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House of Representatives Standing Committee on Legal and Constitutional Affairs

Inquiry into older people and the law

What is Elder Law?

It is submitted that the subject of this Inquiry deals with what lawyers would call Elder Law. I offer my own definition of that term:

Ageing is a process which applies to all living persons, without exception. It is measured by time and proceeds continuously to affect us, during the whole of our lives.

With the process of ageing, for many, may come illness and disability. Another consequence, for most if not all of us, is experience of and familiarity with our personal environment. With that experience will often come authority in our social relationships, because of the knowledge and intuition which memory and familiarity with the past, provides.

An elder, according to this writer, is a person whose experience of life qualifies them with the authority to command respect from others. Elder law is therefore a way of looking at the law through the prism of ageing and from the viewpoint of an elder.

The definition avoids the use of an arbitrary age after which a person is deemed to be an 'older person'.

There is an increasing awareness among lawyers in Australia, of the term Elder Law and what that term means. That awareness comes from the rising number of seminars, lectures and conferences which deal with legal issues of Elder Law. My own commitments to presenting seminars number generally four to six each year. The attendees are usually lawyers in New South Wales but have included accountants and medical professionals.

Elder Law was first taught by me to law undergraduates at the University of Western Sydney in 1999 under the auspices and support of Professor Carolyn Sappideen. So far as we are aware, that was the first time in Australia a course devoted to legal issues of that kind had been presented. Sue Field continues to teach Elder Law at UWS.

What was presented by me at UWS was eventually distilled into the text *Elder Law in Australia*, published by Lexis Nexis, Sydney, 2004. A second edition of that work is currently in preparation.

There are Elder Law Committees in some Law Societies around the country and I am a member of the Elder Law and Succession Committee of the Law Society of New South Wales.

Elder Law is practiced and understood in other jurisdictions throughout the world including especially the United States, Canada and the United Kingdom. It is the USA however where attorneys have the greatest numbers and impact.

Matters outside the Inquiry

It is noted that there are many issues of Elder Law which regrettably fall outside the Terms Of Reference and which have a much closer legislative connection to the Commonwealth. These are

issues which arise under the Aged Care Act and include accreditation issues for residential Care facilities (see for example the submission of Dr N.J. Duncan), the Complaints Resolution regime, restraint and pain relief in dying, to name just four.

Financial Abuse

Much of the relevant law at the level of legal remedy is set out in *Elder Law in Australia* and deals with undue influence, unconscionable conduct and similar issues, using cases which involve elders. Many of those cases are decisions of the High Court and have had an important influence on the development of the law in general in Australia. The cases are examples of financial abuse and are taken from the standpoint of disputes with business, banks, families and friends.

There are also cases cited in the book dealing with so-called 'granny flat' accommodation, some of which also provide an insight into this aspect of human behaviour, which leads to actionable claims and which some may say fall within the meaning of financial elder abuse.

One of the keys to influencing the course of an increasing occurrence of financial abuse alongside increasing numbers of elders proportionally in the community, is the continuing professional education of lawyers to identify and to assist in the process of restoring property of which elders may be deprived, through the legal system where that becomes necessary.

Increasing awareness of these issues, and having the skills and the ability to identify, to negotiate and to avoid them, is essential for lawyers. That is so, for example, in powers of attorney and family agreements which are matters within the Committee's purview. That is the purpose of continuing legal education and that is something which this committee could recommend as worthy of Commonwealth support as part of policy on ageing and the aged.

Powers of Attorney & Advance Health Care Directives

Some parties have made submissions in support of a national register for these instruments. My comments on this aspect in brief are-

- Placement on a national register will require cooperative legislation in the States and Territories;
- Privacy will be an important issue. Access to such a register may need to be limited to relevant professionals who have some relevant duty to perform, such as banks, police, hospitals, doctors and solicitors.

On the issue of avoiding risk of financial abuse arising from the making of an enduring power of attorney, I believe there is a good case for elaborating upon the powers and the limitations of power in the instrument itself. That has been out of favour for many years in the legal profession for various reasons, but the catalyst has been the terms of the various Statutes which allow, in the granting of the power of attorney itself, authority to the attorney to "do anything which I may lawfully do" or words to similar effect. This is in effect a 'blank cheque' to attorneys which extends beyond merely the bank account to all other property of the principal or donor of the power.

There is a case not only for elaboration but also for detailed protocols which could be developed by the various Law Society bodies, which would require solicitors, when giving the mandatory certificate of understanding to the principal of an enduring power, to discuss and consider and advise upon such matters as-

- Supervision;
- Audit;
- Notice to the family when the power commences to be used by the attorney;
- The purpose of the delegation being spelled out in the power.

Family Agreements

These agreements are very important to those who depend upon them. I refer the Committee to *Elder Law in Australia*, pp 260-267.

In the context of this Inquiry, I should like to suggest –

- Such agreements should bear a mandatory certificate form a legal practitioner, in the same manner as those for enduring powers of attorney;
- Members of the family should be given notice, unless there are special reasons why notice should not be given;
- The legal profession should develop protocols for the giving of advice and the drafting of such agreements, with the necessary continuing legal education also being developed and presented in the subject.

Rodney Lewis

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