

# Elder abuse – it’s criminal!

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Practitioners need to be aware of the available criminal law consequences of elder abuse.



“Where, after all, do universal human rights begin? In small places, close to home — so close and so small that they cannot be seen on any maps of the world . . . Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.” – Eleanor Roosevelt, United States First Lady, 1933 to 1945.

Criminal law consequences do not immediately come to mind for most lawyers. Generally, when a client consults, many of us think in terms of civil remedies. This is especially the case in elder abuse and succession law matters. However, we may be ignoring avenues of redress available within the criminal law that would serve to provide appropriate remedies and protections for the complex situations our clients face.

This column outlines a few of these provisions.<sup>1</sup> It is important that, if a client considers pursuing these avenues, they receive advice in concert with an expert criminal lawyer.

There are a number of reasons why an expert criminal lawyer is recommended. In some circumstances, when criminal charges are pursued, it may result in a stay of civil proceedings.<sup>2</sup> Also, criminal offences require a higher standard of proof, with the criminal justice system involving complex, specialised rules of evidence. Further, raising a complaint necessitates liaising with police officers, and that process is enhanced if a client is advised on the proofs and documents necessary to found a complaint.

## Wills and powers of attorney

Increasingly, clients complain of missing wills, powers of attorney (POAs) or the dubious nature of the documents. There are a few criminal law provisions which

may assist to protect their rights, punish the wrongdoer and deter undesirable conduct. The authors use Queensland legislation as illustration, but the footnotes contain equivalent provisions in other jurisdictions.

## Making or revoking a POA

Sections 26 and 61 of the *Powers of Attorney Act 1998* (Qld) makes it an offence to “dishonestly induce the making or revocation of power of attorney”.<sup>3</sup> The maximum penalty for breach of this provision is 200 penalty units, which currently translates to a fine of \$25,230. “Dishonest” has its ordinary, common meaning, which includes an intention to defraud or achieve an end by reason of a statement that is knowingly incorrect and has a dishonest intent. “Induce” includes to offer a promise, a threat or a benefit. It can include things other than money, such as a promise to do an act or omission to benefit another person.

## Concealing, stealing or damaging a testamentary document

It is an offence to defraud or conceal the whole or part of a testamentary document in every jurisdiction. As an example, in both Queensland and Western Australia, the penalty for this offence is 14 years’ imprisonment.<sup>4</sup>

Similarly, stealing a testamentary instrument exposes the perpetrator to 14 years’ imprisonment in Queensland.<sup>5</sup> Willfully and unlawfully destroying or damaging a testamentary document will expose the perpetrator to 14 years’ imprisonment.<sup>6</sup>

In South Australia, there is an offence of dishonestly dealing with documents, which would cover concealing a testamentary document.<sup>7</sup>

## Forgery and uttering

It is an offence to forge and/or utter (knowingly publish or pass) a forged or altered document.<sup>8</sup> In Queensland, where that document is a testamentary instrument, the penalty is 14 years’ imprisonment, and where it is a POA, the penalty is seven years’ imprisonment.<sup>9</sup>

## Broader offences

### Extortion and blackmail

It is an offence for a person to demand money or a benefit by reason of a threat or menace. So, for example, if a person is threatened into making changes to their will or POA, then this provision may be breached. In Queensland, the minimum penalty for this provision is 14 years’ imprisonment.<sup>10</sup>

In the Northern Territory, it is an offence to make demands with menaces with intent to obtain a benefit or to cause detriment or injury and is punishable by 14 years in prison.<sup>11</sup> The offence of blackmail carries a prison term of up to 15 years in Victoria<sup>12</sup> and up to 14 years in NSW.<sup>13</sup>

The Northern Territory also has a crime by deception which carries a prison term of seven years,<sup>14</sup> and in the ACT, up to a \$160,000 fine or 10 years in prison, or both.<sup>15</sup>

Victoria and the ACT maintain a separate offence for dishonestly obtaining a financial advantage by deception.<sup>16</sup>

## Fraud

It is an offence for someone to use another person’s property by dishonestly applying it to their own benefit.<sup>17</sup> In Queensland, the penalty for breach of this provision is five years’ imprisonment. For example, when a POA is misused, this provision may apply. The penalty increases where

it involves sums of more than \$30,000 (up to 14 years' imprisonment),<sup>18</sup> and from \$30,000 to \$100,000 (up to 20 years' imprisonment).<sup>19</sup>

By way of example, in *R v Naidu*,<sup>20</sup> financial abuse was prosecuted as fraud. In that case, the appellant was convicted at trial of two counts of fraud for receiving over \$370,000 by way of gifts from the victim who was aged in his late 70s and suffered from dementia. An appeal against the conviction was dismissed.

In Tasmania, the definition of "fraud" is broader, covering causing a detriment to another person even if there is no advantage to the perpetrator, as well as inducing someone to do or abstain from doing something.<sup>21</sup> The definition is very similar in Western Australia.<sup>22</sup>

## Stealing

Theft applies in the circumstances of elder abuse.<sup>23</sup> A basic definition of theft is: "A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it".<sup>24</sup>

Unauthorised withdrawals by an attorney under POA for their own benefit have been prosecuted under these provisions.

## Crimes against the person

Each jurisdiction's criminal legislation contains a number of provisions for the prosecution of perpetrators of abuse, generally and specifically related to elderly people. For example, in Queensland, these include particular offences of violence such as assault.<sup>25</sup> However, when the assault involves a person who is 60 years old or more, under s 340(1)(g) of the *Criminal Code 1899* (Qld), the penalty is seven years' imprisonment.<sup>26</sup>

One aspect of elder abuse, namely, neglect, is also addressed in the criminal legislation. For example, in Queensland the "failure to supply necessities" is outlined as an offence under s 324 of the *Criminal Code 1899* (Qld).<sup>27</sup> This offence imposes a duty to provide the "necessaries of life" on someone who has charge of another person who is unable to provide themselves those necessities. This duty only arises when a person has the "charge" of another (for example, when a person is the primary carer of an older person). Hence, these provisions, while technically applicable to neglect by a carer of an older person, will not have any application to other types of abuse. Deprivation of

necessaries may include failure to obtain medical attention or to properly feed and clothe the elderly person.

