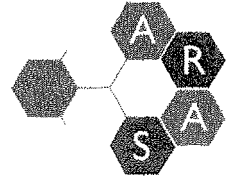


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Aged Rights
Advocacy Service Inc.

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The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO BOX 6021
Parliament House
CANBERRA ACT 2600

Submission No. <u>38</u>
Date Received

*For the Rights
of Older People*

28th November 2006

Dear Secretary,

Please find enclosed the submission from the Aged Rights Advocacy Service Inc to the Inquiry into Older People and the Law.

We appreciate the opportunity to present information about the experiences of older people that we learn from our work.

Yours faithfully

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Aged Rights Advocacy Service Inc.

Submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law.

The Aged Rights Advocacy Service Inc (ARAS) assists older people, or their representatives, whose rights and entitlements are at risk when they are using services in Commonwealth subsidised Aged Care Services (including residential facilities), and Community Services funded by the Home and Community Care (HACC) Program, or where they are at risk of, or experiencing, abuse by family and friends (Abuse Prevention Program). ARAS also has an Aboriginal Advocacy Program for older Aboriginal people, providing information about their rights and improving their access to aged care services.

Our experience and learning from the reports of financial exploitation in the Abuse Prevention Program, and the Aboriginal Advocacy Program, have informed this submission. ARAS provides social advocacy, not legal advocacy. ARAS advocates that recommendations to be considered by the Standing Committee would be able to prevent or address some of the more common scenarios presented in this paper. Some of this information was provided in response to the Discussion Paper: Enduring Powers of Attorney to the Attorney General of South Australia in February 2005.

The Abuse Prevention Program works on average with over 600 older people each year, with information and advocacy support to assist them to maintain or regain control over their lives and assets. The average age of the clients of this program is 78 years.

The definition of abuse used in the program is *'Elder abuse is any act that occurs in a relationship where there is an implication of trust, which results in harm to an older person. Abuse can be financial, psychological, physical, social, neglect or sexual'*. This submission focuses on reports of financial abuse.

ARAS Abuse Prevention Program data for 2005-2006 indicates;

- In 55% of these cases the alleged abuser was the adult son or daughter,
- Financial exploitation was a factor for 37% of clients. This is similar to data in previous years,
- 17% of the all cases were related to the misuse of Enduring Power of Attorney (EPOA),
- Other instances of financial exploitation may not have occurred had there been an EPOA in place.

Enduring Power of Attorney

Many of our clients have indicated that:

- they were not aware of the power they were investing in the donee through this instrument,
- they have stated they were told by the family member to sign the document and they complied as they trusted the person concerned,
- they were not aware they could put limitations on the scope of the financial activity that the donee can undertake,
- the signing of the instrument occurred while they were in hospital, or ill, or suffering the effects of medication, and otherwise unable to give valid consent,
- the donee has assumed powers outside of the scope of the instrument, for example deciding where the donor will live, or
- they were induced, coerced or intimidated into signing the instrument.

"I thought at the time that the POA was a good idea but did not realise the extent of power I had handed over to my children. I was not aware of placing conditions in the document to protect me – but these are my children!" Stated by older woman who had major surgery and gave EPOA to adult children for the time she was in hospital. Her bank balance dropped \$20,000 and they threatened to put her away (in a nursing home) if she did not stop causing trouble by asking about her money.

Older people have reported that they did not understand the nature and effects of the EPOA document. This lack of knowledge about the EPOA is apparent in both the general and professional communities, and is indicative of the general lack of community awareness. Anecdotes from consumers of ARAS, suggests that not all Solicitors/Lawyers are adequately informed of the legal implications of EPOA so they can provide little information about protections to their clients. Increasing information to the community about advance directives would be empowering for older people, who are one of the 'at risk of financial exploitation' groups, and could assist in safeguarding their rights.

A number of safeguards to protect the donor from potential financial exploitation could be put in place. For example, the independent witness could receive training in assessment criteria to be able to determine whether the donor understands the nature and effect of the document. There may also need to be a requirement that the independent witness interview the donor alone, or suggest further exploration be undertaken to ensure that the older person is fully cognisant of the implications of the document, and have not been influenced or under duress to sign.

Limiting the power given in the document may be insufficient as a safeguard in some instances.

APP clients have also indicated that:

- they were not aware that restrictions could be placed on the authority of the donee,
- they would have been unwilling to place restrictions given their sense of loyalty to, and the level of trust conferred on the donee, or alternatively,
- the coercion that occurred during the signing of the instrument would have disempowered them from creating such restrictions.

Information could be more widely available about using restrictions on the authority of the donee as a safeguard. The question then arises as to how these restrictions would be monitored to ensure the donor's wishes are implemented.

Determining that the donor does have the capacity necessary to make valid consent, where there is any doubt, could occur prior to the signing rather than retrospectively, which would be difficult to prove. Where negative family dynamics are an issue, ARAS suggests to our clients in the Abuse Prevention Program that they demonstrate that they do have capacity when they are making the instrument, to minimise the potential for a challenge in the future when family dynamics may have changed.

There have been instances where the donee has continued to access the donor's assets while a challenge to their actions is mounted. A specific safeguard would need to be in place to ensure that the donor's assets were protected while the validity of the instrument was determined by the court or other body.

Increasing the accountability of the donees, and undertaking regular audits could act as a safeguard and ensure that the donee is properly exercising their powers. It would be possible for the donee to sign an agreement stating that they are aware of their obligations, and will maintain full and proper financial records with the understanding that they can be audited. Without the potential for an auditing process to be in place, it is difficult to discover transactions in favour of a donee or donee's friends, and if discovered it is difficult to address.

