



Inquiry into the Adequacy of Existing Financial Protections for Queensland's Seniors

Queensland Aged and Disability Advocacy Service (QADA)

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Please note that all case examples used have been de-identified. All names have been changed.

Background

QADA is a not-for-profit, independent, community based advocacy service with over 20 years experience in supporting and improving the wellbeing of older people and people with a disability in Queensland.

QADA is funded by the Queensland and Commonwealth Governments to provide information, education and support to enable people to understand and exercise their rights and responsibilities when receiving an aged care or community care service, ensuring their voice is heard. QADA's services are free, confidential and client directed.

We have 8 offices throughout Queensland. Last financial year, QADA provided individual support, information and referral to 5,000 consumers, delivered education sessions to 18,000 participants and distributed over 160,000 resources.

Alongside its general advocacy service, QADA's guardianship advocacy service provides support in relation to guardianship and administration matters to adults who may have impaired capacity. QADA's role is to provide information to the adult about Enduring Power of Attorney (EPOA) documents and/or the QCAT process and to assist the adult to express their views and wishes to QCAT.

In the 2013/14 financial year, QADA's guardianship advocacy service worked with over 200 clients and attended some 100 QCAT hearings relating to guardianship and administration. The service also delivered 20 workshops on the Queensland guardianship framework throughout the state. The workshops were primarily attended by service providers working with adults who may have impaired capacity. Over 400 people attended the workshops.

QADA appreciates the opportunity to make a submission to this important Inquiry.

The current levels of financial literacy of seniors and how that can be improved, for example by education programs and what support and advice is available to assist seniors with their independent financial decision-making?

There are currently gaps in the support and advice that is available to assist seniors with their independent financial decision making.

QADA is not aware of any education services in Queensland specifically targeted to older people that would assist them to build skills and knowledge in relation to their financial decision making.

We have often had contact with clients who were seeking, or would benefit from, a referral to such a service. Often the context is that the older person's capacity to manage their own finances has been called in to question. This may be because the older person is having difficulty managing debt or has suffered financial detriment due to a scam or a 'granny flat' arrangement going array. It may also be because the older person has used their money in a way that others believe to be unwise for example, by loaning or giving away money to another person. Another key context is where an older person is confronted with a complex financial decision arising from the need to contract for care in their homes or contract to enter an aged care facility.

QADA would recommend the development and funding of education programs in this area tailored towards older people and the financial decisions that they face.

These could be modelled on, for example, the financial literacy tools for older low-income women developed in Canada (Canadian Center for Elder Law, Background Paper Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts, March 2013 at page 19) or the 'Protect Yourself!' training package which utilises a peer education model to increase financial literacy for older adults (Canadian Center for Elder Law, Background Paper Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts, March 2013 at page 20). This package is also known as Financial Literacy 101. Education programs could be integrated into activity schedules for senior's organisations, community centres, retirement villages and aged care facilities.

As well as targeted education programs, there is a need for more readily accessible and informal dispute resolution services that older people can access to engage in conversations to protect their financial interests or to resolve disputes with their substitute decision makers. These could be modelled on the collaboration between Seniors Rights Victoria and the Dispute Settlement Centre of Victoria which is allowing for facilitated discussions with family members for older people considering 'granny flat' arrangements or exchanging assets for care (Senior Rights Victoria Annual Report 2013/14, page 21). In relation to dispute resolution regarding substitute decision makers, this needs to be linked to a court or Tribunal process, in order to encourage and motivate all parties to participate, in particular the appointed decision makers. This could be through a process similar to that in the family law area where failure to participate in mediation can have implications in relation to later court proceedings.

Older Queenslanders are often required to make complex financial decisions including those relating to entry in to residential aged care and understanding Consumer Directed Care (CDC) Home Care Package contracts and agreements. This complexity and the unique situation of older people must be recognised through the provision of adequate supports and advice for older people in their independent decision making. Such supports should be 'built in' to programs requiring financial decision making by older people and should extend to a whole of government commitment to reducing, to the greatest extent possible, the complexity of these decisions and the processes that surround them.

For some older people, decisions around residential aged care and care at home may be far more complex than the financial decisions that they have been required to make at other stages in their life. These decisions may also come at a time when the older person is in a period of crisis (for example following a hospital admission or the death of a spouse), where the person is experiencing some level of cognitive decline (such as the initial stages of memory loss) and/or where the person no longer has access to those who they would have previously relied on for support in making complex decisions. This may be because their spouse or another close friend or relative has passed away or is in poor health. As a result, there is a real need to ensure that older people can access appropriate supports and advice when facing these decisions.

