



Précis Paper

Elder Law

A discussion of the law relating to elder abuse, and how it might be improved.

Discussion Includes

- Defining elder law
- Common types of elder abuse
- Suggestions for improvement of protections
- Assessing mental capacity
- The role of lawyers and medicos
- Common legal problems with alternate decision-makers
- Mandatory reporting of elder abuse
- Barriers to reporting elder abuse
- Recommended legislative and institutional changes

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1. In this edition of BenchTV, Sue Field (Adjunct Professor of Elder Law, Sydney) and Rod Cunich (Consulting Principal, Keypoint Law, Sydney) discuss problems with the law relating to elder abuse, and suggest ways in which we can address them.

What is Elder law?

2. Elder law in its simplest form is law as it affects the older person. It is unique in that it is defined by the clients themselves, rather than by any specific body of law. Indeed, the law for older people is no different from the law for younger people. For example, no laws specifically pertaining to older people exist in relation to age discrimination, job security, living arrangements, powers of attorney, and guardianship – they apply equally to people of all ages. These laws do, however, have a particular application to people who become more vulnerable throughout the ageing process. As we age, issues of financial viability, family dynamics, long-term health care planning, and end-of-life decisions loom over us more manifestly.
3. As a result, rather than constituting a specific body of law itself, elder law instead *engages* the particular areas of law that most commonly prove to be sources of concern for older people. Examples of these areas of law include those relating to family, health, wills and succession, probate, estate-planning, guardianship, powers of attorney, superannuation disputes, contracts (with particular respect to accommodation), discrimination, and retirement. Problems that arise in these areas can lead older people to suffer what is defined by the World Health Organisation as 'elder abuse'.

What is elder abuse?

4. According to the World Health Organisation, elder abuse is 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'. There are many different types of elder abuse, including physical abuse, financial abuse (the unlawful interference with a person's money), psychological abuse (such as verbal abuse inducing mental distress), sexual abuse, and spiritual abuse.

5. Statistics relating to elder abuse are notoriously unreliable for the purposes of measuring the extent of the types of abuse that usually go unreported, like unintentional elder abuse, and malicious elder abuse. They do however at least reveal the adult son or daughter of an older person to be the most likely perpetrator of elder abuse. Lack of education is the most common cause of unintentional elder abuse, by family members or otherwise; the legal issues that subsequently arise are the symptoms. There is also a factor of shame involved for victims of the type of elder abuse perpetrated by family members.

Planning for life

6. There are many things to consider when planning for life, *regardless of our age*. For the older person, some important questions to ask are:
 - Where am I going to live? (e.g. an unencumbered home, granny flat, reverse mortgage, retirement village, or a residential aged care facility)
 - Who am I going to live with? (e.g. family, or partner)
 - What am I going to live on? (e.g. super, pension, government subsidies)
 - Who could make decisions for me if I couldn't make them myself? (e.g. the appointee of a power of attorney, guardianship, or advance care directive)
7. These questions – although they may seem more pressing as we age – really should concern people of all ages, particularly as we are not required by law in Australia to have a power of attorney, enduring guardianship, or an advanced care directive. Ms Field emphasises that we should be educating people about the importance of planning for life in school.

Older people and alternate decision-makers

8. Forms of substitute decision-making can be used as vehicles for perpetrating all sorts of elder abuse. Some of the most common legal problems confronted by older people arise in relation to alternate decision-makers.
9. In Australia, the legislation relating to substitute decision-making, powers of attorney, and enduring guardianship is state-based. Variations between the relevant law of each state and territory can give rise to operational inconsistency of the relevant instrument between jurisdictions.

10. An important distinction is drawn between General Powers of Attorney – which cease to have effect when a person loses capacity – and Enduring Powers of Attorney – that withstand a person's loss of capacity. Witnesses to the appointment of a General Power of Attorney are only required to be over the age of 18. Witnesses to the appointment of an Enduring Power of Attorney are prescribed by the relevant state Powers of Attorney Act – in NSW, they include Registrars of the Court, employees of NSW Trustee and Guardian, trustee companies, licensed conveyancers, and solicitors.
11. Under the NSW Powers of Attorney Act, a 'section 19 certificate' creates an enduring power of attorney. Subsection (2) requires a person not only to witness the signing of the instrument, but to also state that the 'principal' appeared to understand the effect of the power of attorney.
12. A Power of Attorney's accession is not required to be checked, nor its activities monitored – unlike those of a financial manager, for example.
13. The number of cases before the Legal Services Commissioner involving solicitors and powers of attorney is increasing. Calls to start checking powers of attorneys, by introducing mandatory reporting for example, fall short of addressing the heart of most problems that arise in this area.
14. These problems are usually the upshot of a lack of education on the part of all parties involved, and result in poor explanations to clients of what powers might be afforded to appointees of a Power of Attorney for example, or poor explanations to clients of the significance of any legal documents they might be intending to sign. Again, Ms Field stresses the importance of education, especially for solicitors who prepare powers of attorney.
15. Education of the general public more broadly is equally as important as education of professionals, especially in order to discredit popular misconceptions about the law surrounding elder abuse. Probably the most popular of them all is the misconception that a person's children are the automatic appointees of a Power of Attorney.

Assessing mental capacity

16. The role of determining whether or not a person has the mental capacity to sign a legal document is often shared by both lawyers and doctors.

