

# Response to Australian Law Reform Commission's Elder Abuse Inquiry Proposals

By Hervey Bay Seniors Legal & Support Service  
(Managed by the Hervey Bay Neighbourhood Centre Inc)

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Overall we are generally in agreement with the ALRC proposal, in particular the move towards supported decision-making rather than the current best interests approach.

Our comments below are limited to proposals which we strongly support or with which we disagree.

## **2. National Plan**

### ***Proposal 2-2***

Agree. However it's important to recognise that any study will show financial abuse as the primary abuse. This may not necessarily be accurate and may only appear to be the most common form of abuse because it is easiest to evidence.

## **3. Powers of Investigation**

We fully support the ALRC proposals under section 3 and the social rather than medical approach to disability.

The shift in focus away from the question of legal capacity is welcome. Where a prerequisite for investigation is medical evidence that the person is incapacitated the investigation can be easily negated by the absence of co-operation. Further, medical evidence focuses only the clinical side of the incapacity and does not really focus on the "freely and voluntarily" requirement for capacity. Many of the calls received by this Service result from a concern by one family member that the older person is being controlled or manipulated by another. In those circumstances it can be difficult for the concerned individuals to have the matter investigated if there is no medical evidence of incapacity.

What amounts to "care and support needs" needs to be wide enough to cover all situations where there is a vulnerable older person. In addition to "physical impairment" we suggest the proposed definition be extended to "physical frailty" which is not necessarily the same as "impairment" but can be the reason the older person is dependent on the care of others.

Another important element in the fight against elder abuse, in addition to community awareness and education, is social inclusion. Again, this is also more a community directed activity rather than something that can be addressed by law reform.

We support the rights of the older person to make their own decisions and the limitation of the power to investigate to those who have care and support needs. Elder abuse may occur in many circumstances such as where the older person, who otherwise does not have any disability, is being manipulated due to fear of what the perpetrator may do or due to their love of the perpetrator. If they are willing to tolerate the situation then it is their prerogative and the matter should not be subject of the further investigation.

In our experience family squabbles over financial abuse of an elder person can sometimes be due more to a feeling of "them getting more than we are", or "we are going to miss out", rather than any real concern for the older person being left without and often with no real appreciation of the care

given and cost of looking after the older person. If the older person has care and support needs but is comfortable and well cared for, the fact that the carer is spending their money may be of no concern to them. Their only desire is to be cared for with the least amount of conflict amongst their children so their perspective on the issue is not the same as the complaining children. That is why it is so important that the person's right to refuse assistance is respected subject to capacity and undue influence considerations.

Further if the older person is content, well cared-for and has funds in excess of their needs, do we want to spend public money investigating a fight between the children as to what is happening to the excess, particularly if the older person does not know what is happening and does not have the capacity to care about it. It may very well distress the older person to know that one of the children has taken all their money but whose responsibility should it be to remedy this situation where the money is immaterial to the older person and it does not affect their present situation. Against this position is the fact that the abuser is often in breach of their duties and obligations as an Attorney, we therefore have the situation where our legislation has protections built into it but with insufficient powers, abilities and rights to enforce them.

On the issue of collaboration and coordination we have found that where an older person resides in Queensland but the abuse is in relation to their assets in other states, agencies in those states have been reluctant to assist. This is generally because their mandate is in respect of residents of their area. A protocol for cross-jurisdictional assistance is required.

## **5. Enduring Powers of Attorney and Guardianship**

We do not support the proposal for registration of EPAs.

Undoubtedly a register that is easily searched, up to date, cost effective and secure would make life easier for those who have to rely on the validity of an EPA. Against this is the added layer of cost, complexity and bureaucracy imposed on everyday individuals to undertake what should be a simple transaction to protect their future interests.

Our clients are generally older persons living on a pension to whom any additional cost or complexity in their lives is an extra burden they do not want to deal with. If it is too hard they will not do it. If the validity of an EPA is dependent on registration we can see the situation where many people do not have a valid document or the relevant Attorney remains a person who is no longer the most appropriate to the older person's current situation.

There are a multitude of issues that arise with national registration:

- Cost
- Abuse and Fraud – if a false document or one executed by an older person who does not have capacity is registered it will have prima facie validity and present a bureaucratic battle to have the situation reversed. Whose job is it to verify that any EPA that is registered is valid?
- How do you deal with the resignation or death of attorney or verifying that a successive attorney now has power to act?
- Timeliness;

- Complexity;
- Access/Privacy;
- Volume – the adult population of Australia is approximately 17.5m. Do we really want a system that records the EPA of every one of those adults?

Although financial abuse is one of the most common forms of elder abuse, those that misuse their EPA are arguably only a small proportion of the total number of Attorneys appointed. A register system would add another layer of complexity to a system which is already quite complex for the sake of potentially preventing a small element of misuse. The Powers of Attorney Act already contains provisions to protect third parties from liability as a result of acting on an invalid EPA. A register is a poor substitute in the prevention of elder abuse compared with the contact and knowledge of the staff of banks, health providers and lawyers who deal with the older persons on a regular basis.

Much of the abuse of the role of attorney is perpetrated as systemic abuse. That is, professionals including banks, doctors, solicitors, nursing home staff not having a clear understanding of what the role of the attorney is, and when and how it begins. The resources used to establish and maintain a registry could be better spent with educating professionals who are likely to become part of the system which may use the enduring document.

#### ***Question 5-2 Random Checks***

We also oppose the idea of random checks; it has a Big Brother connotation and is an undue intrusion into a person's private affairs.

#### ***Proposal 5-4 Enhanced Witnessing***

We support the proposal of enhanced witnessing by 2 persons.

