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29 May 2015

The Chair,
Communities, Disability Services and
Domestic and Family Violence
Prevention Committee

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Dear Ms Donaldson MP,

I refer to your letter of 20 April 2015 addressed to the Acting Director General of the Department of Justice & Attorney-General.

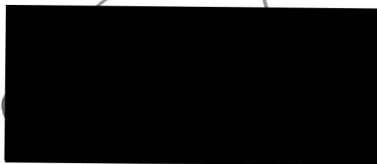
I note with interest your enquiry examining a number of matters including levels of financial literacy, support and advice and scams related to seniors.

I have prepared a short submission for the benefit of the Committee which is **attached**.

The Public Trust Office has significant involvement with seniors, although narrowly only in the areas in which the activities of the Office extend – chiefly providing advice and document making in respect of estate planning instruments (wills and enduring powers of attorney) and acting as financial administrator for seniors who have a decision making incapacity.

I am at the convenience of your Committee if further information is sought.

Yours faithfully



Mark Crofton
Acting Public Trustee

FPQS Inquiry
Sub. 007

SUBMISSION TO

COMMUNITIES, DISABILITY SERVICES AND DOMESTIC
AND FAMILY VIOLENCE PREVENTION COMMITTEE

CHAIR: MS LEANNE DONALDSON MP

PUBLIC TRUSTEE OF QUEENSLAND 2015

1. **Purpose of this submission:** This submission is made on behalf of the Public Trustee of Queensland responding to the Communities, Disability Services and Domestic and Family Violence Prevention Committee's enquiry into the adequacy of existing financial protections for Queensland's seniors inquiry.

The Committee, it is appreciated, has an important and broad burden to report to the legislative assembly in respect of:-

- Financial literacy of seniors
- The support and assistance available to seniors in respect of financial decision making
- Online and internet based vulnerabilities in respect of scams
- The agencies and organisations which presently provide advice and support to seniors
- The role of the financial sector relevant to the inquiry.

This submission is offered to assist the Committee in respect of those terms of reference.

The submission does not reflect the views of the Attorney-General nor the Department of Justice.

The Public Trustee has some knowledge and experience in respect of seniors and the financial protections and vulnerabilities relevant to its area of activity – chiefly in relation to those seniors who have lost capacity to make decisions for themselves.

2. **Context of the discussion – population projections in Queensland and prevalence of elder abuse:**

- 2.1 **Demographic projections:** It is certain that the Committee is seized of the demographic realities in respect of the aging population in Queensland.

The Public Trust Office commissioned a report which is entitled "Older Queenslanders Population Projections, 2013 Edition" from Queensland Government Statisticians Office.

The report may have some utility for the Committee in respect of identifying the particular needs of communities within Queensland relating to support and advice for seniors.

The findings of the report indicate improving life expectancies and the transition of the baby boomer cohort into the older age groups is expected to drive significant increases in the older age groups in coming years.

In 2011, there were an estimated 580,000 Queenslanders aged 65 years and over living in Queensland. By 2036, it is projected that there will be 1.4 million persons in this age group. The number of persons aged 80 years or older is expected to double in the next 15 years (to 272,000) and triple by 2036 to 454,000.

Between 2011 to 2036, the number of persons aged 65 years and over is projected to increase greatly in the areas of:

- Southeast Queensland (from 382,100 to 937,200)
- Ipswich (from 16,600 to 70,200 persons)
- Logan (from 26,800 to 84,600 persons)
- Townsville (from 17,500 to 52,600 persons).

The following table shows those expected demographic movements.

Age Group	2011 000	2016 000	2026 000	2036 000	Difference 000
60–64	245.4	264.8	325.5	375.4	130.0
65–69	191.2	240.7	300.3	352.3	161.0
70–74	139.4	181.9	254.2	317.3	178.0
75–79	101.3	126.7	215.5	279.0	177.7
80–84	78.0	84.2	145.2	215.2	137.2
85+	69.9	85.4	126.7	238.9	169.0

2.2 Elder abuse and prevalence: A particular focus for the Public Trustee’s operations include that which is broadly termed “elder abuse”.

The Public Trust Office sees incidents of elder abuse in a particular context; having been appointed administrator for often a senior person with a decision making incapacity there is a need for the Public Trustee in that role to investigate and sometimes civilly prosecute matters where the adult, senior has had money or property misappropriated from them.