17. First, there is a presumption of capacity in the absence of anything that might suggest otherwise. In NSW, capacity is not defined under the Powers of Attorney Act or Guardianship Act. In QLD, capacity is defined under the Guardianship and Administration Act as the ability to communicate decisions and understand their nature and effect. Capacity is also decision-specific: for example, a person might have the capacity to appoint an enduring Power of Attorney, but not to make a will.
18. Because the starting point is a presumption of capacity, a 'valid trigger' is required to be able to subsequently question that capacity. Valid triggers include behaviour that would otherwise be quite out of the ordinary for the person in question.
19. Assessing capacity and valid triggers however is very difficult, given how little solicitors know about their clients. The Law Society of NSW has a set of guidelines specifically to assist solicitors for when a client's mental capacity might be in doubt. In the context of elder law, old age in itself can be a trigger, insofar as we stand a greater chance of developing some form of cognitive impairment as we age.
20. It is common for lawyers to refer their clients to a doctor to obtain a certificate confirming capacity. Although doctors are in a better position than lawyers to make such assessments at least in a medical sense, they are not in any position to specifically evaluate a client's capacity to understand a legal document, simply because they do not have the legal training.
21. Problems therefore arise when lawyers request certificates from doctors confirming capacity only in a general sense. The determination of capacity should instead be *decision-specific*. Lawyers should set out exactly what it is within the legal document that they want their client to understand when communicating with doctors. Letters seeking medically authorised certificates of capacity that are not decision-specific unfairly presuppose legal knowledge on the part of doctors.
22. An improved relationship between the legal and medical profession would allow for problems with the certification process to be better overcome. Furthermore, lawyers should make concerted efforts to develop rapport with clients whose capacity they might be questioning. Medical students, law students, and allied help professionals (e.g. nurses and social workers) should be taught about mental capacity on a more formal basis.

Is there a need for mandatory reporting of elder abuse?

23. We do not currently have mandatory reporting, except as under the Aged Care Act in residential aged care facilities whereby unlawful sexual contact or unreasonable use of force may be deemed to have occurred. Advocates of mandatory reporting suggest it be directed to the police, or relevant government department.
24. If mandatory reporting were to be introduced, it would be required to clearly define what would and would not constitute abuse – a near impossible task. Another big concern is that the approach would be far too paternalistic. Ms Field states that in this sense it is difficult to see what purpose the mandatory reporting of elder abuse could possibly serve.
25. A person lacking mental capacity and suffering abuse from a substitute decision-maker can instead pursue other more effective means of achieving justice – like applying to the Guardianship Division of the NSW Civil and Administrative Tribunal to have the powers of that decision-maker reviewed, for example.

Addressing problems with the current framework for elder law

26. Ms Field suggests legislative change to begin with an overhaul of the Powers of Attorney Act NSW, and institutional change to begin with an expansion of the powers of NCAT's Guardianship Division. But the real change, she says, must begin at the root of all the issues surrounding elder abuse – education. That is, improved education not only of all professionals involved, but also of the wider community. From such change could then flow others – like improved punitive measures for elder abuse, new warning mechanisms for signs of mental incapacity, and increased encouragement of informed client decision-making by legal professionals.
27. Ms Field concludes by making some recommendations to assist those involved in addressing issues of elder abuse, based on her determination that 'education is the panacea':
 - For lawyers: to educate themselves, so that they might have the ability to appropriately respond to potential signs of elder abuse, and to make a greater effort in enlightening their clients and the wider community about issues of elder abuse
 - For medicos: to have a more in-depth knowledge about the legal instruments likely to involve their assessment of capacity
 - For educators (from preschool through to university): to instil in their students the importance of making a will, and appointing a power of attorney, regardless of age

- For the community: to make the most of the available means of getting the attention of, and communicating with, older people about these issues (like the radio, over social media, for example)
28. In sum, we should be educating our young people about the general necessity of having a will, and alternate decision-makers. We fail as educators when we emphasise the importance of creating these legal documents only later in life. Legal practitioners who regularly deal with older people need to approach each individual client's set of specific circumstances holistically, by taking into account not only the relevant law, but also the client's personal values and preferences.

BIOGRAPHY

Sue Field

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Sue Field has taught elder law to undergraduate law students for the past 14 years. Sue is a Lead Investigator with the Cognitive Decline Partnership Centre, Director of the Australian Centre for Elder Law Pty Ltd and a Distinguished Fellow at the Canadian Centre for Elder Law. Sue is co-editor of the Elder Law Review, the only refereed elder law journal in Australia. Currently Sue is working on a co-authored text on elder law for the layperson and co-editing a text on elder law for professionals working in this area. Sue has published widely and presented at many international and national events. Sue is a member of the NSW Law Society Committee on Elder Law, Capacity and Succession, a member of the Australian Law Reform Commission Advisory Committee for the Inquiry into Elder Abuse and a member of the Steering Committee for the 5th National Elder Abuse Conference to be held in Sydney in February 2018.

Rod Cunich

Consulting Principal, Keypoint Law, Sydney

Rod Cunich has over 30 years' experience in consumer and business law, and specialises in wealth protection, business succession and personal estate planning. He has been a director of numerous companies and NFPs, with clients also benefitting from Rod's first hand commercial experience. Rod has lectured nationally and internationally on a range of topics relating to business transactions, business structures, corporate governance, wealth protection, personal estate planning and business exit planning. He is also the author of the acclaimed text 'Understanding Wills and Estate Planning' and has a Master of Laws, majoring in Wills and Estates.

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Guidelines

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