

## **Enduring Powers of Attorney: Utility v. Safety**

Economic consequences of getting the balance wrong in an ageing population.

May 2012

## Abstract

Since the law in Queensland was changed to enable the granting of enduring powers of attorney for financial matters, many have availed themselves of this seemingly sensible strategy to have a burgeoning necessity about day to day financial affairs handled simply by those who in the main are relatives of the grantor and who can be expected to know and understand their affairs and the grantor's wishes. But anecdotally at least, there is an undertow of anxiety held by many attorneys who try to discharge their obligations using as their guide common sense and plain dealing<sup>1</sup> and only accept appointment and continue on out of a feeling of obligation to the principal. That worthy standard is sadly just not enough to discharge their legal obligations. Then, unfortunately, there are those who look upon the grant as an opportunity to advance their interests ahead of other members of the family and to the detriment of the principal's wishes. Unless an avalanche of cost to the Public Trustee and a diminution of assets of principals are to be averted, attorneys must fully understand their obligations and discharge them. Is the current balance between the need for safeguards and the availability of enduring powers of attorney for financial matters wrong? If so, then is it time for responsible authorities and organisations to take a more proactive role in these matters? This paper addresses this question and concludes that more must be done. The economic consequences of doing nothing are significant. It is essential that further investigation be undertaken into the value of assets lost due to EPA financial abuse by States in concluding what regulatory measures should be enacted.

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<sup>1</sup> Or as the Power of Attorney Act 1998 (Qld.) s.66(1) says "...honestly and with reasonable diligence to protect the adult's interests." See also the discussion in Queensland Law Reform Commission Report No. 67, September 2010, paragraphs 17.39 – 17.100, 17.104.

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## 1. Background

This paper is only concerned with Enduring Powers of Attorney (**EPA's**) which affect financial matters of the principal.

### Reasons for EPA's

The ability of an attorney to make binding financial decisions on behalf of another, particularly ageing relatives suffering from incapacitating illnesses such as dementia or stroke, is a significant aspect of the community's ability to cater for an ever expanding ageing population. Loss of capacity in those cases meant that no such decisions were valid.<sup>2</sup>

### Legislation

The continuing capacity of an attorney to act in such cases was overcome by the introduction into Queensland law of EPA's. This was as a result of the Property Law Act Amendment Act 1990<sup>3</sup> inserting sections 175A to 175I into the Property Law Act 1974. Those provisions were omitted from that Act by the Powers of Attorney Act 1998<sup>4</sup> (**POA**) section 182.

The Powers of Attorney Act 1998 re-enacted and expanded the provisions with respect to such EPA's. The Explanatory Notes to that Act stated:

"The Queensland Law Reform Commission (QLRC) conducted a comprehensive examination of the law in relation to substitute decision making on behalf of people with a decision making disability and has made recommendations for sweeping reforms to the law. Although a two phase approach has been adopted to address the issues, the QLRC recommendations are reflected in the new legislation. In a few instances where another option has been considered more desirable, the departure is not considered to be significant."

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<sup>2</sup> The necessity for everyone to have an EPA has been remarked on in a number of circumstances, e.g. see "Enduring power of attorney should be compulsory", Bryce Figot *"Self Managed Super"*, page 44.

<sup>3</sup> Act No. 54 of 1990

<sup>4</sup> Act No. 22 of 1998

## 2. Experience of EPA's

There is a growing concern in parts of the community as to the burdens on attorneys and actual or potential abuses by attorneys under EPA's.

Anecdotally, some EPA attorneys are concerned as to just what are their obligations under the POA and are equally concerned as to whether they are adequately discharging their obligations. Many are fearful of being questioned about the exercise of their powers. Although there may be an awareness of the limits of acting in conflict situations and the obligation to act in a fiduciary capacity, there is a lack of knowledge of just what these types of requirements mean in day to day activities. In short, many EPA attorneys endeavour to act using common sense and plain dealing in their role, but that is simply not the test the law requires. To have EPA attorneys muddle through is unlikely to present a good outcome either for them, any of their relatives or the principal. For those doing "the right thing", this is likely to be unfounded, but the prospect of having to explain what has been done without being quite sure what it is they have had to do, is stressful. Many take on the role reluctantly. If no one took on the role, then the cost to community of having to appoint (e.g.) the Public Trustee is likely to be significant.

There is a an awareness in the community of the status of an EPA attorney but there is a lack of knowledge of just what that means and particularly of such things as the difference between a joint or several appointment or a joint and several appointment.

### Reported cases

Over the last few years, the number of reported cases before the Queensland Civil & Administrative Tribunal concerning cases of misuse or alleged misuse of EPA's in financial matters has increased markedly.<sup>5</sup>

Most have seen the appointment of the Public Trustee as administrator of the principal's affairs. While it is easy to dismiss the proposition that this is just the tip of the iceberg, anecdotally it is likely to be the case that there are many cases where "the wrong thing" has been done intentionally or not.

### Queensland Law Reform Commission (QLRC) Report

Since the passing of the POA, the QLRC has issued "A Review of Queensland's Guardianship Laws"<sup>6</sup> of which Chapter 16 "Enduring powers of attorney" and Chapter 17 "Conflict transactions" are particularly relevant here.

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<sup>5</sup> See the discussion in QLRC Report, op.cit., paragraph 17.37 – 17.39 and see Schedule 1

<sup>6</sup> Report No. 67, September 2010.

Some of the points made in Chapter 16 of that Report include:

- EPA's involve the "potential for neglect or abuse and a resultant need for safeguards"<sup>7</sup>;
- There could be up to 400,000 active EPA's in Queensland<sup>8</sup>;
- "Barriers to the uptake of EPA's include lack of knowledge about power of attorney provisions, fear of exploitation, family dynamics and difficulties in thinking about future incapacity or advance planning. The Adult Guardian undertakes community education to raise awareness about enduring powers of attorney."<sup>9</sup>
- EPA's provide "a simple, inexpensive means to plan for the future", but it is vital to achieve the right balance between the availability of EPA's and the safeguards on their abuse<sup>10</sup>;
- Abuse may be the result of a lack of knowledge on the part of the attorney as to their duties<sup>11</sup>;
- An important function of the Adult Guardian is the power in Part 2 of Chapter 8 of the Guardianship and Administration Act 2000 to instigate an audit of the attorney's discharge of their duties<sup>12</sup>;
- Financial abuse is a cause of serious concern to the Public Trustee and the Adult Guardian<sup>13</sup>;
- Submissions to QLRC "were divided in their views as to whether the current legislative scheme for EPA achieves the right balance between the utility of an advance planning mechanism and the need for safeguards against abuse."<sup>14</sup>
- QLRC recommended, in order to strengthen the balance between the utility of EPA's for financial matters and the potential abuse of the powers of attorneys, that:

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<sup>7</sup> QLRC Report, op.cit., paragraph 16.7

<sup>8</sup> This would appear to be the result of the various percentages nationally and in Queensland of the "uptake" of EPA's referred to in paragraph 16.8.

<sup>9</sup> QLRC Report, op.cit., paragraph 16.9

<sup>10</sup> QLRC Report, op.cit., paragraph 16.28; paragraphs 16.28 to 16.55

<sup>11</sup> QLRC, op.cit., paragraph 16.30

<sup>12</sup> QLRC, op.cit., paragraph 16.34

<sup>13</sup> QLRC, op.cit., paragraph 16.35; see also the statistics referred to at paragraphs 16.36 – 16.40, especially paragraph 16.38.

<sup>14</sup> QLRC, op.cit., paragraph 16.43; see paragraphs 16.45 – 16.48 for differing views.

- legislative reforms be implemented to prevent abuse in the creation of EPA's<sup>15</sup>;
  - legislative reforms be implemented to prevent the improper use of EPA's<sup>16</sup>;
  - legislative reforms to increase the penalties for attorney fraud and the development of an offence dealing with the financial abuse and exploitation of vulnerable persons<sup>17</sup>;
  - legislative reforms to the approved forms to give more information to principals and attorneys about EPA's; and
  - an increased level of support and training is needed to assist principals and attorneys in fulfilling their role and in educating the wider community about the use and operation of enduring powers of attorney."<sup>18</sup>
- QLRC also considered that section 29(1) be amended to require that "an eligible attorney should have capacity for the matter"<sup>19</sup>;
  - There should be an amendment to exclude as an attorney "a person who has been convicted on indictment of an offence of violence involving personal violence or dishonesty in the previous 10 years";<sup>20</sup>
  - The gifting provisions need to be tightened<sup>21</sup>;
  - QLRC rejected the submissions requiring registration of EPA's on the basis that "on balance, the burdens of mandatory registration would likely outweigh its benefits"<sup>22</sup>, notwithstanding that some other jurisdictions require it<sup>23</sup>;
  - QLRC also rejected a mandatory notification requirement<sup>24</sup>;

<sup>15</sup> QLRC, op.cit., paragraph 16.52

<sup>16</sup> QLRC, op.cit., paragraph 16.53

<sup>17</sup> QLRC, op.cit., paragraph 16.54

<sup>18</sup> QLRC, op.cit., paragraph 16.55

<sup>19</sup> QLRC, op.cit., paragraph 16.94; by "capacity", the QLRC means mental capacity and not financial qualifications or experience: see footnote 535 and paragraphs 16.284 – 16.307; cf. grounds of removal at paragraph 16.322.

<sup>20</sup> QLRC, op.cit., paragraph 16.98

<sup>21</sup> QLRC, op.cit., paragraph 16.281

<sup>22</sup> QLRC, op.cit., paragraph 16.259

<sup>23</sup> QLRC, op.cit., paragraph 16.198 – 202

<sup>24</sup> QLRC, op.cit., paragraph 16.281



- There should be no “periodic auditing of attorney’s accounts or review of attorney’s activities by either the Tribunal or the Adult Guardian”<sup>25</sup> but that principals should be encouraged “to establish their own protections within the enduring power of attorney”<sup>26</sup>.

The theme of Chapter 16 of this Report with respect to EPA’s for financial matters is that “The current scheme for EPA’s involves a balance between the utility of an advance planning mechanism and the need for safeguards against abuse, neglect or exploitation.”<sup>27</sup> The QLRC appears to have concluded that, with the adoption of recommendations in paragraphs 16.51 – 16.55 and in paragraph 16.134 (gifts), the right balance will have been achieved.

To the extent that that view owes some reliance on the “incidence of misconduct”<sup>28</sup>, then that may have to change if the levels of “misconduct” increase with the ageing population. Certainly QLRC refers to the significant disquiet from the Public Trustee and the Adult Guardian<sup>29</sup> and one wonders whether the view of the QLRC may see “the horse bolt” before significant changes are made and stricter safeguards are put in place.

A number of issues rise for consideration, including:

- how are the “incidences of misconduct” to be monitored: complaints, applications to QCAT, reported cases with proven misconduct?
- what is an acceptable number of “incidences” per year?
- what is an acceptable level of loss or potential loss?
- is the degree of the misconduct relevant?

### 3. Economic risks of EPA’s

The contents of this section 3, is from the courtesy of Synergies Economic Consulting (**Synergies**) whom the Economics & Law Research Institute (**ELRI**) engaged to conduct the below report.

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<sup>25</sup> QLRC, op.cit., paragraph 16.388; this is a common theme in other jurisdictions/reports.

<sup>26</sup> QLRC, op.cit., paragraph 16.389

<sup>27</sup> QLRC, op.cit., paragraph 16.49

<sup>28</sup> See the reference to Submission 155 at paragraph 16.384; see also paragraphs 16.41, 16.374 and 16.375.

<sup>29</sup> QLRC, op.cit., paragraph 16.35

## Background

### Older population on the increase

It is projected that from 2010 to 2050, the proportion of older people (defined as people aged 65 years and over) in the Australia population will increase from 13.8% to 28%. The percentage of people aged between 65 and 84 will rise from 12% to 23%. The proportion of Australians aged 85 years and older will rise from 1.8% to 5.0%.<sup>30</sup>

**Table 1 Australian demographic projections**

Population projections	2010	2020	2030	2040	2050
Population (millions)	22.2	25.7	29.2	32.6	35.9
0-14	4.2	4.9	5.4	5.7	6.2
15-64	15.0	16.6	18.2	20.0	21.6
65-84	2.6	3.7	4.8	5.6	6.3
85 and over	0.4	0.5	0.8	1.3	1.8

Source: Intergenerational Report (IGR) 2010 projections summary

### The effect of disability and dementia on the elder population

A high proportion of older Australians require some forms of assistance, such as an EPA attorney to manage their affairs due to conditions such as disability and dementia.