This issue of elder abuse is in the Public Trustee’s experience a pressing one and will become more so with the aging demographic as neatly described by the Queensland Government Statistician.

The term “financial elder abuse” in the context of this submission is intended to include damage or loss in respect of an older person’s financial affairs, with the imperative “abuse” connoting that the damage or loss has been caused by some form of mistreatment.

Financial abuse then in the Public Trustee’s experience encompasses a wide ambit of matters including the loss of money, and property including real property (land) and chattels.

Prevalence studies have been undertaken seeking to frame the dimensions of this form of abuse:-

- **Australia – Monash University:** Work was undertaken by Monash University in respect of elder abuse within the Australian context. The conclusion reached was “studies in Australia indicate that elder abuse affects .5 – 5% of people aged 65 and older and up to half of this is financial abuse”.
- **The United States – National Centre on elder abuse:** The National Centre on elder abuse in the United States observes that “no one knows precisely how many elder Americans are being abused, neglected or exploited ...

according to the best available estimates between 1-2 million Americans aged 65 or older have been injured, exploited or otherwise mistreated by someone whom they are dependant for care or protection”.

The estimate of prevalence was that between 2 – 10% of older Americans suffer abuse.

- **The United Kingdom:** In 2006 a study “UK study of abuse and neglect of older people prevalent survey report” concluded that financial abuse of older people “is the second most prevalent type, affecting roughly 1 older person in 150”.

These types of prevalence reports suggests that elder abuse – that is abuse including financial abuse in respect of seniors is a sizeable issue and will affect between .5% – 10% of those aged 65.

What is also however generally agreed is that these studies relate to reported cases of abuse and the majority of cases are unreported.

The National Centre on elder abuse in the United States observed:-

“The current estimates put the overall reporting of financial exploitation at only 1 in 25 cases”.

Similarly the Monash University study discussed above in concluding that elder abuse occurs in respect to up to 5% of the population age over 65 offers the following salutary observation:-

“These estimates go much higher given that many cases are thought to go unreported”.

Consequently a significant proportion of seniors will suffer some form of abuse and as traced by the Government Statistician in 2013 the number of Queenslanders who will be aged over 65 is expected to dramatically increase within the next two decades.

From the Public Trustee’s experience the impacts of financial abuse frequently are profound.

For an individual (senior) who loses a significant proportion of their property including money the loss is one of financial independence and as a result a loss of lifestyle and amenity.

Seniors are not in a position either in terms of capacity or time to re-establish themselves financially.

Perhaps as importantly however depression and psychological distress is accompanied by financial abuse of older people (as with the broader community) and more particularly physical and mental health issues often result.

Families as a consequence are impacted and beyond that the community and government are called upon to respond – in the Public Trustee’s case by investigating and sometimes litigating, in the case of the Public Guardian investigating and taking action and often being appointed guardian for the adult.

- 3. Public Trustee assistance, support and advice for seniors:** This part 3 relates the areas of involvement, support and assistance offered by the Public Trust Office.

There are in general two areas – the Public Trustee supports seniors through advice and document making in relation to future planning and second, the Public Trustee is appointed administrator for many seniors after they have lost decision making capacity and there is a need for a substitute decision maker.

- 3.1 Will making and enduring powers of attorney.** A particular area of interest if not concern for seniors is making appropriate arrangements for support and assistance in relation to decision making and then upon death the orderly and proper transfer of their wealth to those whom they would like to benefit.

The Public Trustee has, since 1916, provided a will making service which is free to seniors (and all others).

The provision of this service avoids intestacies (the distribution of deceased estates according to the provisions of the *Succession Act 1991*) and provides an appropriate opportunity for Queenslanders to determine how their estate is to be distributed.

The Public Trustee also very much encourages seniors to give consideration to executing an enduring power of attorney which as a statutory form of agency and appoints another or others to make decisions for the (senior) person.

An enduring power of attorney is an important planning instrument and whilst it might take effect upon signing or at some later point it at least will have effect if the person (principal) loses capacity to make decisions for themselves.

An enduring power of attorney can relate to personal or financial matters or both.

Importantly the Public Trustee as an appropriate adjunct to the provision of will and enduring power of attorney making services offers advice to those concerned about planning for their future.