The complexity of these decisions often requires access to legal and/or financial advice. An older person's ability to protect their own legal and financial interests is undermined when they are not aware of the need or desirability of such advice, do not know how to access or cannot afford to access such advice.

In relation to residential aged care, increased access to independent financial advice for older people entering residential aged care would be extremely beneficial. This should be made available free of charge or at a subsidised costs where an older person is unable to access commercial services. Determining the best way to fund residential aged care can be confusing and overwhelming particularly when many seniors have no family to assist and are struggling with the change of having to enter into a residential aged care facility. Having access to independent financial advisors at the

entry stage would assist seniors to understand what decision is best for them. Unfortunately, for many, they are either unaware of the ability to access such a service or cannot afford it and therefore adhere to the advice of the facility, which may not be in their best interest.

In relation to CDC Home Care Packages, many older people who contact QADA describe difficulties in understanding lengthy contracts and agreements which have clearly drafted by the legal representatives of those offering the package. Those contacting QADA also have concerns about terms within those contracts in particular, about terms relating to administration and case management fees. In some instances, older people are being asked to sign contracts in which such fees consume 46% of the total funds available to the older person for their care. We suggest that a general agreement with standard terms be required to be utilised across the sector. Similar to the General tenancy agreement (Form 18a) required under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), this would decrease the complexity of decisions that older people need to make in relation to CDC Packages. We suggest that this would greatly assist older people to understand the standard terms of the agreement and to identify special terms that may vary from provider to provider. This would also assist legal and financial advisers to provide advice to older people at a lower fee than that required for a non-standard agreement. This is something that QADA is currently advocating for with the federal Minister. Another solution would be to provide further funding to community legal services providing legal advice to older people about these contracts.

Similarly, financial hardship applications to the Department of Social Services to reduce income tested fees for Home Care Packages are lengthy and complex. QADA has been called on to assist older people to complete this paperwork and suggests that many older people may not be able to complete that paperwork without assistance. QADA suggests that this process is unnecessarily complex and as such, provides a barrier to independent decision making by older people.

Online and internet based vulnerabilities and the prevalence and vulnerability of seniors to scams

QADA has utilised a cross disciplinary student clinic of social work and law students to conduct information sessions with older people and younger adults with a cognitive disability in relation to scams. The feedback that we received through delivering those information sessions, as well as through intake calls to QADA, has been that older person's key concern was not online or internet based vulnerabilities but pressure from unsolicited phone calls and home visits. Older people have spoken to QADA about tradespeople coming to their door and offering services. The services may or may not be scams but there can be a lot of pressure on the person to make an instant decision, to the point of driving them to an ATM to withdraw money for a deposit. Older people have also described scenarios of door to door salespeople selling equipment intended to meet the needs of frail older people. One example involved a sale to an older woman of a product which exacerbated her back pain. She was sold the product by two young men who came to her home and initiated a very personal and emotional conversation based on photos and memorabilia around her home. Very few participants at the information sessions knew about the laws that provided consumer protections in relation to unsolicited home visits and calls prior to attending the information sessions.

Agencies and organisations that provide advice and support to seniors requiring financial protection

The discussion below will focus on agencies and organisations that provide advice and support to seniors requiring financial protection who lack capacity for relevant decisions or whose capacity for those decisions is in question.

Substituted decision making is often used as a "first-line" response to seniors requiring financial protection. This is often an inadequate response arising from a lack of other more appropriate

supports and occurs at the expense of an older person's right to be supported to make their own decisions.

A scenario that regularly arises in QADA's guardianship casework is where an older person is having some difficulty managing their financial affairs and would benefit from specifically targeted education and support or from informal dispute resolution (as above). Those with concerns in relation to the adult will often make an application to QCAT for the appointment of an administrator to make decisions on the adult's behalf. Financial protection through a substitute decision maker then comes at the expense of the client's right to be supported to make their own decisions and to be supported, through appropriate programs and education, to protect themselves from financial exploitation. The adult's often feel, very keenly, the loss of independence and autonomy that comes with the appointment of a substitute decision maker.

Examples of the above include a woman, Dorothy, who was ageing and had a condition which was deteriorating slowly over time and resulting in cognitive deficits such as slowed processing. She received an extremely high bill for a product and it was unclear whether that bill was legitimate or not. She was having some difficulty resolving the issue. A service provider made an application to QCAT for the appointment of the Public Trustee as an administrator. The Public Trustee was appointed and was presented to the older woman as a way to have these financial issues resolved. Once the Public Trustee was appointed, the older woman disagreed with a number of decisions that were being made by the Public Trustee in relation to her finances and felt keenly the loss of her financial independence. She made a further application to QCAT and was successful in obtaining a declaration of capacity.

