

# Submission to Parliamentary Inquiry as to the adequacy of existing financial protections for Queensland's seniors

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Although the Inquiry appears to be focussed primarily on seniors being taken advantage of by external financial advisors and services, we feel it important to highlight the growing area of financial abuse by family members and carers.

The Hervey Bay Seniors Legal and Support Service (SLASS) provides free legal and social support to seniors at risk of, or experiencing, elder abuse in the Fraser Coast Region. Financial abuse by a person in a position of trust is one of the categories of elder abuse.

In the almost 8 years that the Hervey Bay SLASS has been operational, the incidence of seniors seeking assistance from our service due to online or internet-based scams has been minimal. This is probably largely owing to the low level of computer literacy of older seniors, especially those aged over 70.

Of the 154 cases involving financial issues dealt with by this service since 1 July 2012, only 3 involved external financial transactions. The balance represented abuse by family members, usually in the form of unpaid “loans” and attorneys misusing their Enduring Power of Attorney (EPOA) powers.

The three external matters involved dealings with major banking institutions and concerns about the financial advice received.

### **Family Loans/Payments**

The most common form of financial abuse Hervey Bay SLASS encounters involves an adult family member, carer or other relative asking the senior for a “loan” on the basis they will pay it back when they can or on the happening of a specific event which doesn’t eventuate. Such “loans” are often for the purpose of making a large purchase of some sort, home renovations or for the payment of bills.

Often the motivation for the older person making the “loan” is their strong desire to help out their family members or as a result of threats made to isolate them if they don’t comply (e.g. place them in a nursing home; no longer visit them; restrict access to grandchildren). When the older person seeks repayment of the money, the family member claims it was a gift or they subject the older person to psychological abuse. In most cases the recipient of the loan is not in a financial position to repay the money anyway or does not want to take on a bank loan or external finance to pay it back. More often than not, the relationship between the older person and the family member/s breaks down as a result of the older person seeking to recover the money.

Another common form of financial elder abuse this service encounters is where the older person finds it difficult to get to the bank and he or she entrusts a family member or carer

with the bank card and PIN to access their bank account. Unless there is clear evidence of fraud in these cases, no criminal action can be brought and the only remedy is a civil action.

In any civil proceedings to recover money paid to or taken by family members, the presumption of advancement<sup>1</sup> means that the older person needs strong evidence before they can succeed. These transactions are rarely documented and it requires an independent strong-willed older person to take recovery action in any form.

This service has found that seniors are often reluctant to sue other family members even when the older person has been a victim of financial abuse. Further, the costs and stresses of doing so are often beyond the health and financial resources of the senior. The Queensland Civil and Administrative Tribunal (QCAT) can provide an informal low-cost method of assisting in recovering monies for matters within its jurisdiction<sup>2</sup>. In other cases, the formality and cost of taking action in the Courts often means no action is taken against the abuser.

### **Recommendation 1 - Prevention**

It is recommended that education targeted at seniors on the legal position of financial transactions between family members, as well as the difficulty of recovering family loans be included in any communications strategy adopted to assist seniors with their independent financial decision making. It is noted that Recommendation 12 of the *Not Now, Not Ever* report<sup>3</sup> suggests specific elements in the Communication Strategy target Elder Abuse and this could be included as part of that strategy.

### **Recommendation 2 - Recovery**

2.1 It is recommended that as part of its response to Recommendation 96 of the *Not Now, Not Ever Report* the Queensland Government consider whether the proposed Domestic and Family Violence Courts include within their jurisdiction an informal process to assist in recovering money where there is financial abuse of older persons by family members, and the power to make repayment orders in these circumstances.

2.2 It is recommended that legislative changes be considered to ensure that the presumption of advancement does not apply in the case of financial abuse of older persons by family member or carers, particularly where the transaction involves a substantial proportion of the older person's income or savings or the transaction places them in financial hardship<sup>4</sup>. Additionally, it is recommended that in these cases the presumption of

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<sup>1</sup> The presumption of advancement is the legal presumption that a payment or asset transfer from a parent to a child is a gift unless the older person can rebut the presumption.

<sup>2</sup> QCAT has jurisdiction to hear claims for debts and liquidated demands up to \$25,000.

