

ELDER ABUSE: WHAT CAN ADVISERS DO TO PREVENT IT?

Financial advisers dealing with older clients and their family members are in a position to understand and identify situations in which financial elder abuse could occur by family members. Financial advisers who are aware of the issue of elder abuse can take steps to prevent financial abuse of older clients by encouraging the proper appointment and use of an enduring power of attorney and formalising any granny flat arrangements.

WHAT IS ELDER ABUSE?

Elder abuse is defined by the World Health Organization as ‘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’¹.

There are several definitions that all have a common thread, that is, action or inaction by a person in a position of trust, causing harm to an older person.

Elder abuse is recognised by the international community and governments across the world as a human rights issue that requires attention in order to prevent and respond to the problem. Older people have the right to be treated with dignity, be given autonomy² and to be free from exploitation, violence and abuse³.

FORMS OF ABUSE

Elder abuse occurs in various forms: psychological/emotional, financial, physical, sexual, abandonment and neglect. Psychological and financial abuse are the most common types of abuse reported in Australia⁴.

These forms of abuse often co-occur, with psychological abuse used to groom the older person to enable financial abuse.

Psychological or emotional abuse can

be threats, intimidation, harassment, bullying, pressuring, name calling, treating the person like a child, threatening to withdraw affection, threatening to put an older person into an aged care facility or stopping an older person from seeing family and friends⁵.

Financial abuse is the illegal or improper use or management of an older person’s money, property or other financial resources⁶. Financial abuse can be:

- incurring bills for which the older person is responsible;
- stealing the money or assets of the older person;
- forcing the older person to sign a document (e.g. a Will, guarantor arrangement or power of attorney) or to sign over possession of an asset;
- abusing power of attorney arrangements;
- failing to repay a loan;
- living with the older person without helping to pay for expenses; and
- agreeing to provide care or accommodation in exchange for money or property and then failing to do so⁷.

RISK FACTORS

Strong evidence supports the following risk factors for the abused and abuser⁸:

Abused

- Dependence caused by a significant disability;
- Poor physical health;
- Mental disorders, such as depression;
- Low income or socioeconomic status;
- Cognitive impairment; and
- Social isolation.



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This article is worth
0.5 CPD hours

FPA Dimension
Capability

ASIC Knowledge Area
Aged Care

FASEA CPD Areas
Client Care and Practice

INCLUDES:

- What is elder abuse
- Enduring power of attorney
- Binding nominations
- Granny flat interests



Females aged 74 and older are more likely to be victims of elder abuse.

Abuser

- Mental disorders, such as depression;
- Alcohol and drug abuse;
- Dependence on the abused in terms of needing their financial and emotional support.

According to the World Health Organization's *World Report on Ageing and Health* (2015), living alone with the perpetrator is also a risk factor.

Note: Elder abuse tends to be intergenerational, that is, involving abuse of parents by adult children⁹. This should be at the forefront of financial advisers' minds when dealing with older clients, and particular vigilance may be required if the client is living with an adult child who holds an enduring power of attorney.

PREVENTION IS BETTER THAN CURE

Awareness of elder abuse is vital to help prevent it. By recognising the risk factors, financial advisers can identify situations for potential elder abuse and implement safeguards to protect the older person's financial wellbeing. Prevention avoids the negative impacts on the older person, their family relationships and the need for legal redress.

Where elder abuse occurs in a family or care giver relationship, the older person may be reluctant to report abuse as the consequences can be the loss of that relationship or living arrangement⁹.

WHOSE RESPONSIBILITY IS IT TO PREVENT ELDER ABUSE?

'Preventing elder abuse in an ageing world is everybody's business'¹⁰.

Community awareness of elder abuse can help to address attitudes such as ageism and 'inheritance impatience'. Prevention of elder abuse requires a multi-sector approach – for example, the involvement of the health care, aged care, legal, financial and social security sectors.



A national response to elder abuse in Australia involves a co-ordinated approach by the Commonwealth and state or territory governments. The Commonwealth can legislate in respect to aged care, social security, superannuation and financial institutions. The 2019 Royal Commission into the aged care sector following reports of abuse and neglect of aged care residents, reflects how seriously the Commonwealth Government considers the issue.

