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AUSTRALIA

Submission No. .... 26
Date Received .....

RECEIVED  
27 NOV 2006  
BY: LACT

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27 November 2006

NH

The Secretary of the Committee  
Standing Committee on Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600

Dear Sir/Madam

**RE: Inquiry into older people and the law**

I refer to the Terms of Reference seeking submissions to the Legal and Constitutional Affairs Committee in relation to the Inquiry into older people and the law.

I enclose for your information the submission of the Assets and Ageing Research Team, The University of Queensland.

Yours sincerely,

**Anne-Louise McCawley**  
Project manager

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**Inquiry into Older people and the Law**

**The House of Representatives Standing Committee  
on Legal and Constitutional Affairs**

**Submission by the Assets and Ageing Research  
Team, The University of Queensland**

Professor Linda Rosenman  
Professor Jill Wilson  
Dr Cheryl Tilse  
Dr David Morrison  
Ms Anne-Louise McCawley

**December 2006**

This submission is made by the Assets and Ageing Research Team at the University of Queensland. Since the late 1990's the team with expertise in social work, social policy, economics, finance and law has developed a broad research program exploring a range of matters relating to older people and the law. The research program, supported by the Australian Research Council and a range of government, professional and non-government partners includes:

- A study of older people and informed decision making in socio legal matters. This study investigated the understanding and experiences of older people and their families in relation to Enduring Power of Attorney, the Aged Care act and retirement village legislation. It also explored the knowledge and experiences that legal practitioners and informed intermediaries, such as allied health professionals, have in relation to these three areas of the law;
- Several studies of the management of the financial assets of older people by non professional asset managers. In the program financial abuse has been conceptualised as part of a broader engagement of families, friends and neighbour in the management, misuse and abuse of older people's assets;
- Several studies on financial abuse, and
- A community demonstration project exploring how to improve knowledge and practices relating to asset management and older people and inter-organisational and community responses to financial abuse.

Using this research, this submission focuses on four of the six specific areas noted in the Terms of Reference for the Inquiry. It addresses the adequacy of current legislative regimes in relation to the areas of

- fraud,
- financial abuse,
- enduring powers of attorney provisions, and
- barriers to older Australians accessing legal services.

This submission only addresses fraud as a component of financial abuse of older people. It primarily focuses upon Queensland law and its impact upon the legal needs of older Australians.

### **Inadequacy of current legislative regimes in addressing financial abuse**

There is no law in Australia that specifically legislates in relation to the financial abuse of all older people and therefore no standard definition of financial abuse. The definition of financial abuse therefore arises from the literature around this topic.

One definition commonly adopted in Australia defines the financial abuse of older people as "the illegal or improper use of the older person's property or finances" (Kurrle and Sadler, 1994:6). It is reported to be the fastest growing and one of the most common forms of elder abuse in Australia (Cripps, 2000) and internationally (Brown, 2003; Kemp and Mosqueda, 2005). The act of financial abuse covers a range of activities; from outright theft or fraud of money or possessions to coercion or undue influence of the older person in the attempt to access the older person's assets.

There is redress available in Queensland for all people, including older people, who have been targeted for fraud, theft or undue influence. Queensland has legislated for fraud and theft under s390 and s391 of the *Criminal Code 1899 (Qld)*. Civil

remedies for intentional misuse of property may also apply in certain circumstances. Undue influence and asset stripping that occurs as a result of such influence also may have common law redress. However, such remedies depend first upon the fraud or theft being reported and second, depend upon the older person being prepared or able to press charges or to engage legal counsel. Both remedies are unattractive largely because financial abuse of older people usually occurs in the context of a relationship of trust.

Strangers or professional carers and advisors do abuse (Smith 1999:4). However, current national and international research (Brown, 2003; Kurrle, Sadler and Cameron, 1992; Office of the Public Advocate, 1999; Rabiner, O'Keefe and Brown, 2004; McCawley, Tilse, Wilson, Rosenman and Setterlund, 2006) suggests that close family or relatives are most likely to be the financial abusers of older people. Like other forms of elder abuse, financial abuse is complicated by the emotional and social ties of trust and care that arise from family relationships. These ties mean that many older people are unlikely to want to prosecute or sue a family member, or indeed make a report of any kind. Legal proceedings may be too intimidating. The older person may also depend upon this family member to care for them and assist them to remain living in the community.

