

16 November 2015

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General Purpose Standing Committee No. 2  
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Dear Ms Foley

### **Inquiry into elder abuse in New South Wales**

National Seniors welcomes the opportunity to make a submission to the Inquiry into Elder Abuse in New South Wales (NSW).

As our population ages, there is increasing risk of elder abuse and it is imperative that we raise awareness of the issue in the wider community. Legislation and community support frameworks must also be improved to reduce the incidence of abuse and provide better safeguards for older Australians when it does occur.

National Seniors acknowledges the efforts of the NSW government to combat the problem of elder abuse. Ongoing funding and support for the Elder Abuse Helpline and Resource Unit is essential to ensure that victims and concerned individuals have somewhere to turn. Current efforts to develop interagency policies, protocols and practice guidelines will assist government and community sector workers to respond to elder abuse in a timely and effective manner.

National Seniors strongly supports development of a national response to elder abuse. A national elder abuse strategy would focus attention on this growing yet largely hidden problem and enable coordinated and consistent responses across jurisdictions. This can only happen through the active participation and collaboration of governments in each jurisdiction.

As part of this national strategy, National Seniors recommends that each jurisdiction commit funds to develop a national research effort to clearly evaluate the prevalence of elder abuse and to gain a better understanding of the circumstances in which it is most likely to occur. This would help to address gaps in understanding and could be used to develop more targeted and effective prevention strategies.

While elder abuse incorporates physical, psychological, social and sexual abuse and neglect, National Seniors is concerned about the increasing prevalence of financial abuse among older people. Estimates from the Elder Abuse Helpline and Resource Unit show that 33 per cent of reported cases recorded financial abuse as the primary type in NSW<sup>1</sup>. What is concerning is evidence from the Elder Abuse Prevention Unit

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<sup>1</sup> NSW Elder Abuse Helpline and Resource Unit 2015. *Financial Abuse: Fact Sheet*. Accessed 5 November 2015. <http://www.elderabusehelpline.com.au/uploads/pdf/Financial%20abuse%20-%20for%20professionals%20-%20web-ready.pdf>

in Queensland, which has shown that 65 per cent of reported cases involve financial abuse as a secondary form of abuse<sup>2</sup>. Clearly financial abuse is a significant issue that requires attention by government.

National Seniors believes that the financial abuse of older people is preventable. Yet one of the biggest impediments to prevention is simply the lack of awareness or acceptance of the potential risk of abuse among older people. As one report has shown, it is difficult to engage people to adopt strategies to prevent financial abuse because people are not mindful of the risk of abuse<sup>3</sup>.

In this regard, National Seniors would strongly support the development of a public awareness campaign, which outlines the risks of abuse and highlights the mechanisms that can be used to minimise this risk.

One of the primary means of protecting older people is through an Enduring Power of Attorney (EPA). Many older people have a substantial asset base and need to give careful consideration to how these assets are managed in the event of incapacity. An EPA provides a cost-effective and relatively simple way of enabling another person to manage and coordinate the day-to-day financial affairs of an older person who may have experienced physical or cognitive decline.

Unfortunately an EPA is also a primary means used to cheat older people of their income and assets<sup>4</sup>. Research indicates that elderly people with an EPA are no more protected from financial abuse than elderly people without an EPA<sup>5</sup>. If EPAs are to be used to protect the financial interests of older people in NSW, greater protections are required to ensure that vulnerable older people are not financially abused.

National Seniors recommends that the NSW Government implement better protections for older people who rely on an EPA to manage their day-to-day affairs. Legislation must be strengthened to protect the rights of older people while ensuring that EPAs remain a cost-effective and practical option for the people who use them.

### **Options for reforming Enduring Power of Attorney**

National Seniors supports calls to develop national powers of attorney legislation<sup>6</sup>. Powers of attorney should be fully executable throughout Australia, but currently are not<sup>7</sup>. National legislation to regulate the use of an EPA would ensure consistency across jurisdictions making EPA's more cost-effective<sup>8</sup>.

Mandatory registration of an EPA be included in national legislation would ensure verification, accountability and help to deter abuse. However, the introduction of a

<sup>2</sup> Elder Abuse Prevention Unit (2015). *The EAPU Helpline: Results of an investigation of five years of call data*. Report for the International Association of Gerontology and Geriatrics Asia & Oceania Regional Congress 2015.

<sup>3</sup> Bagshaw, D., Wendt, S., Zannettino, L. and Adams, V. (2013). 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members' in *Australian Social Work*, 66, 1, pp. 86-103.

<sup>4</sup> Wuth, N. (2013). 'Enduring Powers of Attorney: With limited remedies – it's time to face the facts!' in *Elder Law Review*, 7, 1.

<sup>5</sup> Commonwealth of Australia (2007). *Older people and the law*. House of Representatives Standing Committee on Legal and Constitutional Affairs, Canberra, September 2007.

