

Submission to Australian Law Reform Commission Elder Abuse Inquiry

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

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Seniors Legal and Support Service
6/16 Torquay Road
Hervey Bay QLD 4655
Phone: (07) 4124 6863
Email: admin.slass@bigpond.com

Authorised by the Principal Solicitor, Hervey Bay Seniors Legal and Support Service

This submission is based on the position in Queensland.

What is Elder Abuse

Q1 To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse: harm or distress; intention; and payment for services?

Recommendation:

The definition of “elder abuse” must have elements that are able to be proved by objective and independent evidence.

Discussion:

As indicated in the Issues Paper the context in which the definition of elder abuse is required is extremely important.

In general terms there appears to be range of behaviour which could be encompassed within the term:

- At one extreme there is direct intentional abuse by a family member or carer which, in most cases, would amount to criminal behaviour such as domestic violence, assault, fraud, theft or criminal neglect.
- In the middle ground, there is action which causes direct harm but which does not cause the older person distress. This would be the case where the older person is unaware of the harm due to ignorance or where they have no memory, recollection or knowledge of it due to dementia or some other incapacity. This type of abuse can be carried out by any persons whom the older person has entrusted their finances or health and safety including paid carers or institutions. It can also be both intentional and unintentional. Often the harm or abuse is insufficient to warrant criminal action but would give rise to some form of civil cause of action.
- At the other end of the scale is the situation where the older person is taken advantage of because, due to their age or frailty, they are unable to stand up for their rights. This applies not only to dealings with persons in a position of trust but also dealings with external institutions such as banks, service providers, large institutions, telemarketers etc.

Any general-use definition should at least cover the first two situations. The WHO definition does this. The third situation is not necessarily within the general concept of elder abuse but is a useful extension to the range of activities undertaken by service providers established to protect Seniors' interests generally. See for example the charter of Seniors Rights Victoria.

Any definition of elder abuse for legal purposes must have elements that are able to be proved by objective and independent evidence. Many older persons subject to abuse may be unable to give evidence or take proceedings due to incapacity, frailty or memory loss. If any legal response to elder abuse is reliant on a complaint by or the evidence of the older person, no action will be taken. This is further exacerbated by the fact that no lawyer can act for or advise a person without capacity.

Q2 What are the key elements of best practice legal responses to elder abuse?

Recommendations:

- 1. A legislative exception to privacy constraints to enable reporting of elder abuse.**
- 2. A comprehensive best practice review of private guardianship services be undertaken.**

Discussion:

One of the main obstacles to the early prevention of elder abuse is the privacy constraints on hospitals, medical professionals, banks, nursing homes, government agencies and other service providers. A legislative exception could be provided under which these entities either had an overriding obligation to report suspected elder abuse or were exempted from liability for breach of confidentiality if they reported their information to the Aged Care Complaints Commissioner or an equivalent. It would be the obligation of the Commissioner to refer the information to the appropriate agency – i.e. police, support services, Public Guardian/Public Advocate for investigation and follow up.

We are increasingly seeing clients who have no close relatives or friends who they trust enough to appoint as their Attorney under an Enduring Power of Attorney (EPOA). This results in the Public Guardian and Public Trustee being appointed through an application to the Queensland Civil and Administrative Tribunal (QCAT), usually by hospitals or other service providers, after the person has lost capacity. We consider there is an increasing need for private guardianship services, regulated and licensed, as in the USA. This would reduce the pressure on the Public Offices and provide such persons with an element of choice and peace of mind that they will be protected when the time comes. It is recommended that a study be made of the best practice operation of such a system and the feasibility of it being adopted in Australia. This would enable the Public Guardian and Public Trustee to focus more of their resources on compliance and investigation and servicing those members of the public who cannot afford to pay for the service.

Q3 Examples of elder abuse concerning people from rural and regional communities.