The Public Trustee offers these services, both the document making and advice services through its 16 regional officers, outreach services, Centrelink offices and through the Queensland Government Agents program.

The Public Trustee also provides a visiting service to hospitals or private homes for those seniors who are unwell or are not ambulatory.

The Public Trustee makes in excess of 25,000 wills annually and prepares greater than 3,000 powers of attorney.

- 3.2 The Public Trustee as financial administrator:** Queensland's *Guardianship and Administration Act 2000* provides a framework facilitating the appointment by the Queensland Civil and Administrative Tribunal of substitute decision makers for adults who have a decision making incapacity and for whom there is a need for a decision to be made.

Administrators are appointed as substitute decision makers for financial matters and guardians in respect of personal matters.

The Public Trustee is appointed administrator for in excess of 8,300 adults with a decision making incapacity, many of whom are seniors.

The Public Trustee's appointment for adults reflects one part of a comprehensive statutory and policy framework to assist, support and in some cases protect seniors who suffer a decision making incapacity (often a dementia type illness).

It is relevant to note that whilst an administrator (including the Public Trustee) is a substitute decision maker – that is the administrator makes decisions in place of the adult, the framework established under Queensland Law is very much one oriented to making decisions only when necessary and then only with the interests and views of the adult having been taken into account.

Each guardian and administrator is obliged to observe the “general principles”. Those principles require, amongst others, taking account of the adult's right to be a valued member of society (principle 4), participate in the general community (principle 5), encouraging self-reliance (principle 6), to participate as much as is practicable in making decision (principle 7(1)), obliging the substitute decision maker to the greatest extent practicable to preserve the adult's right to make his or her own decisions (principle 7(2)) and also where appropriate to make decisions which would conform with the adult's views and wishes if the adult was not affected by the incapacity (principle 7(4)).

The majority of adults, frequently seniors, for whom the Public Trustee is appointed administrator, have relatively modest assets. Approximately 77% of those adults have assets valued at \$55,000 or less and almost 95% have assets valued at fewer than \$150,000.

Whilst the Public Trustee is self-funding the majority of adults for whom the Public Trustee is appointed administrator receive significant reduction in fees by way of community service obligation rebates. In this area of activity nearing \$0.55 in every \$1 of fees is in fact rebated (not charged) – the cost of the Public Trustee's assistance, support and advice in the role of administrator annually amounts to some \$19M.

- 3.3 General advice and assistance:** The Public Trust Office also is committed to providing advice and support to seniors particularly in the area of future planning as discussed above.

Public Trustee staff attend to many hundreds of community based education forums speaking to the issue of the nature and value of having planning documents in place – principally enduring powers of attorney, wills and advanced health directives.

The Office also supports the Department of Communities Child Safety and Disability Service Elder Abuse Campaign annually by way of financial contribution and other assistance.

- 3.4 Elder Abuse – Seniors:** As discussed in Part 1 unfortunately the incidences of elder abuse often include the misappropriation of property of seniors. The Public Trustee may be involved in such matters where the adult concerned has lost capacity and the Public Trustee has by order of QCAT been appointed administrator.

Often such appointments follow excellent work undertaken by the Office of the Public Guardian in investigating concerns.

The Public Trustee's role as administrator includes a fiat to investigate and commence (civil) legal proceedings against those who may have misappropriated funds or property from adults including seniors.

Often the adult concerned does not have funds or capacity to seek to recover property misappropriated.

Many of these cases are complex, significant and the subject of strident defence from those involved.

By way of brief illustration some of the more significant cases of recent times have included:-

- ***The Public Trustee of Queensland (as litigation guardian for ADF) v Ban & Anor***: In this litigation a senior suffering a dementia illness had purportedly "gifted" both the proceeds of sale of a property (of something greater than \$2m) and an interest in the senior's remaining real estate (also worth a considerable sum of money) to his attorney pursuant to an enduring power.

The Public Trustee litigated in the Supreme Court and obtained declarations that those "gifts" had not been perfected.

- ***Lawrie v Hwang***: In a series of cases in the Supreme Court the Public Trustee litigated for a senior who had been suffering from dementia. The senior's wife (after marrying him) and after QCAT had declared that he lacked capacity flew with her husband to the Sydney branch of a bank, caused a term deposit in a company account previously controlled by the senior to be broken and repatriated the funds from that term deposit to her place of birth – South Korea.

