

NAVIGATING THE AGEING MINEFIELD

As we get older, there's much we have to face up to. Who will look after us in our latter years? How will we manage our finances? What will happen if we fall sick? What if we lose our capacity to make decisions?

The House of Representatives Legal and Constitutional Affairs Committee is investigating how older Australians are dealt with under the law. In our special feature, we look at a number of the issues arising from the committee's investigation.

These are issues we will all need to confront sooner or later.

AGE-OLD DILEMMAS

As the population ages worldwide, financial abuse of the elderly is on the increase. Outdated and state-specific laws are complicating the situation, reports Sharon Palmer.

WE all hope that when the end comes those we leave behind will mourn our loss. But in many families, grief can turn to greed as a tug of war over assets begins.

That's not to say that family feuds over the assets of the elderly only happen at death. Financial abuse is a problem confronting more and more seniors, with family members often being the ones taking advantage.

Take the case of Walter, a 70 year old widower. He lends his son James \$150,000 to buy a house that Walter and James can live in. James convinces his father that only his name should appear on the deeds so he can get the government's first home-owners' bonus. Soon afterwards the relationship breaks down. Walter receives an eviction notice in the mail. James changes the locks on the house, packs up his father's belongings and sends them to a storage facility. Walter is left with nothing, nowhere to live and faces a huge legal bill and battle to reclaim his belongings.

Then there's Mary, who is in the early stages of dementia. Lacking in confidence, family members convince her she no longer has the ability to make decisions. She signs an enduring power of attorney over to her eldest daughter, Joan, who promises to look after her. This not only enables Joan to make everyday decisions for Mary, including health decisions, but also gives her access to all of her mother's bank accounts, assets etc. Over a period of time, Mary is fleeced of her savings, her house is sold from under her and she is placed in sub-standard care for the rest of her days.

As our population ages, these stories, outlined at hearings for a public inquiry into older people and the law, are becoming more commonplace. At a time of life when retirees should be reaping the rewards of years of hard work, they face a minefield of legal and financial dilemmas.

Investigating this minefield and how best to move through it is the House of Representatives Legal and Constitutional Affairs Committee. Issues being considered by the committee include fraud, financial abuse and the barriers to older Australians accessing legal services.

In the more than 100 submissions received to date and at the public hearings held so far in

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Older people are more likely to be victims of financial abuse than physical abuse.

Canberra and Sydney, the committee has heard that one of the biggest issues facing the elderly is the lack of consistent guidelines and legislation across jurisdictions in Australia.

Currently, it's a matter of each jurisdiction looking after its own in regards to power of attorney laws and wills. Like so many other areas of the law, each state and territory has its own legislation which stops at the border of that state. This is something committee chair Peter Slipper (Member for Fisher, Qld) wants addressed.

"We are going to look at matters of both state and Commonwealth law so the Attorney-General will be able to put some of these matters on the agenda for the standing committee of attorneys-general," he said.

"One prime instance is the enduring power of attorney. You can have this crazy situation where a person lives in Queanbeyan [on the NSW side of the border with Canberra] but might end up in an aged care facility in the ACT. The enduring power of attorney dies at the railway line in Queanbeyan. Now that is bizarre, completely unacceptable and I am quite sure that the standing committee of attorneys-general will be looking at this.

"People like to move from one part of the country to the other and I think there should be some sort of expectation out there that the law is not going to be too dissimilar when a person moves from one part of Australia, or New Zealand for that matter, to another."

According to research conducted by the Australian Institute of Criminology, older people are more likely to be victims of financial abuse than physical abuse.

In the United States, a power of attorney has become the most abused legal document in the country. While Australia lacks statistical data on these offences, advocacy organisations across the country report similar instances of power of attorney abuse here.

David Walsh, a Canberra solicitor who consults on asset protection, trusts, estate planning and dispute resolution, said this poses a problem for many retirees, who may choose to settle away from what has been their traditional home base.