The matters seen by this Service fall broadly into the following types:

1. Transfer of the family farm or business to a child and their spouse – usually not all of the purchase price is paid at the time of the transfer or the business is sold at a reduced price and coupled with a right to reside on the property for the remainder of their life. The arrangement breaks down either because the child sells the business, does not have the capacity to run the business profitably, the child's marriage ends or the relationship between the parents and the children breaks down. In most of these cases the farm/business has a substantial mortgage taken out by the child and the parents have very little prospect of recovering the unpaid purchase price or recovering compensation for the loss of their life tenancy. Further, these arrangements are either undocumented, documented in a way that suits the child with the parents being asked to sign where directed without really understanding the documentation or, in small communities, the same solicitor acts for all parties. The parents are therefore never properly advised of the pitfalls of the arrangement.

2. The parents have health or other issues and are not coping with the farm/business. A child moves in with them to assist and the relationship breaks down or the child brings in an abusive partner. The parents are subject to physical, financial or psychological abuse by the child or the partner. Given the remote location and often lack of access to transport, services or adequate means of communication, the parents are unable to extricate themselves from the situation or obtain the assistance required.
3. An older person has no close family, no Attorney or an Attorney who has very little contact with the older person, and for one reason or another is hospitalised. The older person is deemed by the hospital to lack capacity to return home and the hospital then has to seek a nursing home bed for the person. This can often result in the older person being kept in hospital against their wishes and shifted throughout Queensland hospitals until a nursing home bed can be found. The bed may ultimately be in a town in another part of the State. The older person is therefore not only institutionalised but cut off from everything that was familiar to them. Often the Public Trustee or Public Guardian will not give out information as to the persons whereabouts, due to privacy concerns, so any person who actually cares about the older person has no way of contacting them. The packing up and disposal of their personal effects is then left to the Public Trustee or Public Guardian, with very little input by the older person, their family or friends as to what is or was important to them. The “system” therefore has provided the decision-making service by stepping in when no-one else is available but it does not go the further step to provide a mechanism to implement those decisions in a manner considerate of the personal wishes or in any way emotionally supportive to the older person.

Social Security

Q6 What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?

Recommendations:

- 1. Legislative consistency between Nominations and EPoAs.**
- 2. Nominee liability for breach of their obligations.**

Discussion:

The legislation should ensure that there is some consistency between payment and correspondence nominations and EPoA's. Currently, because Centrelink payments are covered by Commonwealth legislation and EPoA's by State legislation Centrelink will act only in accordance with a nomination, even if the nominee was appointed because they were the Attorney and the EPoA has been terminated and a new Attorney appointed.

Although a nominee undertakes to use their powers for the benefit of the pensioner there is no direct liability placed on the nominee if they breach their obligations. Centrelink should be given the power to enforce the nominee obligations and responsibilities and impose liability to repay money where the obligations have not been complied with. Further, under no circumstances should the funds be allowed to be directed to an account which is not in the pensioner's name, although they can be direct debited to pay recurrent charges, such as nursing home or service provider fees.

Granny flat arrangements need to be in writing and either Centrelink approved or noted on the title to overcome gifting (see comments below under Family Agreements).

Q8 What role is there for income management in providing protections or safeguards against elder abuse?

Recommendation:

Income management be implemented when adults enter into full time care to redirect a portion of their pension to the aged care home.

Discussion:

Income management could be implemented where a person enters into care with an automatic redirection of 85% of their pension to the aged care home with no cancellation of the redirection. The nursing home would have an obligation to notify Centrelink if/when the resident has died or left the home and would have an obligation to repay overpayments. We have seen a number of cases where nursing home fees have not been paid due to the Attorney spending the money for their own purposes resulting in no money in the pensioner's bank account to satisfy direct debit arrangements.

Aged care

Q11 What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

Recommendation:

The aged care complaints scheme be broadened to enable compensation be ordered to be paid by the at fault aged care facility.