It is estimated in 2009 that 40% of people aged between 65 and 69, and 88% of those aged 90 and over had a disability<sup>31</sup>, indicating a high need for an EPA attorney.

**Table 2 Disability prevalence among old people**

Age	Proportion of people that have disability (%)
65-69	40.1
70-74	48.1
75-79	53.4
80-84	65.2
85-89	77.6
90 and over	88.3

Source: ABS, Disability, Ageing and Carers, Australia: Summary of findings, 2009. (Category number: 4430.0)

<sup>30</sup> The 2010 Intergenerational Report (IGR), the Treasury, Australia Government.

<sup>31</sup> ABS, Disability, Ageing and Carers, Australia, 2009 (category number: 4430.0).

Another major condition that affects the capacity of older Australians to manage their affairs is dementia. In 2010 it was reported that after the age of 65, the likelihood of being diagnosed with dementia doubles every five years; and that for people over the age of 85 years, the chance of developing dementia is one in four.<sup>32</sup> According to an Access Economics report, it is estimated that around 250,000 people in Australia suffer from dementia, and this number is projected to increase to almost 591,000 by 2030 (9% of those aged over 65 years).<sup>33</sup>

Based on the above statistics it is very likely that as the Australia population ages there will be a higher proportion of Australians whose affairs will need to be managed under an EPA attorney.

### Assets of older Australians

Many older Australians have sizable financial and property assets. Especially in recent years, there has been an increasing concentration of wealth and assets among older Australians, particularly through home ownership. Approximately 80% of people aged 65 years and older own their own home outright, compared with 25% of those aged under 65.<sup>34</sup>

Data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey conducted in 2006 suggests that the medium net worth of households headed by a person aged 65-75 years was \$443,000 and \$332,000 for those headed by a person aged 75 years plus.

According to an AIHW report<sup>35</sup>, in 2005-06, households with a person in the aged group 55-64 years had the highest average household net worth of \$824,000. The average net worth of households with a reference person in the aged group 65-74 years was \$743,000, and that of households with a reference person in the age group aged 75 years and over was at \$575,000.

A NATSEM (National Centre for Social and Economic Modelling) report<sup>36</sup> estimated that the wealth held by older Australians is currently 22% of total household wealth and that this will increase to 47% by 2030. This growth is estimated to increase the total household wealth potentially available for transfer by bequests, from \$8.8 billion in 2002 to more than \$70 billion in 2030.

<sup>32</sup> Access Economics (2005) Dementia Estimates and Projections: Australian States and Territories. Alzheimer's Australia, Canberra.

<sup>33</sup> Access Economics (August 2009) "Keeping Dementia Front of Mind: Incidence and Prevalence 2009-2050". Access Economics, Canberra.

<sup>34</sup> ABS, 4102.0 – *Australian Social Trends*, 2005 Housing arrangements: Housing for older Australians (2005); ABS, 4102.0 – *Australian Social Trends*, 2009 Household debt (2009), 31-34.

<sup>35</sup> Older Australians at a glance (4<sup>th</sup> edition), Australian Institute of Health and Welfare (AIHW), November 2007.

<sup>36</sup> Kelly, S. 2002, *Simulating Future Trends in Wealth Inequality*, Paper presented to the 2002 Annual Conference of Economists, Adelaide, South Australia, October.

As assets of older Australians increase, they are more likely to seek more active and formal asset management, including an EPA. 2005 data<sup>37</sup> suggest that 15.4% of the Australian population used an EPA attorney to manage their financial affairs.

### Prevalence of EPA financial abuse

This section provides a brief overview of the EPA financial abuse complaint system in Queensland and lays a foundation for the cost estimates in the sections below.

In Queensland, organisations involved when an EPA financial abuse happens include: the Elder Abuse Prevention Unit (EAPU), the Adult Guardian, the Public Trustee, and the Queensland Guardianship and Administration Tribunal (QCAT).

Two different channels exist in responding to EPA financial abuse depending on the decision-making capacity of the principal:

1. Full decision-making capacity

If the principal has full capacity and is suspecting an EPA financial abuse, he can either apply to QCAT to revoke the EPA or refer to legal services.

2. Impaired decision-making capacity

If the principal has impaired capacity, the complaint is referred to the Adult Guardian, who has investigation power on abuse cases for people with incapacity. The Adult Guardian can issue up to three months suspension of an EPA attorney if it believes that the attorney is not acting properly. It can also apply to QCAT for an order to appoint alternative administrator and guardian.

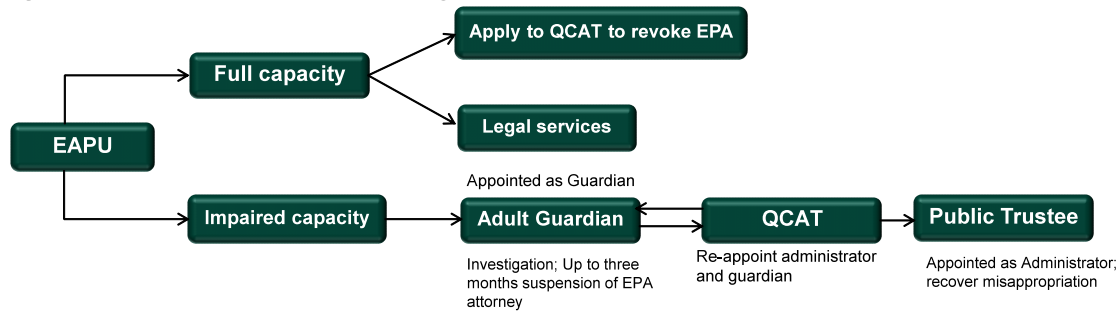
If QCAT decides that the EPA attorney is abusing his power, QCAT can appoint The Public Trustee as administrator looking after financial matters, in which case The Public Trustee will be responsible for recovery of the misappropriation. Adult Guardian can be appointed as Guardian to look after personal matters as a last resort,

An elder abuse reporting unit – EAPU runs a helpline and refers the notifier of elder abuse to the above channels depending on the nature of the cases.

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<sup>37</sup> C Tilse, J Wilson and D Setterlund, 'Older People's Assets: A Contested Site' (2005) 24 *Australasian Journal on Ageing* Supplement 51.

**Figure 1 EPA financial abuse reporting channel**



Data source: Synergies commissioned report.

A more detailed discussion of the roles of each organisation involved can be found in attachment B.

## Value of assets lost

This section utilises data from the Elder Abuse Prevention Unit (EAPU), the Adult Guardian, and the Public Trustee in Queensland to provide a quantitative estimate of the scope of EPA financial abuse experienced by the older population in Queensland.

## EAPU Helpline

EAPU operates a helpline on elder abuse for information, support and referrals to people who experience, witness or suspect elder abuse and records comprehensive data on each call received using their own data management system.

EAPU Helpline raw data from FY2009 to FY2011 was provided by EAPU from their database upon request.

## Key Statistics

- Total number of abuse cases:
  - 792 cases in FY2009;
  - 863 cases in FY2010;
  - 1029 cases in FY2011;
- Number of financial abuse cases:
  - 240 cases in FY2009;
  - 260 cases in FY2010;

- 326 cases in FY2011;
- Number of EPA abuse cases (both financial and non-financial):
  - 80 cases in FY2009;
  - 110 cases in FY2010;
  - 121 cases in FY2011;
- Number of EPA financial abuse<sup>38</sup> cases:
  - 57 cases in FY2009;
  - 79 cases in FY2010;
  - 90 cases in FY2011.

These data show that financial abuse has accounted for almost a third of all types of abuse of older Australians. They also show that the number of abuse cases arising where an EPA is in place is about 10% of total abuse cases, and financial abuse is the major type of abuse reported when an EPA exists.

### *Demographic characters of EPA financial abuse cases – victims*

The following analyses are based on the 57, 79, and 90 EPA financial abuse cases reported in FY2009, FY2010 and FY2011 respectively.

Key features of the victims such as age, capacity, income, and living arrangements are summarised below.

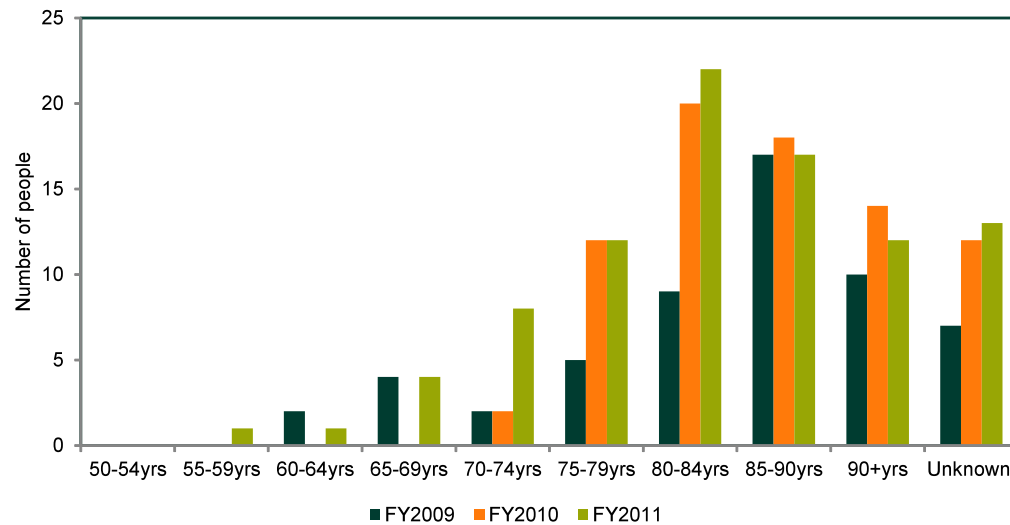
#### *Age*

Most of the EPA financial abuse victims are over 75 years old, and people over 80 years old are the most vulnerable group. There are also a significant proportion of cases for which the age of victim has not been recorded.

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<sup>38</sup> Cases where financial abuse is reported to be secondary abuse types are also included, as some of them do report value of assets being abused.

**Figure 2** Age distribution

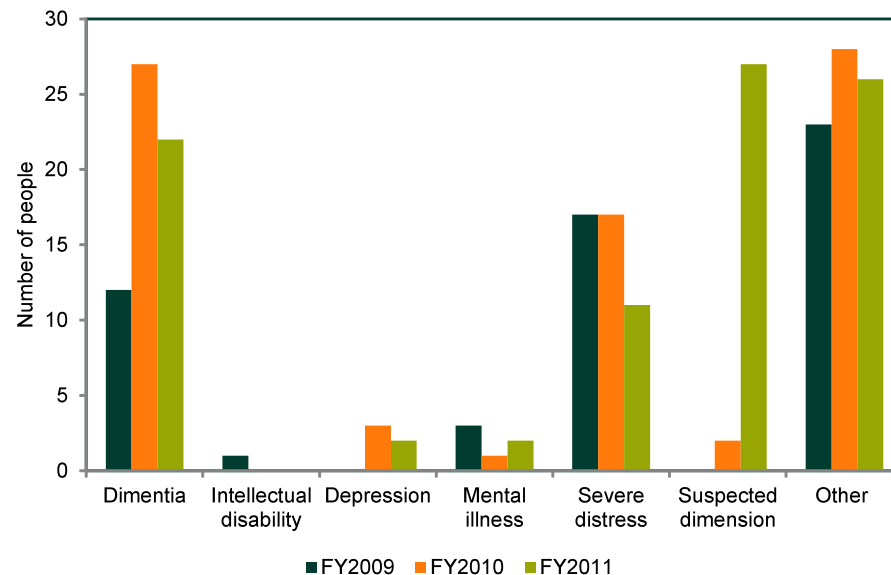


Data source: EAPU database

## Capacity

Most of the victims have a mental health condition, with an average<sup>39</sup> of 56.98% of them suffering from dementia and suspected dementia, and an average of 34.23% of them having severe distress.

