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# Substitute Decision Making and Older People

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Research conducted at the Australian Institute of Criminology indicates that older people are more likely to be victims of financial abuse (for example, fraud, deception, and commercial exploitation) than predatory crime (for example, robbery, assault, and homicide). As people become less able to manage their affairs, they may appoint a Power of Attorney or an Enduring Power of Attorney to assist them in future planning or decision making. A recent FBI paper suggested that Power of Attorney was the most abused legal document in America. Similarly, advocacy organisations have reported cases of abuse of the Power of Attorney in Australia.

This paper is based on a study of older people's knowledge of the substitute decision-making process and experiences of abuse. The study revealed that older people's knowledge of the substitute decision-making process is very limited, but abuse is not widespread. While most respondents reported that the processes involving Enduring Power of Attorneys are satisfactory, they expressed concerns about trust, accountability, and amount of control.

It has been estimated that by 2050 one-quarter of Australians will be over 65 years of age. Given that many older people are asset rich, the level of protection for older people needs to be built on a firm base. This paper identifies current issues and lays out an agenda for further work to help shape policies that will protect our older citizens.

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## Decision Making and Older People

Legislative changes to *The Aged Care Act 1997* by the Commonwealth Government, and the proposed changes to the *Powers of Attorney Act 1998* and *The Retirement Villages Act 1988* in Queensland, have increased the complexity of the legal and financial aspects of future planning and decision making in old age. This complexity suggests an increased need for specialised advice around later life decision making. Other concerns are the potential for conflict of interests and abuse of older people in processes of decision making on their behalf.

The law upholds the rights of older people to protection from abuse and exploitation (Ashton 1995, p. 1). The main legal devices are Powers of Attorney provisions and guardianship. A Power of Attorney is formally conferred to enable a person to make decisions on another person's behalf. Such an agreement ceases when the person concerned loses capacity to manage his or her own affairs. An Enduring Power of Attorney, however, continues in force when a person loses capacity to manage their affairs. Attorneys can be given the power to make decisions about financial matters such as managing finances, selling property, and/or personal matters such as the type of health care received and accommodation choices. Guardianship legislation provides an independent statutory officer to advocate for, and protect, the interests of adults with impaired capacity.

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The Adult Guardian can investigate complaints about the actions of a person using an Enduring Power of Attorney, investigate physical/financial abuse and neglect, act as an attorney on personal and health matters, and mediate disputes between attorneys or others.

Legal rights may be circumscribed by a lack of knowledge of the law and barriers to accessing legal services (Hardy 1997, p. 105). The protection of older people afforded through the law may also be limited by a lack of recognition of the legal aspects of situations (Brown 1997, p. 148) and a limited awareness of legal rights (McCullough 1995; Cunningham and Wright 1996, p. 52). In Australia, an additional factor may be that only a few legal practitioners specialise in the rights of older people living in community/residential care settings or in guardianship issues (Fisher 1997). Thus, there is a limited understanding of older people's attitudes towards, knowledge of, and experience in substitute decision making.

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### Dependency and Decision Making

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Dependency associated with dementia, severe illness, or communication impairment is a critical factor in substitute decision making for older people. Attorneys are needed when older people have lost capacity to make decisions for themselves or inform others of their decisions. The relocation of an older person with a disability to an aged care facility, and the management of the finances and property of older people living in the community/residential settings, raise complex financial, health care, and legal issues for the individual, family members, and service providers.

It has been noted that some older people engage in 'decisional dependency', deferring to children when making decisions concerning the management of their affairs (Gibson 1998, p. 200). Having to rely on others is also viewed as a critical factor in elder

abuse, particularly in relation to financial abuse and neglect (Kurrle 1995). In Australia, the response to an increased awareness of elder abuse is to develop protocols which emphasise multidisciplinary approaches and cooperation between health and other services. The emphasis is on a care model rather than a criminal justice model (Kinnear and Graycar 1999). Legal intervention is generally viewed as 'hopefully a last resort, but may be the first line of intervention in cases of financial abuse or severe physical abuse' (Kurrle 1995, p. 175).

There is little information on the knowledge, use, and experiences of the Powers of Attorney provisions in relation to older people. Paradoxically, while substitute decision-making arrangements are designed to offer protection to older people from financial abuse, they may also provide opportunities for the financial abuse of older people. An American report suggests that the Powers of Attorney provisions were the most abused legal documents in their judicial system (Mathis 1994).