State and territory laws govern powers of attorney, guardianship, Wills and estates. Recommendations made by the Australian Law Reform Commission (ALRC) in its report *Elder Abuse - A National Legal Response*, point out the need for nationally consistent safeguards against the misuse of enduring power of attorney documents¹¹. However, the laws are inconsistent in different states and territories.

Note: Financial advisers need to be aware of the enduring power of attorney laws in their state or territory when dealing with substitute decision-makers to ensure they are not facilitating elder abuse.

ENDURING POWER OF ATTORNEY

An enduring power of attorney (EPoA) is a form of substitute decision-making where a person (referred to as the principal) can appoint another person to make

financial decisions for them when they lose their decision-making capacity. Misuse of an EPoA is a form of financial abuse. Use of an EPoA before the principal loses decision-making capacity or for transactions outside the scope of the EPoA or for the benefit of the appointed person, can be a misuse of an EPoA.

REFORMS TO EPOA LAWS

Reforms to laws relating to EPoAs aimed at preventing elder abuse have occurred in Queensland and Victoria, and are currently underway in NSW. The impetus for this change is a 'paradigm shift' from substituted decision-making to supported decision-making, which takes into account the older person's will, preferences or rights¹².

This shift away from acting in the best interests of the principal, reflects the right of an older person to their autonomy by preserving their right to participate in making decisions. The appointed person's role is to represent the principal and to give effect to the principal's will and preferences wherever possible. Substitute decision-making may still be appropriate where the older person's will or preference cannot be ascertained, however, it should be a last resort.

Building on the EPoA legislation in Queensland and Victoria, the ALRC has recommended that

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state or territory legislation should restrict conflict transactions, that is, transactions where there is, or may be a conflict between the interests of the principal and the interests of an attorney. An EPoA would not be permitted to enter into a conflict transaction unless expressly authorised in the EPoA document or a tribunal authorises the transaction.

Statutory restrictions on conflict transactions build on and are consistent with the attorney's fiduciary duty¹³. The duty not to enter into a transaction where there may be a conflict of interest applies whether there is a statutory restriction or not. Examples of conflict transactions may be the EPoA leasing or buying an asset owned by the principal (e.g. buying the principal's car) or using the principal's holiday home or receiving a gift from the principal.

Recommendations by the ALRC to develop a nationally consistent legal framework and establish a National Register for EPoAs was announced as part of the Australian Government's agenda in the 2018/19 Federal Budget.

NATIONAL REGISTER

Currently, EPoAs only need to be registered in each state or territory for land transactions. Only Tasmania has compulsory registration of EPoAs. A national register of EPoAs

seeks to reduce elder abuse by:

- ensuring only one EPoA is registered at any one time (e.g. to prevent an attorney from using an EPoA that has been revoked or attempting to make another EPoA where the principal has lost decision-making capacity);
- identifying an EPoA which is active; and
- clarifying the role and powers of the attorney.

EPOA AND BINDING NOMINATIONS

A principal cannot delegate acts to an EPoA which the principal must do personally, for example, making or revoking a Will. However, making a binding death benefit nomination is not a testamentary act¹⁴. Whether an EPoA can make, vary, revoke or confirm a binding nomination has not been judicially considered until the Queensland case of *Re Narumon Pty Ltd [2018] QSC 185*. On the facts, it was held that the joint EPoAs were able to confirm a binding nomination made by the member of an SMSF. The nomination was confirmed before it was due to expire three years after the member made it, but after the member lost the capacity to make decisions.

Relevant to the decision was whether any restrictions to an EPoA making or confirming a nomination existed in the SMSF trust deed, *Superannuation*

Industry (Supervision) (SIS) Act or Regulations or EPoA legislation in Queensland. No restrictions were found in the SMSF trust deed or *SIS Act or Regulations*. In the context of the Queensland EPoA legislation, the making or confirming of a binding nomination was considered to be a 'financial matter', within the authority which could be delegated to an EPoA.