**Figure 3** Mental condition



<sup>39</sup>

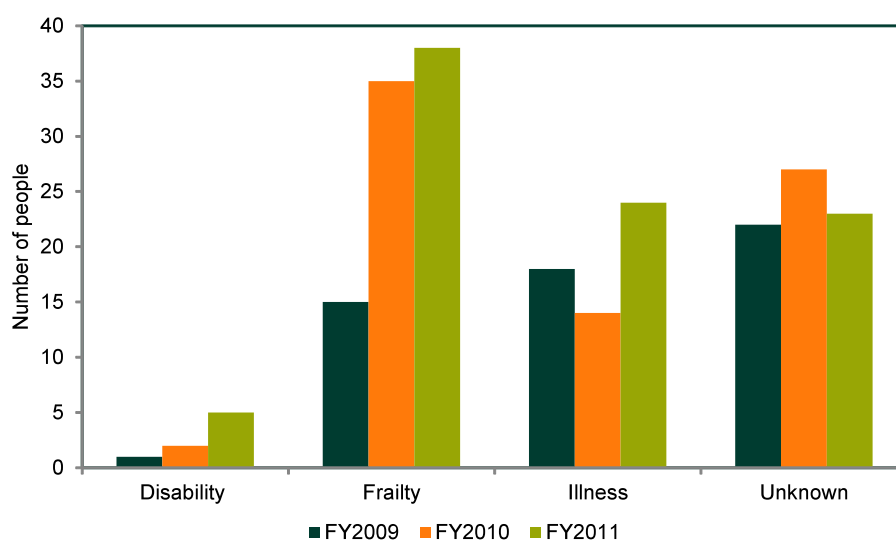
This is three year average data from the helpline data.

Data source: EAPU database

Most of the victims are physically weak, being either frail (56.49%) or ill (38.74%), and a small proportion of them (an average of 4.78%) also have disabilities.

There are also a significant number of cases for which no information on mental or physical condition has been reported.

**Figure 4 Physical condition**



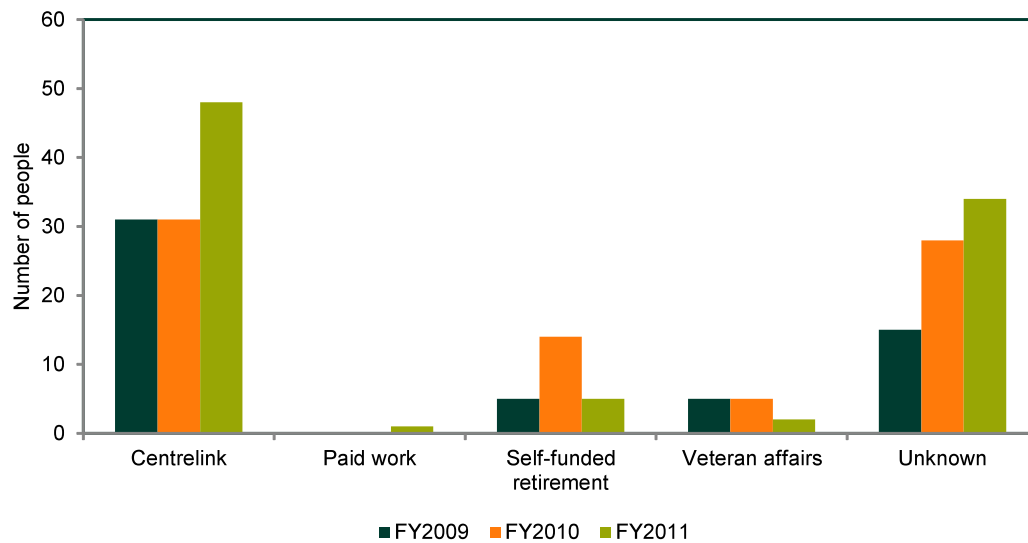
Data source: EAPU database

## Income Source

Most of the abused rely on pension (74.4%), some of them are on self-funded retirement (16.37%), and a small proportion of them is supported by veteran affairs (8.59%) and paid work (1.79%).



**Figure 5** Income source

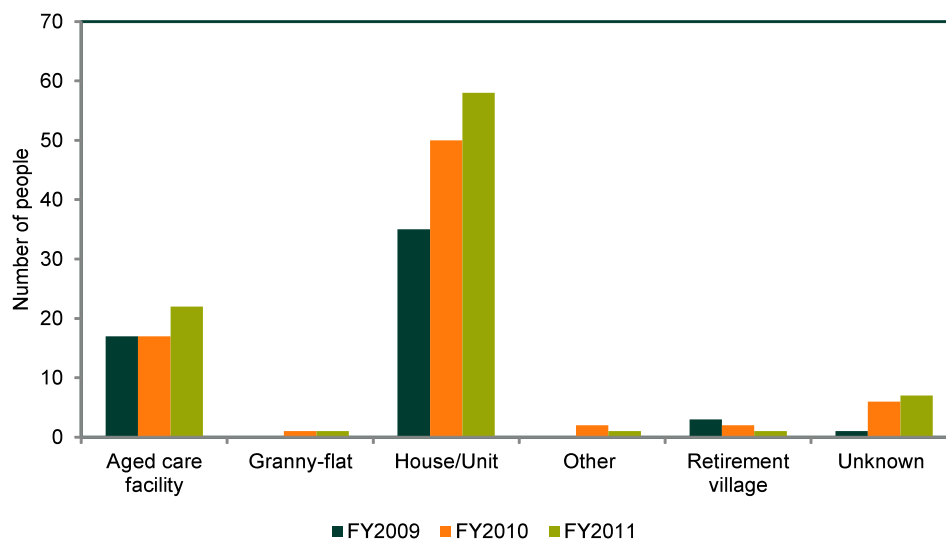


Data source: EAPU database

### Accommodation arrangements

Most victims of abuse live in their own house/unit.

**Figure 6** Accommodation arrangements of the abused



Data source: EAPU database

### Value of assets

In most cases the value of assets in financial abuse cases was not reported. To estimate the total value of EPA financial abuse cases reported to the EAPU, the average reported value was applied to total cases.

- Total estimated value of assets abused:

- \$9,697,490 in FY2009;
- \$65,679,550 in FY2010<sup>40</sup>;
- \$3,982,750 in FY2011.
- Number of EPA financial abuse with asset value reported:
  - 12 cases in FY2009;
  - 12 cases in FY2010;
  - 13 cases in FY2011.
- Value of assets abused by EPA (value reported):
  - \$3,131,530 in FY2009;
  - \$58,663,900 in FY2010<sup>41</sup>;
  - \$1,417,050 in FY2011.
- Average total value of EPA financial abuse reported to EAPU per year:
  - \$3,070,826  $((\$3,131,530 + \$58,663,900 + \$1,417,050) / 3)$  per year.
- Average value of EPA financial abuse per case:
  - \$255,902  $(\$3,070,826 / 12)$ .

#### Other statistics

Based on the three year data analysed above and below, the following averages can be observed:

- On average, only 16.9% of the total EPA financial abuse cases reported have asset value specified;
- On average, the amount of assets involved in each EPA financial abuse case is \$255,902;

<sup>40</sup> This includes two cases of \$27 million each.

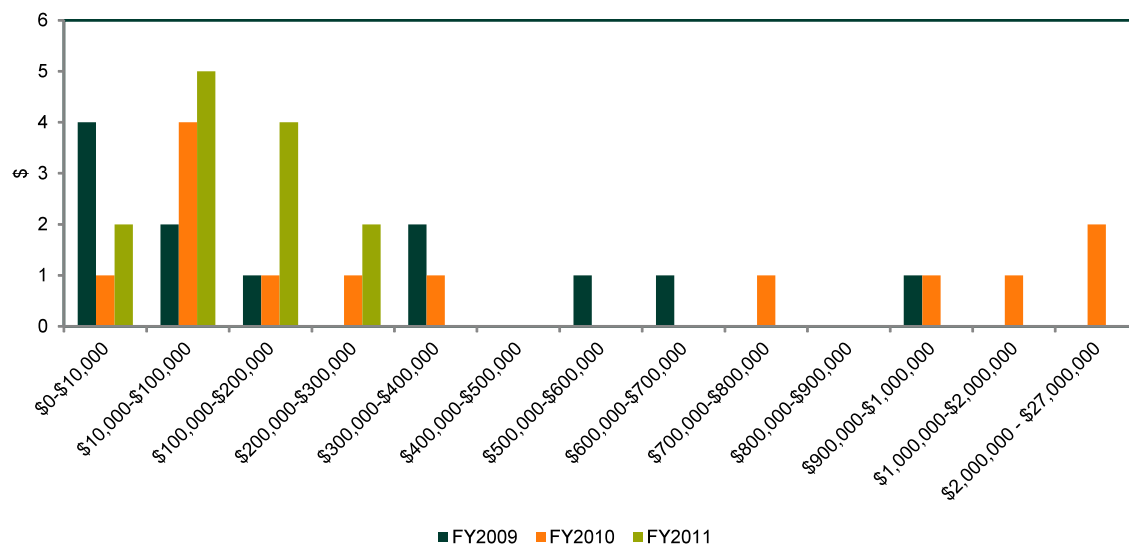
<sup>41</sup> This includes two cases of \$27 million.

<sup>42</sup> Excludes two cases of \$27 million.

- On average, the value of assets under financial abuse by an EPA makes up 40% of total value of assets under financial abuse.

The distribution of the value of assets abused is shown in Figure 7. Most of the abuse occurs for assets values under \$400,000 and are most often found above \$100,000. However, it is also not uncommon to see cases that involve significant amount of money. For example, two cases involving \$27 million each were reported in FY2010.

**Figure 7** Distribution of the value of assets abused by EPA



Data source: EAPU database

## Adult Guardian

According to the FY2011 annual report of the Adult Guardian (Queensland), 203 investigations<sup>43</sup> were concluded by the Adult Guardian. Almost one-half of all investigations concluded were undertaken into allegations that an adult with impaired decision-making capacity had been subject to (or was at risk of) financial abuse or exploitation.

Alleged abuse or exploitation by an attorney acting under an enduring document accounted for more than 60 per cent of investigations into financial matters.

The Adult Guardian concluded 61 investigations in FY2011 in relation to an EPA financial abuse (30%). The majority of investigations centred on elderly adults with impaired capacity; 71 per cent were over 65 years of age, 41 per cent over 85 years, only 13 per cent were aged 35 years or younger.

It can be calculated that 43 (61\*71%) cases have been investigated that related to EPA financial abuse to people over 65 years old.

<sup>43</sup> This includes investigations commenced both during, and prior to, FY2011

## Public Trustee

In 2010-11, 41 misappropriation matters were referred to the Office of Official Solicitor within the Public Trustee, who is responsible for recovering misappropriation for people with impaired capacity.

However, data recording by the Official Solicitor does not separate misappropriation by an attorney and misappropriation generally. But anecdotal evidence suggests that the bulk of misappropriations are by attorneys.

The following information is obtained from a data request to The Public Trustee:

- the value of assets misappropriated range from several thousands of dollars to \$14 million. The average misappropriation involves assets of more than \$100,000;
- the profile of the principals whose assets are taken are generally persons who are retirees suffering from dementia, with a family, but not carer; and
- the person about whom the complaint is made is generally male, between the ages of 25 and 50, a relative and most usually a child.

## Queensland Civil and Administration Tribunal

No relevant data on EPA financial abuse has been obtained for QCAT, mainly as a result that QCAT deals with a wide range of disputes, and therefore does not record specific data for cases relating to EPA financial abuse.

## Estimate of value of assets lost

Estimates of total value of assets lost due to EPA financial abuse is calculated using the formula below:

Value of assets lost = average value lost per case as calculated from EAPU data \* number of cases reported as from EAPU data

$$\$255,902 * 90 = \$23,031,180$$

EAPU provides a better estimate than Adult Guardian<sup>44</sup> in terms of number of cases: Adult Guardian only accepts cases in which a victim has impaired capacity, whereas EAPU also refer cases to legal services for those with full capacity and to QCAT when cases are urgent.

It is of note that this is a strict lower bound estimate both in terms of lost value per case and number of cases:

- The calculation for average value of assets lost did not include the two extreme cases of \$24 million in FY2010; whereas in reality, abuses with such large scale may occur;

<sup>44</sup>

Adult Guardian investigated 43 cases in FY2011 as mentioned in section 3.2.

- The number of cases used in calculation is only what was recorded by the EAPU. The actual number of cases might well be higher than that, as literature suggests that abused old people often do not report financial abuse due to a fear of losing the support of the abusers, or to protect the abusers from being harshly penalised.<sup>45</sup> This is besides the fact that some abuse cases in which the victim has impaired capacity may remain unreported unless a third party discovers and reports the abuse.