However, we do see difficulty with the requirement that the witness certify that the enduring attorney or guardian appears to freely and voluntarily sign in their presence. In Queensland the attorney's signature is not required to be witnessed. What generally occurs is that the document is signed by the adult in the presence of witnesses and then the document is sent to the attorneys for signature. Often the attorneys do not reside close to the adult. Therefore the recommendation would place a significant limitation on the manner in which EPAs are prepared in Queensland if the same witnesses as those witnessed the adult's signature are required to be the ones certifying the attorney's understanding. A better procedure may be for the Attorneys' signature to be witnessed by one of the persons listed, not necessarily the same witness to the adult's signature, and the witness would certify that the Attorney understood the nature of their responsibilities and obligations, in particular with respect to conflict transactions, records and keeping the older persons property separate. The role of the witness should extend to witnessing the attorney's signature and assessing whether the attorney also appears to understand their role. All too often we find that the principal knows exactly what their rights are, but can't stop abuse by the attorney because the attorney does not know what the responsibilities entail.

#### ***Proposal 5-6 – Conflict Transactions***

One of the issues with this proposal is that an EPA is signed when a person has capacity but under the document they may give the Attorney immediate financial power, just in case it is needed, even

though they may not intend for it to be exercised until they lose capacity, which may be 20 years in the future. This proposal would mean that an adult whilst they had capacity could not enter into any conflict transactions with their spouse or child without tribunal approval, unless 20 years before they thought to include it in the EPA document. We consider this unworkable and does not provide protection against elder abuse.

We consider that the relevant authorisation should not be contained within the EPA document but made on a separate, appropriately witnessed document, and that tribunal approval to transactions should not be required where a person has capacity.

#### ***Proposal 5-9***

The role of education cannot be understated in regard to conflict transactions and keeping property separate particularly in relation to banking procedures. It is common to learn that banks have advised attorneys to transfer funds from the principal's account to the attorney's account for one reason or another. This is a conflict transaction under the Powers of Attorney Act but allowable under banking arrangements.

#### ***Proposal 5-10 National Consistency***

We agree with the proposal for nationally consistent laws, this is particularly important if some states move more towards supported decision. This will bring into question whether the powers given are consistent with those which could be given under another State's legislation and therefore whether the EPA is enforceable in that State.

#### ***Proposal 5-11***

Agree. Perhaps the language used in the name of documents should be changed to reflect the accuracy of the role. For example, change the language from Enduring Power of Attorney to Enduring Responsibility of Representative.

## **6. Guardianship and Financial Administration Orders**

### ***Question 6-1 – how should newly appointed guardians/administrators be informed of their roles***

Our experience is that many family members who are appointed guardians and administrators have very low understanding as to the extent of their responsibilities and obligations. We would suggest that either:

- when a person applies to become a guardian or administrator they include a certificate from a suitable organisation certifying they have been trained in the requirements and they fully understand them; or
- in appropriate cases, where the Tribunal considers the person does not fully understand their role, the appointment be conditional on the person receiving the appropriate training within a specified period and lodging the requisite certificate with the Tribunal. If this is not done, the appointment lapses and the Public Guardian/Public Trustee is appointed.

The training could be conducted by either the Public Guardian/Public Trustee, or other organisations who work in the area. The organisation could be funded to conduct the training or hold courses for a small fee. The suitable organisations need to have a presence in rural and remote areas.

***Question 6-3 –what is the best way to include the adult in the process***

The adult should be required to attend the proceedings unless they are physically unable to do so. Since the proceedings are about protecting their rights it is fundamental to the Tribunal reaching a decision that it be given the opportunity to see and speak to the adult before making any decision. We have seen many cases where the adult does not know of an order until after it is made. This is invariably the case where the older person is in hospital and the application is made by the hospital.

Additionally even if the tribunal sends the adult and the family members the paperwork they may not understand the consequences or importance of the hearing. For example, we have had a situation where an application for appointment of the Public Trustee/Public Guardian as Administrator/Guardian to the wife was made by a local doctor without the knowledge of the family. QCAT sent the documents to the husband who did not understand them and took no action. No other member of the family was informed and the Public Trustee and Public Guardian appointed at a hearing where no family member was present. This was despite the wife being part of a close and loving family who would have taken on the roles had they known about it.

It is therefore suggested that in circumstances where the Tribunal has not received any contact from the adult or their family, an agency which protects the rights of the aged or disadvantaged be notified by the Tribunal of the hearing and asked to verify the adult/family is aware of the proceedings and its consequences.

## **8. Family Agreements**

We agree with proposal 8-1 and consider family should be widely defined to include all relationships which arise out of family or domestic circumstances which have been sufficiently long-standing to give rise to a relationship of trust. If state and territory tribunals are given jurisdiction to resolve family disputes, the value of family conferencing should be recognised.

## **10. Social Security**

***Proposal 10-3***

Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that involve social security payments. We agree with this proposal as we regularly see examples of Centrelink staff having inconsistent knowledge regarding the Centrelink nominee arrangements –v- enduring powers of attorney document.

## 11. Aged Care

Too often abuse of a resident occurs because the facility is understaffed. The Aged Care Act 1997 should provide a staff to resident ratio requirement.

### ***Proposal 11-8***

Agree. Too often older people appoint 'risky' attorneys or spend unnecessary time in hospital waiting for the tribunal to appoint a substitute decision maker because aged care facilities will not offer accommodation to prospective residents who do not have a substituted decision maker appointed.

### ***Proposals 11-9 to 11-11***

Agree.

## Recommendation

We recommend that Federal government fund a national body, representing service providers, older people and advocates to:

- participate in the development and implementation of the Nation Plan to better protect the rights of older Australians;
- coordinate independent research and evidence based policy development;
- promote and co-ordinate best practice in elder abuse prevention, intervention and remediation measures.

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