

29 August 2016

Our ref: 326 – 26  
ALRC Elder Abuse Enquiry

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

By post and by email: [REDACTED]

Dear Executive Director

**SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION  
ELDER ABUSE – ISSUES PAPER 47 – JUNE 2016**

Queensland Law Society (the **Society**) thanks the Australian Law Reform Commission for the opportunity to participate in this important discussion.

This response has been compiled with the assistance of the Society's Elder Law Committee and the Alternative Dispute Resolution Committee.

The Society is the peak professional body for Queensland's legal practitioners. The Society assists legal practitioners to continually improve their services, while monitoring their practices to ensure they meet the high standards set for the profession in Queensland. A key function of the Society is to assist the public by advising government on improvements to laws affecting Queenslanders, and working to improve their access to the law.

The Elder Law Committee of the Society comprises lawyers who practice in elder law, or have a professional interest in legal issues associated with older people and the providers of services to older people. As part of its mandate, the Elder Law Committee seeks to identify areas of the law that may impact on older people or the provision of services to them. As such, the subject of elder abuse is directly relevant to its role and is seen as an important matter of legal review.

The Society's Alternative Dispute Resolution Committee is comprised of lawyer mediators and arbitrators from private law firms, universities and non-government organisations that have a special interest in commercial, family and workplace mediations.

The Society notes that the ALRC intends to release a more detailed Discussion Paper in late 2016 and the Society would welcome the opportunity to be involved in this further consultation.



Given the anticipated opportunity to comment on the Discussion Paper, the Society has not responded to every question in the Issues Paper at this time. However, the Society notes that it may make submissions on a wider range of issues when the Discussion Paper is released.

### **Question 1 - The definition of elder abuse**

On 17 June 2010, the Society, together with the Public Advocate of Queensland, released a joint issues paper "*Elder Abuse: How well does the law in Queensland cope?*"<sup>1</sup> (**Elder Abuse Paper**) which, among other issues, examined the definition of elder abuse.

#### **Definition of "elder"**

Within the context of law reform, defining the concept of 'elder' is both a difficult and subjective process. A consideration of chronological age only can be misleading, because individuals over the age of 60 often continue to enjoy good health and full independence. Retirement is not necessarily an appropriate trigger. However, some Australians experience the characteristics associated with being 'elderly' because they are more susceptible to experiencing ill health, disability and death at a younger age (for example, Indigenous Australians).

It is therefore doubtful that chronological age alone is an appropriate criterion in determining who is an 'elder'. In arriving at an appropriate age, and in considering the concept of being elderly, a consideration of the varying individual characteristics of older persons is necessary. Other criterion in addition to chronological age that, when considered as a whole, might assist in defining an 'elder' may be a person's:

- ability to understand the nature and effect of decisions
- ability to make decisions freely and voluntarily
- ability to communicate decisions
- ability to report abuse
- mobility
- frailty of the body or mind; and
- life expectancy.<sup>2</sup>

#### **Definition of "elder abuse"**

In the Elder Abuse Paper, the Public Advocate and the Society also acknowledged the description of "elder abuse" from the Toronto Declaration on the Global Prevention of Elder Abuse.

The Society considers that there are three essential elements of elder abuse which emerge from the various definitions developed. Elder abuse:

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<sup>1</sup> *Elder Abuse: How well does the law in Queensland Cope?* Joint Issues Paper by Queensland Law Society and Office of the Public Advocate (Qld) June 2010.

<sup>2</sup> *Elder Abuse: How well does the law in Queensland Cope?* Joint Issues Paper by Queensland Law Society and Office of the Public Advocate (Qld) June 2010, p 3.



1. Occurs within a relationship where there is an expectation of trust between the perpetrator and victim;<sup>3</sup>
2. Results in harm to the older person; and
3. Can take various forms for example: financial, physical, psychological, intentional or unintentional neglect.

### ***“Vulnerability” and “dependence”***

The Society broadly supports the discussion as regards whether persons have a particular “vulnerability” rather than focusing on a trigger that turns on the person’s age. This issue requires a consideration of what groups comprise elders. There appear to be at least three distinct categories of older people, as follows:

1. Older people who are independent and physically able to attend to all of their own needs and who do not have impaired capacity;
2. Older people who do not have impaired capacity, but due to physical frailty or impairment, are dependent on others to meet their needs, whether it be assistance for daily living, managing financial affairs or for companionship;
3. Older people who have impaired capacity and who may or may not also be physically frail or have another physical impairment.