Discussion:

CASE STUDY

A recent case this Service was involved in, which demonstrates where the current system is deficient, relates to an 83 year old lady with Alzheimer's who was placed in a nursing home for 2 weeks respite. At the time she was placed into the home she was in good health and able to walk using her wheeie walker. When she was picked up 2 weeks later, she was severely dehydrated, had lost considerable body weight and could no longer walk. She was admitted to hospital the next day and spent 11 weeks in hospital before she was well enough to go home, However, she could no longer walk or care for herself in any way.

The Aged Care Complaints Commissioner subsequently found that the care by the nursing home was deficient and required the nursing home to make systemic changes. There was no consideration of compensation to the mother or daughter for the loss they have suffered as the Aged Care Commissioner does not have power to make such an award. The client was advised by no win no fee lawyers that they would not take on the case as the expected compensation would be less than the legal fees involved in the proceedings, and the matter was rejected by QPILCH because it was considered a personal injury matter.

Clearly, there are considerable difficulties in running a personal injury/medical negligence action in these circumstances but where there is an Aged Care Complaints Commissioner finding of neglect by a nursing home there needs to be a method by which compensation can be awarded to the family, possibly through an Age Discrimination process.

Q13 What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient.

Recommendation:

Demonstrated compliance with the Users Rights Principles be one of the funding criteria for aged care homes.

Discussion:

Nursing homes appear as a matter of policy to require all decisions to be made by the Attorney regardless of whether the aged person has capacity in respect of the particular decision. For example, this Service has attended at a nursing home to visit a client and been told that this would not be allowed to occur without the consent of the Attorney. Although the Users Rights Principles exist there seems to be no real effort to abide by them and like a lot of legislation in this area, it sounds good on paper but no enforcement action is ever taken. If any government wishes the Users Rights Principles to be taken seriously by the aged care industry then one of the funding criteria needs to be demonstrated compliance with them.

Q16 In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

Recommendation:

There be an independent review process, with an independent advocate for the older person, for decisions to place a person in a locked ward where there is any indication it is against the will of the older person.

Discussion:

CASE STUDY

Our Service has attended at a nursing home and removed a client who was placed in the locked section of the home against his wishes. He was dumped at the nursing home by one of his children acting as a Statutory Health Authority at a time when he was recovering from an illness and his partner/carer was also hospitalised. Once he recovered, despite his requests to be allowed to leave, the nursing home would not permit him to do so. His condition was such that there was no clinical reason for him to be in a locked ward. This extensive power that nursing homes and hospitals have over the freedom of persons placed in their care appears to have no external review process and the decision is often made with no representative or advocate on behalf of the older person being present. It has, in one case we are aware of, resulted in a reluctance to be admitted to hospital. The person ultimately died at home of a stroke because they would not stay in hospital. This person had, on a previous occasion, been detained for 3 months in a locked ward against their will.

The decision to place a person in a locked ward appears overwhelmingly to be a health and safety decision made by health professionals, without any consideration of the individual's wishes, usually after a decision by those same health professionals that the person does not have capacity. If the circumstances indicate the decision is contrary to the person's wishes, regardless of whether or not a finding of incapacity exists, regulatory safeguards need to be introduced which requires the decision to be reviewed by an independent person with the individual being provided an independent advocate at that review.

Financial institutions

Q25 What evidence is there of elder abuse in the banking or financial systems?

Recommendation:

There be a legal requirement that older persons obtain independent legal advice and a solicitor's certificate to that effect before any loan or arrangement which puts in jeopardy the older person's home is enforceable by the lending institution

Discussion:

There is a trend for lenders to encourage children to seek security from their parents by way of guarantee or intricate loan arrangements.

CASE EXAMPLE

We have seen a situation where a mortgage broker required the parent to transfer a 5% interest in their home to the child and for the child to give a 5% interest in their home to the parent to ensure that liability for the lending of 100% of the loan to the child was fully secured against the home of both the parent and the child and the parent was fully liable for the debt.

