

**EXAMINING ACCESS TO FORMAL JUSTICE MECHANISMS FOR VULNERABLE OLDER PEOPLE  
IN THE CONTEXT OF ENDURING POWERS OF ATTORNEY**

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**Abstract**

Theoretically, enduring powers of attorney (EPAs) promote autonomy as an individual can nominate a person or persons they trust (the attorney) to make decisions for them if they lose legal capacity and can no longer make those decisions for themselves. However, the misuse of EPAs provides a relatively unchecked vehicle for elder abuse because once capacity is lost, the actions of the attorney can go unchecked. This is concerning when considering that Australia's population is ageing and mentally disabling conditions impacting financial capacity, such as dementia, are increasing. Incidents of elder abuse are also expected to increase. The evidence base in relation to accessing formal justice mechanisms where there has been an alleged misuse of an EPA remains relatively limited.

The objective of this paper is to add to that evidence base by exploring the ability of vulnerable older people to access formal justice mechanisms to seek redress from abuse perpetrated through the misuse of a valid EPA. The first part of this paper considers definitional issues. The second part of this paper discusses the prevalence of elder financial abuse. The third part of this paper identifies select themes emerging from the reported judgements dealing with elder financial abuse including: who the victims and perpetrators of elder financial abuse are; the risk factors; access to justice issues; and the role played by legal professionals as well as other stakeholders, such as banks and staff in residential aged care facilities and/or community-based home-care providers, in the identification and prevention of elder financial abuse. The final part of this paper then concludes by making practical suggestions for legal practitioners preparing EPAs in order to minimise the potential opportunities for elder financial abuse created by the misuse of EPAs.

I INTRODUCTION

As Australia faces the reality of an ageing population, the incidence of elder abuse is expected to rise.<sup>1</sup> Older people may be vulnerable to abuse for a variety of reasons including ill health,

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frailty, isolation, disability and/or cognitive impairment.<sup>2</sup> Abuse can take many forms, including neglect as well as physical, psychological, sexual, and financial abuse.<sup>3</sup> This last category of abuse, and the (inadvertent) role played by enduring powers of attorney (EPAs) in its facilitation, is the focus of this paper.

EPAs provide a mechanism through which a person can appoint a substitute decision-maker to make a legally recognised decision on her or his behalf in the event that the person becomes personally incapable of making the decision in question. Theoretically, EPAs promote autonomy as the individual can nominate a person or persons they trust to make decisions for them after the loss of legal capacity. However, there is a growing evidence base suggesting that the misuse of EPAs provides a relatively unchecked vehicle for elder abuse.<sup>4</sup> This is because once the donor loses capacity, she or he can no longer scrutinise the conduct of the substitute decision-maker/s. While the EPA itself can create a risk of abuse, there may also be other factors contributing to and heightening the risk of financial abuse for older adults such as dependence, disability, failing physical health, depression, socio-economic status, cognitive impairment, and social isolation.<sup>5</sup>

Although elder financial abuse (including financial abuse through enduring power of attorney mis-use) is attracting increased attention, the evidence base is still relatively limited.<sup>6</sup> This is particularly the case in relation to access to justice issues, i.e. whether and how older people can avail themselves of remedies for where abuse has taken place. Furthermore, where remedial action is sought, there is limited evidence as to legal outcomes after what can be protracted, costly and emotionally draining litigation. Litigation may need to be taken against family members upon whom the individual is reliant, further increasing the complexity of the

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<sup>1</sup> Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Australian Institute of Family Studies Research Report No 35, February 2016) <<https://aifs.gov.au/publications/elder-abuse>>.

<sup>2</sup> Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016), 22.

<sup>3</sup> J Lindenberg et al, 'Elder Abuse an International Perspective: Exploring the Context of Elder Abuse' (2013) 25(8) *International Psychogeriatrics* 1213, 1213.

<sup>4</sup> Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (National Ageing Research Institute and Seniors Rights Australia, June 2015) 19.

<sup>5</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (Report No 131, June 2017) [2.61].

<sup>6</sup> Kelly Purser et al, 'Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study' (2018) 48(4) *The British Journal of Social Work*, 887-905.

situation. Whether the claim is brought on the basis of statutory or equitable principles will also be relevant. The objective of this paper is to add to that evidence base by exploring the ability of vulnerable older people to access formal justice mechanisms to seek redress from abuse perpetrated through the misuse of a valid EPA, and the obstacles they may face.

The first part of this paper considers issues of definition in relation to a number of key concepts in this context: when an individual becomes ‘older’; what constitutes a valid EPA; what constitutes ‘elder abuse’ and, specifically, the nature of ‘elder financial abuse’; and the meaning of financial capacity. The second part of this paper discusses the prevalence of elder financial abuse. The third part of this paper identifies themes emerging from the reported judgements dealing with elder financial abuse including who the victims and perpetrators of elder financial abuse are, the risk factors, and access to justice issues (including how people sought formal redress e.g. by way of equitable relief). The role played by legal professionals and other stakeholder/gatekeepers, such as banks and staff in residential aged care facilities and/or community-based home-care providers, in the identification and prevention of elder financial abuse is also examined. The final part of this paper concludes by setting out practical suggestions and considerations for legal practitioners preparing EPAs in order to minimise the potential opportunities for elder financial abuse created by the misuse of EPAs.

## II DEFINITIONS

Given the lack of precise terminology in this context, we will first outline the definitions adopted in this paper.

### *A Older*

According to the World Health Organization (WHO), the term ‘older’ is generally linked to the age at which someone can retire (although variations between countries exist).<sup>7</sup> The terms ‘older’ and ‘elder’ are often used interchangeably, but this usage raises difficulty where ‘elder’ has a specific meaning within a particular culture.<sup>8</sup> Use of ‘elder’ or ‘elderly’ to refer to older

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<sup>7</sup> World Health Organization: Centre for Health Development, *Ageing and Health Technical Report Vol.5 A Glossary of Terms for Community Health Care and Services for Older Persons* <[http://www.who.int/kobe\\_centre/publications/Ageing\\_Tech\\_Report\\_5/en/](http://www.who.int/kobe_centre/publications/Ageing_Tech_Report_5/en/)>.

<sup>8</sup> Ibid 22.

persons generally has also been criticised as ageist.<sup>9</sup> The term ‘elderly’ was rejected in preference for the term *older persons* in 1995 by the United Nations Committee on Economic Social and Cultural Rights of Older Persons.<sup>10</sup> Accordingly, the language of ‘older’ and ‘older persons’ is adopted in this paper, although ‘elder abuse’ (as the generally recognised term used to describe the financial abuse of older persons) is used with reference to financial abuse.

The category of ‘older persons’ generally refers to people aged sixty or sixty-five and over (in Australia, ‘older’ for Indigenous and Torres Strait Islander peoples includes fifty and over).<sup>11</sup> The term ‘older’ and ‘older persons’ is used in this paper to refer to persons aged sixty-five years and over).<sup>12</sup> A sub-category of the ‘old, old’, including persons aged 80 or 85 and older, has also been recognised.<sup>13</sup> Identification of an ‘old, old’ cohort with distinct needs reflects the increased age-related risk of developing mentally disabling diseases, including neurodegenerative conditions affecting cognition such as dementia (although age does not automatically equate to impaired capacity), together with increasing physical frailty. These physiological changes give rise to increasing reliance and dependence on others, and may be a source of vulnerability (including vulnerability to abuse) for persons in the ‘old, old’ cohort. As with capacity, chronological age in itself is not equivalent to heightened vulnerability to abuse, either for the ‘old, old’ or for older persons generally.<sup>14</sup>

### *B Enduring powers of attorney*

Enduring powers of attorney (EPAs) provide a formal substitute decision-making mechanism whereby the person executing the EPA (the principal) can appoint another person or persons (the attorney) to make decisions about property and finances on the principal’s behalf after the principal has become incapable of making his or her own legally recognised decisions. Although in some Australian jurisdictions, such as Queensland and the Australian Capital

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<sup>9</sup> Dale Avers et al, ‘Use of the Term “Elderly”’ (2011) 34(4) *Journal of Geriatric Physical Therapy* 153, 153-4.

<sup>10</sup> United Nations Committee on Economic Social and Cultural Rights, *The Economic, Social and Cultural Rights of Older Persons* (1995) <<https://www.refworld.org/pdfid/4538838f11.pdf>>.

<sup>11</sup> Australian Law Reform Commission (n 5).

<sup>12</sup> United Nations, *World Population Ageing: Highlights* (2015) <[http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015\\_Highlights.pdf](http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Highlights.pdf)>; Australian Institute of Health and Welfare, ‘Ageing’ *Ageing* <<http://www.aihw.gov.au/ageing/>>.

<sup>13</sup> Australian Law Reform Commission (n 2).

<sup>14</sup> *Ibid.*

Territory, an EPA can also be made to appoint someone to make personal and/or health-care decisions, this paper focuses on the use of EPAs in relation to property and finance. An individual must be over eighteen and have capacity to be able to execute and/or revoke an EPA, or to be appointed as an attorney. Appointments can be made severally such that attorneys can make decisions independently, or jointly where all attorneys must make the decision. Attorneys have significant obligations at law under the various statutory regimes,<sup>15</sup> and in equity as the attorney/principal relationship is fiduciary in nature.<sup>16</sup>

Ideally, EPAs facilitate individual autonomy by enabling a person to appoint a substitute decision-maker directly rather than having an administrator appointed *for* that person. EPAs are relatively inexpensive and accessible, with no ongoing maintenance costs, registration, or court intervention required.<sup>17</sup> As noted by Justice Lindsay in *Smith v Smith*,<sup>18</sup> EPAs are promoted ‘as a “self-help” alternative to more formal regulatory appointments of an office holder to manage the affairs (the estate and/or the person) of a person who, unable to manage his or her own affairs, is in need of protection.’<sup>19</sup> At the same time, the absence of public intervention and oversight which makes the EPA an accessible, inexpensive and ‘easy’ alternative also creates a heightened risk of financial abuse.<sup>20</sup> The risk of abuse is inherent in the private exercise of authority over another person’s money and property, a risk that is intensified where the individual is no longer capable of monitoring the way in which that authority is being used. It has been suggested that EPA abuse is especially likely where inheritance expectation is involved i.e. where a person is named as a beneficiary under a will.<sup>21</sup>

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<sup>15</sup> *Powers of Attorney Act 2006* (ACT); *Powers of Attorney Act 2003* (NSW); *Powers of Attorney Act 1980* (NT); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney and Agency Act 1984* (SA); *Powers of Attorney Act 2000* (Tas); *Powers of Attorney Act 2014* (Vic); *Guardianship and Administration Act 1990* (WA). Statutory duties include: a duty to act honestly and diligently to protect the principal’s interests (see, for example, the *Powers of Attorney Act (1998)* (Qld) s 66); and a duty not to enter into a conflict transaction unless the principal authorises the transaction (see, for example, the *Powers of Attorney Act (1998)* (Qld) s 73).

