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Work: SSSL Barristers and Solicitors - Reputed in Australia and Globally

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The Chair

Australian Law Reforms Commission (ALRC )

 **Submissions to the ALRC on Elder Abuse in Australia**

SSSL Barristers and Solicitors is concerned about Elderly Abuse in Australia, therefore, these submissions is based on empirical evidence on financial abuse from several research studies in Australia, including the law firm’s practical legal experience. Further, Carmelle Peisah, President of Capacity Australia predicts that one million people will be living with dementia by 2050. She says “this ‘tsunami’ ahead, it’s vital that legal , medical and financial practitioners identify when people can’t manage and provide them with help, rather than miss it and unwittingly facilitate elder abuse”.

The WHO (2017) defines elder financial abuse as “the illegal or improper exploitation or use of funds or resources of the older person” . Darzins et al ( 2009) estimated that this experience affects between 0.5% and 5% of older Australians. The forms that financial abuse takes are varied, and it is this kind of abuse that is most likely to come to the attention of professionals across (including banking , law and welfare sector) because it may involve transactions and engagement with institutions and organisations. Financial abuse covers a spectrum of behaviours , and a guide is published by Seniors Rights Victoria describes it as existing “ in the gray area between thoughtless practice and outright theft” ( Kyle, 2012, p.7). Wainer et al (2010) studies show the ways financial abuse was carried out were through misuse of powers of attorney, coerced changes to wills , unethical trading in title to property, and the coercion of people without capacity into signing documents in relation to assets that would result in financial gain from the perpetrator.

Bagshaw et al ( 2013) examined in separate surveys the views of 209 service providers on the risk factors for elder financial abuse , and the concerns of 114 older people and family members about financial abuse . Six risk factors were identified by service providers:

1. A family member have a strong sense of entitlement to an older person’s property or possession (84%) ;
2. An older person having diminished capacity (82%);
3. An older person being dependent on a family member for care (81%);
4. A family member having a drug or alcohol problem (73%);
5. An older person feeling frightened of a family member (73%) ; and
6. An older person lacking awareness of his or her rights and entitlements (72%) .

About half of the sample of older people and their family members indicated they did not have concerns about financial management issues. The balance indicated they were “somewhat concerned” (30%), “concerned” (8%) or “very concerned” (18%).

Several studies and analytic reports have raised concerns about financial management practices that are risky from perspective of both the elder whose finances are being managed and the person managing them. Assistance in managing financial arrangements may be informal or formal in nature, ranging from informal responsibility for banking and bill payments, to substantial responsibility for financial arrangements being assumed. The frameworks and instruments governing formal transfers of financial responsibility are those relating in enduring power –of-attorney instruments, which are executed when a person has capacity, and allow another person (the attorney) to take responsibility for financial matters . If an enduring power of attorney has not been executed and it becomes necessary for someone else to exercise responsibility for an elder’s financial affairs, then application must be made be made to the guardianship board or tribunal. It appears that anticipatory execution of enduring power –of –attorney instruments is common , with one study of supported asset management identifying 69% of a sample of 421 Victorians aged 65 and over using an enduring power of attorney (Tilse, 2007, as cited in Wainer et al., 2010).

The practical legal experience of SSSL Barristers and Solicitors with their client’s as well as empirical research studies prove that enduring power of attorney won’t always protect the elderly. Family relationships can become pretty fraught when a parent dies and their assets are split up. The division is not always fair and often hasn’t been planned properly. Another equally difficult situation is when the parent –or anyone in the family –becomes unwell and can no longer handle their finances, and someone else needs to take over.

The government statistics shows only 11 per cent of Australians have a valid enduring power of attorney, most households are obviously unprepared. Recently a new report has been released which indicates even when necessary legal steps have been taken there are still problems.

The report, *Policies and Practices of Financial Institutions around Substitute Decision Making*  is a collaboration between the University of Western Sydney (UWS) , the Cognitive Decline Partnership Centre and the Council on Ageing NSW . It looked at how banks and credit unions handle powers of attorney and whether these instruments are practical and effective.

A key problem, it found was that there was no national register to help verify the authority of a power of attorney. Further, the rules relating to the duties and registration of those holding powers of attorney differ between states and territories.

“It’s at the bank branch level that many problems surface”, says Sue Field UWS adjunct fellow in elder law, further, she says “banks do have policies about powers of attorney, but sometimes it is not filtered down. There is also no mandatory requirement in NSW to register these powers of attorney unless you are going to engage in property dealing in which case you’ve got to register with Land and Property Information. So the bank has no guarantee that this instrument is the most recent. They take it at face value but it could have changed”.

**Recommendations**

1. Barbara Campbell of Campbell & Lawyers says “ You should only give the power of attorney to someone you trust with your life”;
2. Field agrees with Campbell and says “ the first thought most people have is their spouse or one of the kids, but before you even think about what you want: integrity, geographical availability and financial acumen , the elder is deceived. If they can’t look after their own money, how can they look after yours?”;
3. Research shows that it tends to be sons , nephews and male relatives who are more likely to “cheat” or misuse funds;
4. Family Conference of all the members of the family;
5. Training tool for tellers. Jenna Macnab, Board Director of Capacity Australia says “if a teller notices that another person comes in with an elderly customer but does all the talking for them, [the tool] guides them to talk to the customer in private instead. It also provides information on powers of attorney, when to escalate matters to a manager , and using support decision-making – for example, where a customer appears to be confused they may be supported just by removing them from the formal teller environment to a less noisy place”.

**Conclusion**

Lord Atkins in Donoghue’s case held “ the rule that you are to love your neighbour becomes in law , you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour?. The answer seems to be –persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so effected when I am directing my mind to the acts or omissions which are called in question”.

The above ratio has always to be applied to Elder Abuse in Australia. The whole concept of love for the elderly has been lost in contemporary Australia. The writer’s say “Everyone for himself/herself, and the devil for the hindmost”.

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Dated: 27 Feb 2017