Older people who do not have impaired capacity, but are reliant on others to meet their needs because of physical frailty or impairment are arguably the most difficult category to adequately provide for. Often a person in this situation will be socially isolated and without appropriate support. When a person depends on another to perform the most basic of activities and has limited contact with the community, a power imbalance exists in the relationship, creating vulnerabilities. An older person in this situation may be subject to undue influence which may, for example, result in them giving sexual favours to their carer. They may also be vulnerable to financial exploitation through providing large sums of money to their carer.<sup>4</sup> Accordingly, it is suggested that some level of dependence will be a common feature of elder abuse.

### ***“Harm”***

The Society supports a definition of “elder abuse” which incorporates an element of “harm or distress”, as discussed in **paragraphs 19 and 20 of the Issues Paper**.

In addressing “harm” as opposed to “abuse”, it is believed that all adults at risk of harm will be safeguarded. Adults who are unable to safeguard their own wellbeing and property are at risk of harm and because they are suffering from a disability, physical or mental impairment, are more vulnerable to being harmed than adults who are not under any disability. Scotland in

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<sup>3</sup> Dr Paul Mazerolle and Dr Jennifer Sanderson, “Executive Summary Literature Review – Elder Abuse” (Key Centre for Ethics, Law, Justice and Governance, Griffith University, 2008) 1.

<sup>4</sup> *Elder Abuse: How well does the law in Queensland Cope?* Joint Issues Paper by Queensland Law Society and Office of the Public Advocate (Qld) June 2010, p 4.



2007 enacted the *Adult Support and Protection Act 2007* which specifically addressed “harm” rather than “abuse”.<sup>5</sup>

The Society notes that section 9 of the *Child Protection Act 1999* (Qld) incorporates the following elements in its definition of “harm”:

- Any detrimental effect of a significant nature on the child’s physical, psychological or emotional or financial wellbeing.
- It is immaterial how the harm is caused.
- Harm can be caused by physical, psychological, financial or emotional abuse or neglect or sexual abuse or exploitation.
- Harm can be caused by a single act, omission or circumstance; or a series or combination of acts, omissions or circumstances.

This definition recognises that a perpetrator’s intentions are irrelevant and focuses instead on the detrimental affect the “harmed” individual experiences. By placing the emphasis on protecting the individual as opposed to punishing the perpetrator we re-orient our thinking towards protective/preventative rather than reactionary responses.

**Recommendation:**

The Society recommends that any definition of “elder abuse” should incorporate:

- The three essential elements of elder abuse as incorporated in the Toronto Declaration on the Global Prevention of Elder Abuse; and
- Specific consideration of the concepts of “vulnerability”, “dependence” and “harm”.

In relation to the definition of “harm”, section 9 of the *Child Protection Act 1999* (Qld) includes elements which may assist in developing a definition of “elder abuse”.

**Question 2 – What are the key elements of best practice legal responses to elder abuse?**

The Society recommends the following key elements for consideration:

National Elder Abuse Best Practice Guidelines

- The development of National Elder Abuse Best Practice Guidelines similar to the Queensland Law Society’s recent Domestic and Family Guidance Best Practice Guidelines.
- The Elder Abuse Guidelines should be developed through a process of national consultation with practitioners who work to support and assist older Australians affected by elder abuse.

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<sup>5</sup> *Adult Support and Protection Act 2007* (Scot) pt I, ss3, 7-10.



- The Elder Abuse Guidelines would represent the standards of practice expected to be provided to older Australians and should guide quality practice and continuous improvement to ensure older Australians receive the best support possible.
- The Guidelines should be multi disciplinary and provide guidance to people working in the areas of health, the law, social work and police.

#### The Financial Ombudsman Service

- Members report successful outcomes with the Financial Ombudsman in relation to financial abuse of their elderly clients in relation to their being unwittingly signed up to mortgages by unscrupulous children and a lack of due diligence on the part of a financial institution.

