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**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

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**Additional Questions for the Aged Rights Advocacy Service Inc arising from the Older people and the law inquiry public hearing in Adelaide, 31 July 2007**

1. Can ARAS tell the Committee whether, in its experience, elder abuse is increasing?

- *Is ARAS able to detect whether certain types of elder abuse are becoming more common in comparison to other types?*

**Answer:** We have experienced a steady increase in the numbers of reports about abuse from approximately 600 in 2003 to 800 in 2006. However this may mean that there is the same amount of abuse happening but more people are reporting it. We also hear a lot more anecdotes from people in our education sessions and people seem more willing to talk about it as awareness of abuse increases. Other agencies for example RDNS or Domiciliary Care also receive reports of cases of abuse but their numbers are not available to ARAS at this time.

Financial abuse is the most commonly reported and that has remained constant throughout the 10 years of our program. It has usually been accompanied by psychological abuse.

2. In its submission ARAS raises the issue of donors of enduring power of attorney not understanding the nature and effects of the document, and recommends training for witnesses so that they can determine whether the donor has the requisite level of understanding, or possibly even a requirement that the witness interview the donor alone (p. 2).

- *Are there any special arrangements or requirements for witnessing enduring powers of attorney in SA currently?*
- *How in ARAS' view should an individual's capacity to enter into financial or other arrangements such as a power of attorney best be assessed?*

**Answer:**

See Appendix One for the Instructions to Justices of the Peace Issued under authority of the Attorney-General. Other witnesses can include lawyers, proclaimed Bank Managers, or a proclaimed member of the Police Force.

Through the Alliance for the Prevention of Elder Abuse a Witnessing Documents brochure was produced to raise awareness of Justices of the Peace to the issue of elder abuse, however using this information is not a requirement. The Alliance also advocated for information to be provided in the JPs training kit and have

provided education sessions to JPs. JPs now provide free training on Witnessing Documents to other JPs although attendance at training was not compulsory.

For the majority of older people the current system works well. Assessment as a form of safeguard may have to be dual layered. The current system could be enhanced to give those witnessing a signature some skill in an initial assessment of the persons understanding of the nature and effect of the document. If they then have any doubts about the persons competence or willingness to donate their attorney they could then be required to request a more formal assessment prior to witnessing. For the small percentage (3-5% of people over 65) who are at risk of abuse, an 'official' assessment eg. from a doctor, or psycho-geriatrician (definitely if the persons capacity is in question) may be more suitable as the assessment must have credibility if challenged in the future, or a specialist abuse support worker (if abuse is suspected).

It is of course impossible to predict every older person who may become at risk in the future therefore a general requirement for an 'official' assessment could be the norm although it could be onerous on the majority of people. However this requirement, in itself, could act as a deterrent and assist in preventing financial abuse and exploitation, and reinforce the importance of the power being given in the document.

3. In its submission ARAS suggests formal agreements or some other form of protection for familial arrangements involving money or assets due to the possibility of abuse, duress etc. (pp. 4-5).

- *In ARAS' view, would family agreements constitute an adequate form of formal agreement in this area? If not, what other form of agreement/protection would ARAS envisage?*

#### **ANSWER**

The Alliance for the Prevention of Elder Abuse have a view that family agreements do have legal force and would be recognised by the courts.

However if the agreement relates to property for example, it would be prudent where possible to have the agreement registered on the title.

Also that it is important that the deed or contract reflects that both parties received independent legal advice.

One of the problems that needs to be resolved is that money or assets can be provided to another party by an older person, without any written documentation so it is very difficult to find the 'trail of evidence'. It is worth remembering that the sums of money vary from a few thousand to several hundred thousand, particularly where a house is being given.

A further problem is where a contract or a deed of agreement between families has been made but the agreement is not registered anywhere.

It is worth considering making a requirement for a formal contract essential and requiring registration where property is involved so that these dilemmas are circumvented.

In those cases where people are seeking information prior to entering an arrangement ARAS recommends that people seek legal advice. However older people have expressed their difficulty in asking for formal agreements because of the trusting relationship. They also say they do not need legal advice because of the trusting relationship they currently have with their adult children. ARAS has many reports where the relationship has broken down and there is no formal contract to the detriment of the older person.

If there was a requirement that a formal contract be made this would take the onus off the older person having to ask for it and could act as a deterrent to the potential abuser.

4. ARAS mentions anecdotal evidence in its submission that many aged care providers are not adequately aware of their responsibilities regarding enduring powers of attorney (p. 6). The Committee has also heard that carers in aged care facilities can pressure residents for gifts or even to change their wills so that the carer will receive a financial advantage.

- *What is ARAS' experience of this issue (if any)?*
- *Does ARAS have any suggestions as to how vulnerable people could be protected from such pressure?*

**Answer:**

ARAS has many examples of aged care providers talking to the Power of Attorney about lifestyle matters, which is outside the scope of the Power of Attorney, even where the resident has capacity to make their own decisions. More awareness of the nature and scope of the document needs to be provided to overcome this confusion.

We also have numerous examples where the Power of Attorney is not paying bills thereby putting the residents accommodation at risk or otherwise not acting in the residents best interests and it is not recognised as financial abuse until the resident has a large debt. The aged care providers appear to be reluctant to challenge a Power of Attorney and to use the Guardianship Board because of their lack of knowledge. Aged care providers need more education about abuse and the need to act swiftly when they suspect it as the aged care legislation requires they assist

the resident to manage their financial affairs (Standard 3.5 of the Standards and Guidelines for Residential Aged Care).