Families are involved in a range of ways in assisting older people to manage assets. One study (Tilse, Setterlund, Wilson and Rosenman, 2005:220) reported that one in four Australians in 2003 had helped an older people with their assets in that year. The type of older person who relied upon others for assistance were not just those with impaired capacity but also those older people who "lacked the confidence to do it themselves due to disability, poor health or being "old and frail". In such cases, there may be difficulty finding clear evidence to support claims of fraud or undue influence, particularly when the alleged financial abuse occurs within a family relationship without witnesses or records to support the claim.

Similar issues arise with the possible application of the *Domestic and Family Violence Protection Act 1989 (Qld)* to such situations. This Act applies if the relationship of the abuser and the older person fit into the category of spousal, intimate person, family or care relationship and there was inter alia, willful damage to the property of the older person or harassment or threat to commit such acts [s11 of the Act]. It is therefore limited in its application.

One advantage is that it does not give rise to a criminal penalty at first instance and therefore might be more acceptable to older people than the criminal sanctions that arise under the *Criminal Code* charges for fraud or theft. However, older people might be loathe to bring such orders against family members due to embarrassment or fear of hostility or loss of important relationships.

In summary, although there is some limited legal redress available, the current criminal and other actions may have significant adverse consequences on the older person with little return. The older person may lose their closest family support or attachment whilst the family member/s that have taken advantage may be unable to re-pay or return the assets taken so the older person receives little return even if they agree to legal proceedings.

With domestic violence orders, the older person must not only be willing to make the initial application but must also be prepared to advise the police or other legal authorities if the abuser continues or breaches the conditions of the Order. Younger people may have a chance to re-build their lives and form new relationships/attachments but older people, particularly if they are frail, unwell or dependent upon others for care, may not. The legal needs of older people cannot be addressed without considering the social impact of any actions.

### **The relationship of asset management practices to financial abuse**

Research (Langan and Means, 1996; Setterlund, Tilse, Wilson and Rosenman, 2000) illustrates that although financial abuse can occur through deliberate action of family members, in many cases, financial abuse may occur due to a lack of knowledge about the proper processes and obligations associated with either substituted or assisted management of older people's assets. In such cases, support in the social and care realm may be more appropriate than legal remedies in preventing financial abuse.

Some inadvertent financial abuse arises due to the lack of clarity around assisted and substituted decision-making processes and poor asset management practices. Insight into risky asset management practices are used by families is reported in a national survey and in-depth study conducted by the team (Tilse, Wilson, Setterlund and Rosenman, 2005). Asset managers reported using a range of informal practices; including poor record-keeping and limited accountability for cash payments, loans and daily expenses and the use or contribution of an asset of the older person without compensation or acknowledgement (Tilse et al, 2005: S55). Other instances of misuse of assets were noted (Tilse et al, 2005) with coercion or intergenerational pressure in relation to providing gifts or loans or acting as guarantor; using capital assets and misuse of EPAs.

Education about proper asset management processes, access to simple accounting systems, training of aged care workers and others who come into contact with older people about how to recognize financial abuse and monitoring of bank accounts for inappropriate practices would help prevent this type of financial abuse.

### **Issues with Enduring Powers of Attorney**

A study of older people's knowledge of the substituted decision-making process after appointment of an attorney under an Enduring Power of Attorney (EPA) revealed that older people's understanding of the nature of the document and the meaning of the signed instrument was limited (Setterlund, Tilse and Wilson 1999). For example, some older people execute these documents in the mistaken belief that the EPA only comes into effect when the older person has impaired capacity whilst in reality, unless the instrument is clearly based on this condition, the EPA is effective immediately.

The current service focus is upon the protection of older people with impaired capacity after abuse occurs rather than prevention by providing training for aged care workers and asset managers who are involved with assisting older people with capacity and by strengthening the reporting requirements for attorneys, referred to in Sections of this submission.

