

**Submission  
No 100**

## **INQUIRY INTO INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES**

**Organisation:** University of Newcastle Legal Centre

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**Submission to the NSW Inquiry into Elder Abuse  
by The University of Newcastle Legal Centre  
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The University of Newcastle Legal Centre (“UNLC”) is a Community Legal Centre which is funded by the University of Newcastle. The UNLC provides law students who are completing the Diploma of Legal Practice as well as their law degree, an opportunity to gain practical legal skills in a ‘live client’ setting. The students, under the supervision of solicitors employed at the UNLC, work on all aspects of client’s legal cases.

The UNLC offers a drop-in legal advice clinic one day per week during University semesters. These clinics are open to the public, and although many clients just receive legal advice on that day, some legal cases will be opened as files, and the UNLC will continue to act in these cases. Through the provision of advice and ongoing involvement in casework, the UNLC sees many clients who have experienced elder abuse personally, or are the relative of a victim of elder abuse. Almost all the abuse we have seen relates to financial abuse. I have worked as a solicitor at the UNLC since 2003, and a reasonable amount of my practice concerns the area broadly described as ‘elder law’. I therefore wish to bring some of the issues I have encountered to the attention of the Committee.

Listed below are examples of cases seen at the UNLC:

- Clients who discover after the death of their parent, that their siblings who was acting as power of attorney has been acting inappropriately. This may be by removing excessive amounts of money from bank accounts or selling real property without good reason. Sometimes the client will describe that their parent had been worried about not having enough money during their lifetime, as they were told by the child acting as attorney that they had little money. When this is discovered after the death of the parent, proving that the attorney had acted inappropriately is very difficult and time consuming. This is especially so where the attorney was the only person with access to all information concerning the assets of the parent.
- Elderly clients who had previously appointed an adult child as power of attorney, and where it appears that child is acting inappropriately as attorney. Even though the client may themselves have their doubts about how the attorney is behaving, many clients, perhaps due to shame and embarrassment, do not want to confront the reality that money may be being spent without their knowledge. The dynamics of the family relationships involved will often mean that the attorney is able to resist the attempts of other relatives to find out where the money is going. Few relatives are willing to override the wishes of the older person by making an application to the NSW Civil and Administrative Tribunal (NCAT).
- Situations where an adult child is acting as power of attorney, in the knowledge that they are also a major (or sole) beneficiary of the client’s will. While this is a common arrangement, in a minority of cases problems arise. In these situations the attorney may be unwilling to spend the client’s money to move them into a higher care facility, because of the reduction in the asset pool that will then pass on death. In one particular situation, the guardian of the elderly person (a different adult child) made the decision, on medical advice, to move the elderly person to a

higher care facility, but the attorney refused to release the elderly person's money to pay for such a move, with the speculation being that this move would have reduced the size of the asset pool available after death. Such a situation creates an impasse which can only be resolved by an application to the Guardianship Division of the NSW Civil and Administrative Tribunal.

- Allegations of fraudulently obtained power of attorney documents are only explored where a suspicious party has the resources and willingness to investigate the matter further.
- Financial abuse made easier by the unwillingness of the older person to think about financial matters. Some older people are keen to no longer have to be involved in paying bills, managing money and attending banks, and this can unwittingly assist an attorney's unauthorized use of money. It can take a very long time for the problems to be discovered.
- Carers often have a strong influence and are sometimes able to overtly, or by inference, threaten to cease their caring role if for example, they do not receive a certain benefit under a will. I had a client who did not want her draft will sent to her home, and after it was executed she took no copy, but rather arranged to store it with a bank, in order to avoid the possibility of the carer finding out the true contents of the will.
- Situations of subtle pressure to pass assets to adult children during the lifetime of the older person. An example of this is the granny flat scenario, when an older person is promised care and company by living in a granny flat or room in a house, in return for paying down mortgage debt of adult children. The older person may then have no legal title to the property, despite having made a substantial financial contribution to it. If the relationship sours, the older person then has no protection and can even be at risk of homelessness.

