THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA

Report by – Mark Warry Crofton – 2011 Churchill Fellow

To Investigate Guardianship Laws, Policy and Education in Order to Prevent and Prosecute Elder Financial Abuse

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Date 4 July 2012
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1. **Introduction**

Whilst attributed to many, United States Senator Hubert Humphrey perhaps most eloquently put the imperative when he said:-

“the moral test of Government is how that Government treats those who in the dawn of life, the children, those who in the twilight of life the elderly and those who are in the shadows of life, the sick the needy and the handicapped”\(^1\)

Mahatma Ghandi succinctly paraphrased “a nation’s greatness is measured by how it treats its weakest members”.

The opportunity afforded to me by the Churchill Trust is one which permitted me to review and investigate the ways the other countries deal with some of their most vulnerable members – the elderly who have some decision-making incapacity against financial abuse.

I am indebted to the Trust for its support.

I would like to acknowledge the Inaugural President of the Guardianship and Administration Tribunal in Queensland, (now) Her Honour Justice Lyons who as President of the Tribunal demonstrated not only a deep understanding of the law and principles underpinning it but a profound compassion for adults with an incapacity in all of her dealings with them.

I appreciate greatly the support of my employer, the Public Trustee of Queensland – for it is through my day to day work that I have at least from a very practical perspective been able to gain some insight and knowledge and perhaps even make a contribution in respect of addressing (if not combating) elder abuse in respect of incapacity in Queensland.

Finally I would like to acknowledge and thank my immediate family – my father from whom I was inculcated with a deep and early passion for social justice, my loving wife Catherine and my children Nicholas, Grace and Geoffrey.

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\(^1\) Last speech of Hubert Humphrey November 1, 1977 Washington DC.
## Executive Summary

**Name:** Mark WARRY Crofton  
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**Position:** Deputy Public Trustee and Official Solicitor  
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**Project Description:** My project focussed upon investigating Guardianship laws, policy and education – with an emphasis upon the prevention and prosecution of elder financial abuse particularly amongst those who suffered some form of decision-making incapacity.

**Highlights:** The fellowship enabled me to travel to and study three different jurisdictions – the United States, British Columbia in Canada and England.

A singular highlight it is not possible to identify.

I met with some extraordinary experts in California including Connie Draxler the Public Guardian in Los Angeles as well as other nationally respected fiduciaries.

In Washington DC I was able to meet with some of the leading experts in the area of elder abuse including Richard Van Duizend, Sally Hurme, Erica Wood and Lori Stiegel – all prolific authors and leading policy contributors.

In Canada I was hosted generously by the Public Guardian and Trustee and gained some important insights during interviews at the Canadian Centre for Elder Law, at British Columbia University.

In England I received generous support from the Public Guardian, the Official Solicitor to the Senior Courts and most particularly the head of the Court of Protection in England, Judge Denzil Lush.

All those whom I met were incredibly generous.

**Lessons and Dissemination:** Whilst difficult to distil in respect of preventing addressing elder abuse some themes did emerge:

- The issue of elder abuse is a pressing one and beginning to explode in dimension with the ageing demographic.
- There is no singular effective response but rather complex and linked strategies which might be engaged to prevent and address elder abuse.
- Community consciousness, education for those involved including older people, their carers, substitute and support decision-makers as well as those members of institutions who come into contact with elders is a key.
- A comprehensive legislative framework which directly addresses elder abuse in necessary. The components of such a framework might include:
  - Sanctions criminal or civil for elder abuse (to punish if not deter)
  - Access to contemporary and effective substitute and support decision-making for those in need.
  - Effective prudential oversight for substitute and support decision-makers.
I am hopeful that the sharing of this knowledge and insight might be advanced through at least:

- The delivery of some papers or at least comments in relation to them at an imminent elder law conference for the Queensland Law Society, and later Society of Trusts and Estates Practitioners Conference and then further in 2012 an International Conference on Guardianship.
- I also hope to share the experience and learnings with other Public Trustees and Guardians in Australia, and the Department of Attorney-General and Justice within my jurisdiction in Queensland.
- Finally I am hopeful that the insights might in a practical way assist my employer – the Public Trustee of Queensland.
3. **Programme**

The Churchill Trust enabled me to visit and speak to industry stakeholders, institutional actors and experts in the area of financial elder abuse in three jurisdictions – the United States of America (California and Washington DC), Canada, particularly British Columbia and England.

The following is a table of those with whom I met and to whom I extend my appreciation for their time:-

<table>
<thead>
<tr>
<th>Jurisdiction and Organisation</th>
<th>Individuals</th>
<th>Nature of the Organisation Represented</th>
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<tbody>
<tr>
<td>United States Of America</td>
<td>Los Angeles County Department of Mental Health - Public Guardian</td>
<td>The Public Guardian for Los Angeles County is an institution of the Government, part of the Department of Mental Health. The Public Guardian acts as Conservator of last resort, and has a significant role in assisting the Court of Probate in respect of guardianship matters and investigating reports of elder financial abuse.</td>
</tr>
<tr>
<td>Private fiduciary Association of California</td>
<td>Judge Aviva Bobb, Emily Stuhlbarg, Richard Norene, Rita D Michel And other Professional, Licensed Fiduciaries</td>
<td>Attended a seminar and discussions with representatives of the Private Fiduciary Association of California (Southern). Judge Aviva Bobb, who served as a Probate Judge (now retired) on the Superior Court in California offered insights in respect of this issue. I spoke to a large number of those who are private fiduciaries (including acting as Conservator of adults with an incapacity) including those from Stuhlbarg Norene &amp; Associates, a professional fiduciary service and the Secretary of the Association.</td>
</tr>
<tr>
<td>Professional Experts – California in respect of Fiduciaries</td>
<td>Julia Nelson, Dan Stubbs, Carol Peters</td>
<td>Julia Nelson is a respected professional fiduciary in Los Angeles and within the Professional Fiduciary Association in California. Dan Stubbs is also a Professional Fiduciary of Stubbs &amp; Associates, and holds the esteemed position of Master Guardian within the United States. Carol Peters is an Attorney at Law specialising in Elder Law issues.</td>
</tr>
<tr>
<td>National Centre for State Courts (NSCS) (Centre for Elders and the Courts) Washington DC</td>
<td>Richard Van Duizend, Brenda Uekert</td>
<td>Richard Van Duizend is the Principal Court Management Consultant at the National Centre for State Courts in Washington DC. The National Centre is a private (not for profit) organisation providing research, evaluation, training and technical assistance for the Courts. Richard and Brenda are both experts in the area of elder abuse as it impacts upon the work of the Courts in the United States.</td>
</tr>
<tr>
<td>American Bar Association – (Commission on Law and Ageing) Washington DC</td>
<td>Erica Wood, Lori Stiegel</td>
<td>Erica Wood is the Assistant Director, ABA Commission on Law and Aging – Lori Stiegel is a Senior Attorney at the Commission. Both are experts in the area of Elder Law.</td>
</tr>
<tr>
<td>AARP Washington DC</td>
<td>Sally Hurme</td>
<td>AARP, previously the American Association of Retired Persons has a membership in excess of 38M members. Sally Hurme is a world renowned expert in the area of elder abuse in particular and more broadly legal issues impacting older persons.</td>
</tr>
<tr>
<td>Country</td>
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<td>Key People</td>
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<tr>
<td>Canada</td>
<td>Canadian Centre for Elder Law - British Columbia Law Institute (BCLI)</td>
<td>Krista James, National Director Canadian Centre for Elder Law Jim Emmerton, Executive Director BCLI Kevin Zakoski, Staff Lawyer BCLI</td>
</tr>
<tr>
<td></td>
<td>Public Guardian &amp; Trustee</td>
<td>Catherine M Romanko - Public Guardian &amp; Trustee Kimberley Azyan, Director Services to Adults Public Guardian &amp; Trustee Jennifer Davenport, Deputy Public Guardian &amp; Trustee Alison M Blair, Director Client Finance and Administrative Services</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Court of Protection, England</td>
<td>Judge Denzil Lush</td>
</tr>
<tr>
<td></td>
<td>Official Solicitor to the Senior Courts</td>
<td>Alastair Pitbaldo - Official Solicitor Janet Ilett, Senior Lawyer - Official Solicitor</td>
</tr>
<tr>
<td></td>
<td>Public Guardian, London and Birmingham</td>
<td>Alan Eccles – Public Guardian Jim Twist – Investigations Jill Martin, Legal Section Angela Johnson, Head of Practice Gary Fisher, Complaints Unit Manager Sheila Mistry, Safe Guardian Team</td>
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4.1 The Issue Defined: Definitions of financial elder abuse vary between the jurisdictions considered and by academics.

A robust definition for the purposes of this paper will suffice, borrowed from that adopted by Monash University in its report "prevalence of financial elder abuse in Victoria"2:-

"(Financial Abuse includes) the illegal use, improper use or mismanagement of a person’s money, property or financial resources by a person with whom they have a relationship implying trust".

The age imperative for the purpose of the discussion – "Elder" – whilst not without variation as between legislation and studies – can for these purposes be defined to extend to those aged greater than 64.

That which is focal to a definition of financial elder abuse is essentially damage or loss in respect of an older person’s financial affairs, with the imperative “abuse” connoting that the damage or loss must be caused by some form of mistreatment (as for example, employed in the definition of abuse in section 1, chapter 6 of the Adult Guardianship Act which operates in British Columbia in Canada)3.

The forms of financial abuse reflect the gambit to which the definition implies; the loss of money, property including real property and chattels.

Common forms or illustrations of financial elder abuse include:-

- The direct misappropriation or misuse of money, property or assets.
- The exercise of improper influence (typically at law defined as undue influence) to compel the gifting away of property, or transfer at an undervalue.
- The failure by a person caring for or in a fiduciary position of decision-making to meet the living expenses of the older person including failure to pay nursing home fees (frequently a first indicator of abuse).
- The misuse of (enduring) powers of attorney by a person appointed as the agent (or attorney) to benefit themselves, their close relatives or business associates.
- Exerting improper influence on the older person to sign cheques or even act as surety – or guarantor for loans.

4.2 Elder Abuse – The Demographics and Prevalence: That which has galvanised engagement and concern about elder abuse at a social political and economic level includes an unyielding growth and aging of most populations, including Australia.

A number of propositions emerge in that regard:-

- The population in Australia as for most countries in the world is ageing – the impact of the “baby boomer” bulge married with increased medical intervention has resulted in a greater number and proportion of the population being defined as seniors.
- The relative proportion of the population who are affected by some form of incapacity is expected to grow exponentially in accordance with these demographic trends.

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2 Dr J Wainer, Prof P Darzins, Ms K Owada “Prevalence of Financial Elder Abuse in Victoria – Protecting Elders Assets Study” Monash University, Medicine Nursing and Health Services 10 May 2010 p. 24
3 “abuse” means the deliberate mistreatment of an adult that causes the adult…(b) damage or loss in respect of the adults financial affairs….. S 1 Adult Guardianship Act [RSBC 1996]
Elder financial abuse, already a significant issue is expected to grow significantly in terms of numbers but also with increasing accumulation of wealth, financial impact.

This part 4.2 is not intended to represent a comprehensive review of the demographic position of Australia nor a review of all studies in respect of the prevalence of elder financial abuse; rather an insight is offered into the size and dimensions and potential impact of the issue.

4.2.1 **An Ageing Population**: The Australian Bureau of Statistics puts the trend succinctly:

"the most profound change that is projected to occur is the ageing of the population. Population ageing is characterised by an upwards shift in the age structure, so the proportion of younger people declines as the proportion of older people increases."\(^4\)

The Australian Bureau of Statistics observes that it is expected that the proportion of the population in Australia aged over 65 will increase to 23% by 2056 compared with 13% of the population in 2007 (an increase of greater than 56%).

From another perspective the Bureau advises "put another way, for each older person in 2007, there were 5 working age people, while in 2056 there will be less than 3 working age people for every older person."

The impact of the baby boomer generation will be significant - again the ABS observes "the rate at which the population aged 65 years and over and 85 years and over will grow and is projected to accelerate in the short to medium term".\(^5\)

In short, and reflected in other particularly Western countries, the population in Australia is ageing at a significant rate driven by the "maturing" of the baby boomer generation, and useful medical interventions extending life expectancy.

4.2.2 **The Population is Growing – What is the Prevalence of Elder Abuse**: The population is ageing, and as a consequence the incidences of elder abuse (absent significant intervention) also are expected to increase.

This belies the question – what are the incidences (and therefore the size of the problem) of elder financial abuse particularly those suffering incapacity?

The answer to the question must be caveated with the observation that whilst there have been studies conducted both in Australia and overseas accurate information is difficult to obtain for a number of reasons.

Those reasons include variability of reliable measurement and reporting on incidences of financial elder abuse, and differences between jurisdictions as to definitions (that is what constitutes financial abuse).

The best that can be offered is that the studies advise that between 2 – 10% people aged over 65 will experience some form of elder abuse and

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\(^4\) See the publication of the Australian Bureau of Statistics (ABS) "Future Population Growth and Ageing" – 4102.0 – Australian Social Trends, March 2009

\(^5\) ABS ibid
as a subset a significant proportion will be the subject of some form of financial abuse.