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### Older People's Knowledge and Experience of Substitute Decision Making

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Research is in progress (Setterlund et al. 1999) to investigate the understanding and experiences that older people and their carers in Queensland have of substitute decision making. The research aims to capture older people's experiences, knowledge, and understanding of the law within three different domains of experience: those living in community settings, those who have moved into aged care facilities, and those who lived in retirement villages.

The recent changes encompassed in the *Powers of Attorney Act 1998* in Queensland have affected several areas of older people's lives (for example, property, health, finances, and accommodation). The Act facili-

tates greater self-determination and autonomy in substitute, assisted, and end of life decision making, an expanded role for families in decision-making processes, and increased protection for older people through the appointment of an Adult Guardian and a proposed guardianship board. However, there are no mechanisms in the Act which define, or prevent, abuse by a person using an Enduring Power of Attorney. Experiences of similar legislation in other states suggest potential difficulties linked to lawyers' inexperience in the procedures for taking instructions for Enduring Power of Attorney and to conflict of interests between older people and their families (Gil 1998, p. 8).

Gender, socioeconomic status, ethnicity, and disability are identified as the major factors in shaping the experiences and the conditions of ageing (Borowski and Hugo 1997, p. 45). In the study, the sample was selected to include both genders and older people with different incomes, diversity of ethnic background, Aboriginal and Torres Strait Islanders, urban and rural locations, people with and without a disability, and carers of those with a disability. Information was collected by focus group discussions, a brief survey of participants, and selected individual interviews. To date, 375 older people and carers have participated in this study.

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### Level of Understanding of Relevant Legislation

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One indicator of people's awareness of the provisions and the extent to which people consider them to be useful is whether people had made arrangements for an attorney (Enduring Power of Attorney or a Power of Attorney). The results show that 40 percent of participants in the community groups and 57 percent in aged care facilities and retirement villages made arrangements to legally appoint an

attorney to manage their affairs in the event of future incapacity. However, some participants were unsure whether an Enduring Power of Attorney or a Power of Attorney had been arranged and some could not recall the details of forms that had been signed or the legal status of the arrangements.

The study indicates that participants have limited knowledge of the substitute decision-making provisions. In over half the groups, the majority of participants were confused about the differences between Power of Attorney and Enduring Power of Attorney, and between appointing an executor of a will and an attorney for substitute decision making. A detailed understanding by participants of the concepts, rules, and procedures related to the provisions was evident in only 3 of the 45 focus groups. How well such arrangements are understood in the wider community is a question for further study.

The research suggests that while a few older people and their families had some understanding of this area of the law, the majority were confused about the details of its provisions. Such a limited understanding has implications for the potential financial abuse of older people, regardless of whether an Enduring Power of Attorney is involved. A lack of knowledge about Enduring Power of Attorney means that many older people's wishes regarding the management of their affairs in the event of future incapacity may not eventuate. The potential for abuse and limiting of choices directs attention to the need to gain a more comprehensive understanding of the factors which influence people's behaviour when planning for substitute decision making.

### Barriers to Making Enduring Power of Attorney Arrangements

A lack of knowledge, fear of exploitation, complex family

dynamics, and a wide range of attitudes towards the idea of substitute decision making are factors which may preclude people from taking out an Enduring Power of Attorney. For some, the issue has simply been overlooked. Others, however, are aware of the issues but find the prospect of future incapacity too emotional to deal with as it touches on sensitive areas of family relationships, trust, and the stress of physical and emotional difficulties. As a result some choose not to make any arrangements.

#### *Lack of Awareness of Powers of Attorney Provisions*

A complete lack of knowledge precludes one from taking action. The study shows that a group of Spanish speaking elders and a group of older people from Eastern Europe had no knowledge of the provisions. However, once they were aware of the issues, most participants readily engaged with the idea that incapacity may occur in future and expressed interest in learning more in order to make informed choices. These situations highlighted the importance of informed intermediaries.

#### *Fear of Exploitation by Family Members and Society*

Some were aware of the law but chose not to make arrangements. Participants were deterred by concerns based on stories about the potential for family members to use an Enduring Power of Attorney to exploit older people; thus, their reluctance to sign over control to others was a key issue that precludes people from appointing an Enduring Power of Attorney.

#### *Difficulties Related to Family Dynamics*

Women's key concerns were linked to the complexity and instability of family relationships and the problem of making decisions based on one set of circumstances and implementing different decisions under another set of circumstances. For ex-

ample, a positive relationship with a son or a daughter may be influenced negatively by an 'unknown spouse' in the event of marriage or remarriage. A number of older women were aware of the potential for hurt, tension, and change of family roles that could be created by telling different children about the content of wills and decisions regarding affairs.

