complex and dynamic problems, provides hope that we will be able to translate the growing pressure on law and policy makers into sophisticated and nuanced reforms which balance the needs of the elderly with their rights to maximum dignity and autonomy.

We would like to express our gratitude to the authors who contributed to this special edition, as well as to the academics and experts who provided peer review of submissions. The breadth and quality of the published papers underpin the strength of this edition’s contribution to the growing body of much needed research in the elder law area. The high calibre and significant diversity of legal, medical, academic, and practice expertise represented by the authors of this edition are truly impressive.

Finally, we wish to express our thanks to, and commend the excellent efforts of, the Student Editors who have worked diligently to make this publication possible.

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