#### Adult Ombudsman

- The establishment of an independent statutory officer such as an “Adult Ombudsman” (**Ombudsman**) with power to properly investigate allegations of harm or suspected harm (physical, psychological, emotional, financial, sexual) to the elderly or others under a legal disability, together with power to investigate complaints regarding the aged care sector.
- The Ombudsman to have powers of referral to appropriate courts / tribunals, the police and financial regulatory authorities such as APRA, depending on the nature of the particular cases.
- The Ombudsman should be the peak educative body so that it publishes decisions and establishes education programs regarding a range of elder law issues/substituted decision-making issues.

#### National Register of Enduring Powers of Attorney

- A national register of enduring powers of attorney, guardianship and administration orders. It may also be possible to include a section on the register of persons who have been prosecuted for breaches of the relevant powers of attorney and guardianship laws.

Other elements may be identified following consideration of the Discussion Paper.

#### **Question 4 – The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence?**

The Society recommends that a multi-jurisdictional case review (retrospective and prospective) needs to be completed of those matters which have been referred to various guardianship tribunals in order to identify emergent themes, characteristics and circumstances which have given rise to proven elder financial abuse/exploitation under substituted decision-making schemes, with a view to developing evidence-based risk reduction strategies.

Such strategies might include evidence-based legislative review of substituted decision-making and structured decision-making tools to guide decisions about the appointment of attorneys.



**Question 24 - What evidence is there of older people being coerced, defrauded or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented?**

The Society provides the following case study by way of anecdotal evidence in response to Question 24.

**Case study:**

*In 2013 V, in her 70s, was brought to our office by her “partner” to make a new Will. The partner was adamant that he wanted to be present for the meeting and was very keen to tell the writer what V “wanted”. After insisting that we could not see V with him present he reluctantly waited in our reception area. Within a very short time frame it became apparent that V would not have the capacity to make a Will, did not know why she had been brought to the appointment, did not know her date of birth, had no idea about her assets and although she could name her family members (children) had no idea about their ages, relationship status or their children’s names and ages. V also kept changing her mind about what it was that she wanted to do (when she could remain focussed on the discussion). As a result of this meeting, we told V that we could not make her Will at that time and recommended that she consent to us seeking an opinion from her geriatrician. We wrote to the geriatrician setting out our concerns and seeking her view regarding V’s testamentary capacity. The geriatrician wrote back to us and told us that V had been brought to the appointment by her partner and the partner was most “unhappy” that we would not write her will for her and that they “would not be going back” to our office. Further, any consent to provide medical information about V to us was withdrawn.*

*Whilst we did not continue to act for V, it became apparent through our discussions that V had made a binding death benefit nomination in relation to her superannuation to her “partner”. Her superannuation, as far as we could tell was her largest asset. V had a copy of the nomination with her (given to her by her partner to bring into our meeting). The nomination had been made within the two weeks prior to our meeting. This concerned me as although the capacity to make a binding death benefit nomination is the ability to enter into a contract, and not the same as making a will, it was doubtful that V had the capacity to understand the nature and effect of that decision. Further it was probable that she was told to sign the nomination by her partner in front of the two witnesses.*

*Given the ease with which binding death benefit nominations can be made and the risk to that asset, it might be worthwhile requiring that prior to any superannuation nomination being made the member obtain a certificate of independent legal advice.*

The Society would also welcome discussion about the option of “whistleblower protection” for legal practitioners in this context. Legal practitioners can become aware of potential elder abuse but in circumstances of confidentiality, for example, in the context of taking new instructions (as outlined in the case study). Legal practitioners are then prevented from taking any action in relation to the suspicion, because of confidentiality obligations.



**Question 25 – What evidence is there of elder abuse in banking or financial systems?**

Society members report a lack of knowledge within banks as to how they deal with Enduring Powers of Attorney, not to mention the provision of incorrect information in relation to Enduring Powers of Attorney.