To offer the older person some protection against these types of arrangements there should be a legal requirement that the older person obtains independent legal advice and a solicitor's certificate to that effect before the loan or arrangement is enforceable by the lending institution. It should be mandatory where the older person's home is put at risk and is the main asset of the older person.

Q26 What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

Recommendations:

- 1. An exception to privacy laws to enable reporting of suspected financial abuse.**
- 2. The ability to put a temporary stop on accounts in cases of suspected financial abuse.**

Discussion:

From the matters dealt with by this Service, the circumstances of financial abuse through the use of the older person's bank accounts seem to fall into one of the following types:

- The older person lives with the abuser and has given them authority to access their bank account, either by giving them the card or through internet banking access. The account is used to pay household expenses and to make cash withdrawals. Often the older person has no knowledge as to the extent of the use of their funds, especially as with internet banking bank, statements are no longer posted through the mail. The use of the funds continues after the older person goes into care and is often only picked up when nursing home fees are not paid.
- The older person has difficulty getting to a bank and gives the abuser access for the purpose of withdrawing funds for them. The abuser withdraws funds for their own use.
- The older person authorises use of a credit card for a specific purpose but it is then used for other purposes.
- The Attorney accesses the account using the EPoA, either without the express consent of the older person, even if that person has capacity, or to transfer the money to their account or use it for their purposes.
- The Attorney denies the older person access to their own funds giving them limited or no spending money even if they have sufficient funds available.

The abuser is generally a person with no means and there is little or no prospect of recovering the funds.

These issues will only increase as financial institutions make banking more accessible by electronic means and reduce the incidence of bank statements being posted. Older people often rely on their younger Attorney/abuser to deal with this type of technology and have to put their trust in them. It means that they are not in possession of information which would alert them to the abuse and it also means that banking staff do not have the face to face contact with customers which would allow them to be alerted to potential abuse.

It would be useful if legislation enabled financial institutions to overcome privacy obligations and report suspected elder abuse to a public advocate or Aged Care Commissioner.

Banks are also very quick to put a stop on an account if they suspect fraud. Similar action could be authorised if they suspect the funds are being taken in circumstances which constitute elder abuse.

Family Agreements

Q27 What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

A sample of the cases we have had involving family agreements are set out below.

CASE STUDIES

1. *The parent paid to renovate a shed into a granny flat. She did not wish to force the adult child to sell their property to refund the money in the event of a change of circumstances. The agreement therefore had no repayment obligation unless the arrangement broke down and the property was sold. The agreement allowed for a consent caveat to be placed on the land. The relationship broke down and the parent wanted her money back. It was explained that this was not possible unless the property was sold. She refused to move and the relationship became acrimonious and violent.*

2. *The parent was to sell her house and build a granny flat on the property of her daughter and son in law. The son in law refused to sign a family agreement as he would not consent to anything that required them to repay the money. The pitfalls of the arrangement were explained to the parent, however she chose to proceed without an agreement.*
3. *The parents sold their house and purchased a property as tenants in common with the daughter and son in law. The property was mortgaged to cover the debt of the children. The daughter's marriage broke down. The son in law then drew down further moneys on the mortgage for a car and other personal loans. There was an agreement they be paid first. The remaining equity in the property will only refund a small part of the parents' money. The parents have been left with insufficient funds to buy another home.*
4. *A property was bought by the daughter and son in law with the parents' money. The parents were given a life interest, noted on the title. There was no obligation to repay the money except on the death of the parents. The daughter is their only child and only beneficiary under the will. The relationship has broken down and the parents want money to go into care. The daughter had no money to buy out their interest.*
5. *The parent wished to transfer a half interest in the property to the son for the purposes of building a house on it. The parent was to live in a renovated shed. The son would mortgage the property. The parent could not understand a family agreement or the consequences if the arrangement broke down.*
6. *The parent was to move a relocatable home on to the property of the daughter. A family agreement was drawn up to ensure that the home remained the property of the parent and there was a right to remove it.*
7. *The son and mother bought a home as tenants in common for the mother to live in. The mother paid cash for her half, and the son's interest was paid through borrowings. The property was mortgaged to secure the son's borrowings. The son wished to exit the arrangements and was requiring the property to be sold. At that time the mortgage amount was greater than half the value of the house due to further drawdowns by the son.*

Q28 What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

Recommendations:

There be established an easily accessible Tribunal which has the power to deal with all issues arising from the breakdown of family agreements, not just the issues relating to any real property in which the older person has an interest.

