

**Submission
No 50**

INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES

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The Director
General Purpose Standing Committee No. 2
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Dear Ms Foley,

RE: INQUIRY INTO ELDER ABUSE IN NSW

We welcome the opportunity to make a submission to this very important inquiry. We have chosen to restrict our submission to the subject of financial abuse and further narrow it down to financial abuse associated with the instruments known as Powers of Attorney.

1. The prevalence of abuse (including but not limited to financial abuse, physical abuse, sexual abuse, psychological abuse and neglect) experienced by persons aged 50 years or older in New South Wales

There are currently no reliable statistics on elder abuse as estimates vary considerably. There are many reasons given for this, not the least being that the abused individual may often consider the reporting of abuse as shameful, particularly if the abuse has been perpetrated by a family member.

Therefore, any information on elder abuse is usually anecdotal, or has been provided anonymously to organisations such as the Elder Abuse Helpline in NSW or the Elder Abuse Prevention Unit (EAPU) which is based in Queensland.

2. The most common forms of abuse experienced by older persons and the most common relationships or settings in which abuse occurs

As stated above, this submission will focus on one area, the financial abuse perpetrated by attorneys pursuant to a power of attorney instrument, in particular the enduring power of attorney (which, remains in effect after the principal (the person appointing the attorney) loses mental capacity unlike the general power of attorney which ceases to have effect after a principal loses mental capacity).

The potential for abuse of older persons derives primarily from four factors:

- the principal may be suffering from cognitive impairment, and thus will have minimal capacity to effectively monitor the activities of his or her attorney;
- usually “highly trusted” family members and relatives are most commonly appointed as attorneys;
- there is generally a limited understanding of the powers and duties of the attorney among both the principals and the attorneys themselves; and

- the fact that a revocation of a power of attorney will only protect a principal's assets from future depletion by the attorney. Revocation does not address any loss the principal has already suffered and in order to recover any such loss, the principal is required to undertake recovery proceedings.

3. The types of government and/or community support services sought by, or on behalf of, victims of elder abuse and the nature of service received from those agencies and organisations

In New South Wales the support systems available to victims of elder abuse are extremely limited. The Aged Rights Service (TARS) remains the only pro bono community legal service for older people in NSW and is essentially confined to the Sydney metropolitan area. The recently launched Government funded Elder Abuse Helpline is not a legal service and offers limited information and resources to victims of elder abuse.

4. The adequacy of the powers of the NSW Police Force to respond to allegations of elder abuse

As this submission is confined to powers of attorney there is currently limited recourse to the NSW Police Force through legislation (specifically the *Powers of Attorney Act 2003* (NSW)). Furthermore, if the abuse is perpetrated by a family member then it is unlikely that the victim will report the matter to the police.

The NSW Police Force currently do not have adequate powers to respond to allegations of financial exploitation of principals, except if an allegation of fraud is brought by or on behalf of the principal (under s192E of the *Crimes Act 1900* (NSW)).

5. Identifying any constraints to elder abuse being reported and best practice strategies to address such constraints

The constraints to elder abuse being reported are three-fold:

1. The *Powers of Attorney Act 2003* (NSW) does not provide any sufficient recourse for compensation or damages through the Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT) or the Supreme Court of NSW where it has been found that an attorney has abused their position for financial gain. Unlike Queensland or Tasmania, where under the *Powers of Attorney Act 1998* (QLD) s107 and under the *Powers of Attorney Act 2000* (Tas) s32 applications can be made for compensation for loss of benefit in an estate;
2. Secondly, many older people are not aware of the avenues that are currently available to them, such as the making of an application (by a defined "interested person") to the Guardianship Division of NCAT or the Supreme Court of NSW for a review of the making, revocation or the operation and effect of the power of attorney under the *Powers of Attorney Act 2003* (NSW) (specifically Part 5); and
3. Thirdly, even if the older person is aware of the process of making such an application, they are unlikely to make an application themselves for a number of reasons. These reasons include a lack of finances to run the litigation (in the Supreme Court), a general reluctance to engage in "legal matters", a fear of retribution from the

perpetrator, or fear of losing the “support” and contact with the perpetrator (if the perpetrator is a family member) and also the potential loss of contact with their grandchildren.

6. Identifying any strength based initiatives which empower older persons to better protect themselves from risks of abuse as they age

The key to empowerment of older people is through education of older persons specifically in relation to recognition of abusive situations, in the early stages, and the provision of resources to assist older people address it before it progresses to a “full-blown” situation creating an irreversible outcome and financial destitution.

Examples of educational resources are the “How Could They” brochure series co-produced by the NSW Older Women’s Network and the University of Western Sydney (now Western Sydney University) and the “Respect for Seniors” series of DVD’s produced by the St. Ives Uniting Church.