**Case Study**

*A member's client reported having to make 16 attempts at providing certified copies of Enduring Powers of Attorney to their grandfather's bank. When the client telephoned the call centre, she received confirmation that the Enduring Power of Attorney was noted on the account. However, when the client attended the bank to conduct a transaction, she was refused as she did not have permission to access the account. The client was told on more than one occasion to consult a lawyer to "register the Enduring Power of Attorney" or that the reason she could not access the account was she had not provided a "registered Enduring Power of Attorney".*

*Ultimately the client attended the bank and requested the teller to telephone the call centre to find out why the teller could not "see" the Enduring Power of Attorney on her system. The teller and the call centre had different levels of access to the client's account. The call centre confirmed to the teller the existence of multiple copies of the Enduring Power of Attorney on the account. The scanned copy had been stored on an incorrect part of the system which was inaccessible to the teller. The process from providing a certified copy of the Enduring Power of Attorney to the client being able to act upon it took over a month.*

In addition, there does not appear to be a "flagging" system for accounts on which there is suspected financial abuse. Clients report that they put the bank on notice that financial abuse is suspected but the banks often refuse to either freeze accounts or flag them as a high risk as they don't recognise the Attorney's authority. Banks steadfastly maintain they have an obligation to do as the bank's client asks, seemingly irrespective of evidence of their client being the subject of financial abuse. Banks require credit card users to advise them of international travel and often freeze cards after unexpected transactions occur on the credit card but the same facility is not available to bank accounts of elderly clients whose Enduring Power of Attorney reports suspected financial abuse.

In the absence of mandatory reporting, the banks have an obligation to act upon receipt of reports of suspected financial abuse to protect the finances of the older person, their client.

One of our members has provided the following case study by way of anecdotal evidence in response to Question 25:

**Case study:**

*A client "Tony" held the Enduring Power of Attorney for his elderly mother "Dawn" who had advanced dementia. Dawn was residing in a nursing home and was immobile so unable to leave the home. Tony became aware that his brother Peter was visiting Dawn in the nursing home and taking cash from Dawn's purse for "petrol expenses" as he lived an hour away. Peter admitted he was taking money from Dawn for petrol but said he would*



*stop. As a precaution Tony advised the bank that he suspected Dawn was being taken advantage of by his brother and to be alert to any unusual transactions. Tony then provided the bank with a certified doctor's report of Dawn's dementia and a report stating she did not have the capacity to make decisions for herself. He had also provided them with another certified copy of the Enduring Power of Attorney.*

*Tony then noticed that \$100 - \$200 was being withdrawn from Dawn's bank account every Friday by cheque. Tony knew that Dawn was not able to leave the nursing home so did not understand who was presenting cheques. Tony approached the bank and stated that he suspected financial abuse as Dawn had dementia, could not leave the nursing home and only Tony was authorised as her Attorney to transact on the account. The bank refused to communicate with Tony despite his holding an Enduring Power of Attorney for Dawn. The bank further stated that Dawn was their client and if she chose to present cheques to the bank then they had to honour them. Tony reminded the bank that Dawn had advanced dementia and was unable to make financial decisions for herself and was unable to present the cheques herself. He reminded the bank that he suspected financial abuse and asked them to stop cashing the cheques. The bank refused. Tony was advised by a nursing home staff member that Peter was coming each Friday with a blank cheque and Dawn was signing it. Tony took this information to the bank but they still refused to stop cashing the cheques. Tony contacted a lawyer who contacted the bank's Head Office, advised them of the financial abuse and reminded them that Dawn had advanced dementia, that Tony had reported his mother was being financially abused by his brother and Tony held a valid Enduring Power of Attorney for Dawn and was authorised to make financial decisions on his mother's behalf. The bank then contacted the branch and the bank stopped cashing the cheques.*

**Question 26 - 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?**

One of our members has reported that recently, their firm has encountered a number of cases where following a death, the deceased's actual estate appears significantly less than the anticipated estate. This has especially been the case when the deceased was of an advanced age and had been living in an aged care facility, where most living costs are provided for and in circumstances where they would not have the ability nor the opportunity to spend large sums of money.

After investigation as to whether or not a third party such as an attorney may have inappropriately used the deceased's funds, it is not uncommon to find that funds have been taken under some form of authorisation but not with the attorney's authority, rather through a third party agreement or authority to the bank. Most banks have a procedure whereby once a customer appoints an attorney any third party authority ceases.

However, because there is no central register of enduring powers of attorney the banks and financial institutions have no way of ascertaining whether a person has made a later enduring power of attorney (or other instrument of statute) which would be capable of overriding the third party authority.