### **Why financial elder abuse is a problem now**

Life expectancy in Australia has increased dramatically for both sexes in the last century. Children born today can expect to live around 33 years longer than those born 100 years ago. Since 1960 alone, the life expectancy of Australians has gone up 11 years. Essentially, people are living longer.

The second change in Australian society is the wealth that has been accumulated by our retirees. According to News Corp Australia, despite the global financial crisis, households aged between 65 and 74 are \$200,000 wealthier than households of that age eight years ago. Likewise, the Grattan Institute reports that the wealth of Australian elderly has increased at a greater rate than the rest of society. That being said, many of these retirees are asset rich, in that their homes are of great value (hence the increase in reported wealth), but they may be cash poor, in that almost all their wealth is found in real estate.

Some of the issues raised above are ones where we are not able to put forward recommendations to improve the situation, but they have been included as we recognize that they are forms of elder abuse which we have encountered.

## **The need for a re-examination of NSW laws**

From our experience, elder abuse can often be financial and occurs when a family member or carer misuses the power granted to them under a power of attorney. The current framework for power of attorney in New South Wales is found under the *Power of Attorney Act 2003* (NSW). A prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do. The idea behind the appointment of a power of attorney is to allow an individual to assist an older person, or a mentally incapable person, to manage their finances when they can no longer do so themselves. This may include paying their bills and dealing with utility providers and banks on their behalf.

Section 12 of the *Power of Attorney Act 2003* (NSW) does not allow an attorney to use their position to confer benefits on themselves and Section 13 does not allow an attorney to confer benefits on third parties (unless the document expressly confers that power). For example, a mother may allow her son who is her attorney to spend money on himself to help him pay for any necessary medical expenses he may have.

Whilst a power of attorney document does provide these protections under section 12 and 13 this does not prevent attorneys from misusing their powers, as there are limited checks and balances. In theory, an attorney is obligated to keep the attorney's money and assets separate from the principal's money and assets (unless the principal and attorney are joint owners or operate joint bank accounts) and keep proper accounts and records of how the attorney handles the principal's money and assets. However, in practice, attorneys are not supervised and are not required to report to any authority. Someone else needs to suspect that the attorney is acting inappropriately and then apply to the NSW Civil and Administrative Tribunal or the Supreme Court. The Tribunal or Court will look at the attorney's actions and possibly have them removed. Both of these processes cost money and take time and require a concerned individual who is willing to challenge the attorney and go through the process.

If the attorney is found guilty of inappropriately using their powers they can be removed as attorney but there is no set punishment. The only punishment under the Act is a maximum of five years' imprisonment under Section 49 which can occur if an attorney continues to act after their appointment has been terminated.

NCAT's annual report for 2014 recorded an increase in the number of applications lodged to the Guardianship Division of the Tribunal. The application rate has grown by approximately 23% over the five years from 2010-2011 (although the report acknowledges that this is largely due to Australia's aging population). It is also acknowledged that many of these applications may not be related to an issue of elder abuse.

The Sunday Telegraph reported 1000 complaints of elder abuse were made to the NSW Elder Abuse Helpline in 2014. Thirty percent of those calls related to financial abuse with stories of family members taking advantage of their elderly relatives for financial gain. As heartbreaking as these statistics may be, it needs to be pointed out that these numbers may not accurately reflect

the rate of elder abuse in NSW, as this process requires an individual to report the attorney. Indeed, these abuses are often not reported. This shows the prevalence of elder abuse in our society as a significant issue that is not adequately being monitored by the law.

Age Discrimination Commissioner Susan Ryan has said “elder abuse is a huge problem in Australia. It affects all kinds of families, it’s not just something that affects poor people or rich people or migrant families, it happens right throughout our community and it’s getting worse”.

We would suggest that the current situation in NSW makes detection and prevention of financial elder abuse very difficult.