Enduring Powers of Attorney [established under the *Powers of Attorney Act 1998 (Qld)*] can be used inadvertently and deliberately to financially abuse older people (McCawley et al, 2006; Rabiner et al, 2004). It often continues without scrutiny or detection because:

- prima facie, the attorney is acting with legal authority;
- there is no system for checking that the attorney knows about what is required. Many people are appointed Attorneys under an Enduring Power of Attorney without knowing that there are significant legal obligations and responsibilities attached to the position. Some family members subsume the older person's Pension into their account for ease of access or fail to keep records of what they spend or buy for the older person.
- there are no regular auditing requirements placed upon such instruments that might guide attorneys to ensure that they are keeping appropriate records or to prevent financial abuse from continuing.
- Enduring Powers of Attorney may be completed with little outside advice. They are available in Queensland without cost and may be down-loaded from the Department of Justice web-site.
- witnesses are needed but there is no demand that either party [donor or donee] executing the document seek legal advice.
- the quality of the legal advice, if sought, is sometimes questionable. Queensland research in 2000 (Setterlund, Tilse, Wilson, 2000) showed that lawyers had problems advising about areas of practice most related to older people such as Enduring Powers of Attorneys and aged care facilities. More recent research (Tilse, Rosenman, Peut, Ryan, Wilson and Setterlund, 2006) shows that this confusion continues with some lawyers in rural areas reported to be lacking current knowledge.
- there is no central registry for Enduring Powers of Attorney in Australia. A practical effect of this is that organizations such as banks cannot check to ensure that the Enduring Power of Attorney presented to them is currently valid or correctly executed. As a result, financial institutions prefer not to accept them and this create added pressure upon attorneys whose donors may have already lost capacity. Another issue that arises from lack of registration is that the older person may execute more than one Enduring Power of Attorney without telling the earlier attorney that the power is revoked; and
- further complexity is added to the attorney's tasks by the legislation being State-specific. Each State in Australia has its own guardianship and administration regime and its own Enduring Power of Attorney legislation. This lack of consistency unnecessarily confuses an already unclear jurisdiction and creates further work for those attorneys who are required to use their powers across State lines.

### **Issues for older people with impaired capacity**

Older people with impaired capacity have particular needs that warrant separate consideration. Their lack of capacity further complicates the situation because such older people are unable to monitor their own assets to prevent financial abuse and unlike other older people, therefore need to be protected from abuse. However, detection of such abuse by others is problematic.

Asset managers must negotiate a range of complex systems with little support and in doing so; often seek recourse in risky practices. They also face a range of asset management systems that do not interface with each other. For example, an older person may allow someone informal access to their assets through withdrawal of their money by Personal Identification Number cards at ATMs; may have someone else acting as a Centrelink Nominee to receive their Age Pension; have appointed another person as their attorney under an Enduring Power of Attorney with yet another able to access their money via a joint bank account. This shows the complex interaction and network of legislation [*Powers of Attorney Act 1998 (Qld)*, *Banking Act 1959 (Cth)*, *the Social Security Act 1991 (Cth)*] that affects just one aspect of asset management task and may allow both inadvertent and intentional financial abuse to occur.

Aged care workers such as social workers and residential care workers generally do not receive specialist training in the detection and monitoring of financial abuse, and few are expected to do so as part of their work. Possible referral pathways and inter-agency collaborations in relation to detecting financial abuse and supporting asset managers are still in their early infancy. This suggests that much financial abuse of such older people may not be identified.

There are no requirements upon financial institutions or organisations such as Centrelink to monitor for possible financial abuse of the accounts of older people with impaired capacity. Financial institutions still remain distanced from cross-collaborative interface despite research in the United States (Price and Fox, 1997) that demonstrates that such partnerships can be successful and beneficial in prevention of financial abuse.

It may be considered that the establishment of the guardianship and administration regime in Queensland through such Acts as the *Guardianship and Administration Act 2000 (Qld)* and the *Powers of Attorney Act 1998 (Qld)* will protect the older person from financial abuse. However, the relevant statutes do not contain a definition for the term "financial abuse". Research (McCawley et al, 2006) based upon a secondary analysis of files from the Guardianship and Administration Tribunal of Queensland found that although cases that could be defined as suspected financial abuse were referred to the Tribunal, the financial abuse was often referred only after the asset stripping has become obvious and/or the older person has lost significant assets.

Accordingly, the legal needs of older people with impaired capacity to be protected from financial abuse are not addressed by the current legislative regime because by the time the abuse is referred to the Tribunal, the assets are lost and remedies are remedial rather than preventative. The law can make protective decisions as required to stop financial abuse of older people who have impaired capacity but it cannot adequately deal with the repercussions that such decisions may have upon the social aspects of the older person's life. The prime position for financial institutions to monitor for early detection of financial abuse needs to be further recognized and promoted.