<sup>16</sup> *Smith v Smith* [2017] NSWSC 408.

<sup>17</sup> Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney: Final Report* (Parliament of Victoria, 2010).

<sup>18</sup> [2017] NSWSC 408.

<sup>19</sup> *Ibid* 87 (Lindsay J).

<sup>20</sup> Australian Law Reform Commission (n 5); Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Queensland Government, 2010); N Wuth, ‘Enduring Powers of Attorney: With Limited Remedies - It’s Time to Face the Facts!’ (2013) *Elder Law Review* 7.

<sup>21</sup> D Setterlund, C Tilse and J Wilson, ‘Substituted Decision-Making and Older People’, *Trends and Issues in Criminal Justice* (1999) 139; Caxton Legal Centre Inc, Submission No 112 to the House Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law* (February 2007)

The recent ‘paradigm shift’ towards supported decision-making (enabling persons with diminished capacity to continue to make their own decisions, so far as is possible and for as long as is possible), rather than substitute decision-making, poses a different kind of challenge for estate planning. Supported decision-making has been proposed by some commentators as a complete replacement for all forms of substitute decision-making, which has been criticised as discriminatory and destructive of autonomy.<sup>22</sup> Others have proposed a continuum on which supported and substitute decision-making co-exist: supported decision-making for as long as possible, allowing for substitute decision-making (including EPAs) if and when the point is reached when supported decision-making becomes unfeasible.<sup>23</sup> That is, once a person completely loses financial capacity and is unable to participate in financial decision-making, a substitute decision-maker will be required. Accordingly, substitute decision-making will continue to be necessary where there is a total loss (as distinct from diminution) of financial capacity, and issues of access to justice following the misuse of an EPA will persist. The continuum approach to supported decision-making has been formally introduced, for example, into legislation in Victoria.<sup>24</sup> Therefore, the response to the risk of EPA associated financial elder abuse should be consistent with a rights-based framework which ensures respect for individual autonomy and dignity,<sup>25</sup> while retaining the necessary protective mechanisms for adults who have lost financial capacity.

### *C Financial capacity*

Financial capacity is a multidimensional, complex concept which addresses the ability of an individual to autonomously control her or his financial affairs in line with her or his own self-

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<[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=/laca/olderpeople/subs.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/olderpeople/subs.htm)>.

<sup>22</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014)*, UN Committee on the Rights of Persons with Disabilities, (2014).

<sup>23</sup> See, Law Commission of Ontario Legal Capacity, Decision-Making and Guardianship: Final Report (Toronto: LCO-CDO, March 2017); MI Hall, ‘Situating dementia in the experience of old age: Reconstructing legal response’ (2019) 66 *International Journal of Law and Psychiatry* 101468.

<sup>24</sup> *Powers of Attorney Act 2014* (Vic) part 7. See also, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, 2014)

<<https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>>.

<sup>25</sup> See generally Australian Law Reform Commission (n 2) [1.89]-[1.97]; Australian Law Reform Commission (n 5).

interest and morals.<sup>26</sup> Queensland is the only Australian jurisdiction which has implemented a legislative test for the capacity to make an EPA.<sup>27</sup> There are two aspects to financial capacity, judgement and performance i.e. an individual needs to be able to give effect (performance) to the financial decision made (judgement).<sup>28</sup> Financial capacity generally requires a relatively high level of cognitive functioning, with the level or degree varying in relation to the kind of decision in question (ranging from the less complex and more familiar activities of paying bills, to more complex financial decisions such as managing investment strategies).<sup>29</sup> What is required to establish financial capacity therefore varies according to the specific decision to be made and is influenced to varying degrees by the nature and the stage of the particular condition affecting cognition, such as dementia (noting that a diagnosis of dementia is not equivalent to financial incapacity).<sup>30</sup> Education, financial experience, socio-economic status, and familial and cultural factors may also influence financial capacity.<sup>31</sup> As capacity is time and decision-specific, it is important to understand that the loss of capacity in one area does not necessarily preclude a person from making legally recognised decisions in other contexts.<sup>32</sup>

The loss of the ability to manage one's own finances is challenging not only from a practical perspective but also because it signifies a loss of autonomy and independence for the individual. The process through which financial capacity is assessed is therefore a crucially important matter and concerns have been raised about the adequacy of current approaches to financial capacity assessment. Consequently, calls have been made to develop best practice national assessment guidelines.<sup>33</sup> Despite the widespread misconception that screening tools such as the Mini-Mental State Examination (MMSE) create the ability to conclusively assess

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<sup>26</sup> DC Marson, 'Clinical and Ethical Aspects of Financial Capacity in Dementia: A Commentary' (2013) 21(4) *The American Journal of Geriatric Psychiatry* 382, 382.

<sup>27</sup> *Powers of Attorney Act 1998* (Qld) sch 3.

<sup>28</sup> Marson (n 26) 384.

<sup>29</sup> *Ibid* 383.

<sup>30</sup> Nearly 1 in 10 Australians aged 65 and over had dementia in 2016: Australian Institute of Health and Welfare, 'Dementia' (2018) <<https://www.aihw.gov.au/reports-data/health-conditions-disability-deaths/dementia/overview>>. Worldwide, around 50 million people have dementia, and there are nearly 10 million new cases every year: World Health Organization, 'Dementia' (2017) <<https://www.who.int/news-room/fact-sheets/detail/dementia>>.

<sup>31</sup> Marson (n 26) 384; DM Pinsker et al, 'Financial Capacity in Older Adults: A Review Clinical Assessment Approaches and Considerations' (2010) 33 *Clinical Gerontologist* 332, 333, 336, 338; Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017).

<sup>32</sup> *Szozda v Szozda* [2010] NSWSC 804.

<sup>33</sup> Purser (n 31).

capacity, there is no standardised test for assessing financial capacity and certainly not one which addresses clinical notions of capacity assessment within the relevant legal framework.<sup>34</sup> Inconsistencies in assessment processes can result in the mis-identification of persons as either capable or incapable of making certain kinds of financial decisions. Either outcome has the potential to increase the risk of financial abuse. There is a need for more research about the satisfactory assessment of financial capacity and until this occurs, there is even greater imperative to ensure access to justice where there has been a breach of a valid EPA.

#### *D Elder abuse*

In 2002, the WHO called for a ‘global response’ to the phenomenon of elder abuse.<sup>35</sup> Elder abuse has been defined in several different ways. For the purpose of this paper, the WHO definition has been adopted: elder abuse is ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.’<sup>36</sup> Notably, the WHO definition highlights an ‘*expectation of trust*’. Other definitions have instead noted the more general requirement that there be ‘an *implication of trust*’.<sup>37</sup> The ‘expectation of trust’ has been described by some as problematic because it excludes abuse that occurs outside of a trusting relationship.<sup>38</sup> The fiduciary nature of the attorney/principal relationship created by an EPA fits within the narrower WHO formulation.<sup>39</sup>

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<sup>34</sup> Ibid; Kelly Purser and Jane Lonie, ‘Mapping Dementia and Cognitive Decline in Testamentary Capacity’ (2019) 66 *International Journal of Law and Psychiatry* article number-101450. See the work of Moye and Marson who have identified the available conceptual models of financial capacity: J Moye J and DC Marson, ‘Assessment of Decision-Making Capacity on Older Adults: An Emerging Area of Practice and Research’ (2007) 62(1) *Journals of Gerontology, Series B: Psychological Sciences and Social Sciences* 3, 7.

<sup>35</sup> World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) <[http://www.who.int/ageing/projects/elder\\_abuse/alc\\_toronto\\_declaration\\_en.pdf](http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf)>.

<sup>36</sup> Ibid.

<sup>37</sup> See Kaspiew, Carson and Rhoades (n 1).

<sup>38</sup> Alzheimer’s Australia, Submission No 80 to the Australian Law Reform Commission, *Elder Abuse* (August 2016) 3; Hervey Bay Seniors Legal and Support Service, Submission No 75 to the Australian Law Reform Commission, *Elder Abuse* (August 2016) 1.

<sup>39</sup> *Smith v Smith* [2017] NSWSC 408.