### **Legislation in other Australian jurisdictions**

Other States in Australia have enacted laws to address the issue of elder abuse. In doing so they have developed legislation that addresses elder abuse by deeming it a criminal act, providing compensation to victims and requiring detailed record keeping.

Criminal Acts: In September 2015 Victoria amended its *Powers of Attorney Act 2014* (Vic) to become the only Australian jurisdiction to introduce a “supportive attorney” role (Part 7). This role confers only limited powers on the attorney, and is aimed at providing assistance to the principal in their decision-making through information and communication powers. The attorney does not have the power to make decisions relating to significant financial transactions, which means there is less risk of an abuse of power. However, the supportive attorney role would not be appropriate in a situation where an enduring power of attorney needs to be appointed, which means that it ceases to operate when the principal loses capacity. The Act includes criminal penalties for dishonestly obtaining and/or using power of attorney to obtain financial advantage or to cause loss to the principal (ss 135, 136). The maximum penalty for these offences is 5 years imprisonment.

Under the Queensland *Powers of Attorney Act 1998* (Qld) it is an offence to dishonestly induce the making or revoking of a power of attorney or an enduring document, with a maximum penalty of 200 penalty units (ss 26, 61). Likewise, under the South Australian legislation, it is an offence for an enduring attorney to fail to keep and preserve accurate records of all dealings and transactions made in pursuance of their powers of attorney, with a maximum penalty \$1000 (*Powers of Attorney and Agency Act 1984* (SA), s 8). A similar provision can be found in the Western Australian legislation, where the penalty is \$2000 (*Guardianship and Administration Act 1990* (WA), s 107(1)(b)).

The NSW *Power of Attorney Act 2003* does not contain specific offences relating to inappropriate behavior by attorneys (with the exception of the limited application of s.49).

Compensation: Some States provide for compensation orders where an attorney misuses their power to the principal’s detriment. The Victorian Act gives VCAT and the Supreme Court the power to order the attorney to compensate the principal for loss caused by the attorney that contravened provisions of the Act (s 77). The Queensland Act has similar provisions, and can also grant beneficiaries of the estate the power to seek compensation for loss caused by the

attorney. The Australian Capital Territory also provides for compensation for failure to comply with the Act (*Powers of Attorney Act 2006* (ACT), s 50). In South Australia and Tasmania compensation can be sought where an enduring attorney breaches their duties to the principal while the principal is incapacitated (*Powers of Attorney and Agency Act 1984* (SA), s 7; *Powers of Attorney Act 2000* (Tas), s 32). In the Western Australian Act the attorney is liable for any loss caused to the principal by failure to exercise reasonable diligence in protecting the interests of the principal (s 107(1)(a)).

New South Wales currently has no compensation available for losses caused by an attorney, other than orders that could be made under criminal proceedings for fraud.

Account and records: A person granted power of attorney has a duty to the principal to act in their best interests, including maintaining proper accounts and records demonstrating how the attorney is dealing with the principal's money and assets. However in most states, including New South Wales, there are not adequate checks and balances in this regard. As stated above, under South Australian and Western Australian legislation, it is an offence for an enduring attorney to fail to keep and preserve records of all dealings and transactions pursuant to their powers as enduring attorney.

### **Legislation in overseas jurisdictions**

In an effort to better understand how legal systems deal with the problem of elder financial abuse, we have also examined laws in similar countries.

The UK: The United Kingdom, in recent years, has reviewed all of its legislative provisions concerning the care of elderly people and those in need of care generally. The overarching statute that encompasses much of the efforts of their law reform is contained in the *Care Act 2014* (UK). While this statute principally concerns the mechanisms to care for elderly people, built into it is a framework covering those charged with their care in all fields and any penalties arising out of abuses of their role or power. Among the areas covered by this legislation, of particular interest to us are situations of financial abuse situations.

The *Care Act 2014* (UK) has a broad definition of financial abuse in s 43:

- “Abuse” includes financial abuse; and for that purpose “financial abuse” includes—
  - (a) having money or other property stolen,
  - (b) being defrauded,
  - (c) being put under pressure in relation to money or other property, and
  - (d) having money or other property misused.