## **Barriers to older people accessing legal services**

Older people need to understand the legal, personal and financial implications of signing Aged Care Agreements for entry into residential care, retirement village and other accommodation contracts and EPAS. Research (Setterlund et al, 2000; Tilse, 2002; Wilson et al, 2003) suggests that there are a number of barriers to older people accessing appropriate legal advice and services in these areas of informed decision-making. These are:

- knowledge of the issues and what was being signed. Many older people do not conceptualize the issue as a legal one and hence do not see the need for legal advice;
- lack of access to independent advice. Older people are more likely to rely upon service providers or families and in some cases, upon family lawyers and accountants for advice;
- reliance on informed intermediaries such as justices of the peace who were at times not well informed;
- concern from older people about the costs of legal advice and limited access to free services;
- limited interest from legal practitioners in providing advice and information in the areas of accommodation bonds and charges and retirement villages' contacts. Legal Practitioners also expressed concern about the length of time taken to explain contacts to older people and the limited ability of such people to pay;
- trust in families and willingness to make informal arrangements around gifts, loans, granny flat arrangements. Older people often do not envisage that such decisions could be financially disastrous if the arrangements fail or that it might leave them vulnerable with few assets to pay for care needs (Setterlund et al, 2003);
- physical access to legal services remains problematic for those older people in rural areas or older people from culturally and linguistically diverse backgrounds. Most legal services for older people are sited or about to be established in the larger regional cities. Obtaining independent legal advice in rural areas is often complicated by the fact that there may be only one solicitor in town (Tilse et al, 2006);
- lack of awareness of older people and families about the types of services available;
- organizations such as the Elder Abuse Protection Unit [EAPU], Legal Aid and the Seniors Advocacy, Information and Legal Service [SAILS] that can assist older people with legal issues are limited by their mandate. Legal Aid can provide in-depth advice but are hampered by a means test requirement that prevents many older people from using their service because they own a house as an asset. SAILS can provide short-term assistance and support for those older people but are restricted to those who fall under the Domestic Violence umbrella and the EAPU provide training, referral and support but no legal advice; and
- the concept of whether the older person has impaired capacity because he/she was unable to freely and voluntarily make decisions [Queensland definition in



*Powers of Attorney Act 1998 (Qld)*] is difficult for legal and aged care practitioners to recognize in practice.

## **Recommendations**

Overall, the current legislative regime is inadequate in dealing effectively with financial abuse or assisting older people to access legal services. Focusing purely upon legal supports and mechanisms for such issues are not sufficient. Legal mechanisms can never adequately address the social or emotional component of familial relationships. To address the legal needs of older Australians, policy makers and practitioners must also provide the social infrastructure to assist in recognizing the problem and encourage older people to be free to access such assistance and to be aware that such assistance is available. The legal needs of older people with impaired capacity to be protected from abuse can best be met by focusing upon providing education, early intervention and detection. Some recommended ways forward are:

- Community education and awareness raising about potential issues with asset management, EPAs and financial abuse;
- Clear protocols to guide decision-making in relation to undue influence; and
- Education requirement for all people who are to act as an Attorney under an EPA and improved monitoring of EPAs;
- A national system of EPAs and national registry<sup>1</sup>;
- Financial institutions to develop an “early alert” system for detecting financial abuse in the accounts of older people with impaired capacity;
- Better specialist training for aged care workers and building of cross-collaborative protocols with financial institutions for both referral and recognition of needs for older people with and without capacity;
- Focus more upon prevention of inadvertent financial abuse by providing free seminars about how to asset manage appropriately with an emphasis upon assisted decision-making;
- Raising awareness of and improving access to the current legal support systems available to assist older people;
- Provision of a dedicated funded legal service that caters to the specific needs of older people;
- Addressing the access issues in rural, Indigenous and CALD communities; and
- Review of the Legal Aid means test so that the older person who owns their home can receive assistance.

The implementation of these recommendations would result in a comprehensive framework that will remedy many of the current barriers that prevent older Australians from accessing legal services and move towards sealing the gaps that allow inadvertent and intentional financial abuse to happen.

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<sup>1</sup> It is acknowledged that there are cost and jurisdictional issues with requiring registration, auditing and consistent application of EPAs; however if it means that older people are less likely to be financially abused because of these safeguards, then the economic and social benefits are likely to be ultimately greater.

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