<sup>3</sup> *Not Now, Not Ever - Putting an End to Domestic and Family Violence in Queensland* Report by the Special Taskforce on Domestic and Family Violence in Queensland - 2015

<sup>4</sup> It is noted that the June 2010 joint Office of the Public Advocate and Queensland Law Society Paper, "Elder Abuse: How well does the law in Queensland cope?" flagged this as an issue requiring review.

undue influence, similar to that contained in section 87 of the *Powers of Attorney Act 1998* (PoAA), be applied to recovery actions by the elder persons. The section provides:

“The fact that a transaction is between a principal and 1 or more of the following –

- (a) An attorney under an enduring power of attorney or advance health directive;
- (b) A relation, business associate or close friend of the attorney;

gives rise to a presumption in the principal’s favour that the principal was induced to enter the transaction by the attorney’s undue influence.”

### **Registerable Granny Flat Interests**

A recurring issue for which our assistance is sought involves money having been paid by an older person towards a family or care arrangement which then goes sour, such as an older person contributing money towards a home or granny flat and then being evicted from same. Any chance of recovering this money again requires a higher court action<sup>5</sup>, which is beyond the means of many of our clients, leaving only the Queensland Public Interest Law Clearing House (QPILCH) to arrange for the matter to be taken on pro bono, if the older person is to see justice.

### **Recommendation 3**

It is recommended that a Title Registration system for granny flat interests be considered as it would assist in securing repayment of funds lent in these circumstances.

### **Abuse by Attorneys**

In addition to direct financial abuse of seniors, the other significant area of concern arising in the matters handled by SLASS is the misuse of the income and assets of the senior by their attorney. The purpose of an EPoA is to protect a person where they do not have the capacity to make their own financial decisions. Section 33 of the PoAA provides that in the absence of an express limitation, a financial attorney can exercise their power immediately on the execution of the document. This Service regularly finds:

- Attorneys taking the view that because they have the financial power they can exercise it in any manner they think appropriate;
- Seniors with capacity believing they can no longer make financial decisions because the attorney is acting; and

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<sup>5</sup> Generally, this is an action for a declaration of a constructive trust which can only be instituted in the superior courts.

- Attorneys exercising the power without consultation or discussion with the senior regardless of the extent of their incapacity. For example, in a recent case the attorney withdrew all of the money from the older person’s bank account and placed it in a trust account in their name which the adult could not access. A large portion of the adult’s pension was then redirected to the new account. This was done without advising or consulting the senior who still had capacity. It was established that these steps were taken by the attorney to protect the money from a grandchild rather than to misappropriate the funds but the attorney nonetheless failed in their duties by not consulting with the adult.

**Recommendation 4 - Prevention:**

4.1 It is recommended that education targeted at seniors as to the extent of the powers and responsibilities under EPoA be included in any communications strategy adopted to assist them with their independent financial decision making. Both principals (the donor of the power) and attorneys need to be better educated as to the operation of EPoAs, the limitations on the powers, and the attorney role and obligations under the general principles. Ideally attorneys should be educated before they accept the role.

4.2 It is submitted that amending the PoAA and the EPoA to make incapacity the default position for the exercise of financial power rather than immediate would reduce the extent of this type of financial abuse. If this is not considered appropriate then at the very least the choices and the effect of those choices should be made clearer in the EPoA document. It is recommended that the EPoA form be amended to the NSW model where the options as to when financial power commences are clearly specified. Our anecdotal evidence from clients is that they unwittingly elect for their attorney’s power on their financial matters to begin ‘immediately’ without really understanding the effect or wishing to do so.

The existing Queensland EPoA form provides:

“5. The power given to my attorney/s begins:

immediately.

on this date: \_\_\_\_\_

[Write here the date when you want the appointed person/s to begin acting as your attorney.]

on this occasion: \_\_\_\_\_

[Write here the occasion on which you want the appointed person/s to begin acting as your attorney.]

Note: If you do not complete clause 5, the power begins immediately. “

This is compared to the New South Wales model which provides:

“ 4. Commencement

Tick the applicable box below (one only)

This power of attorney operates:

- a) Once the attorney/s have accepted his/her appointment by signing this document.
- b) Once a medical practitioner considers that I am unable to manage my affairs (and provides a document to that effect).
- c) Once my attorney considers that I need assistance managing my affairs.
- d) Other.....

