

**Submission
No 81**

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

Organisation: Capacity Australia

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Submission: Inquiry into Elder Abuse in NSW

1. What is Capacity Australia?

Capacity Australia (capacityaustralia.org.au) is a-not-for-profit medico-legal organisation led by senior legal and medical/psychiatric academics and practitioners. We are committed to supporting the rights of people with decision-making disability.

How do we do this?

One of the ways we do this is by providing education regarding capacity (decision making ability) across medical, allied health, legal, financial and community sectors across Australia and internationally. A major element of our mission is to ensure that people with decision making disability can make the decisions (especially financial) that they are capable of making, while preventing abuse.

We note that these dual and sometimes competing priorities, are asserted in Articles 12 and 16 of the United Nations *Convention of the UN Rights of Persons with Disabilities* (CORPD).¹ We note also that both these priorities are asserted to some

¹ United Nations Convention on the Rights of Persons with Disabilities (UNCORPD) (2012). <http://www.un.org/disabilities/convention/conventionfull.shtml>.

extent in the relevant legislation in New South Wales and elsewhere in Australia, as well as in the common law (the judge-made law). We also note that, when Australia ratified the CORPD, it made a declaration that commenced with the following statement:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards

We suggest that the Standing Committee makes its recommendations in relation to this Inquiry mindful of the need to allow people with decision-making disability to be involved as much as possible in the decision-making about themselves and that substitute decision-makers make decisions for them only when that is necessary, as a last resort and is subject to safeguards.

Another way we meet our commitment to supporting the rights of people with decision-making disability is by research. One of our priority areas for research is financial abuse – considered by many to be the most common form of elder abuse.

2. What is financial abuse and how common is it?

Financial abuse is defined as the illegal use, improper use or mismanagement of a person's money, financial resources, or property or assets without the person's knowledge or consent. For the purposes of the Inquiry, and specifically for developing safeguarding strategies, it is important to understand what kind of behavior is encompassed within this definition. Specifically, it includes:-

- Stealing, taking or 'borrowing' a vulnerable person's money, debit or credit cards, possessions or property without their knowledge or consent (with no intent to return/or pay back).
- Forging or forcing a vulnerable person's signature through misrepresentation, including blank withdrawal forms.

- Using a vulnerable person's money for purposes other than what the person wants.
- Cashing a vulnerable person's cheque without permission.
- Deceiving, coercing or unduly influencing a vulnerable person to sign a will, deed, contract or power of attorney.
- Pressuring, tricking or threatening a person to make changes to their will, power of attorney or other legal arrangements.
- Using a power of attorney in a way that is not in the interests of the donor or for direct personal gain (e.g. taking money from their account to pay for personal bills).

Perhaps the largest study of the nature and prevalence of elder abuse in Australia has been conducted on behalf of State Trustees Limited by Eastern Health Clinical School, Monash University, Melbourne.^{2 3} A small qualitative study based in NSW to examine how financial abuse occurs, and what can be done to prevent or reduce its incidence, was conducted by Alzheimer's Australia NSW.⁴ Such studies demonstrate that although figures vary – with certain cultural groups more vulnerable than others – financial abuse affects up to 5% of Australians over 65, such abuse being most often perpetrated by family members. This figure is likely to be an underestimate, as people do not easily and willingly report abuse. As well, cultural practises and beliefs often influence whether or not behaviour is considered abuse, and whether such behaviour abuse is even reported. Certain culturally and linguistically diverse (CALD) groups are at particular risk of abuse by virtue of isolation, “familism” which emphasizes the needs of the family over the needs of the individual, and shame or stigma which leads to concealing mistreatment and inhibiting formal help-seeking.⁵

² Wainer, J., Darzins, P., Owada, K., Prevalence of elder financial abuse in Victoria, Protecting elders' assets study, Monash University, Medicine Nursing and Health Sciences, State Trustees, 10th May, 2010,

³ King C, Wainer J, Lowndes G, Darzins P, Owada K (2011) *For love or money: intergenerational management of older Victorians' assets*, Protecting Elders' Assets Study. Monash University, Eastern Health Clinical School, Melbourne; http://www.eapu.com.au/uploads/research_resources/VIC-For_Love_or_Money_JUN_2011-Monash.pdf

⁴ <https://nsw.fightdementia.org.au/sites/default/files/20140618-NSW-Pub-DiscussionPaperFinancialAbuse.pdf>

⁵ Wainer J., Owada K., Lowndes G., Darzins P (2011) Diversity and financial abuse in Victoria Protecting Elder's assets Study Monash University Eastern Health Clinical School , Melbourne