### *E Elder financial abuse*

Elder financial abuse, along with emotional abuse, are acknowledged as the most common forms of elder abuse.<sup>40</sup> The WHO defines elder financial abuse as ‘the illegal or improper exploitation or use of funds or resources of the older person’.<sup>41</sup> It can include any aspect of a person’s financial affairs such as mishandling money and/or assets, putting a loan in place with the older person acting as a guarantor, or stealing.<sup>42</sup> It can also include coercing or forcing an older person to revoke and/or amend enduring documents such as EPAs and/or testamentary documents, especially given that inheritance expectation can lead people to unjustly expect control of older people’s assets.<sup>43</sup> There is no cost threshold (below which financial abuse will not be identified), and elder financial abuse can occur separately or in connection with other forms of abuse.<sup>44</sup> Elder financial abuse is not dependent on the perpetrator’s intentions, which may be malevolent or well-intentioned. For example, there are strict conflict rules relating to the use of EPAs in Queensland. Absent court or tribunal authorisation, an attorney for a financial matter may enter into a conflict transaction only if the principal authorises: the transaction, conflict transactions of that type or conflict transactions generally.<sup>45</sup> Further, any transaction between the principal and attorney, or a family member, close associate or friend of the attorney, will also attract a rebuttable statutory presumption of undue influence.<sup>46</sup> Attorneys who are unaware of the presumption may not take the steps necessary to rebut it (such as obtaining the principal’s fully informed consent or, if this is not possible, making an

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<sup>40</sup> World Health Organization *Media Centre: Elder abuse*

<<http://www.who.int/mediacentre/factsheets/fs357/en/>>.

<sup>41</sup> World Health Organization, *Missing voices: Views of older persons on elder abuse* (2002) 3

<[www.who.int/ageing/projects/elder\\_abuse/missing\\_voices/en/](http://www.who.int/ageing/projects/elder_abuse/missing_voices/en/)>.

<sup>42</sup> Australian Law Reform Commission (n 5).

<sup>43</sup> *Ibid* 2.51-2.53. See also: Setterlund, Tilse and Wilson (n 21); T Cockburn and B Hamilton, 'Equitable Remedies for Elder Financial Abuse in Inter Vivos Transactions' (2011) 31 *Queensland Lawyer* 123, 123-138; ML Gilhooly et al, 'Framing the Detection of Financial Elder Abuse as Bystander Intervention: Decision Cues, Pathways to Detection and Barriers to Action' (2013) 15(2) *The Journal of Adult Protection*, 54, 54-68; World Health Organization, *Abuse of older people on the rise - 1 in 6 affected*, (2017)

<<http://www.who.int/mediacentre/news/releases/2017/abuse-older-people/en/>>.

<sup>44</sup> D Setterlund et al, 'Understanding Financial Elder Abuse in Families: The Potential of Routine Activities Theory', *Ageing and Society* (2007) 27(4), 599, 599-614.

<sup>45</sup> *Powers of Attorney Act 1998* (Qld) s 73.

<sup>46</sup> *Ibid* s 87; *Smith v Glegg* [2004] QSC 443; *Pinter v Pinter* [2016] QSC 314.

application to the court for an authority to undertake the transaction)<sup>47</sup> and thus may perpetrate, albeit inadvertently, elder financial abuse through undue influence.

### III PREVALENCE OF ELDER FINANCIAL ABUSE

It has been suggested that between 0.5% and 5% of Australians over the age of 65 will experience elder financial abuse (on an annual basis).<sup>48</sup> The perpetrators of elder financial abuse are often family members or carers.<sup>49</sup> Absent a national prevalence study, state-based elder abuse helplines can provide some insight into the extent of elder financial abuse.<sup>50</sup> Helpline data shows that elder financial abuse is now reported in over 65% of elder abuse cases in Queensland, for example.<sup>51</sup> The majority of callers to helplines are witnesses rather than victims of abuse, however, and their accounts may be distorted or contain errors based on the caller's understanding, perception and interpretation of events.<sup>52</sup> It is estimated that more than \$14 million has been inappropriately obtained from older people, although suspected under-reporting has led to a much higher 'real' estimated figure of \$1.8 billion.<sup>53</sup> The misuse and abuse of EPAs has been identified as a major source of this loss.<sup>54</sup>

### IV ENDURING POWERS OF ATTORNEY AND ELDER FINANCIAL ABUSE

That an attorney can abuse the powers delegated to them under an EPA is not new.<sup>55</sup> Effectively monitoring an attorney's activities, however, remains difficult, especially given the breadth of financial decisions able to be made by attorneys. For example, a recent case acknowledged that an attorney's power also extends to making, renewing and/or extending binding nominations

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<sup>47</sup> *Powers of Attorney Act 1998* (Qld) s 118(2).

<sup>48</sup> J Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies', *Australian Social Work* (2017) 69(1), 115, 115-124.

<sup>49</sup> See generally Australian Law Reform Commission (n 5).

<sup>50</sup> Kaspiew, Carson and Rhoades (n 1) 5.

<sup>51</sup> *Ibid.*

<sup>52</sup> Elder Abuse Prevention Unit, *The EAUP Helpline: Results of an Investigation of Five Years of Call Data* (2015) 6 <<http://www.eapu.com.au/publications/research-resources>>.

<sup>53</sup> Elder Abuse Prevention Unit, *The Cost of Elder Abuse in Queensland: Who Pays and How Much?* (June 2015) <<http://www.eapu.com.au/publications/research-resources>>.

<sup>54</sup> Joosten, Dow and Blakey (n 4) 19.

<sup>55</sup> See, for example, Office of the Public Advocate Queensland, Submission No 76 to the House Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law* (2 August 2006); Tina Cockburn, 'Elder Financial Abuse by Attorneys: Relief under Statute and in Equity' (2005) *Proctor* 22; Terry Carney, 'Civil and Social Guardianship for Intellectual Handicapped People' (1982) 8 *Monash University Law Review* 199, 230.

on behalf of a member of a self-managed superannuation fund.<sup>56</sup> It has been suggested that a mandatory registration system for EPAs would impose greater accountability on the attorney and protect the principal from abuse<sup>57</sup> by verifying the existence of an EPA and bringing the document into the public domain.<sup>58</sup> On 19 March 2019 the Council of Attorneys General released its *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023*,<sup>59</sup> including an investigation into the feasibility of developing a national online register of EPAs as a short<sup>60</sup> to medium<sup>61</sup> term priority.<sup>62</sup> Further discussion of the advantages and disadvantages of imposing a mandatory registration scheme is warranted but outside the scope of this paper. Whether or not a preventative approach (such as a registry) can reduce EPA abuse, the issue of access to formal justice mechanisms for redress in cases where EPA abuse *has* taken place will always be important.

The following sections identify common themes emerging from a study of 23 cases in which persons experiencing elder financial abuse sought redress from the courts. Cases were located from the LexisNexis CaseBase, Australasian Legal Information Institute (Austlii), JadeBar Net and relevant official court databases using the search terms 'enduring', 'power of attorney', 'breach', 'fiduciary' and 'capacity'. Although care was taken when developing the search strings, we cannot however certify that every relevant case has been identified. As discussed below, the common themes emerging from the cases relate to both the nature of elder financial abuse and access to justice for persons experiencing that abuse. Themes included significant risk factors for abuse; dependence as a source of risk and access to justice barrier; transaction types and values involved; jurisdictional questions; issues relating to delay in commencing proceedings; the nature of relief sought; defences; remedies; the characteristics of perpetrators; early inheritance syndrome; issue relating to EPA drafting; solicitor liability; issues around financial capacity and its assessment; the cost of accessing formal justice mechanisms; and the

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<sup>56</sup> *Re Narumon Pty Ltd* [2018] QSC 185.

<sup>57</sup> See generally Australian Law Reform Committee, above note 2, 5.29-5.40.

<sup>58</sup> *Ibid.*

<sup>59</sup> See: <<https://www.ag.gov.au/ElderAbuseNationalPlan>>.

<sup>60</sup> Within a timeframe of 1-2 years.

<sup>61</sup> Within a timeframe of 2-3 years.

<sup>62</sup> Council of Attorneys General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023*, Priority area 4: Planning for Future Decision Making <<https://www.ag.gov.au/ElderAbuseNationalPlan>> .

role of external stakeholders such as banks in the identification and prevention of elder financial abuse.

### *A Elder abuse victims and the discovery of abuse*

The ages of persons experiencing elder financial abuse (as discussed in the cases) ranged from 65<sup>63</sup> through to 100,<sup>64</sup> with a concentration of abuse seeming to occur in the ‘old, old’ category.<sup>65</sup> The age of the victim at the date of commencement of legal proceedings ranged from 66<sup>66</sup> to 96,<sup>67</sup> while there were many examples of cases where the victim was deceased by the time proceedings were instituted.<sup>68</sup> Interestingly, although the victims were often residents in aged care facilities,<sup>69</sup> the aged care staff rarely identified the abuse.<sup>70</sup> Further, the cases did not generally identify the period of abuse. However, when the period of abuse was identified this ranged from five months<sup>71</sup> to four and a half years<sup>72</sup> in duration.<sup>73</sup>

### *B Main risk factors for abuse*

Risk factors for elder abuse victims generally, including elder financial abuse under an EPA, included: cognitive impairment<sup>74</sup> or another disability; mental and/or physical health issues;<sup>75</sup> visual and/or auditory impairment,<sup>76</sup> social, cultural and linguistic factors; social isolation<sup>77</sup>

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<sup>63</sup> *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380.

<sup>64</sup> *Smith v Smith* [2017] NSWSC 408.

<sup>65</sup> See for example, *Moylan v Rickard* [2010] QSC 327 (victim aged 92 years); *Western v Male* [2011] SASC 75 (victim aged 91 years); and *Barkley v Barley Brown* [2009] NSWSC 79 (victim aged 91 years).

<sup>66</sup> *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380.

<sup>67</sup> *Moylan v Rickard* [2010] QSC 327.

<sup>68</sup> *Anderson v Anderson* [2013] QSC 8; *Anthony Taverniti and Stephen Domenico Taverniti v Taverniti* [2016] WADC 59; *Thorn, as Executrix of Estate of Mcauley v Boyd* [2014] NSWSC 1159.

<sup>69</sup> See for example: *Smith v Glegg* [2004] QSC 443; *Perochinsky v Kirschner* [2013] NSWSC 400; *Western v Male* [2011] SASC 75; *Athony Taverniti and Stephen Domenico Taverniti v Taverniti* [2016] WADC 59.

<sup>70</sup> For examples of this occurring, see: *Cohen v Cohen* [2016] NSWSC 336 and *Western v Male* [2011] SASC 75.