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate once my attorney/s have accepted their appointment by signing this document.”

4.3 It is further recommended that the PoAA and EPoA form be amended to make it a requirement that the attorney’s signature be witnessed by a qualified witness who has certified that they explained the attorney role and responsibilities to the attorney and that they understood their obligations.

**Better Access to Justice**

The relevant cause of action to recover money taken by an attorney using their powers under an EPoA is not a simple debt claim. It is an equitable action for account, money had and received, breach of fiduciary duty or unconscionable conduct. This type of court action or action to recover money taken by misuse of the EPoA powers can only be instituted in the superior courts. Section 106 of the PoAA gives the court power to order an attorney to compensate a principal for any loss caused by the attorney’s failure to comply with the Act. However, QCAT has no jurisdiction to order an attorney to pay compensation pursuant to this section<sup>6</sup>. Further, QCAT’s jurisdiction under its Guardianship and Administration jurisdiction is limited to making orders in respect of current attorneys only<sup>7</sup>. It cannot make orders against previous attorneys.

The cost and time scale of a Supreme Court action prohibits such recourse being undertaken by many of the clients seen by SLASS. Many adults and their attorneys do not have the resources to bring a superior court action and services such as SLASS do not have the resources to assist them. Consequently, even if an older person has been deprived of their life savings by an attorney – and falls within the QCAT monetary limit – they have very little prospect of obtaining redress. If such actions could be taken through QCAT as part of its Guardianship and Administration jurisdiction this would result in greater access to justice in these circumstances.

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<sup>6</sup> see *LPJ* [2011] QCAT 177 and *Public Trustee v BN* [2011] QCAT 666.

<sup>7</sup> *LPJ* [2011] QCAT 177.

## **Recommendation 5 –Better Access to Justice:**

5.1 It is recommended that PoAA be amended to give QCAT jurisdiction to order compensation up to its monetary limit for losses suffered as a result of the actions of both current and former attorneys.

### **More Attorney Accountability**

Although an attorney under an EPoA has a duty to keep proper records and to keep the principal's property separate<sup>8</sup>, there seems to be no specific duty to hand over those records to a new attorney where their appointment is revoked. QCAT has jurisdiction to order an existing attorney to file records and have accounts audited<sup>9</sup> but the power does not extend to former attorneys.

## **Recommendation 6**

6.1 It is recommended that the PoAA be amended to include a provision that where an attorney's power is revoked or otherwise terminated, that attorney is required to provide to the new attorney, within a specified period of time, all of the adult's financial records in their possession or control and an account of the money spent during the period the attorney exercised their power.

6.2 It is recommended that the QCAT jurisdiction to order the filing of records and accounts be extended to former attorneys and apply to any exercise of power under an EPoA, not just where the person has diminished capacity.

### **Investigation of financial abuse of seniors**

The Public Guardian has the power to investigate financial abuse by current attorneys in respect of persons who do not have capacity. We have been advised by Public Guardian officers when we sought help in a matter where a former attorney had wrongfully used the senior's money for their own benefit that they do not investigate the activities of former attorneys or the activities of attorneys exercising financial decision-making power under an EPoA where the adult still has capacity. Although an adult may have mental capacity, in a medical sense, their circumstances may often be that their ability to take action is limited due to their feelings of vulnerability and dependency on the attorney. Effectively, the actions of a previous attorney go unchallenged unless the older person or new attorney has the means to pursue legal action privately.

Again, even if the matter is taken to court the older person may be too frail to appear as a witness or may have age-related memory loss or dementia. For justice to be done in these circumstances it is important that an investigative body be given access to the older

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<sup>8</sup> Sections 85 and 86 PoAA.

<sup>9</sup> Section 122 PoAA

person's financial information and have powers that override privacy claims by banks and other financial institutions.

**Recommendation 7**

It is recommended that the Queensland Government extend the power of the Public Guardian to enable it to investigate and prosecute all attorneys, both current and former, where there is evidence of financial abuse of a senior, and regardless of whether or not the senior has capacity.

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Submitted by:

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Authorised by the Principal Coordinator, Hervey Bay Neighbourhood Centre Inc.