### Cost of EPA financial abuse to community

In this section, the costs to the community of financial abuse to elder Australians by an EPA attorney are assessed. Cost to community includes human cost of the financial abuse (distress and betrayal experience suffered from the older people, etc.), as well as other measurable cost which can be broadly categorised into the following components:

- cost to agencies involved for investigating and mitigating abuses, including salaries and administration cost;
- cost to government to support the abused elder people; and
- cost to the abused to employ lawyers or lodge complaints.

### Cost to agent

Costs are incurred to services provided by running the EAPU, Adult Guardian, The Public Trustee, and QCAT.

The EAPU helpline employs 5 FTE staff. Roughly 10% of the cases are related to EPA financial abuse. Their average salary is estimated to be \$68,629 per annum based on ABS average weekly earnings data<sup>46</sup>. Therefore staff wage attributed to EPA financial abuse responses can be calculated to be \$34,314 per annum.

The Public Trustee employs 3 to 4 senior lawyers in its Office of Official Solicitor to conduct and process misappropriation files. Although not all of the misappropriation files are related to EPA, the bulk of them are EPA related. According to Queensland Legal Salary Survey Report 2011, salary package for a senior lawyer<sup>47</sup> is estimated to be \$130,000. Total cost to the Public Trustee can be estimated to be \$390,000 per annum.

<sup>45</sup> [http://www.statetrustees.com.au/uploads/content/199-170-3.3.1-Financial-abuse-of-elders\\_A-review-of-the-evidence\\_2009.pdf](http://www.statetrustees.com.au/uploads/content/199-170-3.3.1-Financial-abuse-of-elders_A-review-of-the-evidence_2009.pdf)

<sup>46</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0/>

<sup>47</sup> Salary for a senior associate in a medium size law firm is used, as the Office of Official Solicitors employs 20-25 lawyers.

Cost data for Adult Guardian and QCAT is not available. However, due to the similarity of nature of work among these three agencies, cost to Adult Guardian and QCAT are estimated to be the same as Public Trustee: \$390,000 per annum.

We note that this is a strict lower bound estimate, because the cost above does not cover administration cost and other fixed cost. As a matter a fact, it only covers staff cost.

### Cost to government

The negative impact of financial abuse by an EPA attorney can cause an adult who was financially independent, to require government income support, especially in cases where a property was sold without consent or a large amount of assets was misappropriated.

The cost to government is not known, consistent with the lack of comprehensive data about EPA abuse. To provide an indication of the potential cost to government we have assumed that victims of elder abuse lose their financial independence and require the maximum income support available to older Australians. In some circumstances, the victim may also qualify for other in-kind and financial assistance from government. However to simplify the analysis, we base our estimates on pension payments.

Age pension payment rate is \$695.30 per fortnight for a single applicant which equates to \$18,077 per annum.<sup>48</sup> The total cost to government each year is \$1,626,930 (\$18,077\*90).

### Legal cost to the abused

EPA financial abuse can also cost a significant amount for the victim (or an alternative attorney or administrator on behalf of the victim) to lodge complaints and seek legal advices, in an effort to recover the lost assets.

Cost estimates from a case study on the cost of EPA financial abuse by the EAPU<sup>49</sup> is used to estimate legal cost to the abused. In this example there is minimum professional fee calculated at \$4,853 per person including:

- Cost of revoking the EPA with the Public Trustee;
- Cost of consultation with a private solicitor to obtain legal advice (hourly rate between \$200-350);
- Cost of a private solicitor to represent the victim at the Queensland Civil and Administration Tribunal (hourly rate between \$200-350);
- Cost of auditor to evaluate the compensation (hourly rate at \$160 per hour).

<sup>48</sup> [http://www.centrelink.gov.au/internet/internet.nsf/payments/age\\_rates.htm](http://www.centrelink.gov.au/internet/internet.nsf/payments/age_rates.htm)

<sup>49</sup> EAPU, The cost of elder abuse in Queensland: who pays and how much, June 2009.

- Total legal costs are \$436,770 (\$4,853\*90) each year.

### Total cost to community

Total cost of EPA financial abuse to the community is summarised in the table below:

**Table 3 Cost of EPA financial abuse in Queensland**

Category	Detailed cost	Value
<b>Cost to community</b>	Cost to agents	EAPU \$34,314
		Adult Guardian \$390,000
		Public Trustee \$390,000
		QCAT \$390,000
	Cost to government	\$1,626,930
	Legal cost to the abused	\$436,770
<b>Total cost</b>		<b>\$3,268,014</b>

Source: Synergies calculation.

It can be seen from the table above at least \$3.3 million each year are incurred because of EPA financial abuse. This is a lower bound estimate, for the reasons below:

- Cost to agents calculation only included staff cost, but not administrative cost and other fixed costs;
- Cost to government only included minimum pension that government provides, but not any other contribution in any other forms by the government and the community; and
- Cost to the abused only included legal cost to the abused, but not human cost to the abused, which could be immense.

### Conclusion

Australia's elderly population is increasing. As a consequence, a higher number of older Australians will require some forms of increasing assistance, such as an EPA attorney to manage their affairs due to conditions such as disability and dementia.

This report investigates the cost of EPA financial abuse to older Australians (defined as those over 65 years old), in terms of both value of assets lost due to EPA financial abuse, and cost to the wider community.

The value of assets lost is estimated utilising data from four abuse complaints agencies in Queensland: EAPU, Adult Guardian, Public Trustee, and the QCAT. The value is estimated to be \$23 million per annum, based on an average value of \$255,902 per case on 90 EPA financial abuse cases each year. The cost increases to \$71 million if including the two \$24 million cases in FY2010. This extrapolates to an average Australian-wide cost of \$122 million (\$23 million/18.862%) based on population shares (\$376 million if the two \$24 million cases are included).

It is of note that this is a strict lower bound estimate, as there is significant under-reporting for EPA financial abuse cases. Literature suggests that abused old people often do not report financial abuse due to a fear of losing the support of the abusers, or to protect the abusers from being harshly penalised; and also some abuse cases in which the victim has impaired capacity may remain unreported unless a third party discovers and reports the abuse.

The cost to the wider community incorporated cost of setting up complaint management agencies, cost to government for welfare support, and legal costs to the abused, which add up to a minimum of \$3.3 million per annum.

This is also a lower bound estimate, as human cost of the abuse to the elder person, as well as fixed costs of running abuse complaints agencies were not quantified.

The available evidence on EPA financial abuse is very limited. Further research on value of assets lost due to EPA financial abuse by States should be a priority before considering regulatory measures.

### **Literature review of current EPA financial abuse studies**

This section provides an overview of the existing research into EPA financial abuse in Australia. There have been relatively few studies into EPA financial abuse. Those studies that have been completed have not produced uniform findings on EPA financial abuse. EPA financial abuse was often only investigated as an element of a wider study, for example, financial abuse generally, or all types of abuse to older people. However, all studies note that EPA financial abuse is increasingly significant and the fastest growing type of abuse to older Australians.



## Prevalence of financial abuse to older people

There is no comprehensive national study on the prevalence of financial abuse to older people in Australia, although such studies have been completed in some other countries<sup>50</sup>.

The prevalence of financial abuse is informed by:

- studies of elder abuse cases by agency<sup>51</sup>; and
- surveys of specific population groups of older Australians.

The following state-based prevalence studies provide an overview of the various attempts to estimate prevalence of financial abuse to older people in a limited region or from some limited agency source.

**Table 4 Take up rate of EPA and prevalence of financial abuse**

Source	Relevant statistics
Studies from the USA, Canada, Britain and Europe (large-population based) <sup>1</sup>	Incidence rates for elder abuse of between 3% and 5% of the population 65+ in domestic settings.
EAPU 2005	The most reliable Australian prevalence studies suggest approximately 3-7% of older people over the age of 65 will experience abuse from someone with whom they have a relationship of trust, with financial abuse identified as the fastest growing type of abuse. Studies have also shown that victims of financial abuse are primarily women with a disability (69.4%) and that increased disability leads to greater likelihood of abuse. In addition, the majority of abusers have been identified as relatives of the older people. <sup>2</sup>
Public Advocate Victoria <sup>3</sup>	The Office of the Public Advocate operates an advice service both by telephone and in person. In 2005/06 advice was given in 14,117 instances, In those cases in which data relating to age was requested and recorded 44% of enquiries related to persons 70 years and over with the largest single cohort (29%) concerning those aged 81 and over. The subject matter of the calls was as follows: Administration 22.5%; Guardianship 22.5%; Enduring Powers of Attorney 20%; Health Issues 12%; Welfare Issues 6%; Other 17%.
UQ national representative survey <sup>4</sup>	A national representative survey in 2002 of 3,434 people found that the main forms of assistance for an older person are:  Formal

<sup>50</sup> These factors could include: the definition and scope of financial abuse; the absence of mandatory reporting requirements nationwide for financial abuse; and the reluctance or inability for victims to self-report, etc.

<sup>51</sup> Agencies include public advocate, and federal and state government, etc.

Source	Relevant statistics
	<ul style="list-style-type: none"> <li>- Enduring power of attorney 15.4%</li> <li>- Administration order 1.4%</li> </ul> <p>Semi-formal</p> <ul style="list-style-type: none"> <li>- Bank arrangement 18.7%</li> </ul> <p>Informal</p> <ul style="list-style-type: none"> <li>- Use ATM PIN number 9.8%</li> <li>- Electronic payment e.g. by phone 10.5%</li> <li>- Internet fill-in cheque or make withdrawal 17.0%</li> <li>- Paid with own money 49.7%</li> </ul>
UQ ARC grant study	<ul style="list-style-type: none"> <li>- 11.65% of the Australian population have a valid EPA in place. Queensland has the highest proportion of population in Australia with a valid EPA in place with Queenslanders at 16.3%;</li> <li>- 11.1 % of people living in capital cities in Australia and 14.45% of people living outside the state capitals had given an EPA to someone (note this excludes figures for NT and Tasmania which did not differentiate capital/noncapital city residence). Queensland has the highest percentage of any state (17.6%) of people living in the capital city who have given an EPA, and the second highest (16.8%) (after SA) of those living outside the capital city who have given an EPA to another person;</li> <li>- Nationally of those who had given an EPA 8.2% were aged under 35, 45.5% were aged 35 -64 and 45.5% were 65 and over. Queensland showed a similar pattern with 12.9% of EPA donors aged under 35, 44.1% were 35-64 year olds and 42.4% were aged 65 and over.</li> <li>- When assisting with asset management, 16.3% of the sample of asset managers used an EPA. Just over two per cent (2.4%) of asset managers were appointed as an Administrator of financial manager by a Guardianship and Administration Tribunal or Board or Court.</li> </ul>
ASIC	A Canadian survey of family violence published in 2000 found that 1% of older people in that country had experienced financial abuse at the hands of their children, caregivers or partners during the preceding five years.
PEAS <sup>5</sup>	<p>Interviewees estimated that while 15-20% of clients aged 70-90 have EPAs, 70% of clients are taking up EPAs.</p> <p>Depending on the definition used, it has been proposed that between 0.5% and 5% of older Australians have experienced financial elders' abuse, and these figures are similar to those recorded overseas.</p>
Victoria parliament Inquiry	Between April 2008 and October 2009 Seniors Rights Victoria

Source	Relevant statistics
	<p>had come across 113 financial abuse cases which involved powers of attorney or guardianship and administration.</p> <p>The Master of the Court of Protection in the United Kingdom estimated that financial abuse occurs in 10 to 15 per cent of cases involving registered EPAs.<sup>52</sup> One New Zealand study found even higher rates of abuse – up to 24%.<sup>6</sup></p>

**Source:** 1. Lachs, M. S. and K. Pillemer (2004). "Elder abuse" *Lancet* 364(9441): 1263-1272. 2. National Seniors Association submission to Parliament of Australia House of Representatives Inquiry into Older People and the Law, December 2006. 3. Victorian Public Advocate submission to the Standing Committee on Legal and Constitutional affairs inquiry into older people and the law, 30 November 2006. 4. Tilse C (2007) *Minding the money: a growing responsibility for informal carers*, *Ageing & Society* 25, 2005, 215-227. 5. For Love or Money: International Management of Older Victorians' Assets. 6. Age Concern New Zealand, *Elder abuse and enduring power of attorney: A special report from the Age Concern New Zealand Elder Abuse and Neglect Database covering the period 1 July 2002 to 31 December 2003* (2004), 28.