The key point here is that there should have been a range of other options that could have been presented to Dorothy to support her to resolve the concerns about the bill. She did have supportive family members in her life and she could have been assisted to enlist their support in resolving the issue. There should have been services that she could access that could provide the relatively low level support that she required to resolve the issue in relation to bill. Such support should not have come at the expense of her legal ability to make her own financial decisions.

Similarly, we had a client, Nancy, who was in the early stages of dementia and a family member had begun to access her funds for their own benefit. Nancy was assisted to go to the bank and ensure that that family member could no longer access her accounts. Nancy found the idea of giving up control of her finances very distressing. She wanted to be able to access some kind of support to continue to manage her own finances but, being unable to identify any available supports, she felt that she had no options other than the appointment of the Public Trustee. QCAT put in place the Public Trustee to make her financial decisions.

This over-reliance on substituted decision making is not in accordance with our international human rights obligations which require that we promote supported decision making and reduce reliance on substituted decision making (John Chesterman, "Modernising Adult Protection", *Australian Journal of Public Administration*, vol 73, no. 4, pp 517 – 524)

Financial protection through a substitute decision maker often occurs after financial exploitation has already occurred and does not necessarily lead to the older person's financial loss being redressed.

For example, QADA assisted a client, Fred, who was financially abused by the administrator put in place by QCAT. When this abuse was brought to the attention of the Tribunal, the Tribunal made a number of directions relating to the administrator. The administrator failed to comply with the large majority of those directions, resulting in a significant financial loss by Fred. QCAT did not have the power to enforce these directions.

In addition, substituted decision making itself can be the site of financial exploitation. Fred, above, is an example of this. In that example, almost all of Fred's assets were taken by his administrator. His administrator also failed to pay significant fees that accrued while in control of Fred's finances, leaving Fred with a large debt.

As well as these more blatant examples of financial abuse, it is important to acknowledge that taking a restrictive approach to the role of substitute decision maker is a form of financial exploitation. Older people with substituted decision makers in place can be left with access to little or no funds and can be entirely excluded from having an impact on decisions made in relation to their own funds.

For example, QADA assisted Marion who resides in an aged care facility to access her \$20 per week allowance given to the aged care facility by her administrator. Marion was prevented from spending her allowance as the aged care facility did not agree with her spending plans. When this was presented to QCAT, this was rightly identified as a breach of Marion's rights and the administrator was reprimanded for not ensuring that Marion could access her own allowance.

QADA also assisted Eileen, an older person with a severe anxiety condition. This resulted in her requiring hospital admissions from time to time. During one of these admissions the Public Trustee and Public Guardian were put in place. However, when Eileen was out of hospital, she was quite capable. She was quite able to review her accounts and note where the Public Trustee had paid her accounts incorrectly. Eileen was eventually able to demonstrate her capacity before QCAT, including her ability to seek appropriate supports in decision making. The substitute decision making order was quite ill fitting and Eileen was extremely and unnecessarily frustrated and thwarted in planning her life by the imposition of the order.

Another example is Arthur. Arthur had the power to make his financial decisions taken away from him for a period of time. An interim substitute decision maker was put in place by QCAT even though Arthur had previously prepared his own EPOA with the Public Trustee, and, evidence was later able to be obtained that showed that Arthur had capacity to make his own decisions.

Arthur was an elderly man, who lived alone. He had several falls, which led to hospital admissions. During an initial hospital admission, Arthur's son, Trevor, approached QCAT, overplaying the precariousness of Arthur's situation and concerns about his decision making ability. As a result of this, QCAT appointed the Trevor as guardian and administrator on an interim basis.

Arthur returned home, with appropriate support of the transitional team. Shortly after returning home, Arthur mistakenly locked himself out of the unit, and asked a neighbor to call his son, as the son had the spare key. The son called an ambulance, sending Arthur back to hospital, without any real health need being identified.

This triggered concern on behalf of the treating team, who organized a neuropsychology assessment for Arthur. The assessment concluded that Arthur had capacity for all personal and financial decisions. An advocate was sought for Arthur for the upcoming QCAT hearing. In the initial interview with the advocate, Arthur gave permission to seek information from the Public Trustee to access his EPOA, and forward it to QCAT.

The social worker also made an interim application to QCAT on the basis of the positive neuropsychology report. The hospital staff were keen to assist Arthur in completing another EPOA, however QCAT advised to wait for a hearing (which subsequently found Arthur had capacity to make all his own decisions). As a result of the receipt of the EPOA, and positive reports of capacity, QCAT revoked the previous interim order.