Discussion:

Family arrangements are seen as a solution for a situation where the parent can no longer live alone in their home and the child/carer wishes to provide some level of care but does not have the room or finances to do so.

The benefit to the parent is the care and comfort of having someone they know and trust nearby. The benefit to the child/carer is the money, in whatever form it is delivered. When the relationship breaks down the child/carer is reluctant to give up what they have received and it is the parent who is usually the loser both financially, emotionally and physically. A further consequence is also the breakdown of the relationship between the child and the parent and other family members.

At present, the main way to protect a right to reside interest is to lodge a consent caveat. This is usually not done or is another clause that the children will not consent to. Action to enforce a caveat which is not by consent or to give effect to the equitable interest represented by the right to reside involves expensive superior court litigation, outside of the financial reach of many older persons.

Strengthening the legislation to provide some protection in respect of the parents' financial contribution or providing a Tribunal with jurisdiction deals with only part of the problem. The arrangement is usually accompanied by the appointment of the child as the parent's Attorney and some amendments to the will to reflect the benefit given to the adult child. Often the arrangement breaks down when the parent no longer has capacity to change these ancillary documents or to enforce their rights.

Any Tribunal established to deal with these issues needs a dispute resolution mediation process and power to:

1. Make an order in respect of the underlying property interest and the sale of the property;
2. Revoke an EPoA and appoint a guardian/administrator;
3. Order compensation to be paid by the child/carer to the parent or the parent's estate;
4. Make orders enforcing or varying any existing family agreements;
5. Act in all cases and not just where the parent does not have capacity;
6. Act on the application of any interested party;
7. Deal with the parent's future accommodation and service provision requirements.

QCAT's jurisdiction could be extended to cover these types of family disputes regardless of the amount involved.

One of the issues of concern to the older person is the effect of any such arrangement on their pension, so greater protection could be given by tightening the basis on which Centrelink will grant an exemption from the gifting rules. Exemption could be conditional upon, for example, a written agreement, the interest being noted on the title, and a requirement that the agreement contain terms regarding repayment where the arrangement breaks down within a specified time period. There could also be protection as to ensure the caveat cannot be removed by the child acting under an EPoA. On the down side, strengthening the Centrelink rules penalises the parent in circumstances where they are at the mercy of the children and in respect of a benefit obtained by the children. It is likely to result in unreported gifts where the children will not consent to documenting the arrangement in the manner required by the rules. This will be the case particularly where the parent is in real need for accommodation with the children.

In general, we find resistance between the parties to entering into an extensive legal document and that many of our clients really do not have the capacity to properly understand it or to pay to have one drawn up.

Appointed decision-makers

Q29 What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?

Recommendations:

- 1. Including more detail in the EPoA to enable limitations to be placed on the Attorney in key areas, such as sale of assets, nursing home admission, conflict transactions, and to reflect the person's wishes.**
- 2. The Attorney's signature be witnessed in the same manner as that of the older person and that the witness certify that they explained to the Attorney their duties and responsibilities and that the Attorney understood and accepted them.**
- 3. Make it an offence for an Attorney to fail, without reasonable excuse, to provide evidence of compliance with their duties or to deliver records when requested by the investigating authority or a subsequent Attorney, Guardian or Administrator.**
- 4. Any Tribunal or court dealing with the offence be given power to order compensation be paid to the older person.**

Discussion:

Approximately 50% of the financial abuse cases we see are due to the misuse by an Attorney or family member of the older person's bank account or credit card. Details of this type of abuse are set out in the response to Q26.