## Research into EPA financial abuses

### Commonwealth Government Inquiry into Older People and the Law

On 2 August 2006 the Commonwealth Government conducted an inquiry on *Older People and the Law*, which seeks to investigate and report on the adequacy of current legislative regimes in addressing the legal needs of older<sup>53</sup> Australians in the following specific areas:

- fraud;
- financial abuse;
- general and enduring "power of attorney" provisions;
- family agreements;
- barriers to older Australians accessing legal services; and
- discrimination.

The key recommendations that the report made in the areas of enduring power of attorney include:

- "Uniform legislation on powers of attorney across states and territories;
- A nationally-consistent approach to the assessment of mental capacity;
- A national register of enduring powers of attorney;

<sup>52</sup> Financial abuse of elders: a review of the evidence, Protecting Elders' Assets Study, June 2009.

<sup>53</sup> "Older" in this inquiry is defined as 65 years and over.

- Awareness and education campaigns for powers of attorney, advance health care planning and advance care directives, and family agreements; and
- Nationally-consistent legislation on guardianship arrangements.”

Some of the submissions among the total 157 submissions received from research and industry bodies referred to the following statistics on (EPA) financial abuses to older people in Australia.

**Table 5 Statistics from submissions to the Older People and the Law Inquiry**

Submissions	Relevant Statistics
Final report <sup>1</sup>	Approximately 11% of Australians have an enduring power of attorney. Of those people: 8% were under 35 years old, 45.5% were between 35 and 64 years old; and 45.5% were aged 65 years or older. Queensland has the highest proportion of its population with a valid enduring power of attorney in place at 16 per cent.
EAPU <sup>2</sup>	“From 01/11/02-30/09/06, 1,121 cases reported financial abuse. Only 89 (or 8%) mentioned an actual dollar amount of the financial abuse involved, totalling \$9.2 million. If the average is calculated at \$103,370, the total dollar amount of financial abuse experienced by the 1,121 seniors would be in the region of \$115,877,770, representing \$2.465 million per month or \$29.58 million per year.”
Aged Rights Advocacy Service Inc <sup>3</sup>	“ARAS Abuse Prevention Program data for 2005-06 indicates: in 55% of these cases alleged abuser was the adult son or daughter; financial exploitation was a factor for 37% of clients. This is similar to data in previous years; <b>17%</b> of the all cases were related to the misuse of Enduring Power of Attorney (EPOA); Other instances of financial exploitation may not have been occurred had there been an EPOA in place.”
Alzheimer’s Australia <sup>4</sup>	“(1) A study in Queensland in 2000 found that 39% of respondents had given EPA for financial matters to another person (up from 30% in 1995). As this study involved a large random sample drawn from the Queensland Electoral Roll, with rigorous methodology, the results are considered to be generalizable to the wider community; 39% of Queensland’s adult population is approximately <b>1.2 million people</b> . (2) Elder Abuse Prevention Unit Queensland for the two years ended 30 June 2005 suggest that psychological (42%) and financial (33%) were the common forms of abuse reported.”
Public Trustee of NSW	“Statistics indicate that the average amount of money lost to victims of financial abuse is <b>\$150,000</b> and that one in three adult Australians actively assist an older person with their finances.”
Western Australia for Community	Refer to a report by the Office of Public Advocate: “There are approximately 65,000 Western Australians who have a decision making disability. As of 30 June 2006 the Public Advocate was guardian for 256

Submissions	Relevant Statistics
Development; Seniors and Volunteering; Youth	individuals. Of these, 38% had an intellectual disability, 31% had dementia, 15% had a mental illness and 12% had an ABI (Acquired Brain Injury)."
Office of Public Advocate	"The most comprehensive study available shows that in New South Wales, elder abuse increased costs of services provided to people affected by elder abuse by \$311 per person per week. This adds around <b>\$300 million</b> per year to services costs for older people. <sup>5</sup> "
Western Australia Public Advocate	"In 2005-06, my office undertook some 600 investigations, over half (55%) of which involved a person aged 65 years or older. Of the 600 investigation: 47% involved a person with dementia, 32% involved allegations of abuse; 67% of the alleged abuses cause related to financial abuse; and 33% of the alleged abuse cases involved a victim aged 65 years or older."
State Trustee Limited	<p>"State Trustee's Funds and Assets under Management at 30 June 2006 was \$726 million. For the year 2004/05 we managed trusts worth \$297 million for 4,314 customers.</p> <p>Estate Planning includes the establishment of Trust Deeds, appointments under Enduring Powers (Financial, Medical Treatment, and Guardianship) and bequests for the support of disabled persons. Of the clients State Trustee provides Estate Planning advice to, 79% own a residence, 53% have other investments and 33% have superannuation of some description. The value of these assets is also substantial with 38% having assets in excess of \$500,000."</p>
EAPU	The Helpline data from for the period 01/11/12 to 30/09/06. "A total of 2,101 separate elder abuse reports were recorded for that period, of which 1,121 reports (i.e.53.3%) include some form of financial abuse. Of these financial abuse records only 89 (or 8%) mentioned an actual dollar amount of the financial abuse involved, this totalled \$9.2 million. The \$9.2 million is an alarming amount of money being lost to seniors as it represents only 8% of the total number of financial abuse reports that came in via the EAPU Helpline."
Queensland attorney-general	"Of the investigations undertaken by the Adult Guardian during the year ending 30 June 2006, 67% of the matters investigated were for people aged 65 years or over. Of the matters investigated by the Adult Guardian involving people aged 65 years or over, 98.5% of the matters involved allegations of financial abuse."
Alliance for the Prevention of Elder Abuse: Western Australia	"Financial abuse is the most commonly reported form of elder abuse (forming 81% of unknown cases reported in Bodly et, al. (2002), and 74% of cases in Faye and Sellick (2003)). Adocare's Speak Out Survey found that the vast majority of people experiencing elder abuse lived in their own homes (90%), and in 31% of cases the alleged perpetrator lived in the victim's home, with a third of these receiving carers' payment (Faye & Sellick, 2003). In only three cases did the victim live in the alleged perpetrator's home, and in six per cent of cases the victim was living in residential aged care."

**Source:** 1. Older people and the law, House of Representatives, Standing Committee on Legal and Constitutional Affairs, September 2007. 2. Elder Abuse Prevention Unit – Submission for the House Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law, 13 Dec 2006. 3. Aged Rights Advocacy Service Inc. Submission to the Standing Committee and Legal and Constitutional Affairs Inquiry into Older People and the Law, 28<sup>th</sup> of December 2006. 4. Alzheimer's Australia Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law, November 2006. 5. Costing abuse of older People: towards cost effective responses, *Confronting abuse: the Way Forward, Conference Papers and Proceedings*, the NSW Advisory Committee on Abuse of Older People in their Homes, Wesley Centre, 2-3 May 1996, Sydney. Setterlund, D. (2001) 6. The Strategic Plan for the Prevention of Elder Abuse in Queensland. The Prevention of Elder Abuse Task Force (PEAT force).

## Monash University PEA Study

State Trustees Victoria commissioned Monash University to conduct a three year research project entitled: *Protecting Elders Assets Study: Ethical Management of Older Persons' Financial Assets (PEAS, 2009-2011)*<sup>54</sup> to investigate how older Victorians manage their finances and their attitudes towards planning for old age.

In one of the series of report, *Staying Safe with Money: the Experience of Older English Speaking Victorians*, a survey (31 questions) of older people was conducted. 410 valid survey responses were generated from English speaking Victorians aged 65 years and older living in the Eastern and outer Eastern suburbs of Melbourne.

Among the respondents to the Survey, 69% had an EPA (financial), with the age following age distribution: 26% for 65-74 years old, 37% for 75-84 years old, and 37% for 85+ years old. It was also found out from the survey result that women were more likely than men to have an EPA: 96% of women aged 85-100 had an EPA compared with 72% of men (this was statistically significant). Of the 280 people in the PEA stud who had an EPA, 61% had appointed one or more of their children, 22% appointed their spouse, 12% another family member, and 5% appointed a professional to hold this role.

There are six examples of misuse of powers of attorney to take an older person's money. In two of these the children with the power of attorney used the power to sell their parent's house and take the money (an EPA financial abuse incident rate of 2%).

## The University of Queensland Assets and Ageing Research Program

The University of Queensland Assets and Ageing Research Program conducted a research program<sup>55</sup> in 2000 that focused on asset management in relation to older people. The main purpose of the research program was to support the development of informed and protective financial management practices for older people and those who assist them.<sup>56</sup>

**Table 6 Statistics from UQ Assets and Ageing Research Program**

Topic	Relevant statistics
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<sup>54</sup> <http://www.statetrustees.com.au/financial-elder-abuse/financial-elder-abuse-research-project>

<sup>55</sup> This research program is carried out by the University of Queensland and funded by the Australian Research Council and Industry Partners of the Office of the Adult Guardian, the Public Trustee of Queensland, the Office of the Public Advocate, the Guardianship and Administration Tribunal of Queensland and Department of Communities (Department of Families Youth and Community Care) – Office for Seniors.

<sup>56</sup> <http://www.uq.edu.au/swahs/assets-and-ageing-research-program>

Topic	Relevant statistics
<b>Aged care practitioners</b>	A mailed survey of 159 ACAT members, allied health professionals and other aged care workers across metropolitan, regional and remote Queensland. 86% of ACAT respondents indicated that they had concerns about the misuse of an older person's assets at least once with 80% indicating they had such concerns more than once. Almost 70% of the allied health/aged care workers indicated that they had concerns at least once with 57% indicating they had such concerns more than once. <sup>1</sup>
<b>Older people with impaired capacity<sup>2</sup></b>	A total population sample of eight months from November 2002 until 20 June 2003 (n=261) at the Guardianship and Administration Tribunal of Queensland. Of all the cases processed, 20.69% involved an EPA, 64.58% of which are suspected financial abuse (SFA). So in total 13.36% of all the cases processed by the Tribunal is in relation to an EPA financial abuse.

**Source:** 1. Tilse C., Wilson J. and Setterlund D. (2003) The mismanagement of the assets of older people – the concerns and actions of aged care practitioners in Queensland, *Australian Journal on Ageing* 22(1): 9-14. 2. McCawley A., Tilse C. (2006), *Access to assets: older people with impaired capacity and financial abuse*, The Journal of Adult Protection 8(1), May 2006.

One other study based on the Age Concern New Zealand Elder Abuse and Neglect Database found that among those for whom EPA data was collected (224), around a quarter (58) were being abused by their EPA holder, financial abuse being the main category.<sup>57</sup>

## Organisation involved in EPA financial abuse

### EAPU

The Elder Abuse Prevention Unit (EAPU) is a Queensland wide program provided by Lifeline Community Care Brisbane and funded by the Queensland Government Department of Communities. It was established in 1997 to prevent and respond to elder abuse in Queensland.

EAPU operates a helpline on elder abuse for information, support and referrals to people who experience, witness or suspect elder abuse and records comprehensive data on each call received using their own data management system.

When EAPU receives an abuse complaint, it will refer the notifier to the Adult Guardian if the victim is of impaired decision-making capacity, and to legal services (for example, Seniors Legal and Support Services) or QCAT if the victim has full decision-making capacity.

### Adult Guardian

The Adult Guardian looks after the interests of adults with impaired capacity:

- it can be appointed as the guardian of last resort for adults who have nobody else to be their guardian through QCAT<sup>58</sup>; and



- it has the power to investigate allegations of neglect and exploitation or abuse of adults with impaired decision-making capacity, both financial and personal abuse.

When the Adult Guardian receives abuse complaints, investigation officers make decisions as a result of the findings of an investigation:

- If the Adult Guardian believes that the attorney is not acting correctly, they can suspend the attorney for financial or personal matters for up to three months;
- The Adult Guardian can also make decisions to apply to the Queensland Civil and Administrative Tribunal (QCAT) on the adult's behalf for an order to appoint an administrator or guardian or to conduct advocacy for the adult<sup>59</sup>.

### Public Trustee

The Public Trustee provides financial substitute decision-making and estate planning services in Queensland<sup>60</sup>. It delivers a range of specialist services including Enduring Powers of Attorney, and financial Administration for people with incapacity through the appointment of QCAT or Courts<sup>61</sup>. The role of an Administrator is to make decisions on behalf of the adult with incapacity in respect of financial matters<sup>62</sup>.