Older people have reported that when they challenge the donee, the donee often claims they were not aware of their obligations. Raising awareness of the donee's obligations would be extremely beneficial. An information kit could be developed, containing examples of proformas or checklists that would be acceptable as a record of financial transactions. This may assist donees to more easily comply with their obligations.

People who contact our agency concerned about potential financial exploitation of a legally incapacitated person are referred to the Guardianship Board. There have also been examples where the time lapse between an administration order being made by the Guardianship Board and the implementation by the Public Trustee has allowed the abuser to take the assets of the older person.

Consideration should be given to automatically revoking an EPOA where the donee is a paid carer or health provider for the donor, and having a regulation from this occurring in the first place. There are examples of paid carers ingratiating themselves into the lives of frail, isolated and vulnerable older people in order to personally gain financially from their relationship.

Registering the EPOA could provide a strong safeguard as some clients have reported that they recall signing some papers and are unable to recall what they were. ARAS has numerous examples of older people whose mental capacity may have been compromised while they were in hospital, suffering ill health or suffering the effects of medication, or otherwise unable to give valid consent. Currently this is difficult to ascertain in these circumstances. ARAS would support some form of registration with due consideration of cost. It is important that any measures that would reduce access to this safeguard on the basis of capacity to pay or by making the process too onerous, not be implemented

There are many examples of banks not being consistent in their approach to, and handling of, the EPOA. There have been occasions where the older person has a dementia and the EPOA has been enacted, and the bank still allows the older person to withdraw substantial amounts of money that is then given to the abuser who has targeted them.

The cost of bank fees can act as a deterrent that prevents the older person from seeking bank statements from previous months to find out where their money has gone. Older people are less likely to access this information electronically.

"I should have put something in writing but I trusted my son implicitly. Now I have no money and nowhere else to go". Stated by 85 year old woman whose son suggested she sell her unit because he was concerned about how she was coping. He used the money to build an extension to his house and when his marriage ended up in divorce, he told his mother that the money she had given would be used to pay out his wife".

The issue of trust is also apparent in instances where the older person is invited to sell their home, put the money into an extension of the adult child's house and in return they will be looked after. Older people report that as they trusted their adult child, they have not put any formal agreements in place and this proves detrimental when things go wrong. For example the adult child gets divorced and the home has to be sold (as above), or the family dynamics change and the relationship sours, leaving the older person homeless and without assets.

Formal agreements or other protections should be promoted for smaller amounts of money or assets too. Once a belonging or asset has been taken, the older person rarely gets it back. The family member may have pawned it, spent it on drugs, alcohol, the pokies etc and it can never be redeemed. There can be a threat made to the older person in order to get them to hand over the money or

asset. This kind of theft under duress is often not regarded as theft by families, regardless of their culture.

"I didn't want to tell anyone cos (because) it was a shame job, it was my daughter".

Issues raised to the Aboriginal Advocacy Program tend to be around financial exploitation and fraud rather than EPOA, which are not taken up widely in the Aboriginal communities. There are numerous barriers to remedying the various situations including those of knowledge, distance and culture, highlighted in the following examples:

- The obligations of acting as guarantor are not widely understood by older people. In one instance the nephew of an older Aboriginal person got him to sign for a \$5000 credit card through American Express and then spent it all, leaving the older person with the monthly payments which were well beyond his means.
- An older person whose daughter, a drug addict, visited him every pension day and took him to the bank and coerced him into giving her large sums of money, "cleaning out" all of his savings.
- A frail elderly man had a carer/daughter living in the next town and claiming a carer payment from Centrelink. The daughter did little for her father who lived alone and had HACC services for his activities of daily living. Other family members and the service providers alleged that the daughter only visited her father during pension week and even took away the food he bought, leaving him with nothing to eat.

Older Aboriginal people are experiencing different levels of financial exploitation and abuse, not only by family members. There are also reports of exploitation by shopkeepers/traders or institutional discrimination, especially in rural and remote areas. For example, an older person living in the remote homelands whose keycard was held by the community's storekeeper. He had not received any of his pension for 3 months because the storekeeper had taken all of it. The older person speaks no English and the bank would not give him any information about his account because they could not understand him over the phone and refused to talk to the HACC service provider who spoke on his behalf "for reasons of confidentiality". The bank had suggested to the service provider that the older person go to their nearest branch, which was 600 kms north or 500 kms south of where he lived to get the information and stated that they could not offer him the services of an interpreter. In another instance a taxi driver demanded more money for the fare from an older Aboriginal man who had been provided with a taxi voucher, taking advantage of a lack of knowledge of the system.

There is scope to investigate the various forms of financial exploitation experienced by Aboriginal people and to explore how the law can be more accessible to them.

The Abuse Prevention Program has seen a good response from Police, particularly through the use of a security audit for the older person, which provides a non-threatening initial contact. It is important to acknowledge that older people are easily deterred from reporting incidents and if they do not get a good response from Police – eg its not adequate or timely, then the older person may never bother calling again.

A further aspect for consideration is the growing expectation in the residential aged care industry that an older person will have advance directives in place, suggesting that wider promotion of the benefits of making an EPOA would be beneficial, and should be undertaken using a variety of media that is accessible and appropriate to the broader community. This would encourage the older person to give the instrument due consideration in their own timeframe, rather than having to make it in a time of crisis.

Anecdotes from consumers of ARAS also suggests that many aged care providers are not adequately aware of their responsibilities regarding EPOA, for example, taking instructions about the older resident from family members who do not have legal authority and/or where they are not considering the wishes of the older resident. An awareness raising campaign would be of great benefit to all stakeholders.

For further information please contact:

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November 2006