The main problem areas we see in respect of Attorney decision making relating to personal and health decisions are:

- The Attorney denying the older person contact with friends or family;
- The Attorney acting to place an older person into care for their own convenience or to occupy the family home and against the wishes of the older person; and
- An Attorney who has little contact with the older person acting on the advice of hospital or independent living staff to place an older person into nursing home without any real consideration of the older person's wishes or circumstances. In some cases the hospital is driven by the desire to free up the hospital bed and the residential home by the desire to fill a nursing home bed.

Many of the cases are not motivated by malice but ignorance of their obligations or self-interest. As the intention of the legislation is to formalise family arrangements, it is understandable that ignorance of exactly how an attorney should behave exists, as many attorneys are ordinary people with little or no concept of legislative rights and obligations. Further, the appointment operates in a context of the pre-existing family dynamics, behaviours and attitudes. If the previous relationship between the older person and the children/attorney is not close or the children/attorneys are not prepared to compromise on their lifestyle, always put their interests first or do not have the ethics and sense of responsibility that attach to professional service providers, then abuse of the power is not an unexpected outcome.

CASE STUDY

A not uncommon scenario seen by this service is that the older person lives with the attorney, the older person's money is pooled with that of other household members to meet living expenses of the household or to pay for goods, the older person is often unaware of the extent of the spending or is happy with the arrangement, as they get the care and company of their family and have no immediate need for the money. Often they have reached a position where they do not want to be troubled with the finer details and so long as their day to day needs are taken care of that is all they want. In clinical/legal terms this may mean that they do not have capacity to manage their financial affairs. Strictly speaking the attorney is in breach of their obligations as they are obtaining a benefit from the older person's money and in most cases have no records to justify or evidence how the money has been spent. What is merely a normal arrangement in a close or extended family becomes an offence under the PoA Act and elder abuse. Usually, allegations of elder abuse are made in these circumstances by other children who have little contact with the older person, who do not fully appreciate what is involved in caring for an older person, who consider their sibling is getting something they are not or they see their inheritance dwindling. It is also often the case that the sibling who is the carer cannot or does not work, is on the carer's pension, does not have much money and feels a sense of entitlement to the older person's money as compensation for the care and sacrifices made to their lifestyle to look after the older person.

This fine line between normal family relationships, attorney responsibilities and elder abuse is difficult to draw.

Additionally, an EPoA primarily assists families to satisfy the requirements of external parties such as banks, nursing homes, hospitals, etc. rather than being beneficial in the day to day dealings of the family. It is increasingly used as a form of protection for third parties dealing with older persons, regardless of the extent of their incapacity. For example, the current position is that nursing homes will not accept a resident who does not have either an EPoA or a Guardian and Administrator appointed. We often find that those institutions will also not act on the instructions of the older person regardless of whether or not they have capacity in respect of the particular issue and require the consent of the attorney for all matters affecting the older person.

Strengthening the legislation is not going to assist in dealing with the misuse of the power by attorneys who regard it as a family matter or to stop institutions using them as a means protecting themselves from liability. The EPoA form once signed is generally a complete grant of power with few limitations or guidance given in the form. The person's wishes/instructions on major issues such as being placed in residential care; sale of the home; disposal of possessions; use of their bank account; authorised conflict transactions and access and visitation by family members are generally not made known. End of life health issues are covered by a separate document, an Advance Health Directive.

Although the EPoA form has a space for specific limitations on the power, persons filling in the form are given little guidance as to the types of issues they may want to cover. Including more detail in the form to enable limitations to be placed on the power in these areas so as to reflect the person's wishes is one way of limiting abuse by attorneys as they will have a greater understanding of the limits on their power. It will also place a greater onus on third parties to check the document before

acting on it. That is, it will increase the administrative cost and risk of third parties. So the issue becomes *what is the intention of the legislation?* – to give effect to a person’s wishes or provide an easy method for other persons to act on the instructions of the attorney.