"Current state and territory based regimes are, with the possible exception of Queensland, inadequate and contribute to unnecessary confusion and doubt, in particular where individuals move between jurisdictions and/or have assets located other than in their jurisdiction of domicile," Mr Walsh told the inquiry.

Another major hurdle is that the majority of cases involving elderly financial abuse are never reported.

"The courts, police and lawyers can only work with the available tools," Mr Walsh said.

"Financial and other abuse of older Australians will continue to increase until and unless specific legislation is introduced that defines such abuse as a crime and/or an actionable cause and puts in place significant, meaningful and readily enforceable remedies."

A particular problem is that victims are often reticent to report the abuse.

"I would say that it is a mixture of embarrassment and shame on the part of the person who has been abused," Mr Walsh said.



"It is sometimes because of evidentiary difficulties... Then, finally, in many cases you have the people who may be aware of it, may want to try and do something about it, but they cannot because they either do not have access to the advice or they feel that they cannot afford the implications of instructing a lawyer to represent them."

In the submissions received by the committee, there is a common concern and call for uniform, simple and affordable national legislation covering issues such as power of

Population projections

Australia's population is 20 million, with women slightly outnumbering men (50.2 per cent compared with 49.8 per cent). This will increase to between 24 and 28 million by 2051.

The median age of the total population is 35.2 years and will increase by 8–11 years by 2051.

Over the next 50 years, the proportion of people aged 65 years or more will double (from 12 per cent to 24–27 per cent), while the proportion aged 85 years or more will increase from 1.3 per cent to around 5 per cent. In contrast, the proportion of the population under 15 years old will fall from 21 per cent to around 15 per cent.

The proportion of men per 100 women aged 65 or more years will increase from around 79 in 2000 to 88 by 2051, while the proportion of men per 100 women aged 85 or more years will increase from 45 to 70.

Source: Australian Bureau of Statistics. The projections are based on specific assumptions about fertility and mortality rates and overseas migration, and are revised periodically by the ABS.

Ten tips for older Australians

1. Set yourself financial goals and plan a budget that will help you meet them.
2. Get involved with your super now – it's your investment for your retirement.
3. If you're thinking about a retirement income stream product, do some homework first.
4. You may need to get professional advice about your financial options at retirement.
5. For free and independent financial information contact the Financial Information Service (FIS) through Centrelink on 13 23 00.
6. Shop around for insurance – some insurers will provide cheaper cover.
7. Take care when considering products that allow you to release the equity in your home, such as 'reverse mortgages' or 'home equity loans'.
8. Keep up to date with developments in the financial world and how to spot the latest scams, which often target retirees.
9. Beware of unsolicited offers to buy your shares.
10. Be very wary of anyone offering you an investment opportunity that is 'confidential', or is said to be a 'special deal just for you'.

Source: Australian Securities and Investment Commission. For more information visit www.fido.asic.gov.au

With so many different agencies, departments and state bodies involved in the setting of policy, submissions to the inquiry also point to the inevitability of discrepancies and inconsistencies arising.

Some submissions raise concerns about the capacity of elderly people to sign complex contracts, including those applying at retirement villages. The committee has heard that many people have been caught out selling their homes, only to discover they will not recoup as much money as they first thought when they sell their independent accommodation and move into more dependent care facilities.

Studies have also found women seem to be targeted, as many outlive their spouses who have taken care of all the household and other finances for them. Many older women tend to lack confidence in financial matters and are easily coerced and intimidated.

As more than 50 per cent of cases referred to guardianship tribunals

"Both at a state level in America, and at a federal level, there are laws that have been passed, are being passed, that are devoted to the interests of older people."