#### *Difficulties Dealing with the Demands of Planning and Decision Making*

For some older people, current circumstances such as health problems or the stress of caring limited the emotional energy available to consider future planning. For one old man, the recent death of his wife meant that he did not feel that he had a future to plan for and the thought of such planning evoked a negative response.

#### *Difficulties Related to Thinking about Future Incapacity*

Some participants could not face the possibility that they may be incapacitated and unable to look after themselves one day. Others gave little attention to the idea because they believed that family members would manage their affairs should the need arise. Others believed that their families have the power to engage in any activity on their behalf without recourse to legal documentation. They did not know the legal limitations of the situations. The general perception was that one could cope with the possible difficulties surrounding incapacity by being able to make arrangements without difficulty.

For instance, the experience of Mrs S, an 82-year-old widowed woman who has a detailed understanding of Enduring Power of Attorney, illustrates how issues of trust, family dynamics, and personal beliefs about planning and the future intersect to influence her decision to not take out an Enduring Power of Attorney despite having complex financial arrangements.



Mrs S lives with her son and daughter-in-law. She felt she could not trust her son to put her interests first as she believes his wife may negatively influence him against her. She is very independent, has a strong desire to 'hold on as long as I can' to her decision-making capacities and believes that 'what will be will be'. She is convinced that she will be able to decide when she is no longer capable of managing her own affairs and, at that point, will get an Enduring Power of Attorney and pass the responsibility on to her son. She does not appear to consider the possibility that this perceived window of opportunity might not appear.

Those who have few assets to protect do not see the need for an Enduring Power of Attorney. As one Aboriginal elder stated 'it would be all right if you had something to leave'. This ignores the capacity of Enduring Power of Attorney to cover other aspects of life.

### Potential for Abuse in Relation to Arrangements Made

Most of the participants whose relatives used an Enduring Power of Attorney on their behalf reported positive experiences. The Enduring Power of Attorney was invoked mainly for banking purposes. However, the potential for abuse may arise due to the limited understanding of the provisions by those who had arranged an Enduring Power of Attorney, the complete trust placed in families or professionals to act in their best interests, and the processes involved in using an Enduring Power of Attorney.

#### *Limited Understanding*

A limited understanding increases the likelihood of older people being abused. For some, this limited understanding was linked to the 'peace of mind' produced by arranging an Enduring Power of Attorney. With the passage of time and a sense of security that arrangements are in place, the issue becomes quite peripheral and only vague details

of arrangements are recalled. The exception to this trend was some participants with higher incomes, the participants' detailed understanding of the law appeared to be linked with concerns to manage complex financial arrangements.

Significantly, a small number of people did not know about the legal status of arrangements. Most of these people were physically frail and were more likely to be residents of aged care facilities. Some participants in a hostel were unsure whether a form that they had signed was an Enduring Power of Attorney.

Mrs B (physically frail, aged 89 years) is not sure of the relevant legislation. She signed a letter for the bank which enables her daughter to collect her pension and do her banking each week. Mrs B. did not know if she had signed an Enduring Power of Attorney. She trusts her family to 'do the right thing'.

#### *Trust in Families*

The level of trust placed in family members and professionals appointed as attorneys reflected an unquestioning belief that their interests were protected. The majority of older people with an Enduring Power of Attorney had appointed family members (mainly children) as attorneys. In these situations, older people trusted their children with the forms and felt that all issues had been covered. It is more likely that professionals were appointed when family members are not available.

A nursing home resident who was widowed and childless said that her solicitor managed her affairs. She had no knowledge of Enduring Power of Attorney or Power of Attorney and did not know if her solicitor had made these arrangements. She knew nothing of the details of the decisions made by him but was completely happy with the arrangement: 'I don't know anything about it—I just know that I am taken care of; I'm in very good hands.'

Physically frail participants in aged care facilities were likely to express relief at letting others make decisions on their behalf.

Many did not want to know the details of the management of their affairs.

#### *Utilisation of Enduring Power of Attorneys by families*

The study reveals that only a few people had activated an Enduring Power of Attorney and most reported satisfactory processes. However, in a few instances the processes described raise concerns.