A further issue is that often a person continues to operate the donor's bank accounts under the third party authority even though the donor has lost capacity to manage their finances. At law, a third party authority ceases when the donor loses capacity and if the person has made an enduring power of attorney for finances it is the appointed attorney who then has power to operate the bank accounts.

**Recommendation:**

Options for dealing with these issues might include banks and financial instituting procedures such as:

- seeing the customer on annual basis and requiring that customer to provide that authority annually, after being assessed as capable to enter into the arrangement;
- third party authorities automatically lapse after one or two years; and
- the donor under a third party authority must seek independent advice from a solicitor about making/renewing the authority.

**Question 27 – What evidence is there that older people face difficulty in protecting their interests when family agreements break down?**

One of our members has provided the following case study by way of anecdotal evidence in response to Question 27:

**Case Study**

*In June 2014, the firm was consulted by a client and his father, CW, then aged 99. CW was concerned about the actions of his daughter S, who had been appointed CW's attorney under an enduring power of attorney in 2010. Based on documentation provided, it appeared that:*

- *In 2010, CW's estate was valued at approximately \$1,000,000 which included a house (\$720,000), bank accounts and shareholdings and as at June 2014, his estate had diminished to approximately \$125,000.*
- *In 2010, then aged 95, CW had sold his house and "given" the sale proceeds of \$720,000 to his daughter S (his attorney) to purchase a new property in the joint names of the attorney and her husband, and in which CW could live for the rest of his life.*
- *The solicitor who witnessed CW's signature as transferor was also the same solicitor who acted on behalf of S and her husband in purchasing the new property.*
- *There was no evidence that CW had been provided with any independent advice regarding the providence of the proposed transaction nor was the supposed "family agreement" documented.*
- *In 2013 and contrary to any supposed "family agreement" CW found himself admitted to a nursing home in circumstances where the funds in his bank account were being*



*used to pay outgoings associated with the attorney's property.*

*The solicitor was concerned about CW's disclosures but the solicitor also identified that due to his age and observed short-term memory lapses, the solicitor could not assist with revoking the enduring power of attorney or making a new enduring power of attorney.*

*CW was assessed by a geriatrician as lacking the capacity to revoke the enduring power of attorney. CW's son then referred the matters of concern to the Office of Public Guardian (OPG) for investigation.*

*In relation to the allegation that the attorney had utilised CW's funds to purchase a property, the OPG:*

- concluded that the allegation was not substantiated because CW had contributed the funds to receive a life tenancy, following receipt of "independent legal advice" at a time when he had capacity to do so; and*
- subsequently made an application to the Queensland Civil and Administrative Tribunal (QCAT) seeking the appointment of an administrator for CW and also seeking directions from QCAT as to whether the administrator should take any legal action in relation to the life tenancy arrangement.*

*CW's son could not afford to be legally represented at the QCAT hearing. The attorney S appeared with legal representation.*

*QCAT ordered that the attorney S must arrange for the life interest of CW in the property to be secured and documented by a lawyer within 4 weeks of the hearing. However, the application for the appointment of an administrator was dismissed.*

*The case demonstrates the difficulties that older people face in protecting their interests when family agreements break down. The following factors all contributed CW's vulnerability in this situation:*

- Statutory agencies charged with protecting elders need to be properly trained and properly resourced. In this case, the OPG's investigation lacked rigour and was poorly carried out. The OPG investigator relied on a letter from the attorney S, an RP Data search and a letter from the attorney's solicitor to CW. The investigator did not seek to independently test or obtain corroborative evidence of the attorney's version of events. Further, the investigator did not obtain a range of publicly available and independent documentary evidence in relation to a series of property transactions associated with the matter. The independent documentary evidence would have contradicted significant aspects of the attorney's "story" if the investigation had been properly conducted. This may have led to a different result and, ideally, the removal of the attorney and the appointment of an independent administrator.*
- At no time was CW provided with independent legal advice. The only solicitor involved in these events had been engaged by the attorney S. No solicitor was engaged to act for CW. The OPG finding that CW had received "independent legal advice" was plainly incorrect. The serious consequence of this finding was that the*



*OPG investigator concluded that the presumption of “undue influence” under section 87 of the Powers of Attorney Act 1998 (Qld) could be rebutted.*