<sup>6</sup> Queensland Law Society (2011). *Joint issues paper: elder abuse* June 2011 Accessed 4 November 2015 [http://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse\\_issues-paper\\_v6.pdf](http://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse_issues-paper_v6.pdf)

<sup>7</sup> Commonwealth of Australia (2007). *Ibid.*

<sup>8</sup> Wuth (2013). *Ibid.*

mandatory registration would need to consider how this impacts on the privacy of the principal and how this impacts on the costs to consumers<sup>9</sup>.

National powers of attorney legislation could be made through the powers available to the Commonwealth Government through the constitution<sup>10</sup>, but could also be facilitated by each state and territory government cooperating to refer responsibility for powers of attorney to the Commonwealth.

In the absence of national legislation, National Seniors urges the NSW government to strengthen its own powers of attorney legislation to improve protections for older people. There are a number of potential options available in this regard:

### **Mandatory registration**

EPAs are currently only required to be registered with the Department of Lands if the attorney intends to sell, mortgage, lease or otherwise deal with the principal's real estate<sup>11</sup>. Introducing a mandatory registration system for all EPA's could provide a mechanism to better protect older people from abuse as it would provide a means to identify if someone was an authorised attorney and the conditions of the EPA. Registration would also ensure that revoked powers were not recognised. Implementation of a mandatory registration system would require appropriate privacy protections and further analysis is needed to ensure the system did not impose unrealistic costs.

### **Specific offences for misappropriation by an attorney**

While legal action can be taken if an attorney exceeds their authority, it is more likely that this will not occur. Including a specific offence within existing criminal codes for the misappropriation of assets by an attorney could provide greater protections for principals or donors. This may act as an effective deterrent provided the legal implications of misappropriation are adequately communicated to an attorney.

### **Monitoring and reporting**

Given there is no legal obligation on an attorney to report on the management of a principals' affairs, the powers of attorney are open to exploitation. Provisions for monitoring and reporting must be included within existing powers of attorney legislation to better protect older people who rely on them.

Monitoring could involve analysis of financial documents to observe any irregularities and might require that an attorney be compelled to provide requisite documents for review. Monitoring and reporting could be mandatory but involve the use of a sampling procedure to reduce implementation costs. This could involve the use of sampling techniques that prioritise those at higher risk of misappropriation. The existence of a mandatory audit procedure could act as a deterrent to potential abuse.

Monitoring and reporting could alternatively be voluntary and involve the inclusion of an option for a principal to nominate an accountant or relevant government body to

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<sup>9</sup> Wuth (2013). *Ibid.*

<sup>10</sup> Wuth (2013). *Op cit.*

<sup>11</sup> Department of Lands (2009). *Review of the Powers of Attorney Act 2003: Issue paper*. Department of Lands: Sydney

review financial records at regular intervals<sup>12</sup>. As this would require the principal to pay for the cost of each review, it may act as a barrier to those on low incomes. This option would only act as a deterrent to those who could afford to do so, leaving many without any oversight of their affairs.

An analysis of the costs and benefits of alternative monitoring and reporting tools is required to determine the most appropriate monitoring and reporting method.

### **Right to compensation**

NSW does not currently provide the right to claim compensation or damages under the power of attorney legislation, only the power to revoke an EPA. It is highly unlikely that private litigation would be used to recover lost funds as the costs of such action would be prohibitive and the outcome of that litigation highly uncertain. This course of action is particularly problematic in cases where the principal has diminished capacity.

A legislative right to compensation or damages arising from the misappropriation of funds by an attorney should therefore be included in the power of attorney legislation. The existence of rights to compensation or damages would act as a deterrent to future abuse.

### **Mandatory legal advice**

Legislation could require that a qualified legal practitioner with expertise in the powers of attorney area be consulted when any EPA is prepared. Under the current system a solicitor or barrister; registrar of a NSW Local Court; an employee of NSW Trustee & Guardian or a private trustee company or a licensed conveyancer (who has completed an approved course under the Powers of Attorney Act) must witness a power of attorney document.

Unfortunately, there is no guarantee that this person has expertise in the area of powers of attorney or an ability to recognise if a principal has requisite mental capacity. Advice from a qualified legal practitioner would ensure that the rights and obligations of all parties are made clear and that the wishes of the principal and the duties and obligations of the attorney are clearly outlined within the EPA.

While this might increase understanding and compliance with obligations, the costs of obtaining legal advice may act as a barrier to the use of EPAs.

### **Supportive attorney**

Victoria has introduced legislative amendments to enable individuals to appoint a "supportive attorney" to assist a principal to access information (such as hospitals, banks and utility providers), to communicate their decisions and to give effect to their decisions<sup>13</sup>.

As this is a recent innovation it would be useful to investigate if it were worthwhile implementing this instrument in the NSW context.

<sup>12</sup> Department of Lands (2009). *Op cit*.

<sup>13</sup> Public Advocate (2015). 'Supportive attorney appointments' Accessed 5 November 2015. <http://www.publicadvocate.vic.gov.au/power-of-attorney/supportive-attorney-appointments>

Should you require any further information, please contact Brendon Radford, Senior Policy Officer on 07 3233 9125 or at [b.radford@nationalseniors.com.au](mailto:b.radford@nationalseniors.com.au).

Yours sincerely

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