Further examples include the Legal Aid of New South Wales brochures targeted at older people such as “are you experiencing violence or abuse” and “speaking for myself: planning for later life decision making”.

7. The effectiveness of NSW laws, policies, services and strategies, including the 2014 Interagency Policy Preventing and Responding to Abuse of Older People, in safeguarding older persons from abuse

Currently in NSW the only available avenues to obtain a remedy for an exploited principal are as follows:

1. Under statute: bringing a claim for fraud under the *Crimes Act 1900* (NSW) or unconscionable dealing under the *Contracts Review Act 1980* (NSW); and
2. Equitable remedies: bringing a claim for breach of fiduciary duty¹, unconscionable conduct or undue influence.²

Reported decisions to date in respect of an abuse of a power of attorney include equitable remedies such as restitution for unjust enrichment³, declaration of invalidity⁴ and orders under the *Contracts Review Act 1980* (NSW) for unconscionable dealing.⁵

Despite the potential outcomes of redress, the pursuit of common law remedies in particular is often impracticable given the standard of proof required and the inherent cost of litigation.

¹ *Ward v Ward (No 2)* [2011] NSWSC 1292; *Catherine Margaret Thorn, as Executrix of the Estate of the Late Betty McAuley v Ian Geoffrey Boyd* [2014] NSWSC 1159..

² *Janson v Janson* [2007] NSWSC 1344.

³ *Lake v Crawford* [2010] NSWSC 232.

⁴ *Szoda v Szoda* [2010] NSWSC 804.

⁵ *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326. Other cases involving the grant of a power of attorney include but are not limited to: *Klotz v Neubauer* [2001] SASC 454, *Watson v Watson* [2002] NSWSC 919, *P v NSW Trustee & Guardian* [2015] NSWSC 579.

It is argued that the *Powers of Attorney Act 2003* (NSW) in its current form, allows for financial exploitation, in particular because of the following provisions:

- Firstly, the option of an attorney to commence their powers “once my attorney considers that I need assistance managing my affairs” (clause 4 of the Enduring Power of Attorney form);
- Secondly, there is no sufficient checking mechanism on an attorney and therefore unless a third party has a vested interest in the financial affairs of the principal (and subsequently makes an application to the Guardianship Division of NCAT or the Supreme Court of NSW) for a review of the power of attorney (under the *Powers of Attorney Act 2003* (NSW)) it is likely to go unnoticed. Examples of a third party include a Residential Aged Care Provider, who knows that the fees of the care recipient are the responsibility of the attorney (and the fees are no longer being paid), or a family member who can see their inheritance dissipating before their eyes; or it may also be a concerned individual who can see that the principal is being financially abused;
- Thirdly, the only avenue of recourse available to an exploited principal is for a review of the power of attorney under the *Powers of Attorney Act 2003* (NSW) (Part 5) and can only be made by an “interested person” being the attorney, principal, or other person who has a “proper interest” in the proceedings or a “genuine concern” for the welfare of the principal; and
- Fourthly, although attorneys must keep separate financial records, there is currently no requirement in NSW to ensure the attorney furnish accounts of the principal to a third party (unlike appointed financial managers who must present audited accounts annually to the NSW Trustee and Guardian). However, in Queensland under s85 of the *Powers of Attorney Act 1998* (QLD) an attorney is required to keep and preserve accurate records and accounts of all dealings and transactions made under the power and in South Australia under s8 of the *Powers of Attorney and Agency Act 1984* (SA) it is an offence to fail to keep and preserve accounts of dealings.

8. The possible development of long-term systems and proactive measures to respond to the increasing numbers of older persons, including consideration of cultural diversity among older persons, so as to prevent abuse

Amendments to the *Powers of Attorney Act 2003* (NSW) are urgently required. There are a number of possible long term systems and proactive measures that can be taken to prevent elder abuse such as:

- Removal of the option referred to in 7. above (in respect of when the instrument comes into effect);
- Implementation of a checking mechanism, such as the presentation of audited accounts, perhaps to the NSW Trustee and Guardian;
- Requirement of compulsory education of attorneys prior to their appointment (such education could be in the form of a short module on the powers and responsibilities of an attorney);