<sup>71</sup> *Anthony Taverniti and Stephen Domenico Taverniti v Taverniti* [2016] WADC 59.

<sup>72</sup> *Western Australia v Robert Charles Atherley* [2015] WADC 45.

<sup>73</sup> Other cases where the duration of abuse was identified include: *R v Peter David Kerin* [2014] SASC 19 (11 days); *Western v Male* [2011] SASC 75; *Barkley v Barley Brown* [2009] NSWSC 79 (2 years); *Bird v Bird* [2013] NSWCA 262 (3 years); *Smith v Smith* [2017] NSWSC 408 (4 years).

<sup>74</sup> See, for example: *Moylan v Rickard* [2010] QSC 327; *McFee v Reilly* [2018] NSWCA 322.

<sup>75</sup> See, for example, *Bird v Bird* [2013] NSWCA 262.

<sup>76</sup> See, for example, *Cohen v Cohen* [2016] NSWSC 336.

<sup>77</sup> See, for example, *Smith v Glegg* [2004] QSC 443; *Moylan v Rickard* [2010] QSC 327; and *Anderson v Anderson* [2013] QSC 008.

and prior history of traumatic life events; family conflicts;<sup>78</sup> and relational support and dependence (either physical or mental), including shared housing with the abuser.<sup>79</sup> Few cases identified the principal's country of birth as being somewhere other than Australia<sup>80</sup> or whether the victim was culturally or linguistically diverse, although comments made in two cases suggested this may be the case, referring to the fact that 'little English was spoken'<sup>81</sup> and describing the defendant as 'the black sheep of the family for having married an Australian'.<sup>82</sup> In terms of gender, victims were more likely to be female,<sup>83</sup> often widowed.<sup>84</sup> This trend is supported by the literature which suggests that gender is a risk factor for elder financial abuse, with women traditionally being more likely to relinquish financial control to others (thus heightening the risk of abuse).<sup>85</sup>

One of the major risk factors for elder financial abuse is dependency upon others, particularly the perpetrator, for care.<sup>86</sup> One study found that in 81% reported cases of elder financial abuse, dependency on a family member for care was a major risk factor.<sup>87</sup> This finding was reflected in the cases. In *Smith v Glegg*<sup>88</sup> the principal was an 85-year-old widow living in a retirement home who had appointed her eldest daughter as her attorney. The attorney misused her power

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<sup>78</sup> *Anthony Taverniti and Steven Domenico Taverniti (As Executors of The Estate of Domenico Taverniti) v Taverniti* [2016] WADC 59.

<sup>79</sup> *Gillian Fisher-Pollard by her tutor Miles Fisher-Bollard v Piers Fisher-Pollard* [2018] NSWSC 500. For a discussion see D Cripps, J Biven, J Northey and P Rigger, 'Abuse of Older People: Issues for Lawyers' (2002) *Elder Law Review*, 1; L Zannettino, D Bagshaw, S Wendt and V Adams, 'The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People from Culturally and Linguistically Diverse Communities in Australia' (2015) 27(1) *Journal of Elder Abuse and Neglect* 74, 74-89; World Health Organization, 'Media Centre: Elder Abuse' (2017) <<http://www.who.int/mediacentre/factsheets/fs357/en/>>.

<sup>80</sup> *Spina v Conran Associates Pty Ltd; Spina v M and v Endurance Pty Ltd* [2008] NSWSC 326 (Italy/Sicily); *Perochinsky v Kirschner* [2013] NSWSC 400 (China); *Cohen v Cohen* [2016] NSWSC 336 (Czech Republic)

<sup>81</sup> *Lambrou v Lambrou* [2018] VSC 141, 12.

<sup>82</sup> *Anthony Taverniti and Steven Domenico Taverniti (As Executors of The Estate of Domenico Taverniti) v Taverniti* [2016] WADC 59 [5].

<sup>83</sup> See, for example, *Moyland v Rickard* [2010] QSC 327; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729; *Western v Male* [2011] SASC 75. Examples of cases where the victim was male include: *Bird v Bird* [2018] NSWCA 322 and *Smith v Smith* [2017] NSWSC 408.

<sup>84</sup> See for example, *Anderson v Anderson* [2013] QSC 008; *Smith v Glegg* [2004] QSC 443; *Gillian Fisher-Pollard by her tutor Miles Fisher-Bollard v Piers Fisher-Pollard* [2018] NSWSC 500. Examples of cases where the victim was a widower include: *Watson v Watson* [2002] NSWSC 919 and *Ash v Ash* [2016] VSC 57.

<sup>85</sup> K Peri, J Fanslow and J Hand, 'Keeping Older People Safe by Preventing Elder Abuse and Neglect' (2009) 35 *Social Policy Journal of New Zealand*, 159-172.

<sup>86</sup> See, for example: *Smith v Glegg* [2004] QSC 443; *Perochinsky v Kirschner* [2013] NSWSC 400; and *Western v Male* [2011] SASC 75.

<sup>87</sup> Dale Bagshaw et al 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members' (2013) 66(1) *Australian Social Work* 86.

<sup>88</sup> [2004] QSC 443.

by inducing the principal to transfer her house to the attorney's adult son. The attorney then sold the house, acting as her son's attorney, and used the sale proceeds to purchase a house for her own benefit.<sup>89</sup> The abuse was detected by the principal's other daughter. The evidence presented during the trial showed that the principal experienced depression and was legally blind, although she had capacity.<sup>90</sup> She did, however, require domestic assistance and was wholly reliant on the attorney for care, company, transport to the shops, and medical appointments.<sup>91</sup>

Similarly, in *Western v Male*<sup>92</sup> Justice Nyland said that the victim's dependence on the perpetrator in the circumstances of her advanced age, physical infirmity and cognitive impairment made her particularly vulnerable to abuse. In this case the principal considered her attorney (her son) to be her 'tower of strength' and relied on him for day-to-day tasks.<sup>93</sup> Her dependence on the attorney arguably caused the principal to alienate herself from her daughter, because the attorney instilled lies in his mother's mind about the daughter, which she did not question because of the trust and reliance she placed in him. This isolation, combined with the reliance on her attorney for care and assistance, not only increased her vulnerability to abuse, but also acted as a barrier to access to justice. She was unlikely to confront him for fear of losing his care and assistance. In this case, it was intervention by the nursing home which led to the abuse being exposed and put to an end.

Dependence on the attorney also operated as a barrier to accessing justice in *Irvine v Irvine*.<sup>94</sup> In this case, the principal had executed an EPA in favour of her nephew. The principal no longer wanted her nephew to be her attorney, because he was 'overpowering' and 'forceful.'<sup>95</sup> However, she did not revoke her EPA for fear of confronting the nephew. There was a dependence by the principal on the nephew to look after her, and it was noted that it was 'a dependence that she could not afford to risk by refusal or questioning that might bring out the

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<sup>89</sup> *Smith v Glegg* [2004] QSC 443, [14].

<sup>90</sup> *Ibid* 4.

<sup>91</sup> *Ibid* 7.

<sup>92</sup> *Western v Male* [2011] SASC 75.

<sup>93</sup> *Ibid* 254.

<sup>94</sup> [2008] NSWSC 592.

<sup>95</sup> *Ibid* 49.

“forceful” or “overpowering” side of his nature...<sup>96</sup> This was despite receiving assistance from her solicitor, to whom she ‘confided her thoughts about the power of attorney and her nephew’.<sup>97</sup>

Where an older person is not only dependent on the attorney, but also lives with them, the risk of abuse is further heightened. The fact that the principal lives with, and is reliant upon, the attorney is not only a risk factor for abuse but also operates as a barrier to access to justice. This is because where there has been a breach of an EPA the principal may not want to confront the family member for fear of, for example, being removed from their home and/or losing the care and assistance provided by the attorney.<sup>98</sup> These issues were highlighted in *Gillian Fisher-Pollard by her Tutor Miles Fisher-Pollard v Piers Fisher-Pollard (Fisher-Pollard)*.<sup>99</sup> In that case the principal was a 79-year-old widow who had appointed her youngest son as her attorney. The attorney misused his power by unduly influencing the principal to enter into transactions whereby the principal sold her two properties and gave the proceeds of sale to the attorney. The attorney used the proceeds of sale to purchase a flat and later sold the flat to purchase a large block of land. Both properties were purchased in the attorney’s name. There was evidence presented at the trial that on both occasions the principal believed she was the registered proprietor of the properties purchased by the attorney.<sup>100</sup> The attorney had used the principal’s resources to pay for the properties, professional fees, transfer duties and renovations to the property - the attorney paid for nothing.<sup>101</sup> The abuse was detected after the principal’s other son caused a title search to be done of the later property and discovered that the attorney was the registered proprietor, not the principal.

The evidence presented during the trial established that the principal experienced depression after the death of her husband<sup>102</sup> and 'hated the thought of being alone'.<sup>103</sup> She also suffered from cognitive impairment and memory loss, and experienced severe emotional

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<sup>96</sup> Ibid 50.

<sup>97</sup> Ibid 46.

<sup>98</sup> Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 *Older People and the Law* 41, 45.

<sup>99</sup> [2018] NSWSC 500.

<sup>100</sup> Ibid 201, 238.

<sup>101</sup> Ibid 550.

<sup>102</sup> Ibid 455.

<sup>103</sup> Ibid 535.

vulnerability.<sup>104</sup> She was isolated from other family members - her other two sons were living overseas, and the attorney was her only relative in Australia. She became ‘rapidly and entirely dependent’<sup>105</sup> upon the attorney for all financial matters. A conclusion was drawn that the principal had succumbed to the attorney’s wishes because she wanted to please him, which caused her to go along with the property sales.<sup>106</sup> The principal did write letters and emails to express her dissatisfaction with her living arrangements, that she regretted selling the family home, and complaining about paying for everything. She also stated that she was concerned about her son ‘dumping me in a “home” as I would really HATE that.’ The principal’s dependence therefore increased her vulnerability to abuse - her trust in and dependence on the attorney meant that she was unaware of the true nature of the attorney’s actions.