ARAS is seeing an increase in the number of reports of financial exploitation by paid carers in residential and community aged care. Both groups of older people are vulnerable due to mental or physical frailty.

Common themes that are emerging in community aged care are the paid carer is providing services to an older person who is living alone. Paid carer provides additional services for 'free' such as taking shopping on a weekend, or befriending them in other ways, for example, taking the older person to their home for dinner. After a while the paid carer offers to work privately for the older person, thereby further isolating them. Isolation is a key risk factor in elder abuse so is a strategy that abusers will use.

There has been a number of reports of older people giving paid carers cash because of a 'hard luck' story being told by the paid carer. For example the paid carer will say that they cannot provide service any more because their car has broken down and they cannot afford another one. The older person steps in and 'rescues' the paid carer with money for a new car.

ARAS has had reports that once the older person dies the paid carer moves on to the friends of the older person who may be in a similar position - predatory behaviour.

We have heard reports mostly in community care about changes to wills in favour of paid carers from family members who only find out once the older person has died. It is very hard to track this form of financial exploitation as many older people are targeted because they do not have a family and the paid carer often becomes the executor as well so it remains a secret in effect. ARAS has had very few reports of this occurring in residential care perhaps because of the group environment it is harder to keep it a secret.

There are other examples where service providers have seen the above occurring and express concern to the older person but the older person is adamant they want to continue with the arrangement as the paid carer has infiltrated their life and they like having this person in their life. They do not see that it is an artificial arrangement or do not want to see it. Where they have capacity there is little that can be done. It is easier if they do not have capacity and the Guardianship Board can become involved.

There are numerous reports of theft of items in residential care - residents report loss of clothing, money, toiletries, chocolates etc. People with dementia are very vulnerable and rely on their relatives noticing that something is missing. There may be suspicions about who did it but there are so many staff working in a facility it can be hard to prove. Where staff have been sacked for receiving money from a resident the relationship is sometimes continued and there is little the facility can do about it. For example where the sacked staff member picks the

resident up and takes them out for the day. It usually comes down to the internal policies and procedures of the facility, their employment processes and policies but is very hard to predict or monitor.

When ARAS learns of these issues we encourage the residents to report it to management in the belief that their response will deter further abuse.

5. It has been put to the Committee that one of the major barriers to older people accessing legal services is cost, and that specific legal aid funding should be allocated to address this issue.

- *Does ARAS have a view on this?*

**Answer:** Yes funding should be allocated so that older people are not denied access to the law. Some states are now providing senior law specialists, which seems to be mainly telephone advice. Access to free telephone advice is very important but is unlikely to assist in the more serious cases. Where older people have lost their assets due to financial exploitation, they cannot afford to take it to court due to monetary reasons, and/or health reasons. Court cases take so long to settle and it is the 'older' old people who are seen to be most at risk, so the abuser can virtually wait it out. If some cases were able to be taken to court and there was publicity about them, it could be a strong deterrent.

For many older people the loss of their assets however large or small is catastrophic. Being able to easily access legal mediation or advocacy to recover some of their assets if not all, could make an enormous difference to their quality of life.

The frailty of the older person should be considered in terms of providing a home visiting service as all older people cannot physically access a legal centre. This also acts as a deterrent to accessing legal services and works in the abuser's favour.

Prepared Marilyn Crabtree  
CEO Aged Rights Advocacy Service Inc  
17<sup>th</sup> August 2007

## INSTRUCTIONS TO JUSTICES OF THE PEACE

*Issued under authority of the Attorney-General*

The following instructions are provided for the guidance of Justices of the Peace.

### **8. Powers of Attorney**

Another type of document which you may be requested to witness is an enduring Power of Attorney. If a person wants to authorise someone else to do certain things for him/her, he/she can grant that authority by executing a Power of Attorney. The document sets out what acts the "attorney" (agent) can perform on the person's behalf. This kind of document enables a person, eg who gets overseas, to organise his/her affairs during the period of absence.

A simple Power of Attorney becomes ineffective if the person granting it becomes mentally incapable to the extent that the law deems him/her incapable of looking after his/her own affairs. If a person wants to appoint someone to act for him/her even if he/she becomes legally incapable, a special type of Power of Attorney must be executed. This special type is an **enduring** Power of Attorney and it must be witnessed by someone who is able to take affidavits. This includes Justices, by virtue of the Evidence (Affidavits) Act. Incidentally, to be effective and enduring Power of Attorney also needs a statement of acceptance to be completed by the donee of the Power.

If the person executing the Power of Attorney (the grantor) wants the donee to be able to deal with real estate owned by the grantor, the Power of Attorney needs to be lodged at the LTO before any documents signed by the donee on the grantor's behalf will be accepted by the LTO. Often the Power of Attorney will be inserted in the LTO form, which should be witnessed by you in the same way as other LTO documents (see Section 4 above).

### **9. Witnessing Documents for Relatives**

There are no legal impediments to witnessing a relative's signature or taking a relative's oath. However, the following matters should be borne in mind if you are requested to take a relative's oath or to witness a signature.

A beneficiary under a will cannot witness the will. Hence if you are a possible beneficiary under a will, you should not witness a signature.

The credibility of the statement made by a person in an affidavit may be questioned if the affidavit is taken by a relative of the person. This could result in the person being called to give oral evidence in Court, instead of merely having the affidavit tendered in Court. In LTO transactions there is also increased scope for allegations of fraud to be made if the witness is a relative of the person making the transaction.

Prudence suggests that it would therefore be preferable for you to refrain from witnessing signatures of relatives or from taking oaths of relatives in virtually every situation, so as to eliminate any possibility of fraud or bias being alleged.