The UK have a government office - The Office of the Public Guardian (OPG), which is an agency sponsored by the UK Ministry of Justice to help protect and support people who lack mental capacity to make decisions concerning their care or finances. Financial abuse is the form of abuse they deal with most frequently. Under the UK legislative scheme those suspected of financial abuse can be reported to this body for review.

There is a factsheet provided by the UK Ministry for Justice with some useful information to make sure the information is widely known and it provides some helpful indications of what financial abuse may entail, including:

- o change in living conditions;
- o lack of heating, clothing or food;
- o inability to pay bills/unexplained shortage of money;
- o unexplained withdrawals from an account;
- o unexplained loss/misplacement of financial documents;
- o the recent addition of authorised signers on a client or donor's signature card; or
- o sudden or unexpected changes in a will or other financial documents.

In the UK, there is a substantial statutory penalty for the criminal offence of ill treatment or wilful neglect. This criminal offence includes financial abuse and it applies to attorneys, Court-appointed deputies and anyone who has the care of a person who they believe lacks mental capacity. The penalty for conviction for the offence is a fine or imprisonment of up to five years. This penalty is covered in s 44 of the *Mental Capacity Act 2005* (UK). Such penalties act as a strong deterrent to those tempted to abuse their positions of responsibility.

United States: In the United States, an enduring power of attorney is often referred to as 'a license to steal', says Lori Stiegel of the American Bar Association Commission of Law and Ageing. Due to this widespread problem, all 50 states have enacted adult protective services legislation which establishes systems for reporting and investigating the financial exploitation of the elderly. Furthermore, several different government agencies have been established, such as social securities' Protection Services of Adult. One state, Minnesota, has enacted laws that make it a felony for the financial exploitation of a vulnerable adult involving an amount greater than US\$35,000, which carries a prison sentence of up to 20 years.

Likewise, in the last few years, bills have been enacted in many states that require training of financial institutions such as banks and credit unions to aid them in identifying elderly abuse through financial means. Private institutions have taken it upon themselves to aid in the execution of these laws. One such example is New York's' Best Practices on Reporting of Possible Financial Exploitation on the Elderly. Under the Best Practices, banks develop an internal department to field reports of possible abuse from bank officers and employees.

## **Recommendations**

Based on our experiences and research outlined above, we submit the following recommendations for consideration:

1. That there be established a system for the registration of powers of attorney and enduring powers of attorney. We recommend a simple system whereby a principal takes their power of attorney document (together with appropriate proof of identity) to an agency (such as Service NSW), and has it stored on an electronic register, so that banks, other institutions and individuals can check the authenticity of a document.

2. The *Powers of Attorney Act 2003* (NSW) in s 45 states:

(1) Subject to subsection (2), an offence under this Act is to be prosecuted on indictment.

(2) Proceedings for an offence under the regulations may be dealt with summarily before the Local Court.

There is only one explicit reference to an offence found in the *Powers of Attorney Act 2003*, and that is where an attorney continues to act despite knowing their appointment is no longer valid. We recommend that the legislature create offences that explicitly address activities by an attorney that are not in the best interests of the principal, and that these offences carry with them a criminal penalty. We would suggest that a definition of financial abuse be incorporated, perhaps somewhat like that in the UK mentioned above. Such penalties would also act as a deterrent to ‘would be rogue’ attorneys.

We also recommend also that any new legislation allow for compensation to be paid to the principal (or the beneficiaries of their estate in the event of death).

3. We recommend that there be a streamlined application process which can require an attorney to produce receipts and records for examination. We believe that requiring every attorney to do this may place too heavy a burden on attorneys, but if there were a system that could easily require it in situations where suspicions may exist, that would be worthwhile.

4. We also note our support for the recommendation put forward by Mr Tom Cowen of the Seniors Rights Service in relation to issues arising in relation to Granny Flats.