- The Introduction of the following legislative inclusions into the *Powers of Attorney Act 2003* (NSW), similar to that which is inserted in the newly introduced *Powers of Attorney Act 2014* (VIC), ss 4, 5 and 21.
 - principles to determine capacity should also be inserted to guide the assessment of decision making capacity [where the principal’s capacity may be in question];
 - a definition of “ decision making capacity”;
 - assessment of “decision making capacity”;
 - duties of enduring attorneys (or as outlined in s7 of the *Powers of Attorney and Agency Act 1984* (SA));
- The introduction of a presumption of undue influence where a transaction is entered between the principal and either the attorney or a relative, business associate or close friend of the attorney, similar to the *Powers of Attorney Act 1998* (QLD) s87. Such a transaction would give rise to a presumption in the principal’s favour that the principal was induced to enter the transaction by the attorney’s undue influence.
- Education of the individual principal as to their rights against the attorney and the responsibilities of an appointed attorney;
- Education of the witnesses of enduring powers of attorney, as research demonstrates some witnesses are not as familiar with the instruments as one would expect. It should be noted, that Law Societies generally do have in place Guidelines for Practitioners Preparing and Witnessing Enduring Powers of Attorney.
- Expansion of the subject Elder Law into undergraduate law courses, as currently it would appear that this is only taught at one university within Australia – Western Sydney University;
- Introduction of mandatory courses, for practitioners, on the assessment of mental capacity;
- Implementation of mandatory CPD for all prescribed witnesses (and those drafting the instruments) of enduring powers of attorney such as is required for the witnesses who are employed in Trustee companies, (s19(2), *Powers of Attorney Act 2003* (NSW));
- Amendments to the Act which would permit the Guardianship Division of NCAT to provide recourse where financial abuse has been found to occur; and
- Producing the powers of attorney forms and accompanying information brochure in a number of community languages allowing for both English and a number of other languages.

9. The consideration of new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse,

- Further expansion of pro bono legal services throughout New South Wales, similar to those provided by both the Queensland and Victorian Governments;
- Advertising, through appropriate media outlets which are educationally and culturally specific, at times that are appropriate to specific age demographic, such as 3am radio, and in particular community centres and local government publications etc;
- Coordinated information and education should be available to increase recognition of powers of attorney and to help recognize and detect abuse (through unusual signs/behaviour) and reporting of financial abuse to a central body;
- Inclusion of a checklist to assess a principals’ understanding of the nature and effect of the power of attorney and guidelines as to how to identify and report evidence of

duress, exploitation and any evidence that may put the principal's capacity into question;

- Creating criminal offences for the abuse of powers of attorney, whether by inclusion in the *Crimes Act 1900* (NSW) or the *Powers of Attorney Act 2003* (NSW), similar to s135 of the *Powers of Attorney Act 2014* (VIC) whereby it is an offence to dishonestly obtain/revoke or use an enduring power of attorney to either obtain a financial advantage or to cause loss to the principle;
- A requirement for the enduring power of attorney to be registered before the instrument takes effect;
- Implementation of a recognised procedure to revoke a power of attorney;
- In its current form a lay person can obtain a general power of attorney, complete the blanks in the form and appoint an attorney without the intervention of any advice as to the full consequences of their action. All general powers of attorney should contain a certificate by an approved witness to the principal's signature as required for by an enduring power of attorney; and
- A further certificate should be required by an approved witness to the attorney's signature to the effect that the witness had explained to the attorney the fiduciary nature and consequences of breach of the office of attorney and that the attorney had confirmed to the witness the attorney's understanding of the advice received.

10. Any other related matter

Some financial abuse is not malevolent but occurs through a lack of understanding as to the fiduciary duties of the attorney. This may be in part due to cultural differences, whereby it may be that the first born son automatically assumes the role of attorney, irrespective of their financial acumen. It may be that parents believe that they are obliged to appoint their children (who may be “upset” if not appointed by their parent/s). Many older people themselves confuse powers of attorney, enduring guardianship, advance care directives and wills and therefore are not in the position to have a full appreciation and/or understanding of the implications of appointing or not appointing an attorney.

We believe that there are four essential and non-negotiable criteria when appointing an attorney;

- The attorney must have integrity;
- They must have financial acumen;
- They must be fully informed of their responsibilities and the consequences of not adhering to these responsibilities; and
- They must be available, that is both geographically and willing.

Should a proposed attorney not meet all four criteria, it is argued that irrespective of their status, they should not be considered appropriate to be appointed as an attorney. However, should these criteria be met then it is argued that some of the financial abuse experienced by vulnerable people would be minimised.

Each state should actively promote and support national harmonisation of powers of attorney legislation as recommended by the Victorian Law Reform Commission's Inquiry into Powers of Attorney Report and in the earlier House of Representatives Report on Older People and the Law.

A national register for powers of attorney should be implemented. However, in recommending this we are mindful that the issues of privacy, cost and the need for each instrument to be validated at the time of registration, must also be taken into consideration.

Yours sincerely,

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References

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University of Western Sydney, Cognitive Decline Partnership Centre and COTA (NSW) *The Policies and Practices of Financial Institutions around Substitute Decision Making Instruments*, December, 2014

Legal Aid of New South Wales, series of brochures in relation to older persons, <<http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources>>

Crimes Act 1900 (NSW)

Powers of Attorney Act 2003 (NSW)

Powers of Attorney Act 2014 (VIC)

Powers of Attorney Act 1998 (QLD)

Powers of Attorney and Agency Act 1984 (SA)

Powers of Attorney Act 2000 (TAS)