- *As in many cases, the family agreement was not recorded in writing. The failure to document the “family agreement” in or around 2010 had the following adverse consequences:*
  - *CW’s “life interest” in the house purchased by the attorney was never recorded in writing;*
  - *Therefore, the scope of CW’s interest in the property and other specifics of the “family agreement” could not be particularised to third parties;*
  - *When CW subsequently lost capacity, there was no way to independently establish the terms of the agreement other than through the attorney S;*
  - *When the attorney S completed documentation admitting CW to a residential care facility, S made a statutory declaration to the effect that CW did not own or part own the property in which he lived. This was a false declaration but it could not be independently verified because the life interest in the property was not documented;*
  - *Even though QCAT had ordered the attorney to arrange for the life interest to be adequately secured and documented by a lawyer, QCAT made no additional orders in relation to the form or substance of the retrospective agreement, nor in relation to reviewing the agreement. QCAT only required written confirmation that the written record was in place. It was later discovered that at the time QCAT made these orders, the attorney had one month prior signed transfer documents to sell the property. The attorney did not disclose this fact to QCAT and it was a crucially relevant factor to the attorney being able to comply with the order to document the life interest.*
- *The cost of legal representation in this jurisdiction can be a significant practical barrier to protecting the rights of the elder. CW’s son could not afford to engage legal representation either during the OPG investigation or for the QCAT proceedings. However, the attorney was legally represented, which may have led to an imbalance.*
- *After the QCAT proceedings were concluded, CW’s son discovered the further evidence in relation to the attorney selling the property in which CW held a life interest. When the firm sought to raise these issues with the OPG directly to see what assistance might be available, the OPG confirmed that the matter was closed.*

In summary, the above case demonstrates the adverse outcome of a combination of the failure to record a family agreement in writing, a lack of training and/or funding for statutory agencies, the cost of legal representation and a lack of independent legal advice for the elder involved. These are difficulties that practitioners see all too often in practice.



**Question 29 – 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?**

The Elder Abuse Paper noted a study undertaken in 2006:

*“An analysis of a sample of the Guardianship and Administration Tribunal’s files in May 2006 concluded that EPAs did not protect older persons with impaired capacity from financial abuse, nor prevent the occurrence of such abuse.<sup>6</sup> In the research sample, family members were strongly linked to financial abuse: EPAs which appointed family members as attorneys were twice as likely to involve suspected financial abuse.<sup>7</sup> The nature of EPAs is such that the principal will be unable to oversee the attorney’s activities once the principal has impaired capacity for financial decision-making.<sup>8</sup> In the absence of requirements for EPAs to be registered and monitored, no accountability mechanisms to monitor the activities of attorneys presently exist.*

*Further, by the time suspected financial abuse is notified to the Adult Guardian and/or an application to the QCAT is made, the abuse has already occurred. The current guardianship regime is responsive rather than preventative, leaving the older person in a vulnerable and disadvantaged position.<sup>9</sup>”*

Our members have also reported that the cost of recovering money lost as a result of misuse of powers of attorney is often too great for people to consider.

Often clients have lost all their money to the attorney and the client cannot afford to litigate to recover the funds. In addition, clients have to overcome another hurdle namely the “presumption of advancement” which is a presumption that any money that passes from a parent to a child is a gift. These circumstances are usually further complicated by a lack of or failing capacity and it is almost impossible for people to access justice if they have lost money to an unscrupulous attorney.

Our members report of cases where people are being “signed up” to Enduring Powers of Attorney by untrained people witnessing their signatures who do not provide adequate, if any, explanation of the document they are signing and take little to no steps to assess the person’s capacity to sign the document. Older people are literally being dragged to shopping centres to have their signatures witnessed on these documents.

Enduring Powers of Attorney have become a license to steal.

One of our members has provided the following case study as further anecdotal evidence of appointed decision-makers committing elder abuse:

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<sup>6</sup> Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, ‘Access to assets: Older people with impaired capacity and financial abuse’ (2006) 8(1) *Journal of Adult Protection* <[http://findarticles.com/p/articles/mi\\_qa4124/is\\_200605/ai\\_n16629535/?tag=content;col1](http://findarticles.com/p/articles/mi_qa4124/is_200605/ai_n16629535/?tag=content;col1)> at 15 July 2009.