The defendant in that matter had transferred more than \$2.6M. The wife, defendant had judgments entered against her including amongst other things for fraud.

Many of the matters referred to the Public Trustee in the capacity as administrator though involve sums of money and property of much lesser value resulting in protracted litigation being less viable. The impact of the loss of smaller sums for a senior with modest means though is of no lesser impact.

The Public Trustee does however strive to support, assist and make decisions on behalf of seniors with impaired capacity for whom the office is appointed administrator in a proper and diligent way.

4. **Areas for consideration:** This part raises some issues for consideration relating particularly to elder abuse of seniors who suffer incapacity (for this is an area of the Public Trustee's particular focus and activity).

These comments however ought not be taken necessarily as views contended for by the Public Trustee, rather they are a compendium of issues and structural or legislative reforms that have been implemented in other jurisdictions broadly in order to detect, prevent or prosecute elder abuse.

4.1 Education: Education and awareness for seniors and all others provides a key to preventing exploitation and abuse.

There are some discreet categories to which such education can be directed, in addition to the primary audience – seniors themselves:-

- **Awareness of the community generally:** Others expert in the field of financial elder abuse have remarked that the evolution of the community's awareness and action in respect of elder abuse is not unlike the journey raising community consciousness of child abuse and perhaps currently domestic violence.

That is not to suggest that those proponents believe the same policy or legislative paths should be taken in respect of financial elder abuse, rather that there is a similarity in respect of the level at which the issue sits in the consciousness of the general community.

It is likely that through public education (such as that run by principally the Department of Communities) elder abuse is more likely to be recognised, identified and reported.

- **Substitute decision makers, training and education:** At a discreet level individuals who hold the power and access to an older person's money and property represent institutionally those who may financially abuse that person. Such abuse may be opportunistic and intentional or indeed unintentional.

In jurisdictions overseas explicit and actual knowledge of the duties (and obligations) of decision makers in these circumstances serve to prevent unintentional but even likely intentional financial abuse.

The evolution of such considerations in California has led to the mandatory licensing of professional fiduciaries carrying with it an injunctive for continuing professional development.

The focus in the large part for the Office of the Public Guardian in England is not only to supervise deputies (substitute decision makers) but also to assist, educate and advise them on their duties and obligations.

The Victorian Law Reform Commission has recommended that the Tribunal appointing substitute decision makers have a power to order newly appointed substitute decision makers to undergo training.

- **Training and education – health professionals, lawyers and banks:** A further level of awareness, education and training is that of the identified need to ensure that lawyers, health professionals and other stakeholders important in the areas of seniors or elder financial abuse are trained and educated in:-
 - Identifying such abuse; and
 - Providing their professional services in the context of that understanding.

The nature, content and detail of the type of education awareness and training to be offered to these groups is likely beyond the ambit of this submission.

In California however officers of Banks for example are obliged to report financial abuse (that is there is mandatory reporting). That which has followed such legislative obligation has been training for those staff who come into contact with seniors.

4.2 Technical legal issues – Criminal Law: The Queensland Law Reform Commission in 2010 carefully considered some aspects of the legal framework relating to elder abuse, including criminal sanctions.

A short summary holds that section 298 of the Criminal Code carries an offence of stealing with a maximum penalty of five years, increasing to ten years where the offender is the victim's "agent" and section 408C of the Code proscribes fraud and visits a maximum penalty of five years imprisonment, with 12 years where the offender is in a fiduciary relationship.

The Commission concluded that consideration might be given to the development of a separate offence dealing with financial abuse and exploitation of vulnerable persons, including older persons, people with impaired capacity and people with disability. This recommendation can be found at 17-18 of the 2010 Report – commending that the Criminal Code be amended by adding to the list of aggravated circumstances where the offender is an attorney under an enduring power of attorney or an administrator or in both cases the victim is an adult with an incapacity.

The Commission also recommended that consideration be given as to whether there should be a separate offence in respect of elder abuse (see the QLRC Report No. 67 at volume 3, page 24).

In some jurisdictions within the United States elder abuse of itself is designated as a crime punishable by imprisonment or as a civil wrong, attracting a fine.