3. The context in which financial abuse of elderly people occurs

We have outlined the myriad ways by which financial abuse occurs, often fueled by ignorance, family conflict or inheritance impatience in the context of an unprecedented intergenerational asset transfer from the baby boomer generation. As suggested above, undue influence (a term usually referring to coercion in the context of will-making, but also relevant to other transactions) is an important factor in elder abuse due to the physical and cognitive vulnerability of older people.⁶ Undue influence may be unwittingly facilitated by legal and financial professionals engaged for the purposes of executing documents or assisting with the management of financial affairs. This is often due to a failure to detect when people are struggling with the management of their financial affairs – ie when people lack financial capacity. Importantly, financial capacity includes, in addition to basic monetary skills, ability to conduct cash transactions, financial conceptual knowledge and knowledge of assets, *financial judgment*. Financial judgment involves the ability to withstand fraud, exploitation and abuse.⁷

The 2014 Family and Community Services Interagency Policy *Preventing and Responding to Abuse of Older People* (Item 7 of the Standing Committee's terms of reference for this Inquiry) acknowledges how important it is for legal and medical practitioners to understand mental capacity, consent and undue influence. Yet, despite initiatives to advance understanding of this concept,⁸ many legal and financial professionals undertake only cursory enquiry – usually in the form of closed questions prompting yes/no answers - when they are checking that a client understands the documents they are signing, if they check at all.⁹ This provides ripe opportunity for abuse by others seeking to exploit the person signing the document.

⁶ Peisah C, *et al.*, 2009. For the International Psychogeriatric Association Task Force on Wills and Undue Influence. The wills of older persons: risk factors for undue influence. *International Psychogeriatrics* 21: 7-15.

⁷ For further detail about the matters set out in this paragraph see Chapter 8 "Administration" of the ebook, O'Neill and Peisah, *Capacity and the Law*, published by Sydney University Press, but available free access on the AustLII website austlii.edu.au

⁸ NSW Capacity Toolkit at: <http://www.lawlink.nsw.gov.au/lawlink/diversityservices>; see also NSW Law Society Guidelines <https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm>; and

<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>

⁹ Collier, B, Coyne, C, Sullivan, K. (2005) *Mental Capacity*, Sydney, The Federation Press; 50-51.

This applies to the making of wills, enduring powers of attorney, gifts, contracts of sale and other financial transactions.

Other frontline professionals who are exposed to financial abuse involving customers are bank staff. We have used the following case for training and awareness raising purposes, as it is an example of the kind of financial abuse that bank officers working in branches regularly see. It is based on a true story told to us by banking staff in our consultation rounds from our research:

Mrs S comes to the door. A nice young man tells her he has just cut her lawn and would like her to pay him the \$50. She goes inside, comes back to the door and says she doesn't have the money. He kindly offers to drive her to the bank, which he does and she withdraws \$50 and hands it to him. This happens daily for 3 consecutive days until a staff member at the bank refuses to give Mrs S the money. The nice young man is suddenly no longer nice and leaves Mrs S stranded on the footpath beside a major highway.

Another factor contributing to the prevalence of elder abuse is the increased access of others to the financial resources of elderly people. With an increased standard of living in the last 60 years in Australia, many more older people own their own homes and have money in bank accounts and elsewhere, surplus to their living expenses. Also, a push by government and non-government agencies alike has encouraged the appointment of enduring attorneys to ensure that elderly people with declining physical and mental capacity are able to meet their financial obligations. The consequences of not doing so may include failure to pay utility bills with resultant termination of services, failure to buy food and self-neglect. Moreover, some of these people, because they are unable to manage their finances become the targets of "new-found" friends who take advantage of them financially, and then abandon them. Clearly, the appointment of an attorney is an advisable planning ahead strategy. While it does give others access to assets, and as such, an opportunity for elder abuse as suggested above, most attorneys, particularly family members, do carry out their responsibilities under their appointments appropriately and often very generously. A minority do not. This can be because of incompetence, inability to appreciate their responsibilities, a misguided sense of entitlement, "inheritance impatience" or just plain theft. As most enduring attorneys are family members and,

currently at least, sons, family members make up the majority of enduring attorneys who act inappropriately,

But what outsiders or family members not appointed as enduring attorneys see as financial abuse may not actually be abuse. Nevertheless, it may need intervention in order to protect the interests of the maker of the enduring power of attorney or the person whose estate is the subject of a financial management order. The cases referred to below reveal some of the subtleties of the situations that might arise.