Further, strengthening the legislation is not going to assist if no action is ever taken when breaches occur. For example, in Queensland we understand that no one has ever been prosecuted merely for a breach of Attorney obligations under the Powers of Attorney Act. The only case in Queensland we are aware of where there was a prosecution was when the conduct amounted to fraud and the older person had capacity to give strong evidence.

The limitations to taking the matter any further are generally:

- Lack of evidence – without the Attorney admitting the abuse it is hard to prove what the money was used for and that the access to the account was not made with the consent or authority of the older person. If the older person had capacity when the access authority was given originally it is difficult to prove when it was withdrawn or when capacity was lost;
- If the older person no longer has capacity or has memory issues they cannot give credible evidence. Even if they have capacity they may not wish to take legal proceedings or be medically or emotionally fit to appear in court;
- If the abuser is not the attorney but is a family member it may be difficult to overcome the presumption of advancement. The EPoA legislation overcomes this in the case of an Attorney;
- The transactions are not documented and are generally informal family discussions so proof of what the arrangement was or what conversations took place to ascertain the older person’s wishes may be unavailable;
- If there are no witnesses it may be difficult to disprove an Attorney’s assertions if the older person cannot be relied upon as a witness;
- If the abuse is not financial or physical how is evidence of it to be obtained when most of the abuse occurs within the privacy of the family home?

One possible way of overcoming these limitations is to make it an offence for the Attorney to fail, without reasonable excuse, to provide evidence of compliance or to deliver records when requested by either the investigating authority or a subsequent Attorney, Guardian or Administrator. It is also important that any Tribunal or court dealing with the offence has power to order compensation be paid to the older person.

When the EPoA is prepared the only person who is advised by a solicitor or other provider of the service is the older person. Because the lawyer’s duty is to the client they see no obligation to ensure that the person to whom the power is being given understands the obligations and responsibilities in exercising the power and it would be a conflict situation to give them advice. An attorney is unlikely to spend the money to get this advice. To ensure that attorneys are given some instruction and understanding as to their responsibilities it is suggested that their signature be witnessed in the same manner as that of the older person and that the witness certify that they explained to the Attorney their duties and responsibilities and that the person understood and accepted them.

Forums for Redress

Q39 Should civil and administrative tribunals have greater jurisdiction to determine matters related to elder abuse?

Recommendation:

- 1. Jurisdiction be given to cheap, informal and accessible Tribunals with power to cover all family relationship issues as they affect the older person.**
- 2. At any such Tribunal hearing the older person has independent representation through a public advocate or tribunal appointed representative.**

Discussion:

As stated in the Issues Paper, avenues for redress should be cheap, informal and accessible, as the matters are in most cases essentially a family dispute. In Queensland, the forums that provide this type of redress are QCAT and the Domestic Violence Courts. Both forums have the ability to refer parties to dispute resolution but have a limited ability to award compensation, deal with property issues or with wider service provision issues.

The jurisdiction would ideally cover all family relationship issues – financial, guardianship and administration, housing and service provision. It would be difficult to design the jurisdiction to cover abuse by institutions or persons not in a close relationship with the older person. It should be noted however that if such a jurisdiction is established just to cover elder abuse it would then lead to questions as to why other vulnerable people are left out, such as other adults with a disability.

It is also important that the older person has independent representation at any such hearing through a public advocate or a tribunal appointed representative. This is important as in many cases the older person may not have capacity to give instructions. We are aware that presently at many hearings in the guardianship and administration jurisdiction the older person is not represented in any way. Given the profound effect on the person's finances and human rights the decisions can have, we consider independent representation fundamental at all hearings. Redress through more informal specialised family mediation processes is another way of obtaining the participation of the older person.

18 August 2016

Submitted by:

Seniors Legal and Support Service

6/16 Torquay Road

Hervey Bay QLD 4655

Phone: (07) 4124 6863

Email: admin.slass@bigpond.com