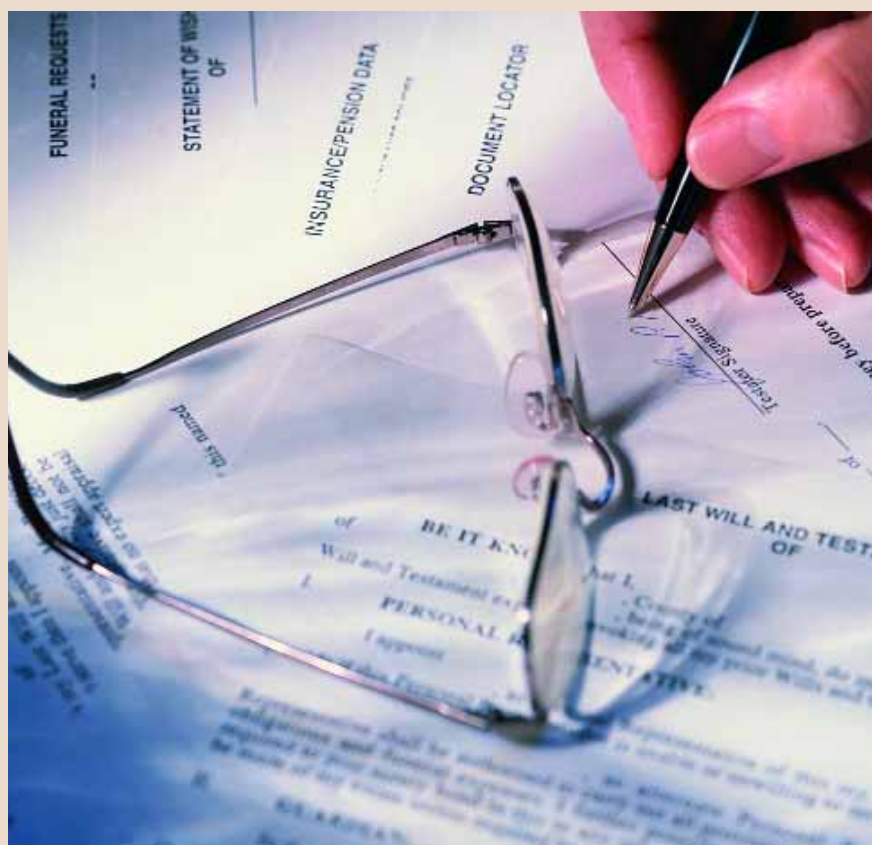
throughout Australia are older people with dementia, Alzheimer's Australia is one of the key drivers for change.

In its submission to the inquiry, it calls for a specialist legal advocacy centre to be established in each state. It would essentially be a one-stop shop for all legal, paralegal and counselling needs of older Australians.

The service would "augment existing aged rights/advocacy services funded by the federal government and support the public advocates and guardianship tribunals". Further, "federally funded state based services will require more uniformity in both the legislative framework and policies throughout Australia".

Alzheimer's Australia has also proposed that elder law be established as a speciality university course, as has already happened at the University of Western Sydney.

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attorney, enduring power of attorney, family agreements, wills and advanced care planning. There are also calls for education programs to help inform older people of their options and how

to go about implementing their choices, as well as a need to educate those appointed or those who hold power of attorney of their responsibilities.

Easy accessibility to do-it-yourself wills and powers of attorney is also raised as a concern. These documents can be purchased from newsagents, supermarkets and over the internet in kit form without any formal legal advice and can lead to errors and misinterpretation of intentions.

As part of its inquiry, the committee is examining what action is being taken in other parts of the world. With an ageing population worldwide, countries such as the United States and Canada have already made important changes.

Massachusetts in the US, for example, is leading the way in educating and training the banking industry to help tackle financial abuse. According to a submission from COTA, the largest seniors organisation in Australia, "this involved the state government and the banks working together to teach bank employees how to recognise and report financial exploitation of elder customers".

Similar steps have been taken in California, where legislation has been drafted to require banks to report any cases or possible cases of financial abuse of the elderly.