The Office of the Official Solicitor is a legal service provider within The Public Trustee; its Disability Legal Workgroup division (3 to 4 senior lawyers) is responsible for investigating and recovery of property or money that has been misappropriated from adults with an incapacity, and providing advice and commencing legal proceedings.

However, The Public Trustee does not have authority to intervene in cases where an adult with impaired capacity is being subjected to neglect, abuse or exploitation - these matters are referred to the Adult Guardian.

### Queensland Guardianship and Administration Tribunal (QCAT)

QCAT makes decisions on a range of matters including administration for adults (Public Trustee as last resort) and guardianship for adults (Adult Guardian as last resort)<sup>63</sup>.

<sup>57</sup> Elder Abuse and Enduring Power of Attorney, *A special report from the Age Concern New Zealand Elder Abuse and Neglect Database covering the period 1 July 2002 to 31 December 2003*, April 2004.

<sup>58</sup> <http://www.justice.qld.gov.au/justice-services/guardianship/power-of-attorney/enduring-power-of-attorney/appointing-an-attorney>

<sup>59</sup> <http://www.justice.qld.gov.au/justice-services/guardianship/adult-guardian/reason-for-decisions>

<sup>60</sup> [http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0017/94220/elder-abuse-resource-directory.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0017/94220/elder-abuse-resource-directory.pdf)

<sup>61</sup> <http://www.pt.qld.gov.au/files/brochures/epa-brochure.pdf>

<sup>62</sup> <http://www.pt.qld.gov.au/files/annual-report/2011-annual-report.pdf>

<sup>63</sup> [http://www.qcat.qld.gov.au/\\_data/assets/pdf\\_file/0009/129447/QCAT\\_annual\\_report\\_2010-11\\_online.pdf](http://www.qcat.qld.gov.au/_data/assets/pdf_file/0009/129447/QCAT_annual_report_2010-11_online.pdf)



QCAT can also make a declaration about whether an adult has capacity to make an enduring power of attorney<sup>64</sup>.

Although the formal channel for reporting an EPA financial abuse is through Adult Guardian (for victim with impaired capacity) or legal services; if the notifier has information that abuse, neglect or exploitation is occurring, he can apply to the QCAT for an urgent order to protect the adult.

#### 4. Addressing concerns

If either:

- one concludes that the QLRC has not got the balance right (even with the proposed legislative changes) ;

or

- one concludes that the QLRC has got the balance right (with the proposed legislative changes) but is minded to suggest that there be further legislative changes which could be made on that day when the “incidences of misconduct” are thought to warrant change;

then what should/could be done?

Remembering that “incidences of misconduct” and other circumstances dissipating a principal’s assets can come about intentionally (= dishonest actions) or unintentionally (= honest actions but lacking a proper level of care and performance), there are a number of possibilities:

- Stricter qualifications for EPA’s with Certificate course
- Stricter qualifications for EPA’s without Certificate course
- Stricter qualifications for EPA’s – Attorneys to demonstrate
- Stricter qualifications for EPA’s – Attorneys to possess
- Registration by Public Trustee/Adult Guardian

<sup>64</sup>

<http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/alternative-arrangements>

- Notification to Public Trustee without registration
- Provision of a financial plan to Public Trustee
- Accounting by EPA periodically to Public Trustee
- Random audits by Public Trustee
- Better education of EPA's
  - On appointment
  - Brochures
  - Courses
  - Solicitors "Help Desk"

### Stricter qualifications for EPA's with Certificate course

This possibility would require prospective attorneys to:

- demonstrate they have the mental capacity to act<sup>65</sup>;
- demonstrate they have sufficient financial qualifications/experience/ knowledge to act;
- undergo training and examination and to be certified as approved as an attorney for financial matters.

But such things as the current level of "incidences of misconduct", the effect on the utility of EPA's, the question of what organisation would run all of this and the resource issue would see this possibility discarded quickly as unacceptable. This possibility is would see eligible attorneys restricted to qualified accountants and lawyers.

### Stricter qualifications for EPA's without Certificate course

This possibility would require prospective attorneys to:

- demonstrate they have the mental capacity to act<sup>66</sup>;

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<sup>65</sup> This is recommended by the QLRC, op.cit., paragraph 16.94

- demonstrate they have sufficient financial qualifications/experience/ knowledge to act;
- undergo training without examination and to be certified as approved as an attorney for financial matters.

Again, such things as the current level of “incidences of misconduct”, the effect on the utility of EPA’s, the question of what organisation would run all of this and the resource issue would see this possibility discarded quickly as unacceptable. Again, this possibility is would see eligible attorneys restricted to qualified accountants and lawyers.

### Stricter qualifications for EPA’s – Attorneys to demonstrate

This possibility would require prospective attorneys to demonstrate they have:

- the mental capacity to act<sup>67</sup>;
- sufficient financial qualifications/experience/ knowledge to act.

Again, such things as the current level of “incidences of misconduct”, the effect on the utility of EPA’s, the question of what organisation would run all of this and the resource issue would see this possibility discarded quickly as unacceptable.

### Stricter qualifications for EPA’s – Attorneys to possess

This possibility would require prospective attorneys to possess at least on execution:

- the mental capacity to act<sup>68</sup>;
- sufficient financial qualifications/experience/ knowledge to act.

At present, anyone who fulfils the requirements of section 29 (1) (a) can be appointed under an EPA for financial matters. It doesn’t matter that the attorney has been bankrupt in the past, has no financial qualifications, no financial experience, has never done even the most rudimentary of household finances, has never made any financial decisions about investments, knows nothing about the stock market and so on.

Curiously, the QLRC Report states:

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<sup>66</sup> This is recommended by the QLRC, op.cit., paragraph 16.94

<sup>67</sup> This is recommended by the QLRC, op.cit., paragraph 16.94

<sup>68</sup> This is recommended by the QLRC, op.cit., paragraph 16.256

“16.58 - The eligibility requirements are designed to ensure at least a minimum degree of competency in undertaking the responsibilities conferred on an attorney, for example, in relation to financial transactions”.

Paragraph 16.59 then refers to the necessity for the attorney not to engage in conflict transactions but that is a post – appointment requirement and doesn’t mean that the attorney must have knowledge of just what those are prior to appointment.

Are the “requirements” referred to in paragraph 16.58 those in section 29? If so, then being over 18 years and having the mental capacity to act seems to be a low standard of competency for someone to be entrusted with what could be onerous financial obligations not only to the principal (and indirectly to relatives and other third parties) but also to State and Commonwealth authorities such as Centrelink and the Australian Taxation Office.

Yet again (but possibility only for the “near term”), such things as the current level of “incidences of misconduct” and the effect on the utility of EPA’s would see this possibility discarded as unacceptable. The main problem lies in demonstrating that an attorney has or hasn’t these requirements. [The proposed requirement<sup>69</sup> that the attorney has the “capacity” to act raises this point also!]. Who is to judge? Being over 18 years can be determined quite simply. Capacity and financial qualifications/experience/ knowledge to act are different matters. Views on them can be the subject of dispute.

But there is likely to be a certain level of “incidences of misconduct” and/or loss through other causes which could see a move to require a stricter level of attorney qualifications.

In addition, if the number of QCAT cases in which the Public Trustee is appointed grows, then the resourcing of that office comes into consideration.

### Registration by Public Trustee/Adult Guardian

A system of registration was rejected by the QLRC.

The benefits acknowledged were:

- EPA’s “are known about so the principal’s wishes can be respected after decision-making capacity is lost or diminished.”<sup>70</sup>
- registration “would enable third parties (including financial institutions, medical facilities and aged care providers) to make enquiries about the existence and current status of an enduring power of attorney.”<sup>71</sup>

<sup>69</sup> ibid

<sup>70</sup> QLRC, op.cit., paragraph 16.256

<sup>71</sup> ibid.

- registration “may also help to expose the situation where an adult has made a succession of enduring powers of attorney which create a series of incompatible powers.”<sup>72</sup>

The weaknesses identified were:

- “there are likely to be limitations on the extent to which a registration system can ensure the essential validity of a registered instrument.”<sup>73</sup>
- “registration would not necessarily detect fraud or abuse.”<sup>74</sup>
- “There are also likely to be limitations on the extent to which a registration system can adequately record the status of an enduring power of attorney.”<sup>75</sup>
- privacy implications<sup>76</sup>;
- resource implications<sup>77</sup>;
- adds an additional layer of formality, complexity and expense.<sup>78</sup>

It is suggested that the arguments against registration are not convincing. Certainly, registration under that presently applying to land is expensive and registration open to public scrutiny may be unacceptable for privacy reasons. But there may be a “half way house” which could provide some benefits (see below).

### Notification to Public Trustee/Adult Guardian without registration

A system of notification was also rejected by the QLRC.

Notwithstanding that notification is used in several circumstances in other jurisdictions,<sup>79</sup> that several submissions supported a notification system in some form and that there were no submissions which were opposed to a notification system, the QLRC rejected a mandatory notification requirement whether on execution of the EPA, commencement of

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<sup>72</sup> *ibid.*

<sup>73</sup> QLRC, *op.cit.*, paragraph 16.257

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> QLRC, *op.cit.*, paragraph 16.258

<sup>77</sup> QLRC, *op.cit.*, paragraph 16.258

<sup>78</sup> QLRC, *op.cit.*, paragraph 16.258

<sup>79</sup> QLRC, *op.cit.*, paragraphs 16.261 – 16.269.

an attorney's powers or implementation by the attorney by way of decisions<sup>80</sup> and left it to principals to consider it on execution.<sup>81</sup>

The benefit identified was identified as: *"These provisions are designed to inform interested parties about an enduring power of attorney that has come into existence so that any objections to it can be ventilated at an early stage"*<sup>82</sup> whether on execution, registration or implementation.

The weaknesses identified by the QLRC were:

- an increase in the level of complexity and hence "may make EPA's less attractive as an advance planning tool"<sup>83</sup>;
- a notification requirement would "infringe on the autonomy and privacy of those principals who do not wish to have others notified of an attorney's decisions".<sup>84</sup>

What however may be considered is a system by which on execution a notification (attaching a copy of the EPA) is given to the Public Trustee and the payment of a fee. <sup>85</sup> The records kept by the Public Trustee would not be searchable by the public. The purpose of this notification is to:

- enable the compilation of statistics on (what would be expected to be) the growing trend in the use of EPA's which could be relevant to economic modelling on the consequences of the abuse of EPA's;
- place the Public Trustee in funds to assist in resourcing that office so far as the suggested (see below) supervision of EPA's is concerned;
- provide a source of funding for the proposal from the Public Trustee which could be used for a form of statutory insurance<sup>86</sup>;
- "help to expose the situation where an adult has made a succession of enduring powers of attorney which create a series of incompatible powers"<sup>87</sup>.

<sup>80</sup> QLRC, op.cit., paragraphs 16.281.

<sup>81</sup> QLRC, op.cit., paragraphs 16.281 – 16.283

<sup>82</sup> QLRC, op.cit., paragraphs 16.261

<sup>83</sup> QLRC, op.cit., paragraphs 16.281

<sup>84</sup> ibid

<sup>85</sup> Ideally, the requirement would be retrospective but that would be met with opposition.]

<sup>86</sup> QLRC, op.cit., paragraphs 16.244

<sup>87</sup> QLRC, op.cit., paragraph 16.256

### **Provision of a financial plan to Public Trustee**

A review of the reported cases shows that it is often the case that the Public Trustee is required to provide a financial plan to QCAT within four/six months.

Why is it not the case that an EPA for financial matters is required to do up such a plan within a similar timeframe? Surely, this would concentrate the mind of the attorney in coming to grips with the principal's affairs, working out what financing will be necessary and prompt some attorneys to get advice if needed. The attorney has to do this at some stage if the appointment is to be successful and there will no doubt be an obligation to file a return with the Australian Taxation Office during the course of that appointment.

If this is considered to be a worthy requirement on attorneys then why not require that plan to be filed with the Public Trustee? The provision of such a plan would also enable the Public Trustee to more effectively supervise attorneys (see below). In the event of the subsequent appointment of the Public Trustee, there would then be a body of information readily available. Again, this body of information could be relevant to economic modelling on the consequences of the abuse of EPA's.

### **Accounting by EPA periodically to Public Trustee**

If it is acceptable for attorneys to file tax returns each year with the Australian Taxation Office, then why isn't it acceptable to do the same with the Public trustee; or, even just send a copy of the tax return?