### *C Value and type of transactions resulting from abuse*

As stated, there is no monetary threshold necessary for elder financial abuse to occur. For example, one case involved the amount of \$500.00,<sup>107</sup> while one of the highest amounts was approximately \$2.25 million.<sup>108</sup> The types of transactions included: using the proceeds of the sale of the principal’s house to purchase a house in the attorney’s own name,<sup>109</sup> or as a deposit for a house in the attorney’s own name;<sup>110</sup> the attorney being registered as the proprietor of the principal’s house;<sup>111</sup> the attorney using the money for his/her own personal gain, such as paying off a credit card<sup>112</sup> and paying off a loan<sup>113</sup> or, purchasing household items such as a microwave, groceries and stationery and services such as hairdressing;<sup>114</sup> and using the \$30,000 of sale proceeds from the principal’s house for the bond at an aged care facility with the balance ‘unknown’.<sup>115</sup> In some cases the EPA included an ‘authority to enter into a conflict transaction’ clause.<sup>116</sup>

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<sup>104</sup> Ibid 536.

<sup>105</sup> Ibid 540.

<sup>106</sup> Ibid 549.

<sup>107</sup> *Perpetual Trustee Company v Gibson and Anor* [2013] NSWSC 276.

<sup>108</sup> *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380.

<sup>109</sup> See, for example, *Smith v Glegg* [2004] QSC 443.

<sup>110</sup> See, for example, *Perpetual Trustee Company v Gibson and Anor* [2013] NSWSC 276.

<sup>111</sup> See, for example, *Anderson v Anderson* [2013] QSC 008.

<sup>112</sup> See for example, *Moylan v Rickard* [2010] QSC 327.

<sup>113</sup> See for example, *Perpetual Trustee v Gibson* [2013] NSWSC 276.

<sup>114</sup> *Western v Male* [2011] SASC 75. See also: *Barkley v Barley Brown* [2009] NSWSC 79 (purchase of clothing, presents, taxi fares and household furniture).

<sup>115</sup> *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729.

<sup>116</sup> *McFee v Reilly* [2018] NSWCA 322.



## D Access to justice

The majority of decided matters seem to be concentrated in New South Wales.<sup>117</sup> There were fewer cases coming before the court than anticipated which is perhaps to be expected when considered in conjunction with the literature about barriers and enablers to accessing justice.<sup>118</sup> Barriers to access to justice for older people can include: diminished or lost capacity; lack of motivation to seek help; geographical, financial, relational and/or familial constraints, including a relationship of dependency between the older person and the abuser; health and mobility concerns; as well as isolation and poor social networks.<sup>119</sup> In its submission to the ALRC Elder Abuse Inquiry, the Australian Research Network on Law and Ageing identified that equitable action is rarely undertaken in the courts because proceedings are costly, time consuming and can be traumatic.<sup>120</sup> Conversely, enablers of access to justice include obtaining legal advice, relational support, and access to service providers (including social workers).<sup>121</sup> The cases show that initial inquiries for legal intervention can be made by children (not being the attorney),<sup>122</sup> other relatives,<sup>123</sup> aged care providers,<sup>124</sup> executors and/or beneficiaries of victim's estate,<sup>125</sup> and aged advocacy rights organisations.<sup>126</sup>

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<sup>117</sup> Recent examples include: *Gillian Fisher-Pollard by her tutor Miles Fisher-Bollard v Piers Fisher-Pollard* [2018] NSWSC 500; *McFee v Reilly* [2018] NSWCA 322; *Smith v Smith* [2017] NSWSC 408; *Chen v Cohen* [2016] NSWSC 408. Cases from other jurisdictions include: *Labrou v Labrou* [2018] VSC 141; *Athony Taverniti and Stephen Domenico Taverniti v Taverniti* [2016] WADC 59; *Western v Male* [2011] SASC 75; and *Anderson v Anderson* [2013] QSC 8.

<sup>118</sup> See, for example, the Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) [5.9] and see generally, Chapter 5: Barriers to older Australians accessing legal services. See also: S Ellison et al, *The legal needs of older people in NSW* (Law and Justice Foundation of NSW, 2004) <<http://www.lawfoundation.net.au/report/older>>.

<sup>119</sup> Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs (n 118); Purser et al (n 6).

<sup>120</sup> Australian Research Network on Law and Ageing (ARNLA), Submission No 262 to the Australian Law Reform Commission, *Elder Abuse – A National Legal Response DP 83* (December 2016) <<https://www.alrc.gov.au/inquiries/elder-abuse/submissions>> .

<sup>121</sup> Purser et al (n 6).

<sup>122</sup> *Anderson v Anderson* [2013] QSC 8; *Smith v Smith* [2017] NSWSC 408; *Ash v Ash* [2016] VSC 57.

<sup>123</sup> *Moylan v Rickard* [2010] QSC 327 (daughter in law of the principal's husband); *Barkley v Barley Brown* [2009] NSWSC 79 (nephew); *Thorn, as Executrix of Estate of Mcauley v Boyd* [2014] NSWSC 1159 (stepdaughter).

<sup>124</sup> *Cohen v Cohen* [2016] NSWSC 336; *Western v Male* [2011] SASC 75.

<sup>125</sup> *R v Peter David Kerin* [2014] SASC 19; *Athony Taverniti and Stephen Domenico Taverniti v Taverniti* [2016] WADC 59; *Western Australia v Robert Charles Atherley* [2015] WADC 45.

<sup>126</sup> *Western v Male* [2011] SASC 75.

The time taken to commence proceedings after the alleged abuse ranged from seven months<sup>127</sup> through to nearly eight years in one of the cases.<sup>128</sup> The question of timing is significant when considering the individual impact of the abuse, but is also significant in relation to access to justice through equitable remedies given that the defence of laches (where there has been a significant time delay between the abuse and commencing proceedings) can be pleaded if too much time has lapsed between the act and the commencement of proceedings. This defence is unlikely to succeed, however, where the older person is impeded from asserting their rights due to barriers preventing access to justice, such as limited resources in the face of advice that ‘the taking of any action would be protracted and difficult’, and reluctance to commence litigation against family members.<sup>129</sup> This is particularly the case where the abuse is not discovered until after the death of the principal.<sup>130</sup>

In *Smith v Smith*<sup>131</sup> the surviving adult children (sons) of the testator’s first marriage (who were the beneficiaries of half the testator’s residuary estate) alleged breaches of fiduciary duties<sup>132</sup> by the first defendant (his 88 year old widow, and beneficiary of the other half of the residue) who was the deceased’s attorney under an EPA. They also alleged knowing receipt of trust property by the third and fourth defendants (her children) as volunteers. The defendants argued that the plaintiffs should be denied equitable relief because they had been guilty of laches, acquiescence and delay in asserting those entitlements.<sup>133</sup> Given the defendant’s conduct in warning off the plaintiffs from any dealings with their father save through her, and her own failure to obtain financial management or other orders to confirm her authority to manage the deceased’s estate as she did, Justice Lindsay held that, ‘it does not lie in the mouth of the first

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<sup>127</sup> *Moylan v Rickard* [2010] QSC 327.

<sup>128</sup> *Bird v Bird* [2013] NSWCA 262.

<sup>129</sup> *Gillespie v Gillespie* [2013] QCA 99 [133] (where a delay of over eight years from the date of the transfer - and five months after the death of the transferee - did not defeat a claim to set aside a transfer of the deceased’s properties to adult children nine days after his re-marriage at the age of 76 to a 62 year old bride).

<sup>130</sup> See for example, *Moylan v Rickard* [2010] QSC 327; *Bird v Bird* [2018] NSWCA 322; *Smith v Smith* [2017] NSWSC 408.

<sup>131</sup> [2017] NSWSC 408.

<sup>132</sup> To act in his best interests, without any unauthorised benefit to herself; to keep her and the deceased’s property separate; and to keep reasonable accounts and records about the deceased’s money and property: see *Ibid* 241.

<sup>133</sup> *Ibid* 118.

defendant (or the third and fourth defendants, whose interests she shares) to complain of laches in these proceedings'.<sup>134</sup> His Honour concluded that,

the defendants' "laches defence" provides no impediment to a grant of relief. It lacks any substantial factual foundation ... The plaintiffs cannot be said to have engaged in calculated (deliberate and informed) inaction in the face of an open assertion by the first defendant of an entitlement to dispose of the deceased's property at will. Nor can they be said to have encouraged her in a belief that she could exercise such a power of disposition. At no time did she keep the plaintiffs informed of her intentions, or her conduct, in management of their father's estate. On the contrary, she kept them in the dark as she sought pre-emptively to spend their inheritance.<sup>135</sup>

Therefore, it will always depend upon the specific circumstances as to whether a laches defence will be successfully raised. This then raises the question more generally of the nature of the relief sought in elder abuse cases, other defences, and remedies.

#### *E Nature of relief sought, defences and remedies*

Relief was commonly sought in the equitable jurisdiction,<sup>136</sup> although the statute and equitable principles were sometimes pleaded in the alternative (after the commencement of the relevant legislation).<sup>137</sup> The equitable causes of action relied upon included breach of fiduciary obligation,<sup>138</sup> undue influence,<sup>139</sup> unconscionable bargain<sup>140</sup> and a breach of trust.<sup>141</sup> The equitable causes of action were often pleaded in the alternative, particularly undue influence and unconscionable bargain, with breach of fiduciary obligation.<sup>142</sup>

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<sup>134</sup> Ibid 119.

<sup>135</sup> Ibid 121.

<sup>136</sup> See, for example, *Anderson v Anderson* [2013] QSC 008; *Smith v Smith* [2017] NSWSC 408.

<sup>137</sup> See, for example, *Smith v Glegg* [2004] QSC 443.