Some of the information that is available includes:-

- **Australia – Monash University**: The excellent work undertaken by Dr Jo Walner Professor Petris Darzins and Ms Kei Wada Monash University in 2010 concludes “studies in Australia indicate that elder abuse affects 0.5 – 5% of people aged 65 and older and up to half of this is financial abuse”.

- **The United States – National Centre on Elder Abuse**: The National Centre on Elder Abuse in the United States observes that “no one knows precisely how many elder Americans are being abused, neglected or exploited...according to the best available estimates between 1 – 2M Americans aged 65 or older have been injured, exploited or otherwise mistreated by someone whom they are dependant for care or protection”.

That which is observed is that estimates of frequency of elder abuse range from 2 – 10% (a higher percentage then the Monash University studies settled at).

- **The United Kingdom Study**: In respect of financial abuse a UK study in 2006 found that (it) “is the second most prevalent type, affecting roughly one older person in 150”.

4.2.3 The Population is Ageing, The Prevalence of Abuse is Significant – But it is the Tip of an Iceberg: It would seem that all studies and from those visited the practitioners and experts in the field agree that the incidences of elder abuse are becoming increasingly confronting both in number and impact.

There is also however general agreement on one other matter – the reported studies show only a tip of an iceberg.

That is, as with other forms of abuse, the majority of cases are in fact unreported.

The National Centre on Elder Abuse draw on the work of John Wasik and observe:-

“Current estimates put the overall reporting of financial exploitation at only 1 in 25 cases”

The Monash University study in concluding that elder abuse affects up to 5% of the population aged over 65 caveats that opinion in the following terms:-

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6 Wainer Dr J et al op cit at page 7 – Drawing on a previous study by the same authors “Financial Abuse of Elders; A Review of the Evidence” at page 11.
Similar demographic trends apply in Canada - See Canadian Centre for Elder Law (visited during Fellowship) “Moving from Scrutiny to Strategy: An Analysis of Key Canadian Elder Abuse and Neglect Cases” 2011 //www.bcli.org
8 Lachs, MS and Pillemer, K “Elder Abuse” The Lancet October 2004 Vol 364, 1192 - 1263
10 See Wasik, JF, “The Fleecing of America’s Elderly” Consumers Digest 2000 March/April
"These estimates could go much higher given that many cases are thought to go unreported"\textsuperscript{11}

4.2.4 There Are Many Affected And Likely To Be Even More But Who Is Doing It?: It is also the case that elder financial abuse unlike other crimes for example have a very particular profile in terms of the perpetrators of the abuse.

They are mostly family, indeed predominantly sons (as the most frequent offenders) and daughters who financially abuse their parents.

Often this is through instruments enabling access to property and money – enduring powers of attorney but sometimes access is gained through direct (inappropriate) influence.

These realities were reflected in the Monash University studies.\textsuperscript{12}

Analysis of the Victorian position at that time suggests that 32% of financial abuse was exacted by sons, 16% by daughters. Brenda Uekert, interviewed in the course of the Fellowship (Senior Research Associate National Centre for State Courts, US) observes that in the US 90% of elder abuse cases with a "known perpetrator" that person is a family member, and 2/3 of the cases are at the hands of a son or daughter.

This profile is replicated in broad terms in the jurisdictions to which the fellowship extended – the United States, Canada and England.

Those who are at risk share some particular features:-

- Those living alone are more likely to be abused.
- Poor health was a risk factor particularly any form of incapacity.
- Older men, or women who are lonely, divorced or separated are more likely "targets" for abuse.\textsuperscript{13}

4.2.5 The Impact: Financial Abuse, when it impacts is devastating for an individual but also increasingly at a societal level.

For an older person with an incapacity the effects of such abuse extend beyond the obvious – a loss often of financial independence, and a resultant loss of lifestyle and amenity. Such individuals do not have the capacity or time to reestablish themselves financially.

Depression and psychological distress often follows\textsuperscript{14}, and more broadly physical and mental health issues evolve.\textsuperscript{15} Families are impacted, and beyond that the community increasingly responds through greater levels of financial assistance, in addition to resourcing intervention and emergency support. In 1996 in New South Wales it was estimated that elder abuse carried with it an impost of $300m in additional State Services, responding directly to financial abuse.\textsuperscript{16}

\textsuperscript{12} Monash University "Prevalence of Financial Elder Abuse in Victoria – Protecting Elders Assets Study" op cit at page 10
\textsuperscript{13} O'Keefe M 'et al UK Study of Abuse and Neglect of Older People Prevalence Survey Report" National Centre for Social Research and Kings College London
\textsuperscript{14} Kemp B et al "Elder Financial Abuse: Tips for the Medical Director" Journal of the American Directors Association p. 591
\textsuperscript{15} Deem LD (2000) "Notes From the Field Observations in Working With the Forgotten Victim of Personal Financial Crimes" Journal of Elder Abuse and Neglect 12 pp 33-48
\textsuperscript{16} Setterlund D (2001) "The Strategic Plan for the Prevention of Elder Abuse" The Prevention of Elder Abuse Task Force
4.2.6 **Summary:** The population is ageing and the baby boomer bulge is increasingly moving into the older category, greater than 65.

Statistically and consistently a significant proportion will be the subject of elder abuse of one form or another; studies suggest ranges between 0.5 – 10% but all seem to agree that those statistics represent an under reporting of the incidences of elder abuse.

The size and dimension of the malady and the very real personal social and economic cost of it therefore is expected in Australia to grow exponentially in the coming years.
5. **Report**

5.1 **Introduction and Structure**: The effective prevention of financial abuse for older people with incapacity, and successful prosecution -- (including recovering money and property misappropriated) is a complex discussion.

The Monash University study previously\(^\text{17}\) referred to identifies a range of factors or "interventions" might be directed at prevention and prosecution including:-

- Education about proper financial management particularly for those assisting elderly people making decisions (including substituted decision-makers).
- Increased emphasis on education more generally and intervention to raise consciousness of the need to identify and address elder issues including elder abuse.
- Training for various professional groups that have contact with older people.
- A system of "optimal financial management" for older people, including prudential oversight, reporting of elder abuse and legal sanctions.

From the jurisdictions discussed in this report consideration will be given to the structural and legislative response in respect of financial elder abuse.

This will include a review of the systems established to prudentially oversight fiduciaries (supporters and substitute decision-makers), the institutional actors who play a role in this area, the investigation and prosecution of elder abuse including the criminalisation of elder abuse.

Some contrasting issues flow from a review of the countries visited. These include the emergence of professional fiduciaries, the competence of those fiduciaries and standards which apply to them, the requirement for financial security for substitute decision-makers, oaths and promises as well as the vexed question of whether elder abuse generally should be reported - as a legislative obligation.

Some trends and issues will also be explored, drawn from overseas jurisdictions – the emergence of forensic centres in the United States as sources of assistance in support for older people, the role of education particularly for those decision-makers assisting older people, the role of fiduciaries and the type of appointment instruments available in respect of substitute decision-makers.

The way in which laws are fashioned to facilitate the recovery of money and property stolen will be discussed.

The function and oversight of people who support and assist older people with an incapacity as well the general communities’ awareness of the issue of abuse and preparedness to report openly are matters that will be considered.

5.2 **The Report - Financial Elder Abuse A Jurisdictional Contrast**

5.2.1 **Introduction and Structure**: Elder abuse of those with an incapacity and in particular financial abuse has in the jurisdictions visited been the subject of significant policy, political and social debate.

These discussions have all touched upon strategies to prevent abuse, the detection and investigation and ultimately potential prosecution of such abuse.

\(^{17}\) Prof Darzins et al *Financial Abuse of Elders: A Review of the Evidence* June 2009 Monash University pp 6-7
There is no doubt that raising community awareness of elder abuse dramatically and in practical terms is central to its prevention.

In addition however there may be some value in considering:-

- The structural and legislative response (the particular elements of) of a jurisdiction’s resources and legislation to detect investigate and prosecute.

- The nature and extent of prudential oversight of fiduciaries, including a consideration of the institutional actors in the area of disability.

- The increasing legislative emphasis on elder abuse as a separate civil or criminal wrong.

The focus of the report therefore will be on the structural and legislative responses to the prevention detection investigation and prosecution of elder financial abuse.

5.3 Decision-Makers and Support – An Overview: It may be useful before discussing some of the subtle and certainly some of the more significant differences between the policies and laws which exist in the UK, US and Canada – contrasted with Australia – to summarise the different terminology which applies and the nature and extent of the powers given to others as support or substitute decision-makers for older people who have a decision-making incapacity.

Each jurisdiction permits adults (typically over the age of 18 years) to appoint another person to make decisions on their behalf should a person suffer an incapacity. Typically the instrument used is a form of a power of attorney.

Similarly all jurisdictions have legislative frameworks (in the absence of an appointed substitute decision-maker or, in the case of Canada, somebody to support the adult in making decisions) for there to be an appointment by a Court or Tribunal of a decision-maker.

The individuals who are as a consequence of either appointment by the adult concerned (by a power of attorney typically) or by a Court or Tribunal vested with the actual power to engage in financial transactions on behalf of an adult are important in any discussion on elder financial abuse.

Where a person is appointed to act or make decisions on behalf of another the prudential framework which exists both to support them but also monitor their activity can play a primary role in preventing those individuals from improperly misappropriating the financial resources or property of the adult concerned.

Similarly although financial elder abuse does occur in the absence of the perpetrator having been given any form of "legitimate" authority the structures which exist to supervise and manage those who have been appointed usually are the same structures which are engaged to investigate and prosecute elder financial abuse more generally.

The following is a short summary of the way in which others may be appointed to act or support an adult who has lost capacity in respect of their financial and property affairs:-
Australia: In all Australian jurisdictions there is legislative capacity for a substitute decision-maker to act on behalf of an adult with an incapacity either by appointment by the adult or by an order typically of a Tribunal.

An adult (a person over the age of 18 years) may sign (execute) an instrument appointing another person or persons to act on their behalf and make decisions. The instrument is called a power of attorney and legislative force has enabled the execution of powers of attorney which endure past where the adult, principal has lost capacity.

Previously (that is before the passage of the relevant legislation) a power of attorney, because it is a form of agency ceased to have effect and the agent therefore ceased to have any powers when the principal giving the power had lost capacity.

In a Queensland context (and other jurisdictions have passed similar legislation) an enduring power of attorney may be created pursuant to the Powers of Attorney Act 1998.

Section 32 (2) of that legislation provides:-

"an enduring power of attorney giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter".

The Queensland legislation specifies with some particularity the duties of an attorney (in the context of attorneys for financial matters particularly chapter 5 part 1 of that Act) and powers.

An attorney is obliged for example to act with reasonable diligence (section 66) in accordance with the document itself – the power of attorney (section 67) avoid conflict transactions and protect confidential information (sections 73 and 74).

Importantly in respect of decision-making the attorney is obliged to apply the general principles where the principal (the person who gave who the power of attorney) has lost capacity.

Those general principles (currently found in schedule 1 to the Powers of Attorney Act 1998) provide that (amongst other important matters) but in no particular order of priority:-

- An adult regardless of capacity has the same basic human rights as others (section 2).
- That there ought be respect for the principles human worth and dignity and value as a member of society (section 3 and 4).
- That there is importance to be placed upon supporting the adult as part of the community (section 5).
- To include the adult in decision-making and apply the principle of substituted judgement – that is from the principal’s previous actions trying to work out what the adult would decide if the adult had capacity (section 7).

Enduring powers of attorney in each jurisdiction broadly can be made at least for financial matters or personal matters or both.

Each jurisdiction also provides capacity for advanced directions in respect of healthcare.
An enduring power of attorney in the Queensland jurisdiction may be made in respect of "financial matters" (see schedule 1 part 1). Financial matters are as would be suggested by its terms include matters relating to financial or property matters including legal matters in that respect.

If an adult has not executed an enduring power of attorney and the adult’s capacity in some way is compromised (in respect of a "matter") and there is a need broadly for a decision to be made each jurisdiction also enables a Tribunal typically to appoint a substitute decision-maker.

In the Queensland context the appointment of such a person falls within the compass of the Guardianship and Administration Act 2000.

In respect of financial matters the appointment of a substitute decision-maker is called the appointment of an administrator (if there needs to be an appointment of a decision-maker in respect of personal matters a Guardian is appointed).

Again in the Queensland context, the same general principles apply to decision-making as apply to enduring powers of attorney.

The legislation also explicitly prescribes the duties, powers and responsibility of an administrator when appointed (see chapter 4, particularly part 1). The same injunctives apply as are visited upon an Attorney – to act with honesty and reasonable diligence in accordance with the relevant order of the Tribunal and to avoid conflict transactions for example.

- **The United States:** In most jurisdictions in the United States there exists not dissimilar legislative authority for an adult to appoint another to act on his or her behalf and for that appointment to endure past the adult’s capacity, a "durable" or enduring power of attorney.

The legislative genesis of what is known in Australia as enduring powers of attorney in the United States evolved largely from the probate codes.

Powers of attorney are regulated by State laws as they are in the Australian jurisdictions.