In a 2011 case the then Guardianship Tribunal dealt with an application from Mrs QQM's stepson's wife to review an enduring power of attorney that Mrs QQM had made appointing her sister as her enduring attorney. The evidence before the Tribunal was that Mrs QQM's sister managed her investments to ensure that all her living expenses, including her nursing home and pharmacy fees, were paid and the accounts kept in order while her investments were managed by financial service providers to preserve her capital as far as possible. Also Mrs QQM, who was a high care resident in the nursing home with mild to moderate cognitive impairment due to dementia, told the Tribunal that she was happy with her current accommodation and that she wanted her sister to continue to manage her finances. The Tribunal dismissed the application to ensure that Mrs QQM's wishes were met.¹⁰ The concerns of the applicant were not demonstrated by the evidence. Indeed the evidence proved the contrary.

In a 2015 case in the NSW Supreme Court, White J dealt with an application by SW, a son of Mrs W. SW was the executor of her will. His application was for his brother, TW, to account to him as their mother's executor for money that he, TW, spent when he was first his mother's enduring attorney under an enduring power of attorney, and later the financial manager of her estate appointed by the then Guardianship Tribunal. White J ordered that TW account to SW for \$185,000 of the \$255,000 he

¹⁰ QQM [2011] NSWGT 2. For an example of differences between members of a family about enduring guardians being settled by conciliation between them see, ZAB [2012] NSWGT 6.

obtained from their mother, but not the remaining \$70,000 which was used for legitimate expenditures for their mother's benefit.¹¹

This case shows at least two issues relevant to this Inquiry. First, a use of the remedy of account that the Supreme Court can use, either to recover money from an attorney or financial manager either during the life-time of the person, or after their death of the person who was the owner of the money. The case also raises, but does not resolve, another issue, namely how tightly should the requirement to account be applied in family circumstances. In this case, Mrs W's house burnt down and TW and his wife took her in, looked after her for a period and made renovations to their house to accommodate her needs. White J referred to 19th century English cases, but also to Dixon J in a case in the High Court of Australia noted that:

*A guardian is not permitted to receive moneys for maintenance without liability to account except upon the condition that he discharges his duty adequately to maintain and not otherwise. Upon his default the Court will administer the fund or intercept the payments and has jurisdiction to order an account or an inquiry ... Where, however, the condition is performed the Court does not inquire whether the money has been completely expended or whether the recipient has spent small sums for his personal benefit, but, nevertheless, it remains an allowance to a person in a fiduciary capacity and for a definite purpose. ...*¹²

White J noted that TW's appointment as financial manager was subject to the authorities and directions of the NSW Trustee who directed that he keep an account with a template provided. However, White J took the view that even if the principle in those cases were applicable, it did not assist TW in this case. The point here is that some discretion must be exercised regarding the detail of accounting required for a person whose finances are being managed by someone else in the same household. If a common-sense discretion is not applied then the result can be that the job of looking after the person can become too onerous with that person losing all the personal, emotional, financial and other benefits of living in a household with members of their own family. This is what Jessel MR and Brett LJ in particular were driving at in cases White J referred to in his judgment.

In a case dealt with by the then Guardianship Tribunal in early 2010, Mrs TKX was an 88 year old woman with dementia who had lived at a nursing home in Sydney

¹¹ *Woodward v Woodward* [2015] NSWSC 1793.

¹² *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-421.

since 2009, prior to which had lived with and was cared for by her daughter, Mrs EAI. In 2005, Mrs TKX appointed EAI her attorney under an enduring power of attorney. Mrs TKX had six other children. They were step siblings of Mrs EAI. One of them supported Mrs EAI, but the other five asked the Tribunal to review the power of attorney due to a range of concerns about actions of Mrs EAI. The Tribunal directed Mrs EAI to provide accounts in relation to Mrs TKX. These accounts showed that out of a sum of \$272,000, only \$26,000 remained and that Mrs EAI could not account for \$60,000. The Tribunal noted that there was strong evidence that Mrs EAI had had a very close relationship with her mother and provided her with very considerable care and support as she aged and became very frail and that Mrs EAI continued to ensure her mother's needs were met. Nevertheless, because a large amount of money remained unaccounted for, the Tribunal made a financial management order (which suspended the enduring power of attorney) and committed the management of Mrs TKX to the NSW Trustee.¹³

The final case to mention is a 2015 decision of the State Administrative Tribunal of Western Australia in which the daughter of an elderly woman with dementia applied to the Tribunal to appoint the Public Trustee of WA as the administrator of her mother's estate. The mother, Mrs NR, had appointed her son and her daughter as her joint and several enduring attorneys. However, the son began to make payments from his mother's bank account to the bank account of a company he controlled. He made cash withdrawals for \$8,500 and claimed to have done work worth \$33,000 on the family home. The Tribunal appointed the Public Trustee as the plenary administrator of Mrs NR's estate.

It should be noted in these last two cases, while the applications were made to protect the financial resources of the elderly person from improper use, those applications indirectly benefitting the financial interests of the applicants. We will return to this issue later in our submission.