<sup>138</sup> See, for example: *McFee v Reilly* [2018] NSWCA 322; and *Perpetual Trustee Company v Gibson & Anor* [2013] NSWSC 276.

<sup>139</sup> *Anderson v Anderson* [2013] QSC 008; *Gillian Fisher-Pollard by her tutor Miles Fisher-Bollard v Piers Fisher-Pollard* [2018] NSWSC 500.

<sup>140</sup> *Spina v Conran Associates Pty Ltd; Spina v M and v Endurance Pty Ltd* [2008] NSWSC 326; *Gillian Fisher-Pollard by her tutor Miles Fisher-Bollard v Piers Fisher-Pollard* [2018] NSWSC 500.

<sup>141</sup> *Anderson v Anderson* [2013] QSC 008.

<sup>142</sup> See, for example: *Anderson v Anderson* [2013] QSC 008; *Smith v Glegg* [2004] QSC 443.

Equitable defences were also raised, including the limitation defence;<sup>143</sup> laches (as discussed above);<sup>144</sup> entry into the transaction as a result of the principal's full, free and informed thought;<sup>145</sup> indefeasibility of title resulting from a constructive trust;<sup>146</sup> independent legal advice;<sup>147</sup> and estoppel.<sup>148</sup> In most cases where the claim was successful the court ordered that costs were payable by the perpetrator,<sup>149</sup> often with interest.<sup>150</sup> Where offers of settlement were made by the plaintiff, costs were ordered on a standard basis until the date of the offer and thereafter on an indemnity basis.<sup>151</sup>

The nature of the remedial relief available to be ordered in equity is perhaps one reason why most claims were made in the equitable jurisdiction.<sup>152</sup> That is, the flexibility of equitable remedies means that they can be better tailored to fit the circumstances. The most common remedies awarded were equitable compensation<sup>153</sup> and setting aside the transaction/transfer of property.<sup>154</sup> Other remedies which were awarded were account of profits<sup>155</sup> and a declaration that the money/property was held on constructive trust.<sup>156</sup> In clear cases it may be possible to obtain an order for summary judgement.<sup>157</sup>

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<sup>143</sup> See, for example: *McFee v Reilly* [2018] NSWCA 322; and *Moylan v Rickard* [2010] QSC 327.

<sup>144</sup> See, for example, *Bird v Bird* [2013] NSWCA 262.

<sup>145</sup> See, for example, *Anderson v Anderson* [2013] QSC 008.

<sup>146</sup> *McFee v Reilly* [2018] NSWCA 322.

<sup>147</sup> *Janson v Janson* [2007] NSWSC 1344.

<sup>148</sup> See, for example, *Bird v Bird* [2013] NSWCA 262.

<sup>149</sup> See, for example: *McFee v Reilly* [2018] NSWCA 322; *Thorn, as Executrix of Estate of Mcauley v Boyd* [2014] NSWSC 1159.

<sup>150</sup> *Smith v Glegg* [2004] QSC 443.

<sup>151</sup> *Moylan v Rickard* [2010] QSC 327.

<sup>152</sup> See generally Cockburn and Hamilton (n 43)123-138.

<sup>153</sup> *Smith v Glegg* [2004] QSC 443; *Bird v Bird* [2013] NSWCA 262; *Perochinsky v Kirschner* [2013] NSWSC 400; *McFee v Reilly* [2018] NSWCA 322; *Perpetual Trustee Co Ltd v Gibson and Another* [2013] NSWSC 276.

<sup>154</sup> *Anderson v Anderson* [2013] QSC 008; *Janson v Janson* [2007] NSWSC 1344; *Cohen v Cohen* [2016] NSWSC 336; *Thorn, as executrix of state of Mcauley v Boyd* [2014] NSWSC 1159.

<sup>155</sup> *Moylan v Rickard* [2010] QSC 327.

<sup>156</sup> *Watson v Watson* [2002] NSWSC 919; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729.

<sup>157</sup> *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380; *Lambrou v Lambrou* [2018] VSC 141.

## *F Perpetrator characteristics*

The ages of the attorneys ranged from 32,<sup>158</sup> through to about 80.<sup>159</sup> It appeared that the attorneys were more often male<sup>160</sup> than female.<sup>161</sup> Not surprisingly, the attorney was often also appointed as the executor or substitute executor of the principal's will,<sup>162</sup> as well as being a beneficiary.<sup>163</sup> There was often a family relationship between the victim and the perpetrator, although in one of the cases there was no familial relationship but rather close friends (albeit described as akin to father/daughter or mentorship).<sup>164</sup> In most cases the relationship was parent/child.<sup>165</sup> Examples of other family relationships identified in the cases were husband/wife,<sup>166</sup> nephew/niece, and uncle/aunt.<sup>167</sup>

Evidence suggests that the misuse of EPAs often occurs where a family member has been appointed as an attorney.<sup>168</sup> In fact, where a family member is appointed as an attorney, the attorney is twice as likely to perpetrate elder financial abuse.<sup>169</sup> The actions of family members are less likely to be questioned by third parties, as the assumption underlying the use of an EPA is that family members will always act for the benefit of the older person.<sup>170</sup> The issue lies in

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<sup>158</sup> *Watson v Watson* [2002] NSWSC 919.

<sup>159</sup> *McFee v Reilly* [2018] NSWCA 322.

<sup>160</sup> See for example *Anderson v Anderson* [2013] QSC 8; *Cohen v Cohen* [2016] NSWSC 336.

<sup>161</sup> See for example, *Smith v Smith* [2017] NSWSC 408; *Smith v Glegg* [2004] QSC 443.

<sup>162</sup> See, for example, *Moylan v Rickard* [2010] QSC 327.

<sup>163</sup> See, for example: *Smith v Glegg* [2004] QSC 443; *Moylan v Rickard* [2010] QSC 327; and *Bird v Bird* [2013] NSWCA 262.

<sup>164</sup> *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380 (akin to a father/daughter or mentoring relationship).

<sup>165</sup> See for example *Smith v Glegg* [2004] QSC 443; *Moylan v Rickard* [2010] QSC 327; *Anderson v Anderson* [2013] QSC; *Watson v Watson* [2002] NSWSC 919; *Perpetual Trustee Co Ltd v Gibson and Another* [2013] NSWSC 276; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729; *Perpetual Trustee Co Ltd v Gibson and Another* [2013] NSWSC 276; *Cohen v Cohen* [2016] NSWSC 336.

<sup>166</sup> *Bird v Bird* [2013] NSWCA 262; *McFee v Reilly* [2018] NSWCA 322.

<sup>167</sup> *Janson v Janson* [2013] NSWCA 262; *Barkley v Barley Brown* [2009] NSWSC 79.

<sup>168</sup> Anne-Louise McCawley, 'Access to Assets: Older People with Impaired Capacity and Financial Abuse' (2006) 8(1) *The Journal of Adult Protection* 20, 28.

<sup>169</sup> *Ibid* 26.

<sup>170</sup> *Ibid* 20.

the fact that the appointment of an attorney, particularly a family member often absent external scrutiny, relies heavily on the attorney honouring the trust placed in them by the principal.<sup>171</sup> As discussed above, often the victim was dependent on the perpetrator for help with everyday tasks<sup>172</sup> and especially housing.<sup>173</sup> In some cases there was evidence that the perpetrator was under financial pressure.<sup>174</sup> In other cases the perpetrator had drug and alcohol dependency issues. For example, in *Fisher-Pollard*<sup>175</sup> the attorney (the victim's son) had been convicted of drink driving and drug offences and had been in prison. 'Early inheritance syndrome' on the part of the perpetrator was another relatively common occurrence; this will now be discussed.<sup>176</sup>

### G Early inheritance syndrome

The concept of 'early inheritance syndrome' represents the expectation by (some) members of younger generations that they are 'entitled' to the assets of older generations (notably their parents). It is a notion that seems to be gaining public traction,<sup>177</sup> with the risk of abuse being related to the feelings of entitlement to the wealth of older people.<sup>178</sup> The 'entitlement' of a child to the assets of their parent, by virtue of their inheritance, is illustrated by *Perpetual Trustee Co Ltd v Gibson*.<sup>179</sup> In that case the attorney was one of the principal's two sons and a beneficiary under her will. The unauthorised conduct involved the attorney using his power of attorney to obtain a loan for his own purposes through using the principal's only substantive asset, her property, as security. The majority of the loan was lost to a high-risk investment made by the attorney and the property was consequently sold by the mortgagee. It was noted that the reason for the attorney misusing the EPA was because he believed it was 'designed to

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<sup>171</sup> New South Wales, *General Purpose Standing Committee No. 2 Elder Abuse in New South Wales*, Parl Paper No 44 (2016) 100 [6.98].

<sup>172</sup> *Western v Male* [2011] SASC 75.

<sup>173</sup> *Gillian Fisher-Pollard by her Tutor Miles Fisher-Pollard v Piers Fisher-Pollard* [2018] NSWSC 500.

<sup>174</sup> *Spina v Conran Associates Pty Ltd; Spina v M and v Endurance Pty Ltd* [2008] NSWSC 326; *Thorn, as Executrix of Estate of Mcauley v Boyd* [2008] NSWSC 326.

<sup>175</sup> [2018] NSWSC 500.

<sup>176</sup> *Moylan v Rickard* [2013] QSC; *Anderson v Anderson* [2013] QSC; *Bird v Bird* [2013] NSWCA 262; *Cohen v Cohen* [2016] NSWSC 336; *Western v Male* [2011] SASC 75.

<sup>177</sup> Sarah Russell, 'The Rise - and Risk - of "Early Inheritance Syndrome"' Sydney Morning Herald (13 June 2017) <<https://www.smh.com.au/opinion/the-rise--and-risk--of-early-inheritance-syndrome-20170613-gwq42d.html>>.

<sup>178</sup> *Alcazar-Stevens v Stevens* [2017] ACTCA 12 [47].