One woman reported that she and her sister obtained an Enduring Power of Attorney for their father after consultation with a Justice of the Peace (JP). Their father had suffered from dementia for several years and would not have been capable of reading or understanding the documents. They signed the documents which were witnessed by a JP. Their father's bank recognised their legal power to manage their father's finances. In this case, the participant wanted to 'get around the legislation' and was able to do so with the assistance of a JP. The carer concerned felt that their total commitment to the care of their father justified their actions.

One nursing home resident gave an Enduring Power of Attorney to her son and daughter-in-law. This arrangement was far from satisfactory due to issues of trust, accountability, and amount of control exercised by the daughter-in-law in her role as principal. For example, on one occasion the participant withdrew money to pay the bills but found out that her daughter-in-law had already paid them. The participant expressed concern about not knowing whether her bills are paid and stated 'I worry about my affairs because my daughter-in-law goes too far.' The arrangement was made through a solicitor but the participant could not recall why she had given Enduring Power of Attorney to her daughter-in-law. She said her family had told her that 'it wasn't worth the paper it was written on.'

When issues of limited knowledge, trust, and questionable processes interact with a sense of relief at having relinquished control over decision making come together, the potential for abuse is amplified. A further concern is that these

aspects are often combined with older people's vulnerability linked to both frailty and conditions of dependency often associated with residential care.

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### Understanding of the Law, Choice, and Vulnerability

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A number of factors combine in quite complex ways to influence two interconnected aspects of life: the power to make informed choices and vulnerability to financial abuse. In order to make informed choices, people need a detailed understanding of the issues related to their decisions. The study shows that the majority of participants, other than those on high incomes, had a limited understanding of the Enduring Power of Attorney provisions. Participants from some non-English speaking backgrounds and those on lower incomes tended to have the lowest levels of understanding and thus reduced power to make choices. This appeared to be a result of language barriers and unfamiliarity with the Australian law and culture. In all groups, poor health, carer stress, personal beliefs about planning, and fears about incapacity and exploitation prevented people from exploring the issues in depth by accessing detailed information. The lack of detailed information means that they may be making choices by default.

Having few assets or un-complicated financial arrangements are also factors which may suggest to some individuals that there are few advantages to making formal legal arrangements for management of their affairs in the event of incapacity. A number of people on pensions and most Aboriginal people expressed this view.

For many older people, trust in their families to act in their best interests supports a sense that there is little need for them to have a detailed understanding of the area. In the context of domi-

nant beliefs about families as caring and trustworthy, asking questions and monitoring decisions may be viewed as questioning the integrity of others. Some participants became anxious when thinking about possible abuse of an Enduring Power of Attorney. The way in which the participants described their trust in families, their perception of having little need to involve themselves in the details of arrangements, and their processes surrounding use of the power suggests an enormous potential for an Enduring Power of Attorney to be used against older people rather than for their protection.

This research raises the issue of the vulnerability of older people to financial abuse. The limited understanding of older participants who had made Enduring Power of Attorney arrangements challenges the premise that arrangements made within families are well understood by principals, attorneys, and other family members.

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### Future Directions

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The potential for financial abuse of older people by those holding an Enduring Power of Attorney exists because:

- Older people are largely unaware of the potential usefulness of this mechanism.
- They are constrained by their attitudes to the prospect of being dependent and by family issues.
- The mechanism for implementing an Enduring Power of Attorney is open to abuse by those entrusted with protecting the interests of vulnerable people.

#### *Researching the Problem*

The current study has begun the process of understanding more clearly:

- What constrains and enables older people to make use of the existing legislation that will give them a say in how their affairs are managed if they are unable to make these decisions in future.
- The experiences older people and their carers have of these mechanisms.
- The role played by informed intermediaries, including allied health professionals and general practitioners, in advising older people about Enduring Powers of Attorney provisions.
- The attitudes and practices of lawyers in these areas.

The following work on these areas would be valuable:

- How best to monitor the use of Enduring Powers of Attorney and similar substitute decision-making mechanisms.
- How to make Enduring Power of Attorneys, or alternate mechanisms, accessible and relevant to different groups of older people in the Australian community.
- The extent of financial abuse of older people.

While financial abuse is recognised as a major form of abuse, it appears to get little attention from service providers, including the police. The growing disparity in wealth in the Australian community means that many older people are asset rich compared to members of the younger generations; thus, the temptation to access these resources by fraud or deception is very real. It is important that the legal mechanisms designed to protect the financial interests of people when they are vulnerable to exploitation are effective. The mechanisms for detecting and responding to financial abuse seem to be qualitatively different to those used in relation to physical and emotional abuse. There is a need to explore how legal and social

mechanisms can interact to prevent and respond to this issue.

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