

# Elder abuse – it's criminal



with Christine Smyth



If you are not a criminal lawyer, 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 month's column outlines a few of these provisions.<sup>1</sup> It is important that, if a client considers pursuing these avenues, they must receive advice in concert with an expert criminal lawyer.

There are a number of reasons. 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.

## Wills and powers of attorney

Increasingly, clients complain of missing wills, powers of attorney (POAs), or the dubious nature of the documents. Some provisions which may assist include the following.

### Make or revoke POA

Section 26 of the *Powers of Attorney Act 1998* (Qld) makes it an offence to "dishonestly induce the making or revocation of power of attorney". 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.

### Criminal Code 1899 (Qld)

**Concealing** – S399(c)<sup>3</sup> This makes it an offence to defraud or conceal the whole or part of a testamentary document. The penalty for this offence is 14 years' imprisonment.

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.

**Stealing** – S398<sup>4</sup> If the thing stolen is a testamentary instrument, it exposes the perpetrator to 14 years' imprisonment.

**Damage** – S469<sup>5</sup> Willfully and unlawfully destroying or damaging a will exposes the perpetrator to 14 years' imprisonment.

**Forgery** – S488<sup>6</sup> It is an offence to forge and/or utter a document. Where that document is a testamentary instrument, the penalty is 14 years' imprisonment. Where it is a POA the penalty is seven years' imprisonment.

**Extortion** – S415 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. The minimum penalty for this provision is 14 years' imprisonment.

**Fraud** – S408C It is an offence for someone to use another person's property by dishonestly applying it to their own benefit. 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 more than \$30,000 (up to 14 years' imprisonment),<sup>7</sup> and from \$30,000 to \$100,000 (up to 20 years' imprisonment).<sup>8</sup>

### Crimes against the person

The *Criminal Code* contains a number of provisions for the prosecution of perpetrators of abuse, generally and specifically related to elderly people. These include particular

offences of violence such as assault (s340); when the assault involves a person who is 60 years old or more, under s340(1)(g) the penalty is seven years' imprisonment.<sup>9</sup>

One aspect of elder abuse, namely neglect, is addressed in the *Criminal Code* offence, 'failure to supply necessities' (s324). This offence imposes a duty on someone who has charge of another person unable to provide themselves with the 'necessaries of life' to provide 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.

### Conclusion

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 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 adult does not have capacity, it may be necessary to involve the office of the Adult Guardian.

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#### Notes

<sup>1</sup> The references here are non-exhaustive; many other provisions across numerous pieces legislation may apply.

<sup>2</sup> This is due to the complexity of giving evidence.

<sup>3</sup> This provision applies whether the testator is alive or dead.

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

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> S408C(2)(d).

<sup>8</sup> S408C(2A)(a).

<sup>9</sup> R v Laing [2008] QCA 317.