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid



**Case Study:**

*An elderly client was diagnosed with an aggressive form of cancer. He was estranged from all of his children. Whilst he was in hospital undergoing chemotherapy, he was visited by one of his estranged children who talked him into signing an Enduring Power of Attorney appointing her. It was witnessed in the hospital by a Justice of the Peace. The client received no legal advice, no explanation of what he was signing and his capacity to sign the document was not tested or assessed by the JP witnessing the document. At the time, the client was on a variety of medication and he cannot recall exactly what document he signed or signing it.*

*Shortly thereafter the client was discharged from hospital and his new attorney / daughter picked him up and took him to a solicitor on their way home. The solicitor presented the client with a Transfer and the client signed ½ share of his farming property over to his attorney/ daughter. Once again the client does not recall what he signed or why he signed it. He indicated that he knew he probably shouldn't sign it but was in a great deal of pain and just wanted to be taken to his home to rest. He was delivered home and the attorney daughter then disappeared.*

*Several weeks later the client received notification that the daughter had obtained a mortgage secured over the property but was not making repayments so he had to start making these repayments. The client consulted a solicitor, revoked the Enduring Power of Attorney and sought some advice on reversing the transfer. Ultimately the cost of pursuing the action was too great financially and physically as the client had just months to live.*

**Recommendation:**

- Registration of enduring powers of attorney (see also comments below in relation to Question 30);
- Only have enduring documents witnessed by legal practitioners who are well versed in capacity requirements;
- Including terms for compulsory annual financial reporting similar to a tax return.

Ultimately, however, the Society considers that the development of such strategies should also be supported by evidence-based research.

In this regard, the Society refers to the comments above at Question 4 regarding multi-jurisdictional case review research.

**Question 30 - Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?**

It is acknowledged that a register will not prevent all forms of elder abuse.

However, on balance, the Society supports the creation of a national register of powers of attorney and other decision-making instruments. Whilst the requirement of registration will



not prevent all cases of abuse, there is an element of transparency associated with registration. The prospect of appointed decision-makers being held accountable because of the accessibility of a register may be a deterrent to abuse of the instruments.

Registering documents and making them available for search by the public will also assist people dealing with attorneys (or other decision makers) to confirm that the relevant decision maker holds a proper and current appointment.

The register should be hosted and managed by an independent public agency. This might include an Adult Ombudsman or similar agency.

***Some options for reform – paragraphs 137-139 – uniformity of documents and reciprocal recognition***

The Society welcomes the discussion of the issues outlined in these paragraphs. In today's society where older people often retire to a different State to their "working life" domicile, or where older people move State jurisdictions to be closer to family, there would be significant advantages to all parties to decision-making instruments being uniform and consistent across Australia.

The Society looks forward to more detailed discussion on these issues when the Discussion Paper is released.

**Question 32 – What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?**

Our members report fewer experiences of elder abuse by guardians and administrators. Our members expect that this is because the orders which authorise the administrators and guardians tend to have reporting conditions which require a level of oversight. In addition most orders have a review date at which time the orders are reviewed for suitability.

These features may be helpful in considering mechanisms for reform with respect to other appointed decision-makers.

**Question 33 - What role should public advocates play in investigating and responding to elder abuse?**

The Society refers to its comments above in relation to Question 2.

**Question 34 - Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?**

The Society welcomes discussion around the option of introducing adult protection legislation and establishing a system akin to the child protection system. It appears that there would be benefits from taking such an approach.

The legislation and system could be administered by an Adult Ombudsman (as discussed in relation to Question 2 above).

The Society notes that due to the powers set out in s 51 of the *Constitution*, the Commonwealth has only limited ability to put in place a legal framework for the prevention



of elder abuse. However, the Commonwealth is able to fund a comprehensive national elder abuse prevention and response scheme to be administered by the States and Territories. Without a national approach, it is submitted that elder abuse prevention schemes in Australia will remain largely variable and ineffective.

**Question 35 - How can the role that health professionals play in identifying and responding to elder abuse be improved?**

The Society considers that if adult protection legislation was introduced, it would also be necessary to support such a framework with mandatory reporting to an appropriate officer (such as an Adult Ombudsman) by health professionals, subject to appropriate privacy and confidentiality safeguards.