The provision of such information would also enable the Public Trustee to more effectively supervise attorneys (see below). In the event of the subsequent appointment of the Public Trustee, this would add to the body of information available. Again, this body of information could be relevant to economic modelling on the consequences of the abuse of EPA's.

### **Random audits by Public Trustee**

QLRC sought submissions on whether the POA should be amended to authorise audits or reviews should occur and if so, whether they should be periodic or random. Responses were apparently divided.

The proposal that the Public Trustee conduct mandatory audits or that there be any such system in place finds resistance in some of the reports and submissions. The resistance is based on the proposition that "Such measures, however, may be 'unnecessarily complex and onerous for the attorney, and costly for the State' especially if misuse of enduring

powers of attorney occurs infrequently.”<sup>88</sup> A South Australian review referred to : “A heavy-handed approach to eliminating abuse and fraud risks that a solution penalising ignorance or inexperience, discouraging those willing to take on the role of agents, thereby reducing the uptake of [enduring documents] and overloading government agencies with oversight responsibilities.”<sup>89</sup> That review also referred to the necessity not to impose “overbearing scrutiny”.

Apart from scrutiny conducted by QCAT subsequent to an order, the possibilities for scrutiny referred to include:

- audits, regular or random, by the Public Trustee/Adult Guardian;
- appointment by the principal of a “trusted individual” as a “monitor” for “financial and other decisions to oversee their agent’s financial management”<sup>90</sup>;
- appointment by the principal of a “company such as a law firm” as a “monitor” for “financial and other decisions to oversee their agent’s financial management”<sup>91</sup>;
- appointing a “financial institution” as a “monitor” for “financial and other decisions to oversee their agent’s financial management”<sup>92</sup>;
- oversight by the Tribunal<sup>93</sup>.

The appointment of a monitor such as a law firm or financial institution would not overcome issues of cost; and unless the monitor has some responsibility to do something to look into what is provided, then is this much of a protection? It is hard to understand how this possibility advances the protection of a principal’s assets. But then the appointment of a monitor especially of a law firm or financial institution certainly appears to reduce the utility of EPA’s. Oversight by the Tribunal seems to place the initial responsibility in the wrong agency.

Some of the issues and some responses to a regular audit by the Public Trustee/Adult Guardian are:

<u>Issue</u>	<u>Response</u>
This is overkill, audits may reduce abuse but	That <u>may</u> be so <u>at the moment</u> but no one

<sup>88</sup> QLRC, op.cit., paragraphs 16.374

<sup>89</sup> QLRC, op.cit., paragraphs 16.375

<sup>90</sup> QLRC, op.cit., paragraphs 16.376

<sup>91</sup> ibid

<sup>92</sup> ibid

<sup>93</sup> QLRC, op.cit., paragraphs 16.381 and 382



does not eliminate it

really knows; the possibility that there be an audit is a powerful inducement for most people to 'do the right thing', and what of the future if claims get out of hand?

It adds to costs

So does the appointment of a law firm of financial institution; and isn't a monitor likely to take advice in complex estates?

This would undermine the utility of EPA's

It is not easy to see that happening: attorneys take on their task and accept an obligation to file tax returns and with it the potential for an audit or enquiries from such authorities as Centrelink.

This would present privacy problems

This is much the same as the previous point; in addition, there are many cases in the community where an authority conducts audits and no one seems to object if it protects their interests.

This would present resourcing problems

That could be funded partly by the payment of a notification fee to the Public Trustee.

After looking at the views, QLRC stated its view:

"In the Commission's view, the flexibility of the present system strikes an appropriate balance by providing mechanisms for the review of an attorney's actions when it **appears necessary**, but not otherwise burdening attorneys with time-consuming procedures that are likely to involve significant costs for the State. Accordingly, the guardianship legislation should not be amended to require the periodic<sup>94</sup> auditing of attorney's accounts or review of attorneys activities by either the Tribunal or Adult Guardian. Instead, the Commission considers it preferable to encourage people who make EPA to establish their **own protections** within the enduring power of attorney."

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The Commission envisaged the appointment of a trusted, independent person who would receive regular summaries of "records and accounts of all dealings and transactions made

<sup>94</sup> Note that there is no mention of random audits but no doubt they are included in this reference.

<sup>95</sup> Emphasis added; QLRC, op.cit., paragraphs 16.388, 16.389

by the attorney”<sup>96</sup> But notably, the Commission stated that such a person would have no “duty or liability to take any action regarding the accounts.”<sup>97</sup>

This proposal relies on some sort of “peer pressure”. Are the peers going to be up to the task? One may ask: when does it *appear necessary*? To whom? If a relative, will they do anything about it? Is it enough to say: establish your *own protections*? What? Who? Will they do anything about it? What’s the point if there is no duty or liability? Is this not giving a principal a false sense of security?

Instead of regular audits, random audits may be the best option. An analogy is perhaps the self-assessment systems of some revenue authorities: the taxpayer has the task of doing the initial work (sometimes engaging an agent) and filing a return but then the revenue authority can go in and audit the taxpayer’s affairs. Are there many in the community who, when faced with the possibility of a random audit, don’t do “the right thing”?

The success of any push to impose audits on attorneys will be directly proportionate to the perceived, or at least the proved, risk to the assets of those likely to use, or who are using, an EPA. As more QCAT cases are decided in which the Public Trustee is appointed the administrator of a principal’s assets and the quantum of the dissipation of assets grows, then this will require everyone to stand back and ask whether the arguments against random audits warrant the increased costs to the Public Trustee or a loss of privacy or utility of EPA’s but, more importantly, the dissipation of principal’s assets themselves and the economic effect that may have.

### Better education of EPA’s

The QLRC acknowledges that the approved forms need some attention.<sup>98</sup>

Paragraph 16.9 notes that “The Adult Guardian undertakes community education to raise awareness about enduring powers of attorney”<sup>99</sup>. Paragraph 17.127 et seq. recommends that amendments be made to the POA to clearly articulate the duty to avoid entering into conflict transactions.

But is there enough to encourage principals, attorneys and third parties to actually engage in seeking an understanding of the responsibilities of an EPA? For example, anecdotally, third parties seem to have no idea what a joint and several appointment means; a principal may therefore falsely think that, by appointing attorneys on that basis, some level of protection is achieved.

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<sup>96</sup> *ibid*

<sup>97</sup> *ibid*

<sup>98</sup> QLRC, *op.cit.*, paragraphs 16.146 – 16.182.

<sup>99</sup> See QLRC, *op.cit.*, paragraphs 17.105 where it is stated that the Adult Guardian claims that the level of funding for education is poor and that “... the effect of community education small.”

Educating principals and attorneys at the time of execution is obviously fundamental. Is it enough to make information available in the forms or on a website? How can anyone come away having confidence that they will be able to what is expected of them?

The task of educating the community – principals, attorneys and third parties – is an onerous one for the Adult Guardian but it could be assisted by QLS, especially in rural and regional parts of the State. For example:

- a “Solicitor’s EPA Help Network” could be set up with a zero or nominal fee for the first consultation;
- brochures could be provided to provide further assistance to the community;
- yearly courses and update seminars could be held and run by QLS in Brisbane and by the District Law Associations in the rural and regional parts of the State.

### Solution?

It is suggested that what should be considered is a system in which:

- within 10 business days of an EPA becoming effective, whether on execution or at a later date, notification in an approved form is to be given to the Public Trustee with a fee (\$50?); provision could be made for that time period to be extended if, for example, there is any doubt as to when the EPA became effective; this requirement would apply to all EPA’s executed after amending legislation and for those executed before that legislation, public announcements could seek notification within twelve months ;
- within 3 months of that effective date, the attorney is to file a statement of the principal’s assets and a financial plan for their administration; again, there could be provision for that date to be extended where for reasons such as the complexity of the principal’s estate;
- within 3 months of the end of each financial year or at the time of the filing of the principal’s tax return, the attorney is to file a return with the Public Trustee updating the statement of assets and the financial plan; again, there could be provision for that date to be extended where for reasons such as the complexity of the principal’s estate;

- the Public Trustee to be given the power to conduct audits of the principal's financial affairs either periodically or randomly but which in practice would be done on a random basis.

## 5. Lack of uniformity between Australian jurisdictions

It is hard not to be overly critical of the fact that there is no uniformity around the jurisdictions on EPA's.<sup>100</sup>

The QLRC Report states<sup>101</sup>:

“While there are rudimentary similarities between the jurisdictions on some matters, such as the minimum formal requirements for the making of enduring powers of attorney and the primary duties of attorneys, there is greater divergence on other issues such as the registration of enduring powers of attorney and recognition of interstate instruments.”<sup>102</sup>

Section 34 of the POA has two conditions for the effective use of an EPA in Queensland:

1. compliance with the requirements of the jurisdiction in which the EPA was made being another Australian State;
2. correlation with the powers which could be exercised in Queensland so that anything authorised under the jurisdiction where the EPA was made cannot be exercised in Queensland if it could not be done under a Queensland EPA.<sup>103</sup>

Again, submissions were mixed. Apart from<sup>104</sup>:

- recommending that the place of execution of an EPA should be irrelevant for its effectiveness under the POA;
- recommending that EPA's made under the New Zealand legislation should be recognised.

The Commission's views on these conditions are understandable. What those views underscore is that moves to achieve “identical”<sup>105</sup> laws on EPA's throughout Australia

<sup>100</sup> See QLRC, op. cit., paragraphs 16.332 – 16.342.

<sup>101</sup> QLRC, op.cit., paragraphs 16.26

<sup>102</sup> In Australia, Tasmania and the Northern Territory require all enduring powers of attorney to be registered; see the discussion at QLRC, op.cit., paragraphs 16.196 – 260. As to interstate recognition, see the discussion at paragraphs 16.332 – 16.363.

<sup>103</sup> See the discussion at QLRC, op.cit., paragraphs 16.333.

<sup>104</sup> QLRC, op.cit., paragraphs 16.362 and 363; a recommendation was also made about advance health directives at paragraph 16.363.

should be pushed ahead as soon as possible. Although there are references in the Commission's Report that there would appear to be no pressing need to do so<sup>106</sup>, surely this will change with an ageing mobile<sup>107</sup> population; and, in any case, can there be justification in the Australian jurisdictions' resistance to standardisation if only a few have problems in this area? The Commission's view is not based on any economic examination of the costs that are likely to result from a lack of standardisation. It is time that the Standing Committee of Attorneys General re-enlivens this issue.<sup>108</sup>

## 6. Conclusion

Simply, more must be done in this area of the law. The economic and social consequences of doing nothing are significant. It is essential that further investigation be undertaken into the value of assets lost due to EPA financial abuse by States in concluding what regulatory measures should be enacted.

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<sup>105</sup> QLRC, op.cit., paragraphs 16.349 citing Submission 156A.

<sup>106</sup> E.g. paragraph 16.347.

<sup>107</sup> "Grey nomads"?

<sup>108</sup> See the comment at paragraph 16.342.

## Schedule 1

1. **SFW** [2011] QCAT 237: A misuse/alleged misuse case. SFW granted an EPA (for personal and health matters as well as financial matters) to his wife SM. SFW's health deteriorated and SM put him into aged care. SM subsequently entered into a relationship with another man who moved into the matrimonial home which was then in joint names. SM also bought a car for use by the "new boyfriend" the funds for which came from the life savings of SFW and SM. SFW severed the joint tenancy with help of a relative. SM wished to restore the joint tenancy for her own benefit. The Tribunal found that SM had not acted appropriately as financial attorney but had so far as personal and health matters. The Tribunal revoked the EPA as to financial matters and appointed the Public Trustee as Administrator.
2. **LPJ** [2011] QCAT 177: A misuse/alleged misuse case. LPJ granted GAP and LJM an EPA (for personal and health matters as well as financial matters). Subsequently, the Tribunal appointed the Public Trustee as Administrator for financial matters. LJP died. GAP was one of the executors of LJP's estate. GAP then lodged an application in the Tribunal for LJM to pay compensation to the estate for losses caused by his failure to comply with his statutory obligations under the Power of Attorney Act 1988 in the exercise of his powers as the attorney of LJP. The Tribunal found that it had no jurisdiction to hear the application. "Such a claim can only be brought in the civil courts": at [16].
3. **OMP** [2011] QCAT 419: A misuse/alleged misuse case. OMP granted to one of her sons an EPA (for personal and health matters as well as financial matters). Large amounts of money were withdrawn from OMP's bank accounts before and after the EPA was granted. The EPA was subsequently revoked by the Tribunal. OMP died. The executor applied to the Tribunal for a compensation order against the former attorney. The Tribunal referred to its decision in LJP and dismissed the application.
4. **PM** [2011] QCAT 363: A lack of capacity case.
5. **HE** [2011] QCAT 180: A misuse/alleged misuse case originally but now was a case questioning the competence of the Public Trustee to continue as administrator. The Tribunal dismissed the application.
6. **BS** [2011] QCAT 539: A misuse/alleged misuse case. BS had granted an EPA (for personal and health matters as well as financial matters). There were allegations of gifts of money and loans by the attorneys. Some were the subject of Authorisations by the Tribunal. Issues concerning some loans, a gift, use of a unit and its rental saw the Tribunal to revoke the EPA and to appoint the Public Trustee.