This small random sample of cases shows some of the complexities that arise when family members in particular are managing the financial affairs of others. Some just

¹³ *TKX* [2010] NSWGT 10.

take the money of the maker of the power of attorney and convert it to their own use, others are confused about their obligations and in mishandling things, gain advantages for themselves and yet still ensure that the person whose money it is, is still provided for. Others are incorrectly accused by others of mishandling the person's money out of misunderstanding, mischief, jealousy, long-standing family conflict or some other cause.

We suggest there are many other circumstances where there are shades of grey in relation to the question of whether the actions of an enduring attorney amounted to financial abuse or not. For example, the NSW Government is encouraging the building of "granny flats" on blocks of land where there is already an established house. This raises the question of the financial benefit to the attorney who puts such a building on their land, the maker of the power of attorney moves in but soon, whether predictable or not, becomes in need for more support than the attorney can reasonably or appropriately give and is moved to an aged care facility. Is this financial abuse? We are aware that, in the past in the time of the Protective Commissioner, and we assume currently in the time of the NSW Trustee and Guardian, great care is taken about this matter when the issue arises involving private financial managers.

We do have some positive recommendations to make to you, but we realise, as we are sure you do, that the issue of elder abuse is not amenable to simple solutions. However, before we do make our recommendations, we wish to set out some of the mechanisms that are currently available to deal with or help reduce the possibility of financial abuse in the first place

4. What are the mechanisms currently available to prevent, deal with or mitigate against financial abuse?

Concern about this issue is not new and over time a range of diverse actions have been taken to either prevent abuse or mitigate against financial abuse after it has occurred.

4.1 Education of finance and legal practitioners

For some time, the centrality of financial service providers in both the context of, and potential intervention for, financial abuse has been acknowledged. In December

2007, the Banking & Financial Services Ombudsman, Colin Neave, observing that "*financial abuse of vulnerable older people has emerged as a national and international issue regarding elder abuse*" and noting areas of potential liability for financial service providers, called for the development of national protocols and training programs for financial service providers.¹⁴ In 2008, the NSW Attorney General's Department's Capacity Toolkit,¹⁵ identified financial sector professional sectors as having a responsibility to undertake an assessment (screen) of a person's capacity to give directions regarding their finances and assets.

Between 2013 and 2014, Capacity Australia, supported by a grant from the Dementia Collaborative Research Centre (UNSW) - Assessment and Better Care, undertook research to develop exactly such education for the banking sector. We developed a brief online education tool¹⁶ to educate banking staff on the identification and management of suspected elder financial abuse, based on consultation with the banking industry including the Australian Banking Association's (ABA) [Industry guideline – Protecting vulnerable customers from potential financial abuse](#). Trials of the tool with two of the major banks showed that almost 100% of bank staff who used the tool showed improvement in knowledge regarding financial abuse and safeguarding strategies.¹⁷

Despite the availability, ease of use, and efficacy of this tool, launched in February 2015, www.bankers.asn.au/Media/Media-Releases/Media-release-2015/New-tool-to-help-detect-financial-abuse-of-Australians, no bank in Australia has availed themselves of the tool.

This remains in sharp contrast to interest in this tool overseas (where Capacity Australia has and is currently, assisting other countries such as Japan and Spain to develop prototypes for their financial sector). Most importantly, the disinterest in this

¹⁴ Financial Ombudsman Service, Banking & Finance – Bulletin 56, p 2.

¹⁵ New South Wales Attorney General's Department, *Capacity Toolkit: Information for government and community workers, professionals, families and carers* in New South Wales, (2008) at <http://www.justice.nsw.gov.au/diversityservices>

¹⁶ Peisah C. Bhatia MacNab J., Brodaty H. (2015) Knowledge translation regarding financial abuse and dementia for the banking sector: the development and testing of an education tool. *International Journal Geriatric Psychiatry* doi: 1002/gps.4379 Epub ahead of print] (In press)

¹⁷ Ibid.

issue locally remains in contrast to the longstanding commitment in the United States, where integration of education regarding elder abuse into the financial services industry has been a given for 20 years. For example, in 1995, the Financial Exploitation Prevention Project, by the Oregon Bankers Association developed a comprehensive toolkit (*Preventing Elder Financial Exploitation: How Banks Can Help*) for bankers which includes a training manual and a DVD with information for bank personnel about how to recognise and report possible elder financial exploitation. The DVD contains scenarios in bank settings based on actual events experienced by OBA members (<http://www.oregonbankers.com/community/elder-exploitation-prevention>).