<sup>179</sup> [2013] NSWSC 276.

give him access to funds of his mother, to which he claimed, without justification, he was entitled'.<sup>180</sup> The attorney further claimed that his mother had wanted to give him, in effect, a one third interest in the property which, he believed, justified his actions of obtaining a loan and mortgaging her property.<sup>181</sup> Thus, the attorney felt that he was entitled to deal with the property as he wished because he was to inherit it.

Similar behaviour was exhibited in *Cohen v Cohen*.<sup>182</sup> In this case the attorney was the son of the principal, and the sole executor and beneficiary under her will. The attorney used the EPA to transfer the principal's 'only substantial asset'<sup>183</sup> to himself for nominal consideration. The Court did not identify the purpose of the attorney's improper dealing with his mother's asset (other than to benefit himself). However, statements made by the solicitors for the attorney indicate that he transferred the property to himself because he was to inherit the property under her will and that, by reason of her moderate health and advanced age, the property would soon be disposed of to him under the will.<sup>184</sup>

The notion of 'early inheritance syndrome' may therefore heighten the risk of elder financial abuse in circumstances where a child is appointed as an attorney, particularly if they are the sole attorney, and where they stand to benefit under the will. It is through the appointment of the child as an attorney that they can access the assets to which they feel entitled. The feelings of entitlement may therefore induce attorneys to misuse their power, perhaps even without realizing that they are acting inappropriately.

#### *H Drafting the enduring power of attorney*

Abuse occurred where attorneys were appointed either solely,<sup>185</sup> severally,<sup>186</sup> or jointly and severally.<sup>187</sup> That is, no identified case involved joint attorneys. Cases where sole attorneys

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<sup>180</sup> Ibid 32.

<sup>181</sup> Ibid 17.

<sup>182</sup> [2016] NSWSC 336.

<sup>183</sup> Ibid 66.

<sup>184</sup> Ibid 30, 32.

<sup>185</sup> See for example *Anderson v Anderson* [2013] QSC 008.

<sup>186</sup> *Perochinsky v Kirschner* [2013] NSWSC 400.

<sup>187</sup> *McFee v Reilly* [2018] NSWCA 322.

were acting were quite common,<sup>188</sup> which could obviously help explain the ability of the attorney to perpetrate the abuse. There was a combination of EPAs prepared by solicitors<sup>189</sup> and pre-prepared kits.<sup>190</sup> Suspicious circumstances were also not infrequent at the time of execution. For instance, one principal was legally blind,<sup>191</sup> one was deaf with a question raised as to capacity,<sup>192</sup> and another was subject to family tension.<sup>193</sup> On one occasion a solicitor refused to sign, and the EPA was signed later.<sup>194</sup> Another case noted the presence of undue influence.<sup>195</sup>

### I Solicitor liability

Given the ageing population and increasing incidences of mentally disabling conditions, legal practitioners are becoming increasingly aware of their obligations when preparing EPAs, particularly when there are questions as to the capacity of the principal.<sup>196</sup> Guidelines are available for witnessing EPAs, although there is no accepted national best practice.<sup>197</sup> If a solicitor does not follow the guidelines he or she may face disciplinary consequences.<sup>198</sup>

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<sup>188</sup> See, for example: *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380; *Anderson v Anderson* [2013] QSC 008; *Janson v Janson* [2007] NSWSC 1344; *Spina v Conran Associates Pty Ltd*; *Spina v M and v Endurance Pty Ltd* [2008] NSWSC 326; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729.

<sup>189</sup> See, for example, *Smith v Glegg* [2004] QSC 443.

<sup>190</sup> *Janson v Janson* [2007] NSWSC 1344.

<sup>191</sup> *Smith v Glegg* [2004] QSC 443.

<sup>192</sup> *Janson v Janson* [2007] NSWSC 1344.

<sup>193</sup> *Athony Taverniti and Stephen Domenico Taverniti v Taverniti* [2016] WADC 59.

<sup>194</sup> *Anderson v Anderson* [2013] QSC 008.

<sup>195</sup> *Western v Male* [2011] SASC 75.

<sup>196</sup> T Cockburn and B Hamilton, 'Assessment of Capacity: Disciplinary Issues and Potential Liability' (2009) March *Proctor* 15; B Hamilton and T Cockburn, 'Capacity to Make a Will and Enduring Power of Attorney: Issues New and Old' (2008) December *QLS Journal* 14.

<sup>197</sup> See for example: Office of the Public Guardian (Qld), *Guidelines for Witnessing Enduring Documents* <[https://www.publicguardian.qld.gov.au/\\_\\_data/assets/pdf\\_file/0011/572357/OPG-Factsheets\\_Guidelines-for-Witnessing-Enduring-documents.pdf](https://www.publicguardian.qld.gov.au/__data/assets/pdf_file/0011/572357/OPG-Factsheets_Guidelines-for-Witnessing-Enduring-documents.pdf)>; the British Medical Association and the Law Society, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (Law Society Publishing, 4th ed, 2015); American Bar Association Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005); American Bar Association Commission on Law and Aging, American Psychological Association and National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (2006); and American Bar Association Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008).

<sup>198</sup> *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commission v de Brenni* [2011] QCAT 340; *Legal Services Commission v Comino* [2011] QCAT 387.



*Anderson v Anderson*<sup>199</sup> illustrates the challenges faced by solicitors who are engaged to prepare EPAs, and estate planning more generally, for older clients where capacity may be in issue. In *Anderson*<sup>200</sup> the solicitor was instructed to prepare a will, property transfer and an EPA. The solicitor had some doubts as to the client's capacity and recommended that the client obtain a certificate from a geriatrician, advising on her capacity. Upon receipt of the certificate, which noted that the older client was able to 'sign documentation of her own free will',<sup>201</sup> the solicitor proceeded to witness the client's will and property transfer. However, the solicitor was not satisfied that the client understood the nature and effect of the EPA and did not proceed to witness the execution of the document.<sup>202</sup> Of note, the reference to 'free will' actually refers to the question of undue influence which is a distinct issue from capacity because in order for a person to be able to exercise her or his own free will, they have to have a 'will'. That is, they require the capacity to be able to make decisions, free or otherwise.<sup>203</sup> This serves to highlight the complexity of capacity and its assessment which will now be discussed.

### *J Capacity*

Capacity is time and decision specific and each decision will have its own standard. Age alone does not indicate diminished or lost capacity, or an increased vulnerability to elder abuse. Nevertheless, cognition can be an issue especially for people in the 'old, old' cohort.<sup>204</sup> Similarly, a diagnosis of a mentally disabling condition, such as dementia, does not automatically equate to a loss of capacity but, again, it should be explored in relation to any potential effects on the capacity in question.<sup>205</sup>

As stated above, capacity is a fluid and challenging concept, and one which can heighten the risk of elder financial abuse as demonstrated by, for example, *Western v Male*.<sup>206</sup> In *Western*, the principal was a 91-year-old female living in an aged care facility who suffered from cognitive dysfunction and impairment.<sup>207</sup> Her son was appointed as her attorney under an EPA. The son regularly debited large amounts from the principal's bank account to purchase goods

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<sup>199</sup> [2013] QSC 008.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid 20.

<sup>202</sup> Ibid 16.

<sup>203</sup> For more on capacity see, for example, Purser (n 31).

<sup>204</sup> Purser et al (n 6).

<sup>205</sup> See Purser (n 31).

<sup>206</sup> [2011] SASC 75.

<sup>207</sup> Ibid 240.

from Harvey Norman, Office Works, David Jones and various supermarkets. The most significant amount of money that was inappropriately obtained was \$17,000. The evidence showed that the principal was unaware of the true state of affairs with respect to her account<sup>208</sup> and that she did not have an understanding of the management of her accounts.<sup>209</sup> This evidence supports the conclusion that the principal's cognitive impairment and limited ability to monitor the activities of her attorney was instrumental in the misuse of the EPA.

It is clear that diminished or lost capacity can inhibit a principal's ability to seek redress. Further, as *Western v Male*<sup>210</sup> demonstrates, even if the principal was aware of the actions of her attorney she had lost a substantial amount of money as a result of the misuse of power and, consequently, may not have a sufficient level of funds available to seek legal assistance. The loss of capacity and, subsequently, funds has been recognised as one of the main barriers to accessing justice for older people.<sup>211</sup>

#### *K The cost of accessing formal justice*

This raises the issue of the cost associated with accessing formal justice mechanisms and the utility of other avenues available for redress, such as tribunals.<sup>212</sup> The later point is recognised in *Smith v Smith*.<sup>213</sup> In this case, the attorney was ordered to pay more than \$1.5 million to the principal's estate for misappropriating assets through the misuse of an EPA. The Court strongly emphasised to all parties that recourse was available to the Guardianship Division of the Civil and Administrative Tribunal of New South Wales and could have prevented the attorney's misuse of the EPA.<sup>214</sup> Further, that an application to the Guardianship Division was usually the most cost-effective approach.<sup>215</sup>

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<sup>208</sup> Ibid 192.

<sup>209</sup> Ibid 263.

<sup>210</sup> Ibid.

<sup>211</sup> Rosslyn Monro, 'Elder Abuse and Legal Remedies: Practical Realities?' (2002) 81 *Older People and the Law* 41, 44; Australian Law Reform Commission (n 2) 141.

<sup>212</sup> Ann Lyons, 'The Queensland Guardianship and Administration Regime- Balancing the Right to Autonomy with the Right to have Adequate and Appropriate Decision-Making Arrangements' (paper presented at AIJA Annual Conference, Brisbane, 13 July 2002).

<sup>213</sup> [2017] NSWSC 408.

<sup>214</sup> Ibid 102.

<sup>215</sup> Ibid.