There is no uniformity of legislation in the United States but there have been calls, in order to prevent financial elder abuse in particular for all State laws to be consistent and:-

- Expressly identify the "default duties" of the attorney (not all States’ legislation specify these duties of an attorney appointed under an enduring power).
- Require that "hot powers" – powers of significant potential impact if exercised on the principal to be expressly provided for. This includes for example a requirement to specify the power to sell real property (land) on behalf of the principal – requiring specific words in the power of attorney if the power of attorney is to provide that authority.
- Include a legislative provision for remedies and sanctions for abuse of the adult by the attorney\textsuperscript{16}.

In addition if there is not an enduring power of attorney all States within America provide for the appointment of individuals as substitute decision-makers.

\textsuperscript{16} See the very interesting and comprehensive report – "Power of Attorney Abuse: What States Can Do about It" – Authored by Lori Stiegel and Ors of the American Bar Association Commission on Law and Aging November 2008. Lori Stiegel was generous in her time in Washington DC, providing me with some insights beyond that report.
In some jurisdictions those individuals in respect of appointments for financial matters are called "financial guardians" and in others "conservators".¹⁹

Conservators and guardians uniformly are appointed by a Court in the United States, usually exercising powers under the relevant probate code.

In California for example, pursuant to the California Probate Code a conservator may be appointed to either the estate or the person of an adult or both (section 1800.3).

There is a need for the Court in making such an appointment to make an express finding "that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee".

In California and in many other of the States within America there is a priority of appointments which the Court is to have recourse to – if a conservator is needed of the estate the spouse or domestic partner ought be appointed in preference to an adult child, parent brother or sister or any other person (in that order) – section 1812 of the Probate Code.

In the United States then there are broadly similar roles or capacities for adults with an incapacity to have their financial affairs managed by another – either through appointment by the adult in an instrument, a power of attorney or by an appointment of an individual by a Court, typically in this context a conservator of that person’s estate.

- **Canada – British Columbia**: The range of possible decision-makers or support persons for elderly adults with some form of incapacity in Canada is in some respects markedly different to that available in the United States and Australia.

Referring particularly to the rules governing British Columbia, where my fellowship provided me with the opportunity to speak to experts in this area, the variety of decision-makers included those found in the US and Australia – the appointment of an attorney under an enduring power of attorney by an adult (pursuant to the Power of Attorney Act [RSBC 1996].)

Not unlike the Australian jurisdiction the relevant legislation in British Columbia does specify the duties of the powers of attorney as well as powers (see division 3 of the Power of Attorney Act).

Further there is capacity in the case of British Columbia for the Court to appoint a substitute decision-maker in that jurisdiction known as a "Committee" – pursuant to section 6 of the Patients Property Act [RSBC 1996]. Interestingly the relevant legislation is not as prescriptive in terms of duties at least of the person or persons appointed as Committee as the legislation for example provides in Australian jurisdiction.²⁰

There are also a variety of possible roles or appointments which are not known to the law in Australia. Each of the roles contemplate the support of substitute decision-makers on behalf of adults with an incapacity:-

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¹⁹ Conservators typically can be of the estate or the person. A conservator of the estate has analogous authority to an administrator in the Australian jurisdiction – in respect of financial and property matters.

²⁰ See the relatively broad statements of powers and obligations in ss 15, 17 and 18 of the Patients Property Act [RSBC 1996]
• **Nomination of Committee:** The *Patients Property Act* gives a power to the Court to appoint a substitute decision-maker but also provides that an adult can nominate a Committee should one be required, in advance.

The Court still is to make an appointment of a Committee but pursuant to section 9 of that Act "the nominee must be appointed Committee unless there is good and sufficient reason for refusing".

• **Representatives:** In addition to the capacity for an adult to appoint an attorney (under an enduring power of attorney) and the Court or the adult themselves to either appoint or nominate in the latter case a Committee should the adult lose capacity there is also provided in the *Representation Agreement Act* [RSBC 1996] the capacity to appoint a "representative".

In general terms in respect of financial matters a representative may only attend to the "routine management of the adult’s financial affairs" (the payment of bills, purchases of food, accommodation and to make investments for example).

A representative then does not have potentially the broad powers that an attorney might under an enduring power of attorney.

The reason for the narrowed scope for adults to appoint representatives to act in their stead can be found in section 8 of the same legislation.

That section provides a test for "incapability" which permits an adult to appoint a representative even although the adult is incapable at law of making a contract, managing their legal matters or attending to the routine management of his or her financial affairs.

Uniquely then the British Columbia legislation allows for an adult who is suffering a form of incapacity (such that the adult would not be permitted at law to sign a power of attorney for example) to nonetheless appoint another person to make decisions on their behalf, or support the making of such decisions.

The considerations include that the adult be in a position to communicate that preference (as well as have the capacity to make a choice or preference) and whether the adult has a relationship with the representative that is "characterised by trust".

I understand from particularly the Office of the Public Guardian in British Columbia that Representation Agreements of this kind (called section 7 or standard provisions representation) particularly permit older persons with dementia but still some reasonable functionality to appoint a substitute decision-maker or a supporter. The policy underpinning "representatives" as observed by the Victorian Law Reform Commission include:-

"the focus of these laws is not to test whether someone has capacity but to enable support to be provided where it is needed"21

• **Certificate of Incapability:** Perhaps at the other end of the spectrum the same legislation permitting the appointment of a representative also

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21 Victorian Law Reform Commission Guardianship Consultation Paper No. 10 (2011) at para 7-38
retains provision for the appointment of the Public Guardian and Trustee as Committee by way of an “Certificate of Incapability”.

Pursuant to section 1 of the Patients Property Act in British Columbia when a person is certified by a Director of a medical facility as broadly incapable the Public Guardian and Trustee automatically becomes that “patient’s” Committee.

There would appear to be no appeal from this decision.

The provisons are, with respect, aged and more reflective of legislation which has been long repealed in Australian jurisdictions.

Whilst the Public Guardian and Trustee seemingly has worked avidly to identify best practice in respect of the use of such certificates that Office itself recognises that this system of “certification” is not consistent with contemporary practice.

Accordingly in British Columbia an adult can appoint an attorney under an enduring power of attorney and a Court in the absence of an Attorney having been appointed, may appoint another individual or individuals to make decisions on behalf of an adult if there is incapacity (called a Committee).

A little uniquely there is also a power for an adult in advance to nominate their preferred Committee. A system which used to prevail in other jurisdictions still exists in British Columbia – there is a capacity for a Doctor to certify incapability which automatically leads to the appointment of a State functionary (Public Guardian and Trustee) as that person’s Committee (without recourse hearing or appeal).

Finally even in circumstances when an adult has lost capacity to sign a contract or enduring power of attorney he or she may appoint another to support his or her decision-making – for limited financial matters.

- **United Kingdom – England:** In England the Mental Capacity Act 2005 largely governs appointment and supervision of substitute decision-makers.

Powers of attorney (in England called lasting powers of attorney) can be made by an adult which will endure past incapacity and as a consequence the Attorney can make decisions beyond that point. Lasting powers of attorney must be registered in England (discussed later) pursuant to section 9 (2) of the Mental Capacity Act.

In addition similar to the United States in the absence of an attorney a Court – the Court of Protection has the power to appoint a substitute decision-maker in respect of financial matters (and also personal matters if required).

Such decision-makers are called “deputies” (s. 16(2)) whose powers are to be “limited in scope and duration as is reasonably practicable” (s 16(4)).

- **A Summary of the Jurisdictions:** In all jurisdictions visited there is a power for individuals to appoint another to make decisions on their behalf should they lose capacity. The focus of consideration then in the context of financial abuse is the nature and extent of such powers and the regulation of attorneys.

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22 This position was advanced in discussions with very fine officers met at the Public Guardian of British Columbia and recognised as a legislative scheme which ought be expunged from legislation – to repeal the “archaic” Patients Property Act (from overview of the Public Guardian provided to me).
Denzil Lush, the Chief Judge in the Court of Protection in England observed in interview that a lasting power of attorney (enduring power) was essentially a "licence to steal". He estimates from his wealth of experience on the bench that 1 in 8 attorneys commit some form of financial abuse.

Again in each jurisdiction there is a capacity for a Tribunal or Court to appoint a substitute decision-maker – in the United States they are either called a guardian or commonly a conservator of the estate (as distinct from "conservator of the person"), in Canada a Committee of the estate and in England a Deputy.

In Australia such appointments are typically made by a Tribunal, in the jurisdictions visited such orders are made by a Court.

In British Columbia there are also some additional alternatives; despite a want of capacity an adult can appoint a representative essentially to support them in decision-making but only for routine financial matters. A person can also in advance nominate a Committee and the seemingly archaic (to engage the term used by the Public Guardian and Trustee) device of a medical practitioner certifying somebody as incapable leading to an automatic appointment of a substitute decision-maker still persists.

The obligations, prudential oversight and potential penalties of each of each of these substitute decision-makers is focal to the prevention and ultimately prosecution of financial abuse – for it is these individuals or people in these types of positions of responsibility and trust who have the apparent legitimate authority to commit financial abuse.

5.4 Structural and Legislative Responses To the Detection, Investigation and Prosecution of Elder Abuse – Financial Matters: Essential to the consideration and an understanding of how a jurisdiction prevents and addresses the financial abuse of older people (particularly those vulnerable through want of capacity) is an appreciation of the structure of the legislative provisions which exist in that jurisdiction.

Substitute decision makers either appointed by way of a power of attorney or a Court or Tribunal hold essentially the keys to the finances of the individuals for whom they are to support and make decisions for.

As Lori Stiegel and Erica Wood explain:

"There are strong connections between guardianship and elder abuse. At times guardianship may be a necessary tool to stop elder abuse...At other times guardianship may be the cause of elder abuse. A guardian may financially exploit...the incapacitated person..."23

The way in which a system prudentially oversees the activities of these fiduciaries is centrally relevant to a consideration of financial abuse.

In each of the systems there are institutional actors – whose role it is to address and in particular investigate and take action in respect of financial abuse.

The path through which investigation and prosecution is facilitated (after financial abuse has occurred) varies between jurisdictions.

It is to these three issues – important in the discussion of the prevention and prosecution of financial elder abuse that the report seeks to address in this part.

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23 Stiegel, L Wood E (2011) "Nine ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship Act" ABA Commission on Law and Aging
5.4.1 **Prudential Oversight of Decision-Makers:** In California conservators appointed by the Court to make decisions on behalf of older members of the community who lack capacity (amongst other people) are subject to the supervision of the Court who appointed them.

Conservators of the estate must take an oath and lodge a bond – a financial security (if required by the Court).

Letters (the authority by which conservators can act for another person) issue only after an oath is taken and the bond if required by the Court is lodged – section 2310 of the California Probate Code.

An inventory of the assets of the person for whom a Conservator is appointed must be taken within 90 days of appointment and filed with the Clerk of the Court – section 2610. A failure to file an inventory may lead to a revocation of the appointment (and personal liability).

On the face of it the most significant prudential oversight after appointment that a Conservator must respond to is the requirement to account and report (section 2820 of the California Code). An accounting must be filed in Court “for settlement of an allowance” including supporting documentation at least every two years (section 2620 of the Probate Code).

This is so unless the estate (section 2628) excluding a residence has income of less than $2,000.

This regular reporting of course is of substantially lesser value in reducing the incidents of financial abuse if the reporting is not diligently and appropriately reviewed.

Those who were engaged in the course of the Fellowship uniformly express reservations about the Court’s scrutiny of the accounts filed, and monitoring generally. The oversight then of fiduciaries is uneven at best, at least in respect of the ongoing proper financial management (as distinct from theft) of those appointed to act for older Americans. Best practice in Court monitoring of fiduciaries is an evolving issue.

Those who are appointed decision-makers by way of a power of attorney essentially carry out their activities (including inappropriate activities) without oversight of any legislative, or substantive kind; it is left to investigatory and prosecution authorities when fraud or misappropriation is detected to take action.

It is for this reason that AARP recommends that legislation should oblige power of attorney documents to reflect:

- A clear statement of duty and responsibilities of attorneys.
- That express language be required for “hot” powers — and that otherwise power of attorney should not extend to significant decisions

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24 This is particularly so for the National Centre for Courts – as expressed by Richard Van Duizend. Erica Wood of the American Bar Association has published a range of material some of it critical of the absence of review of the accounting reported by fiduciaries and calls for a move to a form of on-line reporting. There are however many examples of emerging innovations and excellence in practices – see generally Karp N, Wood E (2007) “Guarding the Guardians: Promising Practices for State Monitoring” AARP Washington DC

involving potentially a financial diminution in the value of the estate of the older person.\footnote{See generally \textit{Power of Attorney Abuse: What States Can Do About It} – Lori A Stiegel and E. Clem research report op cit. See page 5 for a brief description of AARP.}

In British Columbia (in respect of Committee’s of the estate appointed by the Court) bonds of a kind similar to that required in the United States, are sought by the Court. Increasingly however the financial impost of bonds (which are in turn paid out of the estate of the incapable adult) are causing Courts to fashion orders such that the Committee has only limited powers (thus reducing any likelihood of significant damage). In turn bonds are not ordered.