Particular reference was made to the conflict transaction provisions of the EPoA legislation, noting that the principal had not expressly authorised the joint attorneys to enter into any conflict transaction. Confirmation of the member's binding nomination, by the joint attorneys, was not a conflict transaction in the circumstances, even though one attorney would benefit from the nomination.

Confirming the member's binding nomination was consistent with the EPoAs' duty to enable the principal to exercise autonomy and carry out his/her wishes in respect of the distribution of the benefits, rather than have his/her wishes defeated.

A distinction was drawn between an EPoA confirming and making a new or varying an existing binding nomination, however, the question of making or varying a nomination was left undecided. The ALRC has recommended a review of the *SIS Act* and *Regulations* relating to making death benefit nominations. Part of the review will look at whether an EPoA can make, vary or revoke a nomination.

Note: Financial advisers play an important role in providing advice to older clients on superannuation and death benefit nominations. Non-lapsing nominations cater for the loss of decision-making capacity. However, non-lapsing nominations may only be made if permitted by the trust deed and with the active consent of the trustee. Advisers should be aware that the ability of an EPoA to make, vary, revoke or confirm a binding nomination may depend on the trust deed, relevant EPoA legislation and any express authority given in the





QUESTIONS

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1 Why is prevention of elder abuse a better outcome than remedying elder abuse that has occurred?

- The abuser is more likely to be a family member.
- Elder abuse may not be reported because of the complex nature of the relationship between the abused and abuser.
- Legal remedies are not sufficient to redress occurrences of financial abuse.
- The abuser is unlikely to repay the money stolen from the elderly person.

2 What changes have occurred and are occurring to the enduring power of attorney laws in some states?

- Additional witnessing requirements for enduring power of attorney documents.
- A single power of attorney for medical and financial decisions.
- Safeguards are being built into the enduring power of attorney document to limit the amount of power given to an attorney.
- Wishes of the principal are considered and substituted decision-making is considered a last resort.

3 How may a national register of enduring power of attorney documents prevent elder abuse?

- Enduring power of attorneys will have authority to enter into land transactions.
- Financial advisers and institutions will be able to check they are dealing with a valid attorney and the transaction is within the scope of their authority.
- Nationally consistent enduring power of attorney laws will make it easier for appointed persons to understand their role and responsibilities.
- Older clients will have easy access to enduring power of attorney documents.

4 What negative implications for an older client might arise if a granny flat arrangement is not in writing?

- The amount paid may be considered a gift.
- Family relationships will inevitably breakdown because there are no written rights and responsibilities.
- Negative social security implications, as granny flat arrangements not evidenced in writing are not recognised by Centrelink.
- The older client will have no legal remedies available.

5 Can an enduring power of attorney confirm a binding nomination?

- Yes.
- No.
- Yes, this is permitted by the *Superannuation Industry Supervision (Act) and Regulations*.
- Yes, subject to the provisions in the trust deed, enduring power of attorney document and enduring power of attorney legislation.



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EPoA document. The *SIS Act* or *Regulations* currently do not restrict the ability of an EPoA to make, vary, revoke or confirm a binding nomination.

APPOINTMENT OF AN EPOA

Appointing multiple attorneys jointly, so the attorneys must act together, provides added protection from misuse of an EPoA.

When an older client has an SMSF, they should consider whether the person appointed as an EPoA has the skill and knowledge of complex

SMSF rules, especially if the EPoA is appointed as trustee or director.

Superannuation law permits the appointment of an EPoA, but the trust deed or corporate constitution will generally determine whether the EPoA will be appointed the trustee or director.

Older clients should clearly understand what succession arrangements are in place if they lose the capacity to make decisions. This involves interpreting the trust deed (or relevant state or territory trustee legislation, if the provisions of

the trust deed are silent or cannot be invoked) or corporate constitution.

Note: Financial advisers can recommend older clients seek legal advice on the succession arrangements for their SMSF, when appointing an EPoA.

SCOPE OF AN EPOA

An EPoA document can give wide powers to the appointed person to make financial decisions on behalf of the principal. Older clients should

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recognise that they have the flexibility to determine the scope of the powers given under an EPoA document. Measures to prevent elder abuse may be to exclude certain matters or powers, such as restricting the ability to sell the principal home.

