44. University of Newcastle Legal Centre

Name of organisation: University of Newcastle Legal Centre

Question 1

Question 2

In my opinion the key challenge in identifying the best practice legal response is recognising the rights and dignity of the older person, including their right to self determination, while also protecting them, especially their vulnerability.  The balance between the rights of the individual, and their need for protection will often be difficult.

Question 3

All examples of elder abuse I have seen in legal practice (at a Community Legal Centre) relate to financial abuse and I have detailed some of them below:

* An elderly person who resided in an aged care facility had previously appointed her adult daughter as her power of attorney.  Only after the death of the elderly person did it come to the attention of her other children, that the attorney had been withdrawing significant sums of money over an extended period, and the attorney was unable to explain what that money had been used for.  It would appear to have been an abuse of the power of attorney, with the ultimate loss being borne by the beneficiaries of the estate, as it was not discovered until after the death of the elderly person.  In a similar scenario, in another case it was discovered that the house had been sold for an undervalue amount, by the attorney.
* An elderly person who had appointed one adult child as power of attorney, and the other as enduring guardian.  On medical advice, the guardian sought to have the elderly person (who had lost mental capacity) placed in an aged care facility.  The attorney refused to release the money to fund this, apparently on the basis that it would ultimately lead to a reduction in the size of the estate able to be inherited after the death of the elderly person.
* It is most frequently adult children who raise the issue of potential abuse of a power of attorney document by one of their siblings, rather than the elderly parent themselves.  This may be because the elderly person (the parent) is ashamed of the behaviour of their child, or alternatively does not acknowledge the problem or wants to avoid confrontation.  The adult child who brings it to light may be acting out of the best interests of their parent, but also of their own future entitlement after the death of the deceased.  Even when an elderly person raises concerns, they are often unwilling to confront the issue because of the further difficulties that may cause within a family.
* Carers can sometimes exert pressure to have the elderly person prepare a will in certain terms.  I had a client who did not want the draft will sent to her house (and did not wish to keep the finalised will there) because of her concerns about how the carer would view the will and its contents.

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Question 8

Much of the elder abuse I have seen does not occur when the elderly person lacks mental capacity to manage their financial affairs.  It occurs when their relative (most often an adult son or daughter) takes advantage of the trust placed in them, by their parent, to assist them in financial matters.  The elderly person may not be someone therefore who is automatically identified as needing income management.

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Older people are often extremely vulnerable when family agreements break down.  They may often have smaller social circles, so that it is mainly family who they see socially.  This makes it difficult for those outside the family to see that there may be abuse occurring.  In addition, shame that their own family member would treat them so badly will encourage many older people not to report abuse, or seek redress.  Examples of the types of family agreements where this might happen are an agreement by an older person to sell their house, give the proceeds of sale to an adult child to help pay off a mortgage, in return for the older person having somewhere to live (ie a granny flat, or bedroom in the adult child's house).  The older person will have minimal legal protection if the agreement breaks down, and they will be at significant risk of homelessness.

Question 28

The ability to seek redress through a Tribunal may be preferable to having to take an equitable claim to the Supreme Court.

Question 29

I have clients who are concerned that their siblings (who were appointed as attorney for elderly parents) have spent money inappropriately.  This often does not come to light until the elderly person has passed away, as even if suspicions existed, obtaining copies of bank records etc is a difficult process for the concerned adult child, precisely because of the power the attorney has in relation to the property of the elderly person.  If the elderly person has completely lost capacity, the problem is more acute as the concerns cannot be discussed with them.

The abuse would be prevented by a wise selection of who to appoint as attorney.  If people intending to appoint an attorney were provided with advice about the importance of selecting an attorney carefully, that would obviously help.  Beyond that however, education of attorneys may also help; obviously both these approaches are based upon education as a preventative step.  However certain 'rogue' attorneys who intend to benefit personally, are not likely to be deterred by education on the matter.