Talking on ABC Radio National in January last year, Brisbane solicitor Brian Herd said "in America they have raised the status of older people to law-making status".

"In other words they pass laws and have laws that are devoted to the interests of older people," he said. "Both at a state level in America, and at a federal level, there are laws that

Examples of financial abuse

- Taking, misusing or using, withholding knowledge about or permission in regard to money and property.
- Forging or forcing an older person's signature.
- Abusing joint signatory authority on a blank form.
- Misusing ATMs and credit cards.
- Cashing an older person's cheque without permission or authorisation.
- Misappropriating funds from a pension.
- Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence.
- Persuading an older person to change a will or insurance policy to alter who benefits from the will or policy.
- Using an authorised power of attorney not in the interests of the older person.
- Negligently mishandling assets including misuse by a caregiver.
- Promising long term or lifetime care in exchange for money and property and not providing such care.
- Overcharging or not delivering care giving services.
- Denying access to money or property.
- Getting an older person to go guarantor without sufficient knowledge to make an informed decision.

Source: Elder Abuse Prevention Project, Office of Senior Victorians

have been passed, are being passed, that are devoted to the interests of older people."

In the US, there are now law firms specifically devoted to elder law. A legal advocacy centre, such as the one suggested in the submission from Alzheimer's Australia, already exists in Toronto, Canada. And in Britain, the power of attorney is required to advise other

immediate family members that they are exercising their attorney powers. ■

For more information on the public inquiry into older people and the law, or to read the submissions and hearing transcripts, visit www.aph.gov.au/house/committee/laca/olderpeople or email laca.reps@aph.gov.au or phone (02) 6277 2358.

PREPARING FOR THE FINAL YEARS

Elderly Australians facing their final years have difficult decisions to make, including on the health care they wish to receive. Georgie Oakeshott looks at the complexities involved with making those final decisions.

WHEN 81-year-old Dan was diagnosed with lung fibrosis in 2004 his increasing breathlessness suddenly had a name.

Six months later, as his condition gradually worsened, he talked to his GP about his future health care

options. After careful consideration, he told his doctor that if his condition dramatically worsened he didn't want aggressive treatment to be kept alive.

He discussed the range of treatments which would be available to him, and was quite specific in stating his wishes: no "heroic measures", no intensive care and no intubation.

A few months later, when Dan became acutely breathless, his wife called the GP rather than an ambulance. The GP came to their home and carried out Dan's wishes for comfort care only. Eventually, Dan died.

This case, based on an actual event, illustrates an advance care plan—a process that allows patients to make statements about their future health care. It includes advance directives or statements on how they wish to be treated, and the appointment of a substitute decision maker.

Advance care plans take effect when a patient loses legal capacity to make their own medical decisions. Although not exactly a household term today, they're quickly becoming as much a part of old age as dentures and hearing aids.

Advance care planning programs are now in hospitals in every state and territory, many as part of a Commonwealth funded initiative called "Respecting Patient Choices" (RPC) that originated in Victoria in 2002.

RPC Program Director, Dr Bill Silvester said advance care planning provides the opportunity to clarify personal values and choices, and gives family, doctors and nurses the opportunity to respect those choices.

"Most people will die after chronic illness, not a sudden event and up to half of us are not in a position to make our own decision when we are near death," Dr Silvester said.

"Many of us will be kept alive under circumstances that are not dignified, frequently suffering and in a way that we would not have wanted, because a doctor who is uncertain what to do will often treat aggressively.

"Advance care planning enables patients to make decisions about their future health care in consultation with their health care providers, family members and other important people in their lives."

Dr Silvester said the Commonwealth's \$6-million funding for the Respecting Patient Choices program has raised concerns from some groups that the program was government funded euthanasia. He quickly rejects such claims.

"Not only is this program not supporting euthanasia, but we've often had patients say to us after they've participated that they now feel they can turn away from euthanasia, as they now feel they've got some control in their lives again," he said.