In practice pursuant to the \textit{Patient’s Property Act} the Public Guardian and Trustee reviews the conduct of Committees.

They do so through a curious device rather than a clearly articulated one. Section 14 of that Act provides that Committee cannot charge fees without the “passing of the accounts” by the Public Guardian and Trustee (see section 10 (1)(d)). In order then for Committees to be reimbursed (to charge fees) they must submit accounts to the Public Guardian and Trustee which serves as a regulatory regime of oversight.

All of the indications are that the Public Guardian and Trustee applies diligently resources to the review of those accounts.

Again Attorneys appointed by instrument largely submit to no ongoing oversight.

In England by virtue of the \textit{Mental Capacity Act} “supervision” of Deputies appointed by the Court of Protection is mandated to the Office of the Public Guardian.

Deputies are required to comply with the order appointing them, the legislation and a Code of Practice.

Deputies are expected to act in the “best interests” of those for whom they are appointed as detailed in S 4 of the \textit{Mental Capacity Act}. This includes:

- Ensuring the principal participates “as fully as possible” in decisions.
- Taking into account the person’s past and present wishes and beliefs, amongst a range of considerations (see section 4 (1) – (ii)).

The Office of the Public Guardian levies fees for its supervision of Deputies.

An initial “Assessment Fee” is charged - £100.

Ongoing, annual supervision fees are charged contingent upon the category of supervision thought to be required.

There are four categories:-

1. "Close Supervision"
2. "Intermediate Supervision"
3. "Low Level Supervision"
4. "Minimal Supervision"
In respect of minimal supervision (category 3) an annual fee of £35 is charged. For the other categories a fee of £320 per annum is sought. Exemption or remission of fees are provided in appropriate circumstances, premised upon financial circumstances.

In respect of minimal supervision where assets and income are modest annual returns are not required. For the remaining categories annual returns are required and depending on the category are the subject of scrutiny to ensure that amongst other things, financial abuse has not occurred. The intensity of supervision particularly with the higher categories is significant, with returns being considered as well as original documents (receipts and alike).

In respect of attorneys appointed under lasting powers of attorney a slightly different level of prudential security is required contrasted with other jurisdictions.

Lasting powers of attorney must be registered – pursuant to section 9 (2) Mental Capacity Act. In 2011 some 174,214 lasting powers of attorney were registered, and 16,368 enduring powers of attorney (now not able to be made) were registered.

According to the records retained by Denzil Lush Chief Judge of the Court of Protection, 94% of lasting powers of attorney are filed on behalf of adults who are 60 years or older with the average age of a person making a lasting power of attorney being 81 years and 10 months.\(^{27}\) Registration of powers of attorney (carrying with it through the Office of the Public Guardian a check on the facial validity of the document) has a role in preventing financial abuse. At least a public authority has a record of the identity of the attorney.

Interestingly also there is a capacity in respect of lasting powers of attorney to identify “named persons”. The requirement in respect of named persons include that they are to be notified upon the power of attorney being advanced for registration. The named person is provided with notice after the filing of the application for registration and has standing to object to the registration of the Power of Attorney. Objections are made to the Court of Protection but will only be successful in relatively rare circumstances.

This is because grounds to object to registration (section 22 of the Mental Capacity Act) require that the Attorney under the lasting power, has behaved in a way which contradicts the authority or has not acted in the best interests of the adult or proposes to do so. This test is a particularly difficult one to meet. The device of nominating a named person also is intended to serve as a way in which the person involved – “named” – can exercise oversight in respect of the welfare and presumably financial health of the adult.

In the Australian jurisdiction it is largely for the Tribunal vested with the power to appoint administrators, in the case of Queensland, financial administrators to oversee the conduct of those fiduciaries.

Financial management plans are required and there are periodic reviews of the conduct and the appointment of those decision-makers.

Accordingly there does exist varying forms of prudential oversight of those appointed to make decisions or to support older people with incapacity.

\(^{27}\) Statistics provided during an interview with Judge Lush and to be noted in his soon to be published Chapter “England and Wales Comparative Perspectives on Adult Guardianship”.
In the United States it falls to the Courts who appointed the decision-makers to review accounts and returns required to be filed (as well as inventories).

The advice received however is that application to the task of oversight in the Court system in many jurisdictions in the US is variable. The laws then might establish a system of oversight but the outcome – to monitor effectively incidents of financial abuse may falter through administrative lethargy. 28

Naomi Karp and Erica Wood (the latter visited as part of the Fellowship) in their report "Guarding the Guardians Promising Practices for Court Monitoring" 29 identified a number of practices reflecting "excellence" in the US Court systems. As the Forward to their paper explains:

"Court monitoring of guardians is essential to ensure the welfare of incapacitated persons, indentify abuses, and sanction guardians who demonstrate malfeasance".

Those promising practices included:-

- **Reports Accounts and Plans**: Requiring prospective plans for estate management, clear forms for reporting, and early first reports.
- **Court Actions**: The facility of e-filing of reports (as in Minnesota), Court Officers providing information to (newly appointed) guardians, and stepped sanctions for guardians who fail to comply.
- **Protecting Assets**: Requiring early and complete inventories, and financial management plans, the submission of supporting documentation particularly for expenditure, bonds, restricted accounts and Court Orders requiring specific approval for large transactions (such as the sale of a residence).
- **Court Reviews**: Requiring Courts to approve (and therefore consider) reports and accounts filed, or have a State agency attend to this task, hire designated staff to attend to this task, use checklists and employ random deeper examinations.
- **Sanctions**: Use of trained investigators when there is a concern (as occurs in California), engage volunteer monitors, call in bonds when there is malfeasance.
- **Guardian Training and Assistance**: Require training for professional fiduciaries (and certification) and provide training tools and staff resources for "family Guardians". 30

In British Columbia, Canada the Office of the Public Guardian and Trustee serves to review the conduct of fiduciaries appointed by the Court for older people with incapacity. They do so through a curious device and not by way of clear and expressed fiat. In the United Kingdom the Office of the Public Guardian by legislation clearly is authorised to play the role of supervising substitute decision-makers.

In each of the jurisdictions there is a capacity for the Courts to have an older person lacking capacity actually visited to check amongst other things on their health and welfare.

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29 Karp N and Wood E (2007) op cit
30 There are other detailed recommendations identified in the paper. Of interest however was that in only 16% of cases does anybody verify reports filed from guardians.
In California a Court investigator might be appointed (section 1826 of the Probate Code) in that respect. Increasingly common also are volunteer visitors who will attend upon adults in respect of whom orders have been made.

In the United Kingdom there are “general and special visitors” appointed by the Court of Protection and the Office of the Public Guardian. These visitors meet and supervise deputies but also will visit upon the adults, the subject of Court orders.

Discussions with the Office of the Public Guardian indicate that there were 7,000 “visits” conducted in 2011 – and there was some 45,000 deputies “supervised” under the regime described. Importantly and congruent with the demographic advice there has been according to that office “phenomenal growth” in the number of matters for which deputies are appointed – 8,000 are added to the population of matters each year.

The observation that might be made by looking at the various jurisdictions is that there ought be a completed and coordinated system of supervision for substitute decision-makers appointed by the State through either the Courts or Tribunals.

This needs to at least include the regular filing of reports and accounts, including prospective plans.

Importantly also however the nature and extent to which those reports are scrutinised is perhaps the most important aspect of such a scheme.

There may exist some merit in a registration system of Enduring Powers of Attorney, which exist in England. In the context of financial abuse registration at least creates a record which can be checked and may be accompanied by a permissive system of “named persons” to be notified who may serve as “monitors”.

5.4.2 Who Do We Call – Incapacity and Elder Abuse

5.4.2.1 Generally: In each jurisdiction visited (and one of the most frequently asked questions in the area) an enquiry was put; in cases of suspected elder financial abuse, particularly if the older person suffers an incapacity who can or should be contacted?

This question centrally does not deal with whether there is an obligation to make a report (although reporting will be considered later, in part 5.4), rather what institutional actors exist to investigate reports of such abuse.

In all jurisdictions, naturally enough, the relevant prosecutorial authority – including the Police Service were of course available. The nature and capacity of each prosecutorial authority to effectively prosecute elder abuse is a discreet but significant topic of itself.

The differing levels of sophistication and resources available to investigate financial elder abuse is beyond the scope of this work.

Each jurisdiction however has a refined legislative and policy scheme as to how reports of financial abuse are investigated.
5.4.2.2 **The United States:** As is succinctly described by Lori Stiegel (who was interviewed as part of this Fellowship) and Ellen Clem, both then of the American Bar Association31, "all 50 States...have an active legislation authorising the provision of Adult Protective Services (APS) in cases of elder abuse".

Legislation in each State contemplates a system of reporting to a "Adult Protective Services (APS)" agency in respect of adults who have a disability, vulnerability or impairment as it is defined in each jurisdiction. The scope of the work of APS in each State extends to adults more generally, not just older persons.

In the particular jurisdiction visited, California, the Department of Social Services (on its website)32 explains that each County has an APS Agency to help older adults (65 years and older) and dependant adults (18 – 64) who are disabled "when these adults...are victims of abuse, neglect or exploitation".

APS agencies investigate reports of abuse and typically when an investigation raises greater suspicion and evidence the Police or prosecuting authorities generally will be notified and typically also the Court will be engaged. Each County APS agency in California has a 24 hour abuse hotline and APS agencies are departments or agencies of County governments.

Section 15630 of the Welfare and Institutions Code of California obliges reporting to APS, amongst other possible entities, all cases of suspected financial abuse.

The nature and extent of the action taken subsequent to investigation is contingent upon the particular matter at hand.

Prosecution (including criminal prosecution) can be referred to the District Attorney (discussed later in this report), and application might be made to the Court for the appointment of a Conservator.

There is broad capacity for the Court to order (itself) investigation reports – section 1826 of the California Probate Code might be engaged such that a "Court Investigator" provides a report in respect of the alleged abuse.

It might be in circumstances where serious concerns are held (in the absence of any other individual, corporate or otherwise) that the Public Guardian might be appointed as Conservator of the estate of the adult concerned.

There are interesting provisions found in the Probate Code which effectively compel such an appointment in appropriate cases.

Section 2920 of the Probate Code provides that where there is "no one else who is qualified and willing to act" the Public Guardian shall (that is mandatory) apply for appointment – as Conservator amongst other things of the estate.

The Public Guardian, to remove any doubt is obliged to apply for appointment "if the Court so orders" – section 2920 (2)(b).

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31 See Stiegel L and Clem E (2007) "Information About Laws Related to Elder Abuse" – American Bar Association on Law and Aging for the National Centre on Elder Abuse

32 See DCA.Gov "Department of Social Services" website – www.cdss.ca.gov
It then lies at the suit of the Public Guardian to take action in respect of the abuse.

5.4.2.3 Canada: In the jurisdiction visited – British Columbia, in Canada reporting to “designated agencies” in respect of “adult abuse and neglect” (see the Adult Guardianship Act) obliges the designated agencies to investigate.

By a range of legislative imperatives it is often the case that the Public Guardian and Trustee investigates financial elder abuse (as distinct from other forms of abuse, or neglect).

The scheme is a relatively complete one.

Part 3 of the Adult Guardianship Act for the purposes of this paper defines “abuse”.

Reporting of information indicating that an adult has been abused is facilitated by section 46 of that Act and provides that a report is to be made to a “designated agency”.

Section 47 provides that a designated agency must (that is it is obliged to) “determine whether” a person the subject of the report needs “support and assistance”.

If it is determined that the adult does need such support and assistance referral might be had to appropriate services (including legal and social services) to investigate the abuse and, importantly the designated agency may inform the Public Guardian and Trustee (section 47 (3)(c)). The designated agency has powers to investigate otherwise provided for in the Act (in particular may apply to Court for orders to enter premises for example, section 49).

A designated agency for the purposes of that legislation (the agency that initially investigates abuse) is by regulation determined by the Public Guardian and Trustee and currently includes the five regional health authorities in British Columbia, Providence Health Care Society and Community Living BC.

The Public Guardian and Trustee to whom reports are ordinarily made of financial abuse (as it is contemplated under the Adult Guardianship Act) has a broad fiat to investigate not only information received from “designated agencies” but also in regulating, investigating and supervising substitute and support decision-makers.33

The Public Guardian and Trustee investigates reports of abuse referred, and can receive reports of abuse by Attorneys under the Powers of Attorney Act and representatives under the Representation Agreement Act.

Section 17 of the Public Guardian and Trustee Act [RSBC 1996] provides that the guardian and trustee may “investigate and audit the affairs of” (amongst other matters) an adult who is “apparently abused” as it is defined under the Adult Guardianship Act – if the

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33 See publication of the Public Guardian and Trustee of British Columbia – “BC’s Adult Guardianship Laws; Support and Self Determination for Adults Protecting Adults from Abuse and Neglect and Self Neglect" www.trustee.bc.ca
Public Guardian and Trustee "has reason to believe that the interest" of the adult "may be at risk".

The Public Guardian and Trustee may require the production of documents and records and may compel information or explanation (section 18).