Additionally, the American Bankers Association (in 2012) produced a professional development course with an extensive learning module to assist frontline employees to identify abuse, describe why seniors are vulnerable to abuse, examine the laws pertaining to abuse and identify the roles banks play in recognising the signs of elder abuse. Similarly, The Preventing Elder Financial Abuse Video Toolkit (<http://www.shcpfoundation.org/index.php?page=video-toolkit>) by the Senior Housing Crime Prevention Foundation (in 2013) has developed a video to be disseminated to banks. Finally, another paper-based training manual, published by the Californian Bankers Association ('Stop Elder Financial Abuse') provides knowledge about the relevant law in that jurisdiction as well as offering common scenarios and how to spot financial abuse and report suspected transactions (<http://www.calbankers.com/sites/main/files/fileattachments/elderfinancialabusefinal.pdf>).

In 2007, the Australian Banking & Financial Services Ombudsman suggested:

The North American resources would be relatively easy to adapt for the Australian banking environment. We think they would form a useful basis for the collaborative development of an Australian template training program that could then be used as appropriate or modified by individual financial institutions.¹⁸

A collaborative training programme has now been developed by Capacity Australia. Capacity Australia remains committed to educating the financial sector regarding financial abuse and safeguarding, and has been extending partnerships beyond the

¹⁸ Financial Ombudsman Service, 2007, p25

banking sector to financial advisors and accounting services. A series of seminars are planned for 2016 for this sector. In addition, we wish to explore safeguarding in vulnerable groups, particularly within specific culturally and linguistically diverse groups. To date, our resources have limited us to focus awareness-raising within a small number of community groups, and the NSW Ministry of Health.

As outlined from the outset, each and every one of these initiatives carried out by Capacity Australia are geared towards both abuse identification and prevention, AND promoting autonomy or supported decision-making where possible.

4.2 Financial management orders

From the time it was established in 1824, the NSW Supreme Court has had jurisdiction to make orders to take control of the financial affairs of a person unable to manage those affairs and to appoint suitable private persons or the Protective Commissioner, now the NSW Trustee, to manage those affairs in the best interests of the person. From 1989, the then Guardianship Board, now the NSW Guardianship Division of the Civil and Administrative Tribunal (NCAT), has had an increasing jurisdiction, and a now heavily used jurisdiction, to make financial management orders. Before it may make such an order, NCAT must be satisfied that the person is unable to manage their financial affairs, that there is a need for another person to manage those affairs, and that it is in the best interests of the incapable person that the financial management order be made. The NSW Mental Health Review Tribunal has a similar jurisdiction in relation to some people subject to the *Mental Health Act 2007 (NSW)*.¹⁹

If management of a person's estate is committed to the NSW Trustee or a private financial manager is appointed, they may be authorised to seek to recover the money or property improperly obtained from the person whose affairs are under management. If the private manager acts improperly in the management of the person's estate, they may be dismissed by the Court or Tribunal appointing them. They may also be pursued for the return or reimbursement of funds or improperly

¹⁹ For further detail about the matters set out in this paragraph see Chapter 8 "Administration" of the ebook, O'Neill and Peisah, *Capacity and the Law*, published by Sydney University Press, but available free access on the AustLII website austlii.edu.au.

used by them or others during their administration of the person's estate. We suggest that these matters could be explained in more detail to you by representatives of the NSW Trustee.

4.3 Enduring powers of attorney

Under the *Powers of Attorney Act 2003 (NSW)*, both NCAT and the Supreme Court may remove an attorney appointed under an enduring power of attorney. As was seen in the cases described briefly above, both the Court and NCAT may also require an attorney to furnish accounts and other information, copies of records and accounts, to have the records and accounts audited as well as make other orders.

Currently NCAT does not have power to award compensation to the maker of the power of attorney for any financial or property loss caused by the acts or omissions of the attorney, but the Supreme Court may employ other aspects of its inherent jurisdiction to award compensation.

4.4 Other safeguarding strategies

Private financial managers must account to the NSW Trustee

The NSW Trustee has a supervisory role in relation to private financial managers. Private financial managers are required to provide accounts to the NSW Trustee dealing how they managed the property and financial affairs of the person whose estate they were appointed to manage.

The NSW Trustee applies a risk based approach requiring financial managers to account either annually or at other intervals appropriate to the circumstances of the particular estate. For example at least annual accounting may be required when the estate is complex and or where there have been intra-family arguments about it. However, in other cases where, for example, the private manager is both caring for an elderly parent as well as managing their estate and is the only child and the only beneficiary under the parent's will, it will require accounting every two or three years. This represents an administrative approach to preventing financial exploitation under Article 16 of the CORPD.

On the other hand, when managing some of the estates committed directly to it, the NSW Trustee will, again using its statutory authority to do so, give the managed person responsibility for the management of part of their estate with a view of building or rebuilding, over time, that person's capacity to manage their own financial affairs. This practice is consistent with Article 12 of the CORPD as it will help the person to regain and demonstrate that they can manage their financial affairs and thus exercise full legal capacity.