While supportive of legally binding advance care planning, the Australian Medical Association has told a House of Representative inquiry into older people and the law that it has concerns about current state and territory legislation.

The AMA described the existing legislative framework as fragmented and unclear, offering little certainty for both patients and health care professionals.

Some state and territory governments have legislation in place or are considering legislation. Where legislation does exist, it is inconsistent across jurisdictions.

Advance directives made in one state are often not recognised in

another. This creates problems when, for example, an elderly parent moves interstate to be closer to a son or daughter.

Doctors are also concerned about their clinical independence, with the AMA calling for nationally consistent legislation which protects doctors whether they comply or don't comply with an advance directive.

"Medical practitioners need to know they will not be put in a position where they are asked, by instrument of law, to act in a way that is not consistent with good standards of medical practice," President of AMA Victoria Dr Mark Yates told the House of Representatives Legal and Constitutional Affairs Committee.

He said while the AMA supported the role of patient autonomy in the advance care planning process, doctors' clinical independence had to be protected in order for them to act in the best interests of their patients. This applied whether they were following an advance care plan or decided not to comply with that plan if there were reasonable grounds to believe it was inconsistent with good medical practice.

The AMA told the inquiry it wanted clear, nationally consistent legislation across all jurisdictions in Australia that recognises this. It also called for the development of clear, nationally consistent guidance for the preparation, notification and storage of advance directives, including a consistent proforma.

"I hope that in the legislation that we achieve around advance care planning, patients are given an opportunity to be part of the debate. That is what the advantage of an advance care plan would be, rather than having it as a directive that you must or must not follow something," Dr Yates said.

The AMA pointed to Queensland's legislation as providing the best protection for doctors, because doctors aren't bound to follow an advance care directive if they consider it to be inconsistent with good medical practice.

"I think Queensland probably has the best legislation that we could find currently. South Australia also has some legislation, which I would see as somewhat restrictive because, as I am aware, it does not have any protection

for doctors who do not follow an advance care plan. Certainly in Victoria there will be debate about advance care plans and in Tasmania there has been some recent debate about them.

"We feel there is an urgency for the Commonwealth to give direction," Dr Yates told the inquiry.

Another supporter of advance care planning is Alzheimer's Australia, the national peak consumer organisation for 500,000 Australians living with dementia.

It told the committee that as the population aged the number of people developing dementia would increase, from 200,000 to more than 730,000 by 2050. It was vitally important these people planned for their future while they were still able to do so.

"Advance care planning provides an opportunity to think ahead about how you want to be cared for, who you want to be cared by, where you want to be, to work through the issues around old age and dying," Research Fellow at the Hawke Research Institute at the University of South Australia, Margaret Brown said.

"It's about having a conversation with your carers and family to say, for

"Advance care planning provides an opportunity to think ahead about how you want to be cared for."



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"Many of us will be kept alive under circumstances that are not dignified, frequently suffering and in a way that we would not have wanted."



example, if I have a major stroke and I'm unable to communicate meaningfully, then I don't want to be kept alive with particular sorts of treatments, or I may not want to be taken to hospital.

"It's really about thinking ahead about your future and making decisions in advance.

"Sometimes an informal arrangement is enough, but when the circumstances change, such as being admitted to hospital, or if there is conflict in the family, the medical team may want more evidence of that conversation," she said.

Ms Brown said the inconsistencies between state and territory legislation were confusing and needed addressing.

"Few people appoint a substitute decision maker or make an advance health care directive, and once legal capacity has been lost, then the opportunity to do so is lost," she said.

While acknowledging the difficulties advance directives can present for doctors, she said good medical practice should take account of the individual's decisions and respect their wishes.

"It can present a very big ethical dilemma, for example, when respecting the decision to refuse treatment is contrary to what a doctor believes is in the best interest of the patient, but good medical practice should respect an individual's decision," she said.