Court orders may follow if there is a need (section 18(5) of the Public Guardian and Trustee Act).³⁴

Ultimately as with other jurisdictions such an investigation can take a number of paths including the Public Guardian and Trustee recommending that she becomes the Committee of the adult’s estate when there is no other person available or appropriate to assume that role.

5.4.2.4 England: In England as discussed previously the Office of the Public Guardian carries the statutory obligation to supervise "deputies" appointed to manage the financial affairs of adults with an incapacity.

The level of the supervision is contingent upon the assets managed by the deputy and other factors including the relationship of the deputy to the adult and any history of concerns as well as timing (newly appointed deputies for a time receive closer supervision). Section 58 of the Mental Capacity Act 2005 formally visits these functions amongst others on the Public Guardian which include:-

- Supervising deputies (pursuant to section 58 (1)(c))
- Directing a Court of Protection visitor to visit a person who is granted a Power of Attorney (section 58 (1)(d))
- Reporting to the Court as the Court requires (section 58 (1)(g))

When there has been a suspected financial abuse the Public Guardian frequently is involved and has powers to take records (section 58 (5)) and interview the adult concerned (section 58 (6)). It is intended according to the Code of Practice that issued pursuant to the Mental Capacity Act 2005 to the Public Guardian serve as “a single point of contact for referring allegations of abuse in relation to attorneys and deputies to other relevant agencies”.

That Code of Practice urges those who have concerns about abuse generally regarding a vulnerable adult to contact “local Social Services”, the Office of the Public Guardian or a relevant Help Line.

Very much in circumstances where either an Attorney (under a lasting Power of Attorney) or a Deputy (appointed by the Court) is involved it is the Office of the Public Guardian who investigates – often preceded or accompanied by a Court of Protection visitor having prepared a report.

5.4.2.5 A Summary – Who to Call: In each jurisdiction visited there are institutional actors established with legislative authority to investigate cases of financial elder abuse.

³⁴ See also the publication available on the Public Guardian and Trustee of British Columbia’s website “Responding to Elder Abuse”.
³⁵ See page 5 of “Mental Capacity Act 2005 Code of Practice” issued pursuant to sections 42 and 43 of that Act.
Those agencies in the context of California include Adult Protective Services as a first point of report, perhaps also followed by the likely appointment of a substitute decision-maker (if the investigation is not about an existing substitute decision-maker) – ultimately of last resort the Public Guardian.

In Canada the focus is had upon designated agencies to investigate elder abuse generally but particularly in respect of financial elder abuse frequently it is the Public Guardian and Trustee who has specific statutory powers to investigate. The Public Guardian and Trustee may make application for the appointment of its own Office as substitute decision-maker should the circumstances warrant it.

In England particularly in respect of financial abuse by existing substitute decision-makers the Office of the Public Guardian typically will investigate reports or concerns raised.

These largely legislative schemes of course do not exclude the very fine work done by the (increasingly burdened) not for profit entities which exist in each jurisdiction. Increasingly churches and philanthropic entities and other organisations are establishing elder abuse prevention and sometimes investigation capacity with dedicated and fine personnel available to assist.

Indeed the experience in the United States is that the network of "volunteers" available to assist the Court in meeting with adults with an incapacity is being relied upon (discussions during my fellowship with several respected academics identified this as a growing and positive trend).

5.4.3 A Note on Reporting – Must You?: Before investigation and possible action to recover property or even criminal prosecution can commence an individual brings the suspected abuse to the attention of the institutional actors or other appropriate organisations – that is reports the suspicion.

There is some contention about the type of scheme which might usefully be engaged to encourage and facilitate reporting.

Reporting and the issues attendant upon it is worthy of a discreet consideration beyond the scope of this writing but is integral to the issue of prosecution of elder financial abuse.

At one end of the spectrum sits mandatory reporting (that is legislative compulsion to report) of suspected elder financial abuse.

Opponents of such a scheme suggest that there is little evidence that mandatory reporting is more effective in identifying instances of elder financial abuse then is voluntary reporting.36

Other jurisdictions have found mandatory reporting to be worthy of legislative prescription.

It would seem at least that there are "significantly higher investigation rates" found for States that have mandatory reporting (and tracking of reports). 37

The policy debate also touches upon the rights of the adult concerned; should he or she be the subject of mandatory reporting in the absence of the adult’s views being sought (and acted upon)?

That which was engaging in the course of the Fellowship was that it is not only a question of whether reporting is mandatory or not; the subtle legislative protections offered are also important. Put neatly the issue also turns upon (if reporting is not to be mandatory):

- the education of those involved (to identify suspicions)
- the legislative scheme supporting and protecting those who might report – in respect of confidentiality they might otherwise feel or in fact have imposed upon them as well as orthodox whistle blowers protection.

The jurisdictions considered draw out at least some of these possible different approaches to reporting:

- Mandatory Reporting - The United States – California: In California there is a system of mandatory reporting – and the scope of those obliged to report is quite broad (that is more expansive than a narrow group of professionals who might in the course of their profession with frequency come into contact with potential elder abuse).

The scheme is set out in the California Welfare and Institutions Code at chapter 11.

That chapter is entitled "Elder Abuse and Dependant Adult Civil Protection Act".

That part of the Welfare and Institutions Code (sections 15610 – 15675) explicitly was enacted in order to address elder abuse.

"Abuse of an elder or a dependant adult" is defined to include financial abuse (section 15610.07) and financial abuse in turn is defined very broadly as any action when a person or entity takes or assists in taking, appropriating, obtaining or retaining by a broad range of measures – including undue influence, wrongful use or fraud, real or personal property of an elder or dependant adult (section 15610.30).

An elder is defined as somebody aged 65 years or older, a dependant adult a person between the ages of 18 – 64 who has a form of dependency otherwise defined (see sections 15610.27 and 15610.23).

The Code requires that any person “who has assumed full or intermittent responsibility for the care or custody of an elder or dependant adult” to be a "mandated reporter".

Members of the clergy (but for penitential communications), health practitioners, and those broadly working in “public or private” facilities that provides care or services for elder or dependent adults are mandated reporters.

A mandated reporter who has “observed or has knowledge of an incident that reasonably appears to be financial abuse” is required to report by telephone or internet the abuse “as soon as practically possible” (section 15630).

In the case of financial abuse the report must be made to the local District Attorney’s office and as a matter of course to the Adult Protective Services Agency.

A mandated report in respect of financial abuse explicitly includes “officers and employees of financial institutions” including banks (section 15630.1). Interestingly suspected financial abuse includes observing or having knowledge of behaviour or unusual circumstances or transactions, or a pattern of behaviour or unusual circumstances or transactions, that will lead an individual with like training or experience, based on the same facts, to form a reasonable belief that an elder or dependant adult is the victim of financial abuse” (section 15630.1).

Suspictions of financial abuse do not have to be reported if there is no awareness of any other corroborating or independent evidence or the person with the knowledge or information “in the exercise of his or her professional judgement” reasonably believes that financial abuse is not occurring.

The failure to report “financial abuse” may lead to a civil penalty of $1,000 but if the failure report is “wilful” a $5,000 fine might be imposed. The employer of the financial institution can be obliged to pay the fine.

There is confidentiality as to the identity of the person who makes such a report (section 15633.5) and there is a general exemption from Civil or Criminal liability for having made the report (section 15634).

Accordingly at one end of the spectrum California provides for mandatory reporting of suspected financial abuse by those who essentially come into contact by way of care or dealing more generally with elder persons.

There are protections for those who are obliged to make the report and there are penalties if reports are not made.

The legislation explicitly extends to financial institutions such as banks.

- **British Columbia – Canada:** British Columbia does not reflect a system of mandatory reporting.

  It is however of interest to consider the legislative provisions that surround reporting – it serves as an example of facilitative system of reporting with clear legislative guidance for those who intend to report.

  Centrally reporting is not mandatory but action by the agency to whom reports are to be made must occur.

  As previously discussed designated agencies under the relevant legislation (the Adult Guardianship Act) receive reports.

  Section 46 of the Adult Guardianship Act provides that a person may “report the circumstances to a designated agency”.

  The “circumstances” to which the report may be directed includes information that an adult is abused. “Abused” (section 1) “includes deliberate mistreatment” that causes the adult "damage or loss in respect of the adults financial affairs".

  Protections are offered to those who have reported:-
o **Relief from Liability:** No action for damages which might be brought against a person for making a report (unless the report is made falsely and maliciously) that is an "exclusion of liability provision" (section 26(3)).

o **No Victimisation:** Essentially recriminations or victimisation cannot be visited upon a person – that is dismissal or discrimination, intimidation coercion or discipline (amongst other things) cannot be exacted upon essentially a whistleblower who makes a report (section 46(4)).

That which is of further interest in the British Columbia scheme of facilitative reporting in respect to financial abuse is that which is occurring at the Federal level in Canada.

Drawn to attention by the National Director of the Canadian Centre for Elder Law 38 the Federal Parliament has had introduced (but not yet passed) an Act to facilitate further the sharing of information in respect of financial abuse.

That legislation “Bill C-12” reflects a provision which according to the legislative summary 39:-

“would allow disclosure without consent to a Government Institution or to the individual's next of kin or authorised representative if there are reasonable grounds to believe that an individual has been the victim of “financial abuse.”

The Bill therefore intends to allow employees of financial institutions in particular who otherwise might be constrained by the banker and customer relationship or the inherent confidential nature of the commercial relationship to report suspected financial abuse notwithstanding those concerns.

This Federal legislation would serve to further facilitate the operation of provincial laws such as those in British Columbia (by removing barriers to reporting abuse that can only be addressed at a national level).

Accordingly in Canada reporting is not mandatory although there is a clear scheme established by legislation as to where reports ought be made and perhaps as importantly what agencies who are the legislative institutional actors ought do upon receipt of a report.

Further there are protections for those who make reports (such protections that are of course central and are also found in Australian legislation). Interestingly the barrier which sometimes is raised in respect of reporting amongst banks and financial institutions is intended to be addressed through relatively novel Federal legislation.

Perhaps the two ends of the spectrum in respect of reporting are represented by the US and Canadian positions considered. In the United States or at least in California (as for other States) there is mandatory reporting with the threat of penalty if suspected financial abuse is not reported.

In British Columbia Canada a voluntary reporting position is adopted but the legislative scheme encouraging facilitating reporting is well advanced.

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38 Krista James in an interview for Fellowship, National Director Canadian Centre for Elder Law and Member of the British Columbia Law Institute – 10 April 2012

39 Legislative Summary Bill C-12: An Act to amend the personal information protection and an electronic documents Act
5.5 Reflections on Distinctions Between the Jurisdictions – Combating Elder Abuse: The Differences: That which was most engaging in the course of the Fellowship was to identify and begin to understand the different approaches taken in countries considered to the issues in respect of elder abuse particularly amongst those with an incapacity.

The problems seem to be common – rising incidents of financial elder abuse but each jurisdiction reflected a different emphasis at least in respect of addressing the issue.

There was certainly a raised consciousness of those experts in the field visited of the problem, but in all three countries – the United States, Canada and England – there were also assertions that socially and politically the issue of elder abuse had been raised to one of prominence. Partly this is as a consequence of the general or social and political discourse identifying the issue as one of importance but also each jurisdiction related that there had been at varying times in the recent past intense media scrutiny of particular cases of elder abuse (or a series of media stories or articles).

The LA Times as far back as 2005 has raised the issue of elder abuse and in particular the conduct of fiduciaries. In Canada the advices received is that there has been intense media interest as well as an Ombudsman Report in British Columbia in respect of residential care for seniors which further focussed attention and in England there has been media and parliamentary scrutiny of the issues.

Some of the different structural and legislative responses to the issue which will be discussed in this part have included:-

- The criminalisation or legislating civil penalties specifically for elder abuse (as particularly reflected in the United States).
- The creation of specific legislative schemes more broadly to combat elder abuse.
- The emergence of professional fiduciaries, their competence and standards.
- The requirements for fiduciaries in jurisdictions other than in Australia to provide financial security for their conduct (bonds) take oaths and make promises.
- The increasing response from the not for profit sector and volunteer organisations to assist in addressing the problem and the emergence of forensic centres particularly in California which centres on a case by case basis plan and sometimes prosecute elder abuse cases.
- The various levels and audiences to whom education campaigns are addressed, ranging from general education campaigns for the community, those addressed specifically to older people, the education of those who work within the field (fiduciaries and health and allied health professionals) even including training members of the judiciary (judges) in managing elder abuse cases.

5.5.1 Elder Abuse as a Civil Wrong Or a Crime: In some jurisdictions within the United States elder abuse (and California represents the particular jurisdiction considered) is designated as either a crime punishable by imprisonment or as a civil wrong, attracting a fine.

Criminal sanctions and civil wrongs broadly serve to punish the offender but also it has been contended have value as a deterrence, in this context in respect of those who might otherwise financially abuse an older person with an incapacity. 

The position in Australia is that broadly elder abuse may be prosecuted as a crime but (only) in the context of existing criminal law (that is a separate criminal sanction for elder abuse generally does not exist).

