

Your Ref:

Our Ref: Elder Law Committee

28 June 2011

The Honourable Paul Lucas MP
Attorney-General and Minister for Industrial Relations
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

Dear Paul,

Elder Abuse Issues Paper

It is with much pleasure that I **enclose** a copy of the Queensland Law Society Report on the Joint Issues Paper on Elder Abuse, for your kind attention.

Yours faithfully

Bruce Doyle
President



Queensland **Law Society**

Report

Joint Issues Paper: Elder Abuse

June 2011

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1. Acknowledgments

- 1.1 Brian Herd, Chair Elder Law Section, Queensland Law Society
- 1.2 Elder Law Section, Queensland Law Society
- 1.3 Mark O'Connor and Stuart Naylor, Litigation Rules Section, Queensland Law Society
- 1.4 Criminal Law Section, Queensland Law Society
- 1.5 Louise Pennisi, Policy Solicitor, Queensland Law Society
- 1.6 External stakeholders – refer to Appendix 1

2. Background

- 1.7 On 17 June 2010 the Queensland Law Society, together with the Public Advocate of Queensland, released a joint issues paper on Elder Abuse.
- 1.8 The issues paper canvassed issues regarding elder abuse including the meaning of elder abuse, financial abuse and neglect, common law and equitable remedies, civil law, criminal law and the guardianship regime.
- 1.9 The issues paper also considered the legal responses in international jurisdictions.
- 1.10 The Society held a two-month consultation period, inviting public consultation and discussion as to how the law can adequately address and older Queenslanders from physical, emotional and financial abuse and neglect.

3. Executive Summary

- 1.11 Over the two month consultation period, the Society received over fifteen submissions in response to the Joint Issues Paper on Elder Abuse, released on 17 June 2010.
- 1.12 As a result of the Joint Issues Paper and Community and Stakeholder comments, the Society recommends the following:
 - (a) Amendment to section 52(2) of the *Civil Liability Act 2003* as discussed in Section 7 of this Report;
 - (b) Amendment to regulation 13 of the *Personal Injuries Proceeding Regulations 2002* as discussed in Section 7 of this Report;
 - (c) Consultation with COAG and state and territory governments in introducing uniform enduring powers of attorney;

- (d) State-based education and awareness campaigns which includes specific target groups such as the Queensland Police Service, community members, Justice of the Peace, the elderly and powers of attorney, in relation to identifying elder abuse and conflict transactions and preventing elder abuse, as discussed in Section 8 of this Report;
- (e) Establishment of a specialist Unit within the State Crimes Operations Command to investigate complaints of elder abuse, as discussed in Section 8 of this Report; and
- (f) Considering an extension of the current state domestic violence laws, so that a protection order may be available in circumstances of abuse in a formal care relationship, as discussed in Section 8 of this Report.

1.13 That proposed reforms address elder issues with consideration to anticipated population projections for 2056 and 2101, as discussed in Section 5 of this Report.

4. Summary of Community and Stakeholder Comments

1.14 The Society received community and stakeholder commentary and suggestions to strengthen guardianship laws. Suggestions proffered include:

- (a) Reciprocal recognition of appointed attorneys, administrators and guardians throughout the states and territories;
- (b) Uniformity of guardianship laws throughout the states and territories;
- (c) A register of appointed attorneys, guardians and administrators;
- (d) Improving Court procedures involving elderly persons so that matters are heard as expeditiously as possible and with compassion;
- (e) That Queensland improve regulation and enforcement of guardianship matters;
- (f) That banks, credit unions and other financial institutions regularly monitor and notify seniors or large or unusual withdrawals from their accounts; and
- (g) That there be better education:
 - (i) for the public and the Queensland Police Service to recognise and prevent elder abuse;
 - (ii) to assist the public, the Queensland Police Service and professionals in interacting with elderly or vulnerable persons; and
 - (iii) for Family Members, elderly and vulnerable persons and high school aged children on the importance and benefit of succession planning.