Doubt as to the affordability of the various avenues for redress, at all levels, may be gleaned from suggestions in the cases that experienced legal representation is being utilised in tribunal proceedings. For example, in *Ash v Ash*<sup>216</sup> affidavit material showed that the attorney had received legal advice from a barrister in relation to a proceeding in the Victorian Civil and Administrative Tribunal. The matter concerned several unauthorised dealings by the attorney. This demonstrates that, despite aiming to provide a flexible and informal approach, the reality is that making and progressing an application in the civil and administrative tribunals might nevertheless be (almost) as daunting and complex for the lay person as a court application. Therefore, further empirical research would be useful to ascertain if and how people access justice, at all the different levels, and if not, why.

#### *L External stakeholders - the role of banks*

In *Perochinsky v Kirschner*<sup>217</sup> the Court commented that it was unlikely that the bank in question required that the defendant produce the EPA on dealing with the principal's account. This comment is particularly significant considering the new Australian Banking Code of Practice (ABCP) which was introduced on 1 August 2018 and which takes effect on 1 July 2019.<sup>218</sup> The ABCP was developed to improve banking services and standards, and to better meet community expectations. The Banking Code Compliance Committee (BCCC) has been created to monitor compliance and enforce sanctions in the event of a breach of the ABCP. Anyone can refer an alleged breach to the BCCC. Chapter 14, section 38 of the ABCP requires banks to be aware of customers who may be vulnerable, particularly any person(s) experiencing age related impairment, cognitive impairment or elder abuse. This includes training staff to act with sensitivity, respect and compassion for any person who appears to be vulnerable.<sup>219</sup>

As discussed above, the law and assessment paradigms around evaluating financial capacity and the valid operation of EPAs is not well understood. This is exacerbated by the hidden nature of elder abuse and difficulties identifying cognitive impairment(s). Given the

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<sup>216</sup> [2016] VSC 577.

<sup>217</sup> [2013] NSWSC 400.

<sup>218</sup> Australian Banking Association, 'Banking Code of Practice' (September 2018) <[https://www.ausbanking.org.au/images/uploads/Banking\\_Code\\_of\\_Practice\\_2019\\_web.pdf](https://www.ausbanking.org.au/images/uploads/Banking_Code_of_Practice_2019_web.pdf)>.

<sup>219</sup> *Ibid* s 39.

requirements of the new ABCP and the need to respond appropriately to those who ‘appear to be in a vulnerable situation’, this poses some significant challenges for the banking industry moving forward given their appearance in cases of elder financial abuse and role as gatekeepers of people’s funds.

## V MAKING IT REAL: PRACTICAL RISK MANAGEMENT STRATEGIES

Elder financial abuse is a pervasive problem confronting society generally. It is one in which a number of stakeholders have a role to play. Legal professionals in particular need to implement best practice when it comes to the drafting and execution of EPAs, especially in relation to capacity assessment. This section will offer some risk management strategies for legal professionals. These strategies are based on the themes identified in the cases examined (as discussed above), the literature, and practical experience.<sup>220</sup>

To this end, lawyers should have regard to the following:

- a) Have a face-to-face meeting with the client on her or his own, or at least provide an opportunity for private instructions.
- b) Carefully document the scope and limits of the retainer, particularly where the client and other family members present with instructions, or instructions are initially given via telephone. Do not act for more than one client and be mindful of professional and ethical rules as well as conflicts of interest. Consider whether it is appropriate for the client or other family members to take independent advice.
- c) Carefully document instructions, making notes of questions and responses and in some cases consider having an additional witness to the giving and taking of instructions.
- d) Ensure the particular matters relating to capacity are considered.<sup>221</sup>

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<sup>220</sup> See, for example: Cockburn and Hamilton (n 196); Jane Lonie and Kelly Purser, ‘Assessing Testamentary Capacity from the Medical Perspective’ (2017) *Australian Bar Review* 44; and Kelly Purser and Tuly Rosenfeld, ‘Evaluation of Legal Capacity by Doctors and Lawyers: The Need for Collaborative Assessment’ (2014) 201(8) *Medical Journal of Australia* 483, 483-5.

<sup>221</sup> For example, in Queensland see *Powers of Attorney Act 1998* (Qld) s 41.

- e) Refer to relevant guidelines in the making and executing of the EPA as well as in relation to the assessment of capacity.<sup>222</sup>
- f) Consider the involvement of medical staff for an opinion as to capacity if the client has a diagnosed condition affecting decision-making capacity or the solicitor forms a view that the client may have impaired capacity from the process of questioning.<sup>223</sup> Generally a patient's general practitioner will be the best source, but sometimes an expert opinion may need to be sought. What can or should be done will also depend on the specific circumstances, in particular the urgency with which the EPA is to be prepared and whether there is a radical (and perhaps) unexplained change compared to a previous document.
- g) Ask open-ended rather than closed questions.
- h) Where the client is in hospital or a nursing home, consider liaising with nurses and/or other medical staff for practical advice on the optimum time to take instructions or execute the EPA, including advice as to the effects of any medications and/or co-morbidities.
- i) Consider who is being appointed as the attorney(s) and the manner in which they are being appointed, for example, several, several and joint, or joint. Discuss the implications of this with the principal.
- j) Discuss also wider estate planning implications, for example, whether the principal has a valid will and advance health directive. The intersection between the financial and health attorneys can be particularly important, and disruptive, if different people are appointed and conflict ensues.<sup>224</sup>

Lawyer recognition of and attention to the main risk factors for elder financial abuse when preparing enduring powers of attorney will assist in the prevention of financial abuse. As discussed in this paper, diminished financial capacity is a significant risk factor for that abuse.

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<sup>222</sup> See, for example: See for example: Office of the Public Guardian (Qld) (n 195); the British Medical Association and the Law Society (n 195); American Bar Association Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group (n 195); American Bar Association Commission on Law and Aging, American Psychological Association and National College of Probate Judges (n 195).

<sup>223</sup> On this see: Purser (n 31); and Purser and Rosenfeld (n 220).

<sup>224</sup> This checklist draws from Cockburn and Hamilton (n 196) 17. For best practice tips when assessing testamentary capacity, see: Lonie and Purser (n 220).

Adopting best practices, as suggested in the above recommendations, addresses the inadequacies of the current *ad hoc* approach to capacity assessment. Considering issues relating to estate planning more generally equips individuals with knowledge that will assist them in preparing for their own future, a future in which they may not possess financial capacity and/or be exposed to elder financial abuse. Knowledge is also a significant factor in facilitating access justice, and, through knowledge translation legal professionals can play enable persons to protect themselves in a way that maximizes autonomy. Knowledge includes an understanding of remedies, causes of action, and what types of remedies are generally awarded in relation to which causes of action so that clients can plan or proceed accordingly.

## VI CONCLUSION

Ideally, EPAs are a protective tool designed to facilitate the appointment of an attorney by a principal for a time when the principal no longer has the requisite legal capacity necessary to be able to make her or his own legally binding decisions. However, evidence suggests that in a significant number of cases, elder financial abuse is facilitated through the misuse of these instruments.<sup>225</sup> This paper examined issues arising in relation to access to formal justice mechanisms for alleged abuses of an EPA including the nature of any relief ordered.

Before examining the issues in this area, the terms ‘older’ and ‘EPA’ were defined. We then discussed the fundamental concepts of financial capacity, elder abuse and elder financial abuse. Some of the key themes were then explored, including elder abuse victims and who is discovering the abuse, the main risk factors for abuse, the value and type of transactions resulting from elder financial abuse, jurisdictional questions, access to justice and issues around delay in the commencement of proceedings, the nature of the form of relief sought, any defences raised and remedies awarded, perpetrator characteristics, abuse arising from the notion of entitlement to an early inheritance, the drafting and terms of the EPA, solicitor liability, fundamental questions of capacity and its assessment, the cost of accessing justice mechanisms, and finally, the role of banks as external but key stakeholders in both the identification and prevention of elder financial abuse.

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<sup>225</sup> Joosten, Dow and Blakey (n 4) 19.

Formal justice mechanisms do not appear to be commonly sought out where there is an alleged breach of an EPA – especially considering the statistics evidencing the frequency with which elder financial abuse is occurring, statistics that are alarming even without taking into account the underreporting that is suspected to occur. The characteristics of the victims and perpetrators of elder financial abuse from the cases seem to match the literature, although further empirical research would obviously be beneficial in ascertaining this with certainty. There seems to be a heavier reliance on equitable rather than statutory relief. However, this could be explained by the timing of the introduction of the legislation in the various jurisdictions in relation to when proceedings were commenced, but also by the flexibility of the relief offered in equity. There is also a trend towards pleading multiple causes of action in the alternative (both equitable and statutory claims), which tactically broadens the chances of success (depending on the individual facts). The barriers to accessing formal justice mechanisms remain relatively unknown and also require further empirical research exploring why people are not accessing them. What has emerged is the role that stakeholders, such as banks, have in the protection of vulnerable older people and in the prevention of elder financial abuse. Lawyers too have a significant role to play, both in drafting specific EPA documents, but also in ensuring best practice in relation to capacity assessments and in providing estate planning advice more generally.

EPAs provide a vehicle through which to preserve autonomy by appointing a trusted person(s) as a substitute decision-maker and yet, at the same time expose vulnerable older people to the risk of abuse. Action is needed to help preserve individual autonomy whilst protecting vulnerable older people from financial abuse. Fostering access to justice is one avenue through which this can be achieved. However, to do so successfully requires a more comprehensive, empirical knowledge of some of the themes identified above which are emerging from the decided cases, particularly the barriers and enablers to accessing justice where an EPA has been misused.

A loss of capacity can substantially increase a person's vulnerability to abuse. The individual is no longer able to make their own, legally recognised decisions and thus becomes reliant upon others to do so for them. The themes identified here have examined how this vulnerability can be abused through the misuse of an enduring power of attorney document by the person or

persons appointed to act in the best interests of the vulnerable person. Recommendations have thus been made to add to the discourse around how, practically, to adopt best practice to begin to address the abuse of vulnerable people through the misuse of the very documents intended to protect them.