4.3 Technical civil law: Not infrequently financial abuse of seniors occurs in circumstances where assets have been transferred, sometimes for a value less than they are worth or often for no consideration.

In the context of the Public Trustee when appointed as substitute decision maker a view is adopted in these circumstances that they transaction is at least improvident. In order to "reverse" or overturn such a transaction (recover the property) two things likely need to be shown – first that the senior involved lacked capacity and second that the other transacting party knew or ought to have known of that incapacity (a requirement set in *Gibbons v Wright (1954) 91 CLR 423*). This position applies if no other legal rights or remedies can be approached.

In British Columbia legislation provides simply that where an adult is "incapable" a transfer is voidable unless it has been made for full and valuable consideration (effectively obviating the requirement to show that the other party knew or ought to have known of the vulnerability or incapacity of the person involved).

- 4.4 Registration of powers of attorney:** Enduring powers of attorney are useful, indeed socially necessary instruments and part of an appropriate future planning exercise by all adults but particularly seniors.

Powers of attorney however do provide a source or instrument by which financial abuse can occur.

Some jurisdictions provide for registration of powers of attorney holding that in part registration and public (or limited) knowledge of who the attorney is tends to reduce the incidences of financial abuse.

In England there is such mandatory registration for “lasting” powers of attorney – pursuant to the *Mental Capacity Act 2005*.

In the Australian context the Victorian Law Reform Commission has recommended compulsory registration of powers of attorney.

The Australian Bankers Association have called for uniformity in respect of enduring documents as well as a system of registration.

- 4.5 Support services:** A key capacity for seniors (in addition to training and education) lies with those in government, and not-for-profit and private sector professionals who are dedicated to providing support in the legal and financial context in particular.

In the United States increasingly the first responders to elder abuse take the form of coordinated groups involving lawyers, doctors and social workers (subsequent to reports of such abuse by Adult Protective Services).

In Queensland the Office of the Public Guardian (sometimes with Police or other services) investigates concerns in respect of elder abuse of those with an incapacity and acquits that task in the Public Trustee’s view well.

Seniors’ legal services provide great support for seniors in respect of all matters concerning older Queenslanders and are an important capacity.

- 4.6 Reporting:** There is some contention as to whether there should be a scheme obliging those who come in contact with or suspect elder abuse to report their concerns.

At one end of the spectrum sits mandatory reporting (that is legislative compulsion to report) of suspected abuse.

At the other end of that continuum proponents suggest there is little evidence that mandatory reporting is more effective in identifying instances of financial abuse than is voluntary reporting.

In California there is an obligation upon all persons “who has assumed full or intermittent responsibility for the care or custody of an elder or dependant adult” to report suspicions of abuse (see the Elder Abuse and Dependant Adult Civil Protection Act – Welfare and Institutions Code). In British Columbia in Canada there is no system of mandatory reporting but there is legislative obligation to investigate once a report is made (see the Adult Guardianship Act in that jurisdiction).

Interestingly one of the difficulties for financial institutions in the context of financial elder abuse is concerns as to confidentiality or privacy of customers of their institution. This may tend to prevent reporting of concerns identified.

There is legislation in some overseas jurisdictions addressing this type of issue and in the Queensland context would be matter for Federal law.

4.7 Summary: There are many areas for potential consideration in order to better advance the financial security of seniors.

Education and training of the community and particular sectors of it might well hold an important key. The criminalisation of elder abuse is an option which has been chosen in some jurisdictions and has been given some consideration by the Queensland Law Reform Commission in this State.

There are opposing views as to whether registration systems for enduring powers of attorney hold any greater security or benefit for seniors and in a similar way legal systems which oblige mandatory reporting of abuse attract discussion.

For the Public Trustee's role, limited in the way described in this submission however the system of investigation (through the Office of the Public Guardian and the Queensland Police Service) and consideration of the appointment of substitute decision makers for seniors with an incapacity by QCAT is a well functioning and very accessible resource.

Seniors are supported through these institutions of the Queensland Government and for the Public Trustee's part the Office seeks to provide advice and support to seniors in respect of future estate planning (wills and enduring powers of attorney including advanced health directives) as well as support, advice and make decisions for seniors in circumstances where they have lost capacity and the Office has been appointed administrator.