The circumstances when an EPoA takes effect should be specified to ensure it only takes effect when the principal has genuinely lost decision-making capacity in relation to a specific situation or area, such as the ability to manage their finances¹⁵.

GRANNY FLAT INTERESTS

Granny flat interests are family arrangements that provide support for older people. The older person pays for a life interest or for the right to accommodation for life in a private residence and is precluded under social security rules from having legal title to the property. Currently, there is no requirement for these arrangements to be in writing.

The breakdown of family arrangements is a common form of financial abuse. If family arrangements are not in writing, the older person is at risk of financial abuse when things go wrong. Failure to document a granny flat interest can result in the older person finding themselves homeless and having lost the proceeds of their home, which they invested under a family agreement¹⁶.

Financial advisers should strongly recommend an older client seek independent legal advice and to document a granny flat agreement. Exit clauses should be built into the agreement to protect the older person's interest if things go wrong. For example, the agreement may include details about what happens if:

- the older person needs to enter into residential aged care;
- the carer predeceases the older person;
- the carer sells the property and moves to a new property; and
- the relationship between the carer and older person breaks down.

A written agreement provides evidence that the transfer of assets or

title to a property was not a gift and may assist the older person access legal remedies if necessary.

Granny flat interests often result in the older person giving up their legal title to their property and leaves them vulnerable to financial abuse by family members.

Financial advisers can explore other co-living arrangements which allow the older person to stay on the title without losing the Age Pension. For example, it is possible for a person receiving the Age Pension to undertake the following transaction without affecting their entitlement to the pension:

- The Age Pension recipient could sell their house for \$500,000 and contribute those funds towards the purchase of a \$1,000,000 home with another person, provided they have a 50 per cent interest as tenants in common registered on the legal title to the property¹⁷.

CONCLUSION

Prevention of elder abuse should be everyone's responsibility and this includes financial advisers. Awareness of this human rights issue is the first step towards the prevention of elder abuse.

Financial abuse of elders can occur through the misuse of an EPoA or family arrangements, such as granny flat interests, when things go wrong.

Financial advisers should be familiar with the EPoA legislation in their state or territory and keep up-to-date with any developments in these laws.

Where these laws recognise supported decision-making and the right of the older person to participate in making their own decisions, financial advisers should assist EPoAs to carry out their duty by considering the Will and preferences of the older person.

Failure to understand the EPoA laws can result in financial advisers facilitating misuse of an EPoA.

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FOOTNOTES

1. *Australian Law Reform Commission, Elder Abuse – A National Legal Response, Report No 131 (2017) [2.84].*
2. *World Health Organization, The Toronto Declaration on the Global Prevention of Elder Abuse (2002).*
3. *Ibid.*
4. *Australian Institute of Family Studies, Elder abuse – Understanding issues, frameworks and responses, Research Report No 35 (2016).*
5. *Australian Law Reform Commission, Elder Abuse – A National Legal Response, Report No 131 (2017) [2.47]–[2.49].*
6. *NSW Government, Preventing and responding to abuse of older people (Elder Abuse) NSW Interagency Policy (2018).*
7. *Australian Law Reform Commission, Elder Abuse – A National Legal Response, Report No 131 (2017) [2.51]–[2.53].*
8. *World Health Organization, World Report on Ageing and Health (2015) table 3.1.*
9. *Australian Institute of Family Studies, Elder abuse – Understanding issues, frameworks and responses, Research Report No 35 (2016).*
10. *World Health Organization, The Toronto Declaration on the Global Prevention of Elder Abuse (2002).*
11. *Recommendation 5-1.*
12. *Australian Law Reform Commission, Elder Abuse – A National Legal Response, Report No 131 (2017) [2.89].*
13. *Ibid [5.55].*
14. *Re Narumon Pty Ltd [2018] QSC 185 (24 August 2018) [7].*
15. *Australian Law Reform Commission, Elder Abuse – A National Legal Response, Report No 131 (2017) [5.18].*
16. *Ibid [6.14].*
17. *Ibid [6.91] n 106.*