There is also a myriad of punishments for battery, assault, unwanted sexual contact and use of force.<sup>28</sup> There are also protections against these in the *Aged Care Act 1997* (Cth).

## Conclusion

Man's inhumanity towards fellow man can be endless in its permutations, but the criminal law can be a valuable mechanism to not merely punish those who have broken the law, but also to deter like-minded people from committing these crimes as well as providing a means of restitution.

Although criminal law offers punishment for many forms of elder abuse, the difficulty with these offences is that they are often committed privately, within a family group, and behind closed doors where the only witnesses are frightened, isolated or lacking the capacity to make or sustain a complaint.

The defences most often raised include consent or a gift. In the case of injury to the person, the reason often proffered is harm by accident. For these reasons, it is important to keep an open mind to the possible avenues of redress and consult with an experienced criminal lawyer to identify a resolution pathway that best suits your client. When the person does not have capacity, it may be necessary to involve the office of the public guardian/advocate.

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## References

- 1 The references here are non-exhaustive; many other provisions across numerous pieces of legislation may apply.
- 2 This is due to the complexity of giving evidence.
- 3 Ss 26 and 61 of the *Powers of Attorney Act 1998* (Qld). See also ss 36 and 54 of the *Powers of Attorney Act 2003* (NSW); s 135 of the *Powers of Attorney Act 2014* (Vic); s 90 of the *Powers of Attorney Act 2006* (ACT); s 261 of the *Criminal Code Act 1983* (NT).
- 4 S 399(c) of the *Criminal Code 1899* (Qld); s 380 of the *Criminal Code Act Compilation Act 1913* (WA).
- 5 S 398 of the *Criminal Code 1899* (Qld).
- 6 S 469 of the *Criminal Code 1899* (Qld).

- 7 S 140 of the *Criminal Law Consolidation Act 1935* (SA).
- 8 S 488 of the *Criminal Code 1899* (Qld); s 83A of the *Crimes Act 1958* (Vic); s 140 of the *Criminal Law Consolidation Act 1935* (SA); s 253 of the *Crimes Act 1900* (NSW); s 255 of the *Criminal Code Act 1983* (NT); s 346 of the *Criminal Code 2002* (ACT).
- 9 S 488(1) of the *Criminal Code 1899* (Qld).
- 10 S 415 of the *Criminal Code 1899* (Qld); s 87 of the *Crimes Act 1958* (Vic); s 172 of the *Criminal Law Consolidation Act 1935* (SA); s 241 of the *Criminal Code Act 1924* (Tas); s 342 of the *Criminal Code 2002* (ACT).
- 11 S 228 of Sch 1 to the *Criminal Code Act* (NT).
- 12 S 87 of the *Crimes Act 1958* (Vic).
- 13 S 249K of the *Crimes Act 1900* (NSW).
- 14 S 227 of Sch 1 to the *Criminal Code Act* (NT).
- 15 S 326 of the *Criminal Code 2002* (ACT).
- 16 S 332 of the *Criminal Code 2002* (ACT); s 82(1) of the *Crimes Act 1958* (Vic).
- 17 S 408C of the *Criminal Code 1899* (Qld); s 82 of the *Crimes Act 1958* (Vic); s 192E of the *Crimes Act 1900* (NSW); s 253A of the *Criminal Code Act 1924* (Tas); s 344 of the *Criminal Code 2002* (ACT); s 284 of Sch 1 to the *Criminal Code Act* (NT).
- 18 S 408C(2)(d) of the *Criminal Code 1899* (Qld).
- 19 S 408C(2A)(a) of the *Criminal Code 1899* (Qld).
- 20 [2008] QCA 130.
- 21 S 253A of the *Criminal Code Act 1924* (Tas).
- 22 S 409 *Criminal Code Act Compilation Act 1913* (WA).
- 23 Ss 14 and 72 of the *Crimes Act 1958* (Vic); s 398 of the *Criminal Code 1899* (Qld); s 378 of the *Criminal Code Act 1913* (WA); s 226(1) of the *Criminal Code Act 1924* (Tas); s 209(1) of Sch 1 to the *Criminal Code Act* (NT); s 117 of the *Crimes Act 1900* (NSW); s 308 of the *Criminal Code 2002* (ACT); s 134 of the *Criminal Law Consolidation Act 1935* (SA).
- 24 S 72 of the *Crimes Act 1958* (Vic).
- 25 S 340 of the *Criminal Code 1899* (Qld).
- 26 *R v Laing* [2008] QCA 317.
- 27 S 45 of the *Civil Law (Wrongs) Act 2002* (ACT); s 44 of the *Crimes Act 1900* (NSW); s 14 of the *Criminal Law Consolidation Act 1935* (SA); s 26 of the *Wrongs Act 1958* (Vic); s 5K of the *Civil Liability Act 2002* (WA).
- 28 S 54 of the *Crimes Act 1900* (ACT); s 611 of the *Crimes Act 1900* (NSW); s 192 of the *Criminal Code Act* (NT); s 46 of the *Criminal Law Consolidation Act 1935* (SA); s 2A of the *Criminal Code Act 1924* (Tas); s 41 of the *Crimes Act 1958* (Vic); s 325 *Criminal Code Compilation Act 1913* (WA).