Powers of attorney can be registered at present and must be registered if they are to be used to deal in land

While powers of attorney do not have to be registered in NSW to be in operation, they may be registered. However, before an attorney may deal in any registerable interest in land that is the property of the person whose estate they were appointed to manage, the power of attorney that they are acting under must be registered.²⁰

The relevant government agency dealing with this matter, Land and Property Information, advises on its website as follows:

You must register your power of attorney if your attorney is going to sell, mortgage, lease or otherwise deal with your real estate. Otherwise, it is not necessary to register it.

However, by registering your power of attorney it will be:

- on record as a public document
- safe from loss or destruction, and
- more easily accepted as evidence that your attorney is allowed to deal with your legal and financial affairs.

Capacity Australia's recommendations - generally

In making our recommendations to you, we limit ourselves to proposals that we believe will have the effect of reducing financial abuse of the elderly and, in one case, in making it easier to recover what the person has lost through a particular means of abuse.

We believe that our recommendations, if implemented, would be effective with little extra governmental expenditure. In relation to one matter, we recommend against

²⁰ Powers of Attorney Act 2003 (NSW) ss 51 and 52.

the adoption of a proposal because, in our view, it will increase government expenditure without doing anything to reduce financial abuse of the elderly.

We are also mindful that there is a balance between safeguarding a person's financial resources from the depredations of others and respecting their personal autonomy and their right to make their own mistakes.

Capacity Australia's recommendations – in particular

1. The Standing Committee recommend to the NSW Government that it encourage the banks and other financial institutions, accountants and other financial advisors to develop training programs for their staff, in order to ensure that they conduct their businesses in ways that help to reduce the incidence of financial abuse.

We note item 7 of the Standing Committee's terms of reference for this Inquiry is to inquire into and report on the effectiveness of the 2014 Interagency Policy *Preventing and Responding to Abuse of Older People* in safeguarding older people from elder abuse. We note that the Policy that government, non-government, community agencies and organisations should ensure their workers are, among other things, alert to the risk of abuse and are appropriately trained to respond in a timely manner, at all times acting in the best interests of the older person who has been abused.

We also note that the call by the Banking & Financial Services Ombudsman in 2007 for the development of national protocols and training programs for financial service providers appears to have gone unheeded, but that financial abuse of the elderly continues to be a matter of concern.

Our experience in relation to the education tool developed by Capacity Australia referred to above, was that banking employees with a role in disability policy, hardship matters, or with responsibility for vulnerable people were extremely interested in the banking tool, which raises awareness of financial abuse and strategies to deal with such activity. While those employees recommended the tool to management in both major and medium sized banks and credit unions,

management did not follow up on the matter. We understand that this was due to the lack of visibility of the problem at a management level and non-mandatory compliance with education on the matter. However we recommend that the Standing Committee advise the NSW Government to encourage banks and other financial institutions, accountants and other financial advisors to take appropriate action, including the development of training programs for their staff, in order to ensure that they conduct their businesses in ways that help to reduce the incidence of financial abuse.

As recommended by the Banking & Financial Services Ombudsman in 2007, financial institutions require education regarding their liability, for example, regarding the banks responsibility if a service professional does not pick up when someone might be struggling with management of their finances (i.e. when questions of financial capacity arise), or when the older person is operating under undue influence or where elder abuse exists, and assets or finances are wasted, dissipated, or stolen. This may be the impetus needed for financial institutions to pursue education for staff in financial abuse, capacity or supported decision making.

We also recommend that the Law Society pursue more actively the education of its members in regards to their “obligations to consider a person’s capacity before acting on instructions about a variety of decisions such as property transactions, civil litigation and future planning,” as recommended in the NSW Attorney General’s Department Capacity Toolkit.²¹ Such education must include the risk factors for and indicators of undue influence (both within and outside will-making)²² and the specific screening assessment of capacity to make Enduring Powers of Attorney and Wills.

2. Community Education and Awareness raising.

Funding for education and awareness raising of CORPD human rights, mental capacity and consent, elder abuse, neglect and exploitation within the community,

²¹ NSW Attorney General’s Department, *Capacity Toolkit: Information for government and community workers, professionals, families and carers* in New South Wales, (2008) at <http://www.justice.nsw.gov.au/diversityservices>

²² Peisah C, *et al.*, 2009. For the International Psychogeriatric Association Task Force on Wills and Undue Influence. The wills of older persons: risk factors for undue influence. *International Psychogeriatrics* 21: 7-15

medical, disability and aged care sectors is fundamental to ensuring the issue is brought to the fore. Education, using organisations already embedded within/across these sectors with existing relationships in the community and utilising relevant professionals, is necessary. Specific and tailored educational tools are required to obtain maximum knowledge translation. Education tools must also provide clear guidelines or procedures for staff/professionals and their employer organisations to empower action where necessary, with education and management support aligned with the 2014 Interagency Policy *Preventing and Responding to Abuse of Older People* and building and supporting work by the NSW Elder Abuse Helpline and Resource Unit.