In relation to redressing abuse when it occurs, in my opinion a readily accessible system requiring an attorney to account for spending would be more likely to identify problems at an earlier stage.  By way of explanation, if an interested person is concerned that an attorney is acting inappropriately, current NSW law provides 2 options, firstly in the most serious instances of fraud, the police could be approached.  More often where there are just concerns and suspicions, the step available is to make an application to the NSW Civil and Administrative Tribunal (Guardianship Division), which can review and if necessary remove the attorney.  The onus is on the interested person to obtain enough evidence to satisfy the Tribunal that the current attorney is not acting appropriately.  Obtaining such evidence and having the resources to pursue such an action may often be challenging and time consuming.  My suggestion is that it be possible for an interested and concerned person to effectively 'tip off' the Guardianship Division (of NCAT), which could then, as an administrative process, require the attorney to account for the money and assets of the person for a designated time period.  Through that process, NCAT may then be able to identify concerns and consider whether the attorney should continue in that position.   I am aware that such a system could itself be abused however, in that an adult child who was annoyed not to have been appointed as attorney, and who holds animosity towards the appointed attorney, could be inclined to use the process vexatiously.

Question 30

It is my belief that there should be a register of such instruments.  I have seen many clients who wish to appoint an attorney, and when questioned about whether they have ever previously appointed an attorney, they are unsure, or they think they may have but do not know the location of previous documents.  This makes it very difficult to draft documents given they may be inconsistent with previous documents, but revoking those previous appointments is impossible if it is not known who was appointed under them.

In addition to this, I think it would be in the interests of those being asked to rely upon the authenticity of appointing documents, if there was the ability to confirm the authenticity of the document (in particular any institution or individual being asked to release an asset on the basis of a power of attorney document, would likely be keen to gain confirmation that the document they are presented with is genuine).

Coming from NSW, in my view Service NSW may be the appropriate body to host and manage a register of instruments, due to its accessibility and user friendly nature.  However, having said that if a national system of power of attorney and guardianship documents was introduced, then it may be that the system would be better managed by a national body, for example Centrelink/Medicare offices.

Question 31

I am not of the view that expanded powers of attorneys or guardians would necessarily assist in protecting older people from abuse.  In part I think this is because in relation to financial abuse, it is often the attorney themselves who is the perpetrator of abuse.

Question 32

I do not have experience with cases of abuse by guardians or administrators so cannot comment.

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Question 39

Yes, I believe such tribunals should have that jurisdiction.  At the moment, to obtain financial compensation for abuse of a financial nature requires a person to institute proceedings in Courts where the proceedings are costly, especially if legal representation is required.  In addition, where fraud is alleged, it is necessary for the police to take steps, and challenges in obtaining evidence may make it difficult to prove such fraud (to the required standard of proof).

By contrast the less formal jurisdiction of tribunals may allow people to more readily raise concerns of abuse.  For example, a low cost and less formal jurisdiction will make it easier for an unrepresented person to have an 'abuser' called to account.

Question 40

Procedural requirements that could act as a 'tip off' to a Tribunal, so that the Tribunal then of its own motion looked into a matter, would make the application process less onerous.  This may make it easier of third parties to raise an issue, without having to themselves obtain all the evidence necessary to prove a claim of abuse.

Question 41

Alternative dispute mechanisms would need to be used with great care, given the vulnerability of many elderly people.  This is especially so where the elderly person may not wish to acknowledge that abuse has taken place, because of their desire to 'keep the peace' and not to have to confront the enormity of having a situation where their own family member is the perpetrator of abuse.

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Question 50

Civil penalties can obviously act as a deterrent, but can also raise awareness that abusing a position of trust financially is not 'OK'.  It is important that civil penalties also run hand in hand with financial compensation, where the elderly person has sustained a financial loss as a result of the actions of the perpetrator (often an attorney or recipient of proceeds of sale in relation to granny flat situations).  At the moment the law makes it very difficult to obtain financial compensation to cover direct financial losses suffered by the victim of the abuse.

Other comments?