She described a case where a 92-year-old woman, who was obviously dying, was admitted to hospital and suffered a cardiac arrest. The medical team resuscitated her, breaking her ribs because she was so thin. She was then transferred to intensive care, where she died two days later.

"Is that an example of good medical practice?" Ms Brown asked.

"That situation could have been avoided if an advance directive was in place and the medical staff had been informed about the woman's wishes not to die in such an undignified way.

"Advance care planning can ease the stress for patients, families and the medical staff, when decisions are thought through in advance and the patients' wishes are respected.

"The benefits of advance care planning outweigh the difficulties in most situations," Ms Brown said. ■



THE POWER TO DECIDE

It's one of life's big questions and one which supporters of advance care planning want you to think about now, while you are still able: what happens if you can no longer make your own decisions?

WHO do you trust to make decisions on your behalf, what powers do you give them, and when do those powers take effect?

These questions are about relationships, communication and families, according to Margaret Brown from the Hawke Research Institute at the University of South Australia.

"Appointing another person to make one's decisions is complex and

raises questions about trust, responsibility, competence and appropriate timing for the activation of enduring powers," Ms Brown said.

"It involves acknowledging one's frailty, future loss of competence and ultimately one's death.

"Not everyone has a close trusting family. For those who do the process can be relatively easy, if English is their first language, they are relatively well educated and they can afford to consult a lawyer.

"For those who do not, the process can be just too hard and confronting. Who do you trust? Where can you get advice?" she asked.

Further complicating the process is the fact that every state and territory has a different approach to enduring powers and advance directives, which Ms Brown said causes anxiety, confusion and additional cost.

"For example in South Australia there is an overlap between the Enduring Power of Guardianship and the Medical Power of Attorney," she said.

"In Western Australia and the Northern Territory people cannot appoint an enduring guardian. This means they cannot appoint a substitute decision maker for lifestyle and health care decisions.

"On the other hand, Queensland and the ACT have enduring powers that cover financial, lifestyle and health care decisions under the one power."

These inconsistencies require urgent attention, she said, if these policies are to become more user-friendly for people as they age, especially those who would lose capacity.

This raises another issue. "Not all people are clear about when the enduring powers are activated. This point needs clarification for all enduring powers in all jurisdictions," Ms Brown said.

She hopes the parliamentary inquiry into older people and the law can investigate these issues, and make information more readily available about advance directives, including making enduring powers of attorney more accessible, especially for older people and people from other cultures and language groups. ■

The powers that be

An enduring power of attorney (EPA) is a legal document that allows an individual to appoint an attorney (substitute decision maker) to make decisions about financial and business matters. This power extends after the person has lost legal capacity, unlike the power of attorney which ceases once the person no longer has capacity.

Each state and territory has specific legislation but there are differences in terminology; registration of the enduring powers; when the power is activated; and mutual recognition of the other states' enduring powers.

Both Queensland and the ACT have enduring powers of attorney that can cover financial, lifestyle and health care decisions. The other states and territories specifically do not allow an EPA to decide on health and lifestyle decisions.

An enduring power of guardianship (EPG) is a legal document that allows an individual to appoint a guardian to make decisions about lifestyle and health care.

This power commences after the person no longer has decision-making capacity. The enduring power of guardianship is available in NSW, Victoria, South Australia and Tasmania. Western Australia and the Northern Territory do not have an equivalent power. Queensland and the ACT have one enduring power to cover both financial and health care decisions.

The Medical Power of Attorney (MPA) is a legal document that allows an individual to appoint a medical agent to make decisions only about medical treatments when the person is no longer competent to do so. South Australia has an MPA. Victoria's legislation uses a different term, enduring power of attorney (medical treatment).

Guardianship Tribunals can appoint an administrator of finances or a guardian to make personal and health care decisions if an individual loses capacity and has not appointed an enduring power.

Source of definitions: Margaret Brown, Research Fellow, Hawke Research Institute, University of South Australia