1.15 Specific areas of law that were addressed by the community and stakeholders were:

- (a) Guardianship laws;

- (b) Duty of care and tort law;
- (c) Workplace health and safety;
- (d) Family Law;
- (e) Criminal Law including the *Peace and Good Behaviour Act 1982* (QLD); and
- (f) Civil Procedure.

1.16 In addition to receiving submissions on this issue, the Society received a signed petition from over forty signatories advocating for law reform to criminalise elder abuse.

5. Population Projection and Elder Issues

1.17 Presently Australia's resident population is estimated to be 22.5 million people.¹

1.18 The Australian Bureau of Statistics estimates that Australia's resident population will be:

- (a) Between 30.9 million and 42.5 million in 2056; and
- (b) Between 33.7 million and 62.2 million in 2101.²

1.19 The Australian Bureaus of Statistics has also predicted that:

By 2056 there will be a greater proportion of people aged 65 years and over than at 30 June 2007, and a lower proportion of people aged under 15 years. In 2007 people aged 65 years and over made up 13% of Australia's population. This proportion is projected to increase to between 23% and 25% in 2056 (Series B and C respectively) and to between 25% and 28% in 2101 (Series B and C).³

1.20 Therefore it is the Society's view that if one quarter of Australia's resident population will be aged 65 years and over by 2056, substantial law reform, addressing both elder abuse and aged care issues, is required to sustain this anticipated population shift as well as to address present lacunas in the law.

6. Guardianship Law

Reciprocal recognition of Enduring Powers of Attorney

1.21 Feedback received from the two month consultation period revealed the public perception that there is a lack of reciprocal recognition of guardianship documents and orders between the states and territories.

1.22 Already Queensland law recognises that an enduring power of attorney made in another state will be valid in Queensland. However that enduring power of attorney needs to comply with the

¹ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Web+Pages/Population+Clock?opendocument>

² "3222.0 - Population Projections, Australia, 2006 to 2101," <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>

³ "3222.0 - Population Projections, Australia, 2006 to 2101," <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>

powers and obligations set out in Queensland law. Section 34 of the *Powers of Attorney Act 1998* relevantly states:

34 Recognition of enduring power of attorney made in other States

If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.

- 1.23 Given the differing enduring powers of attorneys between the states and territories and that in most cases there is a real risk that an interstate enduring powers of attorney will not comply with section 34 of the *Powers of Attorney Act 1998*, there is a strong call for uniform forms and rules.
- 1.24 The Society recommends that there be further consultation with state and territory governments on this issue and this issue be brought to the attention of COAG.

7. Civil Law – Personal Injuries and Tort Law

- 1.25 The regime which governs the running of public liability personal injury claims in Queensland are the *Personal Injuries Proceedings Act 2002* and the *Civil Liability Act 2003* and corresponding Regulations.
- 1.26 Elderly people who suffer injury are generally not in paid employment and therefore have no claim for economic loss as a part of their personal injury claims. Their personal injury claims are generally limited to claims for general damages, domestic assistance and medical expenses.
- 1.27 General damages awarded under the regime are often modest.
- 1.28 If elderly people suffer a personal injury as a result of neglect, as opposed to an intentional act done with the intent to cause personal injury, they would not be eligible for exemplary, punitive or aggravated damages in accordance with section 52 of the *Civil Liability Act 2003*.
- 1.29 Elderly people are also limited to the amount of legal costs they can recover as a result of personal injury, where under regulation 13 of the *Personal Injuries Proceedings Regulation 2002*:
 - (a) *If they are awarded less than \$35,340*: the injured person pays his or her own costs and the defendant pays his or her own costs;
 - (b) *If they are awarded between \$35,340 - \$58,900*: the maximum costs and outlays an injured person can recover is \$2,950;
 - (c) *If they are awarded over \$58,900*: the usual cost recovery rules apply. However as general damages awarded under the regime are modest, it would be difficult for an injured person to be awarded over \$58,900 if their injury was caused as a result of neglect.
- 1.30 In summary, elderly people are discouraged from making a claim, as the award for general damages is not adequate to compensate them for their injury or to cover medical and legal costs and outlays. Further difficulties arise if the defendant is uninsured.
- 1.31 The Society recommends that these issues be addressed by:

- (a) widening s52(2) of the *Civil Liability Act 2003* (Qld) to include negligent acts and omissions against vulnerable persons; and
- (b) reconsidering regulation 13 of the *Personal Proceedings Regulation 2002* in accordance with section 75A of the *Personal Proceedings Act 2002* with special consideration and indexing amounts for vulnerable persons and persons on a pension or low income.

1.32 In the Society's view, by recognising in statute that vulnerable persons may be eligible for exemplary, punitive or aggravated damages following a negligent act or omission, together with a review and indexing of legal costs recoverable to elderly and vulnerable persons, this would improve elderly and vulnerable persons access and attainment of justice with respect to personal injury claims.

8. Criminal Law

1.33 Queensland's Criminal Code provides general offences of:

- physical and sexual assaults;
- neglect;
- domestic violence; and
- fraud and stealing

which may be applied to situations of elder abuse.

1.34 However in the past there have been inherent difficulties in the prosecution of elder abuse offences.

1.35 To address this problem, the Society recommends the following initiatives:

- State-based education and awareness campaigns which includes specific target groups such as the Queensland Police Service, community members, Justice of the Peace, the elderly and powers of attorney, in relation to identifying elder abuse and conflict transactions and preventing elder abuse;
- Establishment of a specialist Unit within the State Crimes Operations Command to investigate complaints of elder abuse; and
- Considering an extension of the current state domestic violence laws, so that a protection order may be available in circumstances of abuse in a formal care relationship.

1.36 The Society has also considered a proposal for inserting examples of elder abuse under the general offences in the Criminal Code. For example inserting:

- An boxed example in Schedule 1 of the *Criminal Code 1899* (QLD) under s 408C(1)(b)⁴ as follows:

⁴ s408C (1) A person who dishonestly— ... (b)obtains property from any person;”

EXAMPLE: A person who dishonestly induces or compels an elderly person to transfer property to them without legal justification maybe considered to have committed the offence of fraud.

and

- examples for other general offences in the *Criminal Code*, such as:
 - Misappropriation of monies, valuables or assets of an elderly person;
 - Forging signatures or cheques or counselling or procuring an elderly person to sign documents or cheques; and
 - A carer failing or neglecting to provide an elderly person with the necessities of life.

1.37 As there are divergent views as to the benefit and utility of this proposal, the Society has not formed a view as to whether examples of elder abuse should be inserted under the general offences in the *Criminal Code*.

9. Conclusions

1.38 The Australian resident population is steadily increasing, with the ageing population predicted at approximately 25% by 2056.⁵ Therefore substantial law reform is required to address this growing trend.

1.39 The Joint Issues Paper and Community and Stakeholder consultation discussed and highlighted critical issues and concerns regarding elder abuse.

1.40 The Society suggests the recommendations set out in the Executive Summary of this Report be considered in order to protect elderly and vulnerable persons and prevent the occurrence of elder abuse.

⁵ “3222.0 - Population Projections, Australia, 2006 to 2101,” <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>

Appendix 1

This document represents the views of the Queensland Law Society. However, a number of other agencies and individuals made contributions to the development of this paper. The Queensland Law Society would like to acknowledge the following:

All the signatories to the Petition organised by Mrs J Bernie
Australian Lawyers Alliance
Mrs J Bernie
Ms Elley Browning
Caxton Legal Centre
Robyn Challiner
Jacinta Curbis
Department of Communities, Queensland
Heather Isaacs
Chris Jenkinson
Ms L Jilkins
Older People Speak Out
Dr Maged Rofail of UQ
Janene Watts