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40 A discussion as to the relative merits of criminal sanctions and their deterrent value is an area well traversed in academic studies and this report cannot accommodate a review of that literature.
In Queensland by way of illustration the prosecution of elder financial abuse may be progressed through the ordinary crimes of theft or fraud. As discussed most recently in the Queensland Law Reform Commission Report in a criminal context, elder financial abuse is dealt with by:-

- Section 298 of the Criminal Code – the offence of stealing carrying a maximum penalty of 5 years, increasing to 10 years where the offender is the victim’s “agent” (for example attorney under an enduring power of attorney).
- Section 408C of the Criminal Code which proscribes fraud and visits a maximum penalty of five years imprisonment, 12 years where the offender is in a fiduciary relationship (for example an administrator or substitute decision-maker).

Interestingly that Commission concludes that “consideration be given...to the development of the separate offence dealing with financial abuse and exploitation of vulnerable persons, including older persons, people with impaired capacity and people with disabilities”.

The specific recommendation (recommendation 17 – 18 in that report) is that the Criminal Code (Queensland) be amended by adding to the list of aggravated circumstances (resulting in potentially a higher penalty) where the offender is an attorney under an enduring power of attorney or an administrator and in both cases the victim is the adult with an incapacity.

Consideration is to be given as to whether there should be a separate offence.

In Queensland there already exists a penalty for a substitute decision-maker who fails to exercise his or her powers other than with honesty and reasonable diligence. The Guardianship and Administration Act 2000 at section 35 provides that a maximum penalty of 200 penalty units may be imposed (by the Queensland Civil and Administrative Tribunal) for a guardian or administrator who fails to act with honesty and diligence – a similar provision at section 66 of the Powers of Attorney Act 1998 in Queensland also applies to an Attorney.

The recent Victorian Law Reform Commission Report recommends for that State that there be a civil penalty “for a new public wrong” – broadly for abuse of those with a decision-making incapacity.

It contends that abuse should be defined to include physical abuse, sexual abuse and financial abuse and would also extend to exploitation defined as including financial exploitation.

The Commission commended a civil penalty (as opposed to a crime) drawing upon the Australian Law Reform Commission which found that civil penalties “are closely founded on the notion of preventing or punishing public harm”.

Accordingly in Australian jurisdictions whilst there are particular, civil penalties for fiduciaries failing to discharge their duties there is no discreet civil wrong or criminal offence in respect of elder financial abuse related to those with an incapacity.

Both Queensland and Victorian Law Reform Commissions have commended specific action in this regard, in Queensland offering that a specific criminal wrong be enacted and in Victoria a civil wrong.

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42 See QLRC Report (No. 67) op cit at Volume 3page 284.
In the United States elder abuse of those with an incapacity has for some time been given voice both as a civil wrong and a criminal offence.

In California one of the provisions in the armoury of those who prosecute elder abuse (or in particular are seeking to recover property) include a provision in section 859 of the California Probate Code which provides that:-

- If a person in bad faith wrongfully has taken, concealed or disposed of property.
- The property belongs to the estate of the conservatee (in this context a person with an incapacity) through the commission of elder or dependant adult financial abuse,

the person is liable "to twice the value of the property recovered".

The California and Welfare Institutions Code at chapter 11 introduces a particular scheme to address "elder abuse and dependent adult civil protection".

In addition to the provisions in the various codes in California law dealing with probate and welfare, elder abuse is also a crime.

The California Penal Code at section 368 is California's "elder abuse statute".

The legislation provides (and this is only a brief summary of it):-

- **Elder:** An elder for the purposes of the Code is any person who is 65 years of age or older, and a dependant adult is any one between the ages of 18 – 64 who has physical or mental limitations restricting their ability to carry out normal activities or protect his or her rights.
- **The Crime:** The code makes it an offence for theft, neglect or physical abuse of an elder or a dependant adult.
- **Penalty:** The ordinary penalty is between 2 – 4 years in State Prison, and a maximum possible sentence for a misdemeanour is one year in jail and a fine of $2,000. If in a financial elder abuse case the money or property misappropriated exceeds $400 in value a felony prosecution is advanced. Additional terms of imprisonment are attracted where the theft involved exceeds certain financial limits ($65,000, $200,000, $1.3M and $3.2M).

In particular it is section 368 of the Penal Code which is engaged for prosecutions of financial abuse, including the taking of property, the acquiring of property through consent which is obtained by "trickery or deceit" and the profiting from undue influence.

The Penal Code is broader than simply facilitating prosecution of those in a fiduciary position (that is attorneys or conservators) as exemplified in the case referred to by Deputy District Attorney Allen in her article "Protecting our Elders"[^44] – as she draws from the case of People v Cleaver.[^45] In that case the defendant was convicted under the Code when she stole money from elders (people aged over 65) who had purported to invest the money with the defendant but instead was used "to fund her lavish lifestyle and a lawsuit she was pursuing against her former employer".

The defendant in that case preyed upon elder people and was ultimately sentenced to five years imprisonment.

[^45]: People v Cleaver, LA Country Superior Court Case No. BA274666 (sentenced December 11, 2007)
The difficulty (which the Fellowship provided an insight into) with prosecuting elder abuse cases is the burden of “beyond reasonable doubt” in the Australian context having to be jumped.

In these cases frequently the “elder” has a disability or an incapacity of some kind and there are difficulties in evidentially proving a case.

There is great expertise clearly developed and continuing to develop in the United States jurisdictions in respect of such prosecutions.

Accordingly there is a mature body of legislative and case law particularly in the United States which is illustrative of elevating elder financial abuse for those with an incapacity to the level of a crime or at least a civil wrong. Such statutes serve at least to reflect a legislative focus upon the abhorrence of elder abuse (because there is a distinct and separate crime or civil wrong) and in successful prosecutions serve to punish the offenders and, though not without controversy may serve as a deterrent.

5.5.2 Fiduciaries – Those Who Assist Older People With An Incapacity – The Emergence of Professionals, Competence Training and Support. There are significantly different regimes which apply in respect of educating supporting and supervising those who are appointed either by a Court or an enduring power of attorney as substitute decision-makers.

Supervision has been considered previously in this paper but the profile of those who support elders in a fiduciary capacity is common across jurisdictions – the majority of people either appointed by a power of attorney or by a competent Tribunal or Court are family members (in England some 53% of appointments of deputies are to family members). 46

A trend which is developed in the United States but increasingly emerging in England is the establishment or growth of professional fiduciaries – that is those who seek appointments as substitute decision-makers as their business. It is likely that “professionalization” of these roles will be felt soon in Australia.

There are a number of points at which there is divergence also in the way in which substitute decision-makers are educated and supervised – in part to ensure that elder financial abuse does not occur.

• The Emerging Trend: The Fellowship enabled me to meet with many Californian professional fiduciaries – that is individuals who conduct a business amongst other things acting as conservators on behalf of adults with a disability – often older Americans.

Professional fiduciaries as an industry or business would seem to be well established and not only is regulated but the subject of mandatory continuing development.

In England during Fellowship discussions in Birmingham at the Office of the Public Guardian it was noted by senior officers there that there has been an emergence of some entities or organisations holding themselves out as professional deputies (substitute decision-makers). An estimate of some six companies who are conducting business in that way have been identified.

In Australia the menu of potential administrators or guardians has traditionally extended to family members – being appropriately the majority

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46 On the advices of Judge Lush of the Court of Protection in interview for the Fellowship
of those appointed as substitute decision-makers, public (Government) bodies and private trustee companies.

The trend observed in America and now extending into England – the emergence of professional fiduciaries as a discipline and business unique to itself was a significant development observed. It is the way in which these fiduciaries are regulated and to a large extent self regulated that it is of further interest.

- **Regulation Supervision and Education:** Substitute decision-makers either through the instrument of an attorneyship document or by appointment hold a unique and trusted position which places in their hands the financial management of property and assets on behalf of others. The scope for these individuals to engage in financial abuse is generous – such individuals hold the capacity to access the funds and property of the adults whom they represent.

There are celebrated (or perhaps more accurately infamous) cases in the general media in each jurisdiction of such individuals misappropriating money and property.

The nature and extent of the regulation, supervision and education of such fiduciaries therefore is an important aspect in preventing financial abuse.

In England as discussed previously in this paper the role or supervision of Deputies is statutorily given to the Office of the Public Guardian.

It might be recalled that there are four levels of supervision of deputies as defined by the Office of the Public Guardian.

Interestingly where the value of the estate of the adult to whom the appointment relates is valued at over £18,000 and there is a new appointment of a lay deputy the supervision level at least for a time is assessed as being the second highest – type 2a.

In that way the Office of the Public Guardian attends greater levels of supervision and indeed support to the newly appointed deputy – usually a family member.

Of recent times there has been a trial of early intervention and support for newly appointed deputies.\(^{47}\)

That additional supervision or support includes (by trial) telephone contact with the newly appointed deputy, lasting some 20 – 25 minutes within 6 – 8 weeks from the receipt of the Court order appointing the deputy.

This level of supervision (type 2a) also usually entails an interview from an Office of the Public Guardian "visitor", a requirement for an annual report from the deputy and the application of the dedicated case work team with a direct telephone number and mail box.

In this way the Office of the Public Guardian not only supervises but seeks to support and assist family members appointed as deputies to ensure that they understand amongst other things their duties and obligations (including the necessity to avoid misappropriation, gifts to themselves and others and conflicts of interest).

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\(^{47}\) This trial was discussed and subject to a specific presentation during the Fellowship visit in the Birmingham Office of the Public Guardian in May 2012
It is to this level of supervision that professional deputies are also subject if "the deputy is operating as a commercial enterprise with a multiple deputyships, and is not regulated by any professional body and does not yet have a proven track record in providing deputyship service."\(^{48}\)

Apart from the tolerably extensive level of supervision and increasing focus on assisting and educating appointed deputies in England there exists alongside the relevant legislation - the *Mental Capacity Act*, an extensive Code of Practice.

Whilst quite appropriately Judge Denzil Lush who heads the Court of Protection expresses concerns about the length of the Code (it extends to greater than 250 pages) the Code intends to "explain how the Act will operate on a day to day basis and offers examples of best practice."\(^{49}\)

This Code of Practice has legislative context – it is issued by the Lord Chancellor pursuant to sections 42 and 43 of the *Mental Capacity Act 2005*.

The Code of Practice "provides guidance to anyone who is working with and/or caring for adults who may lack capacity to make particular decisions. It describes the responsibilities for an acting or making decisions."\(^{50}\)

Of particular interest in respect of elder financial abuse and incapacity is the observations in chapter 14 of the Code which explains the role and functions of supervision of attorneys and deputies by the Public Guardian, chapter 7 in respect of the attorneys and their obligations under Lasting Powers of Attorney and chapter 5 which describes how decisions ought be made on behalf of people with an incapacity.

Consequently in England an extensive code with some legislative force exists which, notwithstanding some controversy about its length presents as a practical guide with scenarios as to how attorneys and deputies should act (and as a corollary avoid at least unintentional financial abuse).

5.5.3 **The United States and Standards:** In the United States there are many aspects of fiduciaries which differ from those features of systems which exist in Australia.

At its highest significant work and attention has been applied to developing National Standards for Guardians\(^{51}\) most recently at the third National Guardianship Summit.

The National Guardianship Standards which were produced as a result of that Summit do not have force of law but rather are intended to be adopted as standards by professional fiduciaries and their representative bodies.

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\(^{48}\) Excerpt from presentation by Kevin Tomlinson, Katie Gibbs and Trish Bloomer – the Office of the Public Guardian in Birmingham, Ministry of Justice as part of the Fellowship (unpublished)

\(^{49}\) Forward by Lord Falconer of Thoroton to the *Mental Capacity Act 2005* Code of Practice

\(^{50}\) *Mental Capacity Act 2005* Code of Practice page 5

\(^{51}\) There was a Third National Guardianship Summit held in October 2011 which as part of its objectives produced "guardian standards" for substitute decision-makers. That guardianship network which met at the Summit was chaired by Sally Hurme who was interviewed as part of the Fellowship and the organisations represented were an impressive alignment of significant entities and included: AARP, the American Bar Association (commission on Law and Aging) the Alzheimer Association, American College for Trust and Estate Council, Centre for Guardianship Certification, National Academy of Elder Law Attorneys, National Centre for State Courts (also visited on the Fellowship), National College of Probate Judges and the National Guardianship Association. Essentially all bodies involved in the area participated.
They may be given some force of law.

They are presented as "standards of excellence" for guardians.

The core standards deal with a range of matters and are worthy of separate consideration:

- **Core Standards**: There are core standards which include that there should be planning for short and long term goals of adults and that those plans are to emphasise "self determination and the preference for substituted judgement" and "person centred" planning. The core standards require a guardian to treat the person with dignity, to cooperate with others, to discharge the relevant duties to the Court and to promptly report abuse, neglect and exploitation.

- **The Guardians Relationship to the Court**: The standards call upon guardians to seek "ongoing education", keep the Court informed and to seek assistance where required.

- **Financial Decision-Making**: There are weighty and detailed standards in respect of financial decision-making (standard 4).

Priority is to be given to the needs and preferences of the person, weighing the costs and benefits to the estate and applying the relevant laws. The essential content of a financial guardian's obligations – to ascertain the incomes, assets and liabilities and to appropriately plan is well considered in the standards and a further standard calls upon the conservators to continue education about the person and more generally.