The Society supports models such as Health Law Partnerships which embeds a legal practitioner and a social worker in a health facility. Legal issues are identified immediately and acted upon before further harm is caused to a vulnerable older person.

**Question 41 - What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services and where should they be located?**

The Society refers to its comments above in relation to Question 2.

The establishment of a conciliation service could include the capacity for parties to agree to compensation or restitution where appropriate, without the need for tribunal or court proceedings.

In life transitions, stress and unresolved intergenerational conflict can potentially lead to elder abuse by an adult child or carer. In the early stages of intergenerational conflict a mediator can empower a vulnerable elder to express their views and wishes in a neutral environment.

Research conducted in Europe, the United States of America and Canada has shown that Elder Mediation can prevent elder abuse.<sup>10</sup> Overseas, Elder Mediation has been used to resolve family disputes about:

- Health and medical care (at home, in the community, in the hospital, continuing care and long term care facilities)
- Progressive dementias and other memory impairments
- Caregiving
- Financial issues
- Guardianship issues
- Housing issues

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<sup>10</sup> Craig Y (1994) 'Elder Mediation: Can it Contribute to the Prevention of Elder Abuse and the Protection of the Rights of the Elders and their Carers?' *Journal of Elder Abuse & Neglect* (6) 1. Craig (1998) 'Intergeneration mediation: Its potential for the contributing to the prevention of elder abuse' *Journal of Work Practice*, McCann-Beranger J, ( 2010) Exploring the Role Elder Mediation in the Prevention of Elder Abuse , Final Report, Presented to Family, Children and Youth Section Department of Justice Canada



- Living arrangements
- Intergenerational relationship issues
- New marriage and step-relative issues
- Religious issues
- Family business issues (including succession planning)
- Driving issues
- Abuse, safety and self-neglect issues
- Legal issues (estate planning, inheritance, living will, power of attorney etc.)
- End-of-life planning and decision-making.<sup>11</sup>

In Australia, Elder Mediation is a new specialised sub-branch of family mediation. Ideally, Elder Mediation is conducted by experienced family mediators who have undertaken additional specialist skills training in areas including:

- Determining the ability of an Elder to participate in the mediation;
- managing intergenerational family dynamics;
- assisting parties to reach a consensus on multiple issues;
- maximizing an Elder's participation;
- managing a mediation when an Elder (or another party) requires a surrogate or advocate;
- determining the prior wishes of an Elder when the Elder does not participate;
- identifying and overcoming obstacles to bring parties to the table; and
- identifying if other family members need support to participate in the mediation process.

Elder Mediators also need specialist knowledge of:

- What distinguishes Elder Mediation from family mediation;
- Ethical challenges that can arise in Elder Mediation;
- The impact of capacity, ageism and culture on the Elder Mediation process;
- How to determine the competency of an Elder to participate in mediation and accommodations which can be made to assist the Elder to participate;
- The process for reporting suspected, or allegations of, Elder abuse; and
- The community support services and residential aged care.

Compulsory Elder Mediation training should be required for Family Dispute Resolution Practitioners before they undertake Elder Mediation.

A specialist form of Elder Mediation should be developed for matters in the Guardianship Tribunals.

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<sup>11</sup> McCann-Beranger J, (2010) Exploring the Role of Elder Mediation in the Prevention of Elder Abuse, Final Report, Presented to Family, Children and Youth Section Department of Justice Canada, 2



Elder Mediation services should be provided to Elders and their families in a location and an environment where the Elder feels most comfortable, such as the older person's home.

### **Summary**

The Society supports a consistent national approach to affect an adult protection regime so that all States and Territories can put in place nationally coordinated strategies for inter-agency approaches to elder abuse.

Older people as a group are deserving of special consideration, support and protection from abuse. Considering that the proportion of ageing residents in Australia is steadily increasing, substantial law reform is required to protect this growing demographic.

The Society supports the work of the ALRC in this regard in order to improve the protections available for elderly and vulnerable persons and prevent the occurrence of elder abuse. The Society looks forward to working with the ALRC as the inquiry progresses.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Wendy Devine at [REDACTED]

Yours faithfully,

[REDACTED]

Bill Potts  
**President**