

Legislative Council – Standing Committee No. 2 - Inquiry into elder abuse

Supplementary questions Mr Nick O'Neill, Director, Capacity Australia, received 18 April 2016

1. What are your views on the potential value of the various provisions in the Victorian Powers of Attorney Act 2014 for New South Wales?

I think that there are a number of benefits for NSW adopting most of the provisions of the *Powers of Attorney Act 2014 (Vic)*.

The first is that you would have effective uniformity of the statute law relating to powers of attorney down the east coast of Australia covering approximately two thirds of the country's population. This is because the Victorian Act is based on the Queensland Act. Both those Acts provide for enduring powers of attorney covering both financial and personal decision-making and the same rules in relation to the making and revoking of powers of attorney and the same arrangements for reviewing both the making of such powers of attorney and the operation of them. Those arrangements allow concerned persons to bring their concerns about the making of those enduring powers of attorney, concerns about how the attorney is managing the maker's financial affairs and whether the attorney should be required to account for expenses or pay compensation for ant losses to the maker that he or she caused. These concerns are currently dealt with by the State tribunals, QCAT in Queensland, VCAT in Victoria and would be dealt with by NCAT in NSW.

The second advantage would be introducing into NSW a much better set of processes to be gone through at making stage of an enduring power of attorney. At that stage the makers (also called the principals or donors) would have to have explained to them the nature and effect of the appointment and the explainer would have to certify that the maker appeared to understand what he or she was doing. Also before the power of attorney became effective, the attorney (also called the donee) would have to have explained to them the nature and effect of the appointment and the obligations, set out in the legislation, that they undertook when accepting the role of attorney. Also the explainer would have to certify that the attorney appeared to understand what an enduring power of attorney was and their obligations when carrying out their function under the power of attorney.

Because attorneys would have to have explained to them that the legislation requires them, among other things, to act honestly, diligently and in good faith as well as exercise reasonable skill and care, avoid entering into arrangements which may cause a conflict of interest between their interests and those of the maker, and

that there could be consequences for them if they fail to do so, in terms of having to account (pay back money of the maker that they cannot account for) or pay compensation, they would not be able to get away with claiming that they didn't know what their obligations were.

The third advantage has already been referred to in the last paragraph, namely the liability to pay compensation. If the Victorian legislation were adopted, NCAT would have the power, which both QCAT and VCAT currently have, to require attorneys who misuse their powers and cause loss to the maker of the power of attorney to pay compensation to the maker, or their estate if the loss is discovered after their death. Currently seeking the return of lost money has to be dealt with in the superior courts with all their fees and complex procedures, the cost of lawyers and the complex rules of equity, which results in only people with very substantial resources taking the risk of pursuing such matters.

All these advantages are very substantial in themselves, but they also allow for the responsibilities of attorneys under enduring powers of attorney to become more generally known. As those obligations would be set out in the legislation in clear terms, as they are in Queensland and Victoria, many government and non-government organisations would be able to set them out on their websites, together with information about what a concerned person could do if they had a sound basis for believing that an enduring attorney was acting improperly in relation to the maker's money or property. This legislation would also help to "concentrate the mind" of potentially recalcitrant solicitors who did not carry out their obligation to explain matters as required to the maker and the attorney. Their failure to meet such a clear requirement of practice could amount to unsatisfactory professional and sometimes professional misconduct. Also the breach of that obligation could result in an incompetent or recalcitrant solicitor being liable in damages for the loss caused to the maker, if not others.

3. Have you any further comments about the desirability of criminal sanctions against perpetrators of elder abuse?

It is convenient to deal with question 3 at this point as one of the issues is, should attorneys who use their position to gain access to the maker's money or property and convert it to their own use, be subject to a new criminal sanction of elder abuse?

My personal opinion is that new criminal offences should not be created if there are existing offences relevant to the conduct that is considered to be criminal in

nature. There would be stealing offences that would cover the actions of an attorney (attorneys are also agents) in existence already; and stealing offences would also cover the actions of others who removed moveable property from an elderly person's house without their consent. Also, as Prof Lacey pointed out, there are offences relating to the duty to provide necessities.

However, the problem with criminal offences where elderly people are the victims is usually the problem of proof. The standard of proof is (appropriately) high and the reliability of the evidence of the victim, particularly if they have dementia, is likely to be low. The evidence of others may well be hearsay, being reports to them by eye-witnesses unable to give evidence, or reliable evidence, themselves. The difficulties of proving a case may well also discourage police commencing investigations or prosecutors from proceeding to pursue charges.

While all these reasons make creating new criminal charges a cosmetic rather than an effective exercise, there is also the question of the value to those adversely affected by the consequences the misappropriation of the maker's money or property by the attorney. For the maker of the power of attorney and those who will inherit the property of the maker upon his or her death, civil action is much more beneficial if what has been misappropriated can be recovered or compensation can be collected from the miscreants.

As can be seen from these comments, I don't see the value of creating new criminal offences. Existing criminal offences will cover most activities which should be considered criminal. Also making new criminal offences does not advance the interests of the victims of elder abuse and is open to the criticism that it is pretending to do something when nothing is actually being done. What would be much more useful is reforming the NSW powers of attorney legislation in line with the powers of attorney legislation in Qld and Victoria.

Now back to question 2.

2. What are your views on the responsibilities of banks and other financial institutions in preventing financial abuse, and how these bodies can be encouraged to take further action in this area?

My personal view, and the view of Capacity Australia (CA) is, that the banks and other financial institutions, including companies and firms that give financial advice are obliged to take practical steps to prevent the way that they relate to their customers for being occasions of financial abuse to their customers.

That is why CA developed a tool for training bank staff who have direct contact, face to face contact with customers to be able to recognise situations that could be occasions of people taking money from elderly people, and take action, using the architecture of modern banking premises to check out the matter in a way that is courteous to all concerned, but which is effective to stop actual occasions of misappropriation and also effective in discouraging wrong-doers, whether they be relatives, “new-found friends” or others from trying to defraud elderly persons by gaining access to their bank accounts or other resources held by the banks.

Again my personal view and that of CA is, is that financial advisors have to be careful, in the interests of their clients (customers), if they are involved promoting investments, which they know are risky, to particular clients who they know are seeking balanced portfolios and lack the ability to make assessments of investments themselves, but instead are reliant on their financial advisors for prudent advice. They need to give advice consistent with the sort of investment approach that their client has adopted. In addition, if involved in handling investments and customers seek advice as to the wisdom of making loans to family members or “new-found” friends, they need to give advice that is appropriate in the circumstances of the case.

Nick O’Neill
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