The standards of excellence for guardianship is only one part of an impressive body of principles, best practice guides and toolkits produced, usually by peak representative organisations such as those represented in the membership of the National Guardianship Network.

Those standards are intended to speak to all guardians but particularly the increasing body of professional fiduciaries who conduct business as substitute decision-makers.

The second aspect of interest in the United States jurisdictions which differs from the Australian experience focuses upon the competence and standards to be adopted by those who conduct the business of acting as substitute decision-maker.

In California such fiduciaries are required to be licensed, there is a requirement for examinations to be sat in order to obtain a licence as well as the accumulation of a requisite level of education. Ongoing licensing requires continued professional development and an adherence to appropriate standards.

The Fellowship permitted an opportunity to speak to a master guardian (Mr Dan Stubbs) in the field as well as other professional fiduciaries.

The requirement for licensing fiduciaries is not uniform across States within the US, indeed California is an exemplar of this kind of prudential requirement.

The Licensing requirement and that which leads to it (education including continuing education) as well as the standards promulgated by the Fiduciary Associations visited all are at least in part directed at preventing
elder financial abuse as well as proper management of an incapacitated person’s estate.

The requirement to be licensed is to be found in Probate Code, section 1821 which provides that:-

“If the practitioner is licensed under the professional Fiduciaries Act, chapter 6...the petition shall include both of the following:

- A statement of the petitioner's licence information.
- A statement explaining who engages the petitioner or how the petitioner was engaged to file the petition.”

The Professional Fiduciaries Act requires the licensing of fiduciaries in this area by the "Professional Fiduciaries Bureau" (a State entity).

Requirements for licensing include passing an examination and completing 30 hours of approved education courses – fifteen hours of continued education each year is required for renewal of a license.

The fellowship enabled visiting with senior members of the Professional Fiduciary Association of California, the peak body for Fiduciaries in that State.

5.5.4 A Summary: The Fellowship provided an insight into some significant differences in respect of how fiduciaries are trained and carry out their work – and the schemes differed as between jurisdictions as to their content but all have one eye on preventing fiduciaries from abusing their position. The differences in trends included:-

- That there is a growing emergence of the “business” of acting as a substitute decision-maker (individuals and entities established to commercially provide this service).
- In England an extensive Code of Practice is intended to provide valuable education and guidance to substitute decision-makers (deputies in the English context). This sets the context for the supervisory functions of the Public Guardian who sees his role as not just supervising but also assisting in educating deputies (to prevent in part financial abuse).
- In America impressive institutional actors – representative bodies continue to progress an agenda calling for and producing best practice and standards for substitute decision-makers (guardians and conservators). The most recent expression of this includes new guardianship standards which in part directly speak to high ethical and professional standards for substitute decision-making.
- California as a jurisdiction has particularly dealt with in a legislative way those who conduct the business of acting as fiduciaries. That State require these individuals to be licensed. In turn such licensing requires a level of knowledge and competence which is examined in a formal way. To retain a licence continuing education is required.
- There is an established mature and sophisticated system of professional associations for fiduciaries some of whom were visited during the course of the Fellowship. These bodies not just represent fiduciaries but maintain vigilance in respect of standards and professionalism.

In Australia generally professional “private” fiduciaries outside private trustee companies aren’t required to be licensed (as they are in
California). Whilst the various pieces of legislation are proscriptive in terms of duties an extensive practical Code of Practice does not uniformly exist or at least not to the extent reflected in the Code of Practice in England.

These and other features of the jurisdictions visited not only distinguish them from the Australian experience but may provide valuable options to consider in the Australian context.

5.5.5 Bonds, Oaths and Promises – I Promise Not To Take Any Money...: A distinction which is reflected in the countries travelled (as compared to Australia) is the prevalence of:-

- **Bonds**: The requirement for substitute decision-makers appointed to that position by the Court to take out bonds – financial instruments to secure against, amongst other things, misappropriation of financial abuse; and

- **Oaths and Promises**: The delivery of signed oaths or promises through which the fiduciary formally undertakes to comply with the obligations visited upon the person flowing from their appointment.

Neither of these two matters – bonds or oaths have currency in any Australian jurisdiction but both may serve in some way to preventing financial elder abuse particularly in respect of elders with an incapacity.

The nature and qualitative effect of such provisions however may be open to debate though empirical research is not available to inform such a discussion.

Whilst the Queensland Law Reform Commission in its most recent review of Guardianship Laws in Queensland has not substantively dealt with either issue, the Victorian Law Reform Commission has.

In brief terms that Commission has commended changes to the laws that operate there which, whilst not going so far as an oath commended “formal acknowledgements”:-

"it was suggested that it would be an effective way of identifying or countering potential abuse by appointed substitute decision-makers,""52

and supported changes in the law so that substitute decision-makers formally acknowledge their responsibilities and duties.

The Commission concluded that “it is desirable for all substitute decision-makers to sign an undertaking upon commencing their role to act in accordance with their responsibilities”.63

This would apply to those appointed as substitute decision-makers (by the Victorian Civil and Administrative Tribunal) as well as attorneys under enduring powers.

Apart from seeking to focus the fiduciaries mind upon these duties such an undertaking would, it is suggested by the Commission serve to be used in any subsequent proceedings (in respect of financial abuse).

52 See VLRC Report op cit at page 410, footnote 33
63 See VLRC Report op cit at page 413
The contrasting and stronger positions in other jurisdictions on these two issues include:-

- **Bonds:** A bond is required for a conservator of the estate appropriately appointed pursuant to section 2300 of the California Probate Code.

  *Letters* (the authority by which the substitute decision-maker acts) will only issue after the bond ordered by the Court is provided.

The bond must be provided by an "admitted surety insurer" (section 2320 of the Code) and the Court may only waive the requirement for a bond to be provided where there is good cause (section 2321 of the Code).

The experts in California whom the Fellowship enabled me to speak to suggests that bonds are usually required by the Court and may be called upon where the fiduciary misbehaves and financial abuse occurs.

In the Canadian jurisdiction of British Columbia visited bonds also feature in the legislative scheme. They too can be obliged by Order of the Court and historically are required where private (as distinct from corporate or public), committees are appointed. Increasingly it is understood from the interviews conducted the expense involved in obtaining a bond is encouraging private committees or perhaps the Courts in lieu of ordering a bond to be obtained to fashion orders from the Courts so that the fiduciary in fact does not have the power to deal with significant assets (thereby obviating the risk of financial abuse).

It is said by the Public Guardian that bonds are put in place to protect against the "unforseen and unpredictable".

Bonds generally where they are required or the cost of them are paid from the assets or estate of the adult for whom the fiduciary is appointed.

In England under the *Mental Capacity Act 2005* when a deputy is appointed a bond is usually required. The bond is calculated according to the assets of the adult in respect of whom the appointment is made.

The cost of the bond varies depending on the size of the estate – between 0.5 – 0.2% for a bond of £250,000 or above.⁶⁴

A bond is of course not an insurance rather a “guarantee” bond which can be called upon should in this context there be misappropriation by a deputy.

Accordingly from the information obtained as a result of the Fellowship the jurisdictions visited particularly California, England and British Columbia all require as a matter of course bonds to be taken out which secure against financial abuse.

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⁶⁴ The rate for bonds includes 0.5% up to £40,000 to 5% for £40,000 up to £150,000; 0.2% for greater than £250,000. Interestingly the Ministry of Justice with the Office of the Public Guardian has arranged for a guarantee bond provided by Marsh Limited, supported by the company Aviva.
The cost of obtaining the bond is visited upon the estate. This cost in the case of the Canadian jurisdiction is increasingly being reviewed to the extent that the Court as an alternative is fashioning orders to reduce a risk of misappropriation of financial abuse without the necessity of obtaining a bond by putting beyond the substitute decision-makers powers the capacity to deal in the significant assets of the adult concerned.

In Australia bonds are not typically required and do not for example feature in the Queensland legislation.

- **Oaths and Promises:** As observed in the Victorian Law Reform Commission report previously, some value in the jurisdictions visited is placed upon the fiduciary appointed promising to perform the duties asked of them diligently and appropriately.

It might also be considered that such a promise or undertaking provides some assistance in Court proceedings should the appointed fiduciary be shown to have breached those duties.

By way of illustration the Probate Code in California at section 2300 requires an oath:

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“before the appointment of a guardian or conservator is effective, the guardian or conservator shall; take an oath to perform the duties of the office according to the law, which oath should be attached to or endorsed upon the letters”.
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As discussed in the Code of Practice in England a person who wishes to be appointed a deputy must sign a “declaration” which is to give details of their circumstances and ability to manage financial affairs.

That declaration reflects details of the tasks and duties that the deputy must carry out and serves as an assurance that the deputy will comply.

- **A Note on Inventories and Accounts:** A further feature of the jurisdictions visited is that routinely a substitute decision-maker appointed must compile and usually file with the relevant court an inventory of the assets of the person for whom the appointment has been made and account with regularity.

The former at least, the compilation of an inventory, whilst good practice generally is not required in Australian jurisdictions (at least by virtue of legislative obligation).

In California section 2610 of the Probate Code requires an “inventory and appraisal” to be filed by the appointed conservator within 90 days of the appointment. The inventory and appraisal must be filed with the Clerk of the Court.

Accounting must occur – section 2620 of the same Code requires accountings to be filed at least every 2 years “to the Court” and must include supporting documentation.

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55 Mental Capacity Act 2005 Code of Practice op cit at page 148 para 8.37
In British Columbia section 10 of the Patients Property Act requires that a Committee deliver to the Public Guardian and Trustee a true account of the property "as it is discovered" (if the property is valued at $25,000 or more). The Public Guardian and Trustee also serves to review the accounts (financial management) of the substitute decision-maker – committee by virtue of the same section.

As previously canvassed the scheme existing in England is that the Office of the Public Guardian has an extensive and sophisticated supervision process which includes annual reports detailing assets expenditure and income.

The requirement to furnish inventories and to account periodically clearly are intended to protect in part against financial abuse of adults with an incapacity.

There are two issues which arise in this context:-

- First, to what purpose the inventories and accounts are put – as previously described there is doubt as to consideration given or at least proper consideration being given to the accounts and inventory in some Court systems in the United States.
- Second, the inventories and accounts, properly reviewed are of limited utility if they are not accurate. This might be ameliorated to some extent by requiring original documentation as to assets expenditure and so on (as occurs in England with the Office of the Public Guardian).

In any event it would seem that in other jurisdictions there are more extensive requirements upon substitute decision-makers to take inventories, declare and account for their actions in respect of the financial affairs of the adults for whom they are appointed.

5.5.6 Powers of Attorney, Abuse and Registration: Enduring (durable or lasting in other jurisdictions) powers of attorney quite properly enable an adult to appoint another to act for them, amongst other matters, when the Principal loses capacity.

There is no controversy that enduring powers of attorney are useful, indeed socially necessary instruments.

They are however instruments which can be misused, leading to a financial abuse.

As was observed the publication "Power of Attorney Abuse; What States Can Do About It" Lori Stiegel and Ellen Clem described in the United States context (which has relevance to all jurisdictions) in respect of such abuse:-

"These sources reveal that POA (for our purposes Enduring Powers of Attorney) abuse may occur because the Agent does not understand his or her role and the duties owed to the Principal, or because the Agent who understands the duties owed to the Principal intentionally violets them. Adding to the complexity, intentional POA abuse may be opportunistic or targeted. Opportunistic abuse occurs when an Agent – whether a family member or not – takes advantage of an opportunity to exploit a vulnerable Principal. Targeted abuse occurs when an individual – again whether a family member or not – deliberately
targets and develops or enhances a relationship with a vulnerable elder in order to become the elder's agent and then commit POA abuse. 56

It is in that context that a system of registration of Powers of Attorney has been raised, as one (partial) way to address financial misuse or abuse. 57

In England, where the Fellowship enabled me to visit there is compulsory or mandatory registration of lasting powers of attorney. Part of the reason for the introduction of that system of registration included the proposition that "registration involving a public body will undoubtedly discourage some who might abuse powers which remain in the private domain and will provide a point of reference for those who have queries or concerns about the status of a particular document". 58

The role that mandatory registration of powers of attorney plays in preventing abuse however is uncertain – with some arguing that in fact registration will confer a legitimacy upon the mischievous or criminal attorney such that proper enquiries when financial abuse occurs may not be made. 58

There are other arguments favouring registration which do not centrally touch upon the issue of financial abuse with which the Fellowship is concerned. 60

In England and Wales as discussed there is mandatory registration of lasting and the now otiose enduring powers of attorney for both personal and financial matters pursuant to the Mental Capacity Act 2005 - section 9 (2)(b). Lasting and enduring powers of attorney are registered with the Office of the Public Guardian and registration costs £130 although there are concessions for those on lower incomes.

The register might be searched in a limited way at a cost of £25.

Prior to registration if the Principal having made the power of attorney identifies individuals (named persons) those individuals must be notified. It is thought that such "named persons' might serve as a safeguard against, amongst other things financial abuse (see again the Mental Capacity Act 2005 schedule 1 paragraphs 6 – 9). The administrative process operating in England and largely undertaken by the Office of the Public Guardian is an involved one.