A separate funding pool for Aboriginal and Torres Strait Islander (ATSI) and culturally diverse (CALD) communities is necessary. Funding for the development of education and awareness raising tools must incorporate quarantined funds for development of tools appropriate for communities and culturally diverse communities. The development of these tools must be done in collaboration with communities, and their leaders and elders, to ensure cultural authenticity. It is also essential for trainers / educators to work with leaders and elders to deliver education, and to be culturally competent.

Education and awareness raising material must ensure the correct balance between safeguarding and promoting autonomy and dignity of risk. More specifically, information on human rights (CORPD), decision making capacity, supported decision making and the right of an individual to make their own mistakes (dignity of risk) is required. Development of education programmes that include but extend Item 6 in the Inquiry Terms of Reference - Identifying any strength based initiatives which empower older persons to better protect themselves from risks of abuse as they age. These initiatives must empower older persons to both safeguard AND retain autonomy in their financial and other decision making for as long as possible.

Additionally, we support the extension of the NSW Police Force *Vulnerable Communities Officer* initiative by the establishment of such positions in each Local Area Command to assist in the identification of those at risk of financial abuse and to support victims of abuse.

3. Amendments to the Powers of Attorney Act 2003 (NSW)

We are aware that the New South Wales Law Reform Commission has recently been given a reference to review and report on the desirability of changes to the *Guardianship Act 1987 (NSW)*, having regard to the relationship between it and, among other Acts the *Powers of Attorney Act 2003 (NSW)*. We recommend that the Standing Committee recommend to the Government that the Attorney-General amend her reference to the NSW Law Reform Commission in order to authorise it to report on the desirability of changes to the *Powers of Attorney Act 2003 (NSW)* itself.

We consider that there are a number of matters set out in the *Powers of Attorney Act 2014 (Vic)*, which came into force on 1 September 2015 that, if incorporated into the NSW Act, would greatly assist an enduring attorney to understand the responsibilities they undertake when they accept the appointment as attorney. The Victorian Act sets out the duties of an enduring attorney in clear terms, in s. 63, as follows:

- (1) An attorney under an enduring power of attorney—
 - (a) must act honestly, diligently and in good faith; and
 - (b) must exercise reasonable skill and care; and
 - (c) must not use the position for profit, unless permitted under section 70; and
 - (d) must avoid acting where there is or may be a conflict of interest unless the power so authorises; and
 - (e) must not disclose confidential information gained as the attorney under the power unless authorised by the power or by law; and
 - (f) must keep accurate records and accounts as required by section 66.

- (2) Nothing in this section is to be taken to affect any duty an attorney has at common law.

Also if the enduring attorney has been convicted or found guilty of an offence involving dishonesty, they must state that they have disclosed to the principal (the maker of the enduring power of attorney) that they have been convicted or found guilty of an offence involving dishonesty.²³

As part of the process of accepting the appointment of enduring attorney, the person must sign a statement in the following terms:

I accept my appointment as attorney under this enduring power of attorney and state that:

²³ *Powers of Attorney Regulations 2015 (Vic)* Sch. 1.

- I am eligible under Part 3 of the Powers of Attorney Act 2014 to act as an attorney under an enduring power of attorney; and
- I understand the obligations of an attorney under an enduring power of attorney and under the Powers of Attorney Act 2014 and the consequences of failing to comply with those obligations; and
- I undertake to act in accordance with the provisions of the Powers of Attorney Act 2014 that relate to enduring powers of attorney.

This puts the person who is about to accept the office on clear notice that they have serious obligations to meet when carrying out their functions as an enduring attorney.

However, the Victorian Act goes further; it provides that the Supreme Court of Victoria or VCAT (the Victorian equivalent of NCAT) may order an attorney under an enduring power of attorney to compensate the maker of the power of attorney for a loss caused by the attorney contravening any provision of the Act relating to enduring powers of attorney when acting as attorney under the power of attorney.