7. **CK** [2011] QCAT 336: A misuse/alleged misuse case. CK had granted an EPA for personal and health matters to CP and for financial matters to the Permanent Trustee Company Ltd and CP. The EPA came into effect when the CK was deemed to be incapable of managing his affairs. CP got CK to mortgage his house CK's house. The Tribunal appointed the Public Trustee as administrator.
8. **BE v. Office of the Adult Guardian & Public Trustee of Queensland** [2010] QCATA 24: A case about the conflicts within the grantor's family and the loss of trust that the grantor once had in the attorney. The case showed no grounds to appeal.
9. **PJK** [2011] QCAT 522: A care case where the Public Trustee was appointed the administrator.
10. **SZ** [2011] QCAT 64: A care case.
11. **SZ** [2011] QCAT 641: A follow on from SZ [2011] QCAT 64.
12. **PK** [2011] QCAT 75: A care case where the EPA was "overtaken" by the Tribunal's order.
13. **CA** [2011] QCAT 196: A misuse/alleged misuse case. A granted an EPA to CF, CN and CM (for personal and health matters as well as financial matters) on the basis of a majority decision. The issue was whether the Tribunal should sever joint tenancies of some properties so as to align their ownership with the will of A or whether the Tribunal could authorise attorneys to do so. The tribunal held that it had no power to do so but could authorise the attorneys. But on the evidence the Tribunal held it could not conclude that A intended that the properties go as per the will: see [49] to [52]. However, the Tribunal permitted CN to live in a unit rent free.
14. **DN** [2010] QCAT 398: A care case.
15. **HD** [2011] QCAT 523: A misuse/alleged misuse case. HD granted an EPA (for personal and health matters as well as financial matters) to VY. There was an allegation that nursing home fees had not been paid and issues concerning a house. The Tribunal revoked the EPA. And appointed the Public Trustee as administrator.
16. **S (aka MP) P (aka M) M** [2011] QCAT 59: A care case.
17. **HWR** [2011] QCAT 349: A misuse/alleged misuse case. HWR granted an EPA to HW for financial matters. HWR gave instructions with respect to his financial affairs. One question was whether HWR had the capacity to give those instructions. The Tribunal appointed the Public Trustee to investigate HWR's affairs.
18. **RJA** [2010] QCAT 301: A misuse/alleged misuse case. RJA granted an EPA (for personal and health matters as well as financial matters) to his wife RFM and his son RRC. RJA's granddaughter was concerned about the actions taken under the EPA and made application to the Tribunal. The Tribunal found no need to appoint an administrator.
19. **ER** [2010] QCAT 688: A misuse/alleged misuse case. ER granted an EPA (for personal and health matters as well as financial matters) to his step daughter which he later revoked and later granted a similar EPA to his friends MN and MJ. This was later overtaken by the Tribunal's appointment of the Public Trustee. The Tribunal found

- that, through grief and anxiety due to the death of his wife, ER was vulnerable to financial exploitation. The Public trustee was appointed administrator.
20. **NE** [2010] QCAT 83: A misuse/alleged misuse case. NE granted an EPA (for personal and health matters as well as financial matters) to his daughter TR. The Tribunal was satisfied that, despite some concern expressed by some, that TR was not to be replaced by an administrator.
  21. **SG** [2010] QCAT 234: A misuse/alleged misuse case. SG granted an EPA (for personal and health matters as well as financial matters) to his son SJ and SA. The Tribunal determined that without the appointment of an administrator there was a risk to SG's property. The Public Trustee was appointed and directed to investigate the transfer of certain of SG's lands.
  22. **JB** [2010] QCAT 689: A case in which the Tribunal found that there was a risk to the grantor's assets. JB granted an EPA (for personal and health matters as well as financial matters) to his son and daughter in law TW and DW. But in the end the Tribunal appointed them as administrators of his assets.
  23. **WED** [2010] QCAT 3: A case which looked at the situation after an earlier decision was that an EPA was invalid because of a lack of capacity at the time of its execution.
  24. **JAA, Re** [2009] QGAAT 1: A case in which a purported EPA was in fact a GPA and so was ineffective once JAA lost capacity. The Tribunal appointed the Public Trustee administrator because there was concern about the mixing of finances with those of her son.
  25. **PAA, Re** [2009] QGAAT 18: A misuse/alleged misuse case. PAA granted an EPA (for personal and health matters as well as financial matters) to BI. As there were issues with respect to bank accounts and some property, the Public Trustee was appointed administrator.
  26. **BAE, Re** [2009] QGAAT 24: [The Gold Lotto case]. A misuse/alleged misuse case. BAE granted an EPA (for personal and health matters as well as financial matters) to RJ, KM and her son BB. The Public Trustee was appointed administrator because of breaches of duties as attorney.
  27. **DAD, Re** [2009] QGAAT 53: A misuse/alleged misuse case. DAD granted an EPA (for financial matters) to her husband DS. The Tribunal found that DS's attorneyship should not continue because of clear breaches by DS of DS's obligations. The Public Trustee was appointed administrator.
  28. **TAA, Re** [2009] QGAAT 39: A misuse/alleged misuse case. TAA granted an EPA (for personal and health matters as well as financial matters) to her husband TM and her daughter KM. KM alleged that her father had exploited TAA financially. The Public Trustee was appointed administrator.
  29. **LAD, Re** [2009] QGAAT 77: A misuse/alleged misuse case. LAD granted an EPA (for personal and health matters as well as financial matters) to a friend AR (who at one point in time was a social worker with Queensland Health). On the application of a



- social worker, the Tribunal found that AR was not a person of integrity and amongst other things had concealed the gift to him of a one half interest in a property. The Public Trustee was appointed administrator.
30. **KAE, Re** [2008] QGAAT 48: A misuse/alleged misuse case. On the application of a caring centre where KAE resided for the appointment of an administrator, it was reported to the Tribunal that PM had been granted an EPA. This was not established as PM had not responded to correspondence. The Tribunal appointed the Public Trustee as administrator.
  31. **WAF, Re** [2008] QGAAT 62: A misuse/alleged misuse case. WAF granted an EPA (for personal and health matters as well as financial matters) to KL with whom WAF shared his house after the death of WAF's wife. The property was at some point transferred to their joint names. The Public Trustee was appointed administrator because concerns with bank accounts etc. and also in accepting a transfer of the half share at the time of her appointment as attorney.
  32. **OAC, Re** [2008] QGAAT 72: A misuse/alleged misuse case. OAC granted an EPA (for financial matters) to her nephew BM who moved into her house with her before OAC was admitted to a nursing home. There was an allegation that BM was using OAC's funds for his own benefit. The Public Trustee was appointed administrator.
  33. **SAI, Re** [2007] QGAAT 50: A case in which the Tribunal came to the conclusion that SAI had capacity to run her own affairs and that the attorneys who had appointed under an EPA could do nothing about her revocation of that EPA.
  34. **BAB, Re** [2007] QGAAT 19: A misuse/alleged misuse case. BAB granted an EPA (for personal and health matters as well as financial matters) to WB and DD. BAB moved into accommodation under WB's home. WB and DD decided (with BAB's concurrence) that the cost of renovating that accommodation would be paid from part proceeds of the sale of BAB's home and that BAB would live there until a place in a nursing home became available. An application to the Tribunal was necessary as the EPA did not authorise conflict transactions and this was a conflict transaction since the expenditure of the money will increase the value of the attorney's house. One point was that BAB's use of the accommodation would be only temporary. The application for approval was dismissed: see [69].
  35. **BH, Re** [2006] QGAAT 66: A care case but one also in which BH had granted an EPA to her husband. The Tribunal found that BH could be influenced by her husband and so appointed the Public Trustee administrator.
  36. **ELF, Re** [2006] QGAAT 74: A case concerning an EPA for personal matters only.
  37. **HJ, Re** [2006] QGAAT 67: A misuse/alleged misuse case. HJ granted an EPA (for financial matters) to SM. The Public Trustee was appointed administrator as there was no evidence to rebut the presumption of undue influence in relation to a gift of \$282,000 to SM's bank account.

38. **SLF, Re** [2006] QGAAT 47: A misuse/alleged misuse case. SLF granted an EPA (for personal and health matters as well as financial matters) to VM who was not a relative but with whom SLF had a close relationship for many years. There were serious allegations about SLF's share account, about his house having been sold and his car having been sold to VM's son. The Tribunal did not accept that SLF and VM had a de facto relationship which might explain the use of SLF's assets. The Tribunal found that VM had abused the trust reposed in her by SLF. There was no supportable dependency claim under s. 89 of the POA Act. The Public Trustee was appointed administrator.
39. **HMV, Re** [2006] QGAAT 87: A misuse/alleged misuse case. HMV granted an EPA (for personal and health matters as well as financial matters) to her husband TM and her nephew GW. GW resided with HMV as a live-in carer. The Tribunal found that there was no conflict transactions clause in the EPA. There may be a claim against the former attorney for a gift of \$65,000 he made to himself and about \$70,000 he took for care by him at the rate of \$16.50 per hour on a 24/7 basis. The Public Trustee was appointed administrator.
40. **RE, Re** [2005] QGAAT 67: A misuse/alleged misuse case. RE granted an EPA (for personal and health matters as well as financial matters) to RM. It is not clear that the Tribunal accepted allegations of financial impropriety had been made out. But the Tribunal held that RM had not taken proper care of certain items of jewellery and other property. This, coupled with RM's failure to disclose a previous bankruptcy, meant that RM could no longer act.
41. **MDCA, Re** [2005] QGAAT 24: A misuse/alleged misuse case. MDCA granted an EPA (for personal and health matters as well as financial matters) to S. A unit owned by MDCA was sold and the proceeds not properly accounted for by S. The Tribunal appointed the Public Trustee administrator.
42. **TAW, Re** [2004] QGAAT 56: A family conflict case.
43. **MLB, Re** [2004] QGAAT 59: A misuse/alleged misuse case. MJB granted an EPA (for personal and health matters as well as financial matters) to MLB's brother, WD. The Tribunal appointed the Public Trustee administrator because of such things as the evidence that WD had bought shares using MLB's money.
44. **ELF** [2004] QGAAT 57: A misuse/alleged misuse case. ELF granted an EPA (for personal and health matters as well as financial matters) to his son ER and daughter BS. The Tribunal appointed the Public Trustee administrator because of such things as preferring his children to rent property of ELF.
45. **NS, Re** [2003] QGAAT 17: A misuse/alleged misuse case. NS granted an EPA (for personal and health matters as well as financial matters) to her niece JL. NS later accused JL of trying to steal her money which the Tribunal found were paranoid. The Tribunal found that there was no evidence that attorney had abused her powers. The attorney continued in her role.

46. **TAO, Re** [2003] QGAAT 23: A misuse/alleged misuse case. TAO granted an EPA (for personal and health matters as well as financial matters) to her son TO and his partner MK. The Tribunal found that there had been inappropriate decisions made by the attorneys. The Adult Guardian had submitted that TAO's assets had been seen by family members as "readily available". The Public Trustee was appointed administrator.
47. **WLC, Re** [2003] QGAAT 3: A misuse/alleged misuse case. TAO granted an EPA (for personal and health matters as well as financial matters) to her son TO and his partner MK. The Tribunal found that there had been inappropriate decisions made by the attorneys. The Adult Guardian had submitted that TAO's assets had been seen by family members as "readily available". The Public Trustee was appointed administrator.
48. **FMM, Re** [2003] QGAAT 9: A misuse/alleged misuse case. FMM granted an EPA (for personal and health matters as well as financial matters) to her son. As there were issues concerning amongst other things the recovery of money used by the son, the Public Trustee's appointment was confirmed.