Arthur was discharged home from hospital. He needed food and stopped off at the bank to get some cash to purchase food on his way home. The bank only had the first interim order appointing Trevor on their records and initially refused him access to his own money. Eventually, the other QCAT revocation orders were sent to the bank, allowing Arthur to access the basic funds he needed to buy his own food.

There are constraints and limitations to the protections that are currently in place in relation to financial exploitation by substitute decision makers.

QCAT does not have the power to make directions, other than directions necessary because of the ending of the person's appointment as an attorney, in relation to an attorney once an EPOA document has been revoked (*LPG* [2011] QCAT 177). This limits the extent to which QCAT can provide financial protection to an older person who has experienced financial abuse at the hands of their attorney.

The Office of Public Guardian (OPG) has extensive powers to investigate allegations of financial abuse of older people with impaired capacity by their substitute decision maker. They can also suspend an EPOA document and refer the matter to QCAT. QADA has had success in referring matters of this nature for investigation by the OPG. However, on other occasions, the OPG has been unable to follow up a referral because there has not been a way to access medical information to show that the adult to whom the referral relates has impaired capacity. QADA is not aware of how often such an investigation leads to attempted or successful action to recover monies or property on behalf of older people or whether the OPG sends these cases to the police for criminal investigation. QADA's understanding is that there are only a handful of staff within this area of the OPG.

Aged care facilities are a potential site of financial protection for older people however, they can also facilitate overly restrictive substitute decision making and as such, financial abuse. As seen in Marion's case (above), not all aged care facilities sufficiently understand the substituted decision making framework and the general principles that underpin it. If the aged care facility fully understood that their role was not to also act as a "de facto" substitute decision maker, and that Marion had the right to make her own choices in regards the \$20 per week, it would have been easier to remind the facility of Marion's rights, rather than resort to a QCAT application. Similarly, aged care facilities can, at times, facilitate financial abuse of older people by their EPOA. Again, this is particularly when the powers and responsibilities of an attorney are not well understood.

There are barriers to lawyers providing advice and support to those requiring financial protection whose capacity may be in question. The professional conduct rules for lawyers stress that instructions can only be taken from a competent person (Australian Solicitor's Conduct Rules 8.1). Lawyers are apprehensive in working with people with a cognitive disability in the absence of clear guidelines and are concerned about jeopardizing their professional career. This gives lawyers little confidence in being able to bring a case before the courts in terms of strict legal rights.

Therefore, another process, the appointment of a litigation guardian, is required for civil matters. Statutory agencies are averse to taking on this role, as it leaves them exposed to costs orders. For further discussion of these issues, please see the Australian Law Reform Commission Report "Equality, Capacity and Disability in Commonwealth Laws in particular Chapter 7 (<http://www.alrc.gov.au/publications/7-access-justice/access-justice-issues>).

A proactive prosecution approach that seeks out and prosecutes elder abuse, including financial abuse, could provide some financial protection to older people. This could be guided by a "Prosecutors Handbook", similar to that in the USA and Canada, to show, in practical terms how to investigate and take evidence from older people with disabilities and vulnerabilities whose evidence may otherwise be discounted from the beginning (National Center for State Courts, Prosecution Guide to Effective Collaboration on Elder Abuse, available at

<http://www.eldersandcourts.org/~media/Microsites/Files/cec/Prosecution%20Collaboration.ashx>).

Training could be delivered to police and prosecutors on the basis of this handbook.

Closing Comment

Overall, QADA sees a need for further support and advice to older people to assist in their independent financial decision making. We would suggest that this should include targeted education programs (such as the peer education model referred to above), further access to dispute resolution services, enhanced access to independent legal and financial advice and a whole of government commitment to reducing, to the greatest extent possible, the complexity of the financial decisions facing older people.

QADA also suggests that substitute decision making is used too often to provide financial protection to older people when it would be far more appropriate for older people to be supported to protect themselves. QADA highlights that substituted decision making often does not lead to financial loss suffered being redressed and can itself be a site of financial abuse including through the adoption of an overly restrictive approach to substituted decision making. QADA also points to some of the constraints that impact on the ability of QCAT, the OPG, aged care facilities, lawyers and prosecutors to provide financial protection to older people who may have impaired capacity.

QADA suggests that an EPOA registration system be available to prevent unnecessary QCAT hearings occurring.

QADA would also like to highlight that many of these issues apply equally to others with impaired capacity such as those with an intellectual disability or mental illness.