This applies even if:

- (a) the attorney is convicted of an offence in relation to the attorney's contravention; and
- (b) the maker has died, in which case compensation is payable to the estate of the maker; and
- (c) the enduring power of attorney is invalid or has been revoked or, at the time of the contravention, was invalid or had been revoked.²⁴

Also, the Victorian Act makes it a criminal offence for an attorney under an enduring power of attorney to use the enduring power of attorney dishonestly either to obtain financial advantage for the attorney or another person or to cause loss to the maker of the enduring power of attorney or another person. It is also a criminal offence to obtain the making or the revocation of a power of attorney for either of those purposes.²⁵

These provisions setting out the duties of an enduring attorney, requiring a person about to become an enduring attorney to acknowledge, in writing, that they understood the obligations of an attorney under an enduring power of attorney and the consequences of failing to comply with those obligations (the risk of being ordered to pay compensation or charged with a criminal offence or both) and undertaking to act in accordance with the provisions of the Act, provide substantial

²⁴ *Powers of Attorney Act 2013 (NSW)* s 77.

²⁵ *Ibid.* s 135.

safeguards against enduring attorneys acting inappropriately in the first place. But the fact that they may be required to pay compensation for losses caused by them contravening the enduring powers of attorney provisions as well as being charged and convicted of a criminal offence and sent to prison for up to 5 years or fine a substantial sum or both should act as a deterrent to at least some enduring attorneys.

We recommend that these provisions be included in the *Powers of Attorney Act 2003 (NSW)*.

We note that when the concept of enduring guardianship was introduced into NSW in 1998 when amendments were made to the *Guardianship Act 1987 (NSW)*, those amendments also required that the effect of the appointment had to be explained by an eligible witness to both the appointor when making the appointment and the enduring attorney when they were accepting their appointment. These provisions remain in place. The eligible witnesses are Australian legal practitioners (practising solicitors and barristers), registrars of Local Courts, certain officers of the NSW Trustee and Guardian and the Office of the Public Guardian and certain overseas registered lawyers. The eligible witnesses must sign the appointment document stating that the appointor or the enduring guardian, as the case may be, appeared to understand the effect of the appointment document and, in their presence, signed it voluntarily.

The advantage of this extra requirement is that it requires the eligible witness to explain the appointment to both the appointor and the appointee. In relation to enduring powers of attorney, this would involve the witness explaining the responsibilities of an attorney to both the appointor and the appointee, along with all the other salient matters. This should ensure that each newly appointed enduring attorney knew what their role and obligations as an enduring attorney were. It should also help to reduce the number of enduring attorneys misusing their appointments. The disadvantage would be the increased complexity in the processes leading to appointments which could lead to fewer appointments. However, we note that there are significant numbers of appointments of enduring guardians each year and that the eligible witness requirements we propose in relation to the appointment of enduring attorneys apply to appointments of enduring guardians.

4. No mandatory registration of all enduring powers of attorney

We do not recommend mandatory registration of all enduring powers of attorney. We consider that the current requirements referred to by us above are enough.

Registration of itself would not bring any further protection to the makers of enduring powers of attorney. The requirement to have enduring powers of attorney witnessed by eligible witnesses who make sure that enduring attorneys know what their obligations are, together with easily obtained orders for compensation and the possibility of criminal charges, are much more likely to raise public awareness about enduring powers of attorney.

A mandatory registration process would cost money to run and would demand use of some of resources of Land and Property Information better used for that government agency's primary purposes.

5. The Office of the Public Guardian to become the Office of the Public Advocate and with authority to investigate allegations of misuse of enduring powers of attorney

A far more effective use of public money would be to give the Office of the Public Guardian, finally converted into a Public Advocate's Office, with one of its roles being the investigation of allegations of misuse by enduring attorneys of the property or funds of the makers of the relevant powers of attorney. It should be noted that, in Victoria, the Public Advocate is one of those listed as authorised to apply to VCAT or the Supreme Court for compensation for the maker of the power of attorney. The maker is also on that list together with any attorney under the enduring power of attorney, an executor or administrator of the maker's estate, the nearest relative of the maker or any other person whom VCAT is satisfied has a special interest in the affairs of the maker.²⁶ That list is likely to include at least some of those who also have a personal interest in compensation for loss caused by the attorney being awarded to the maker in their lifetime or the estate of the maker after their death.²⁷

²⁶ *Powers of Attorney Act 2014 (Vic)* s 78.

²⁷ *Ibid.* s 79,

Summary of recommendations.

- 1. The Standing Committee recommend to the NSW Government that it encourage the banks and other financial institutions, accountants and other financial advisors to develop training programs for their staff, in order to ensure that they conduct their businesses in ways that help to reduce the incidence of financial abuse.**
- 2. Community Education and Awareness raising**
- 3. Significant amendments to the Powers of Attorney Act 2003 (NSW) – as outlined above.**
- 4. No mandatory registration of enduring powers of attorney.**
- 5. The Office of the Public Guardian to become the Office of the Public Advocate and with authority to investigate allegations of misuse of enduring powers of attorney.**