Checks are made in respect of the facial validity of the document and objections to registration are considered (objections are heard in the Court of Protection but are successful relatively rarely given the limited basis to object). Of interest for the purposes of the Fellowship is that senior officers in the Office of the Public Guardian do not uniformly hold the view that the registration system of itself serves to prevent financial abuse.

57 Both the Queensland Law Reform Commission and the Victorian Law Reform Commissions have considered proposals for registration of Powers of Attorney, with the Queensland Law Reform Commission rejecting the proposal and the Victorian Law Reform Commission commending an on-line registration system
60 These include a registration system will provide a source of reliable information for those who seek to rely upon them – banks and other contracting parties.
The other purposes to which a registration system may lend itself may of themselves commend such a system as has been recommended in Victoria.

The Victorian Law Reform Commission has recommended a compulsory register in that respect.\textsuperscript{61} The Victorian Commission however offered that the primary benefits of a register included the benefit of locating verifying and validating the existence of an appointment (and not that the register necessarily would primarily serve to prevent abuse).\textsuperscript{62}

To the extent then that mandatory registration of powers of attorney is offered as a step to prevent financial abuse particularly of older people it would seem that there is inconclusive evidence. Registration systems are such that documents (or appointments more generally as is recommended in Victoria) if it is to gain currency will do so not for that reason but rather to provide greater certainty for those dealing with powers of attorney.

5.5.7 Financial Abuse - Technical Provisions Which Might Assist in Recovery: The legislative scheme which operates in a jurisdiction is of course pivotal to at least the likelihood or possibility that financial abuse of older people with incapacity might have some redress in respect of recovery of their money or property.

There were some differences as between the jurisdictions under consideration in this respect.

In the Australian context there is explicit recognition legislatively of the issue of abuse of those with an incapacity (which would include older people).

For example in Queensland chapter 8 of the \textit{Guardianship and Administration Act} establishes the Office of an Adult Guardian (section 173) whose role includes "protecting adults who have impaired capacity for a matter from neglect, exploitation or abuse" (section 174 (2)(a)).

In part 2 of that chapter 8 the Adult Guardian is given investigative powers (sections 180 and 181), the power to require from at least attorneys and administrators documents and records (section 182), and a general right to obtain information (section 183).

The Adult Guardian is visited with protective powers as well in part 3 of chapter 8 including suspending any powers of an existing attorney under an enduring power of attorney (section 195) and a power to seek from the relevant Tribunal a warrant to enter a place and remove and adult (section 197).

Different jurisdictions have approached legislatively the issue of elder abuse with different emphasis however.

The California Welfare and Institutions Code, as discussed previously, reflects a specific chapter seeking to address elder abuse prevention (chapter 11).

The emphasis in that chapter is upon mandatory reporting with the powers and authorities to investigate sitting with the Adult Protective Service agencies existent in each County.

\textsuperscript{61} See the VLRC Report op cit at recommendations 261.
\textsuperscript{62} See the VLRC Report op cit at paragraph 16.90 page 364
In Canada an express purpose in respect of the introduction of the *Adult Guardianship Act* was to provide support and assistance “for abused neglected adults”. Part 3 of that legislation further facilitates reporting of abuse or neglect but also that Part provides a clear path for largely Government agencies to provide support and assistance (including through “support and assistance orders” – section 56), in cases of abuse.

A feature then of each jurisdiction has been introduction of particular and directed legislative provisions to address elder abuse.

At a second level there remains the seminal issue of the types of powers and authorities which exist to recover property and money *after* financial abuses have occurred.

In all jurisdictions the orthodox rights of action generally available at law exist. Whilst differing a little in content obtaining property through undue influence is actionable in all jurisdictions as is the general actions which lie where an agent (such as an attorney) personally benefits to the detriment of their principal (a conflict of interest and duty – a breach of a fiduciary obligation leading to an account).

One provision however in Canadian jurisdiction represents a departure from that which exists certainly in Australia but also in other jurisdictions considered.

Not infrequently financial abuse occurs in circumstances where assets have been transferred, sometimes, for a value less than they are worth, often for no consideration.

This may occur whether a substitute decision-maker is appointed or not but on the face of it the adult who likely suffered an incapacity at the time has entered into an improvident transaction.

Often the first step in these types of matters is the availability (and the appointment) of a substitute decision-maker to review the transaction and then take appropriate steps – preferably to “reverse” it. This paper has already considered the types of substitute decision-makers that can be appointed.

The reversal of the transaction often however is met with great difficulties; the person who took the benefit of the transaction (that is the person who received the asset at a value often substantially less than it is worth) – will often assert there was a valid agreement and they had no knowledge of the incapacity of the adult concerned.

This occurs also where the person that took the benefit of the transaction or the person’s family is in fact the fiduciary appointed – that is the attorney received a transfer of the principal’s house at an undervalue or as often is the case the house is transferred to a close relative of the attorney.

The attorney almost invariably will assert that the transaction was made by the principal, the adult of their own volition (an “authorised” transaction) and if it is later shown that that adult principal did not have capacity that the attorney involved had no knowledge of that want of capacity.

In terms of contract the position in Australia is prescribed in *Gibbons v Wright*.63

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63 See Gibbons v Wright (1954) 91 CLR 423
Essentially that which needs to be shown is two-fold (in order to undo a transaction which is redolent of financial abuse):-

- First that the adult concerned did at the relevant time lack capacity (that is to understand the "nature and effect" of the transaction); and
- The other party knew or ought to have known of that incapacity.

It is to that latter requirement that often presents a barrier which cannot be scaled; that there are cases where it would seem clear that an adult older person with an incapacity has transferred his or her property for little value, and certainly not its market value perhaps to somebody previously unknown to them until recent times or perhaps to a relative or even attorney.

The issue that arises is that often the adult concerned by the time the matter is looked at by any other party has lost capacity and therefore any evidence they may have been able to provide at the time the transaction was entered into is of little value in a Court or Tribunal.

The other party of course would simply assert that they did not know or ought to have known of the want of capacity at the relevant time.

In Queensland if the adult at the time had an administrator (substitute decision-maker) appointed it is clear from the case of Bergmann v Daw that the transaction is void.

Where the adult however does not have an administrator appointed (including where there is an attorney available) the Common Law test described above needs to be addressed.

The Adult Guardianship Act changes substantially in British Columbia that result.

Section 60.2 of that Act provides that if an adult transfers an interest in the adult’s property “while the adult is incapable” the transfer is “voidable” unless “full and valuable consideration” was paid or “a reasonable person” would not have known the adult was incapable.

That section 60.2 places a different proposition for those defending transactions procured through improper means (financial abuse); there is at least a need to show that full and valuable consideration was paid and importantly the burden to show that a reasonable person would not have known the adult was incapable falls to the transferee, the recipient of the property.

5.5.8 **Guideline Awareness and Education:** A central theme in each of the jurisdictions considered is that education awareness and engagement by the community remains a primary weapon in the armoury combating elder abuse.

The precise nature and content of that education and training however can be refined into some discreet categories:-

- **Awareness of the Community Generally:** Observations were offered from those experts visited on the Fellowship that the evolution of the communities view of elder abuse generally including financial abuse is
not unlike the evolution of the communities awareness and action in respect of child abuse or perhaps domestic violence.

That is not to say that the proponents interviewed believed that the same policy or legislative paths should be taken in respect of elder financial abuse, rather that there was similarity in respect of the level at which the issue sits in consciousness of the general community.

That on which there was agreement was that elder abuse is a discreet issue which needed consistent attention, through public education campaigns so that (at least) elder abuse is recognised as inappropriate and a matter which should attract support and attention regardless of a person’s proximity to the adult concerned.

There is a greater prospect of both preventing elder abuse or at a more minimal level stopping it from continuing if the community is conscious and prepared to report instances as a societal good (as well as an individual offence). 66

- **Substitute Decision-Makers, Training and Education:** At an individual level those who hold the power and access to an older person’s money and property represent institutionally those who may financially abuse an older person with an incapacity.

As previously observed this might be opportunistic and intentional or indeed unintentional.

In each jurisdiction there is increasing focus upon the training and education of substitute decision-makers.

Explicit and actual knowledge of the duties (and indeed obligations) of a decision-maker in these circumstances helps serve to prevent certainly unintentional but even likely intentional financial abuse.

In California the mandatory licensing of professional fiduciaries carry with it an injunctive for continuing professional development in this regard.

Sally Hurme who was interviewed as part of the Fellowship calls for focus upon “the importance of education to address the constant need to have more and better qualified guardians.” 66

The focus in large part of the Office of the Public Guardian in England is not only to supervise deputies (substitute decision-makers) but also to assist educate and advise them of their duties and obligations.

In California pursuant to section 1835 of the Probate Code the Courts are in fact obliged to inform the conservator (substitute decision-maker) of their duties and obligations consistent with this growing focus on educating those directly involved in managing the funds of the people who are incapacitated. The Victorian Law Reform Commission has recommended that the Tribunal appointing substitute decision-makers have the power to order that newly appointed substitute decision-makers undergo training (on-line). 67

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66 Hurmes S “Guardianship Trends in the United States” and in interview.
67 See the Victorian Law Reform Commission Report op cit at page 413
Finally the Office of the Public Guardian in Canada too is very much focussed not only on general public education campaigns but particularly focussed upon ensuring that substitute decision-makers are informed of their duties and obligations.

An increasing emphasis is directed across jurisdictions at ensuring those attorneys under enduring powers and substitute decision-makers (administrators) are aware of their obligations. That which hopefully will follow is a reduced likelihood of those decision-makers by misadventure or intent to misuse their powers.

- **Training and Education – Health Professionals, Lawyers and Banks:** A further level of awareness, education and training is that of the identified need to ensure that lawyers, health professionals and other stakeholders important in the area of elder financial abuse are trained and educated in:-
  - identifying such abuse; and
  - providing their professional services in the context of that understanding including a need to report.

Those who represent the front-line of detecting elder abuse include:-

- Employees and officers of banks (where withdrawals are made).
- Health professionals including allied health professionals particularly those working in the aged care sector.
- Law enforcement officers to whom reports are made and investigations frequently commenced into financial abuse.

Whilst the nature, content and detail of the type of education awareness and training to be offered to these and other groups is beyond the ambit of this paper jurisdictionally each of these groups has been the focus of a specific education and awareness training.

As previously observed in California officers of banks for example are obliged to report financial elder abuse (under threat of civil penalty) – that which has followed such an obligation is training for those staff who may come into contact with the issue.

Health and allied health professionals in all jurisdictions including Australia have been the focus of education and training – this likely must continue to ensure elder abuse when it occurs is reported and action taken.

In the United States because ordinarily probate judges attend to matters involving elder financial abuse there has been produced a range of tools and guides for the judiciary in detecting the issues.

One such publication, a joint enterprise of the American Bar Association Commission on law and aging, the American Psychological Association and the National College of Probate Judges provides a practical handbook to assist judges in determining whether older adults have capacity.68

That which was recognised as a trend necessary and in need of continuance therefore is the continued focus upon raising knowledge

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68 The publication is called “A Handbook for Judges – Judicial Determination of Capacity of Older Adults in Guardianship Proceedings”
and awareness of elder abuse generally but in particular financial abuse for those with an incapacity.

The levels at which that education, training awareness needs to be directed though are multi faceted and must at least include enterprises addressing the community generally, specifically those who are decision-makers and hold the keys to the finances for older people with an incapacity, those who are more likely to come into contact with specific cases of financial elder abuse and older people themselves.

5.5.9 A Note on Trends: There are a number of new trends which are worthy of identification and consideration.

First in all jurisdictions the importance of the not for profit sector in a variety of applications cannot be underestimated.

It is largely the not for profit sector who provide the immediate assistance and support for older people who have suffered at the hands of elder abuse; the provision of "hot lines" for advice and sometimes intervention all increasingly fall to this sector.

The participants are too numerous to individually indentify. Support for their endeavours is important.

Second, in the United States the emergence and settling of forensic centres are of interest. Such centres present multi disciplinary teams to manage and plan action in respect of individual financial abuse cases. Unfortunately in such cases there is real need in order to address them to have allied health support, social worker intervention, legal application and in order to trace that which has occurred often accounting including forensic accounting skills applied. Such centres have been established to bring together a range of professional disciplines to address individual cases as well as broader policy issues. The success of these centres has been measured and studied and are likely a model for other jurisdictions including Australia.69

Finally in British Columbia there is some real consideration being given (in addition to the institutional actors otherwise detailed in this report) to the establishment of the office at the Seniors Advocate.

Such an advocate would serve as a one stop shop for issues relating to older British Columbians. The fiat of such an advocate would include providing both policy and in particular support to older Canadians who have been the subject of financial abuse as well as providing referral services for all manner of resources meeting the needs of older persons.

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6. Conclusions And Recommendations

The Fellowship and the work that proceeded from it has provided some very particular insights into financial elder abuse.

These in summary include:-

- **Prevalence**: In each country visited the issue of elder financial abuse is a significant one; the demographic profile of the countries visited approximate that of Australia — in the US and England however because of the considerable size of the populations comparatively the issue of elder financial abuse concomitant with the sheer size of the ageing population is more pressing. That trend will impact greatly in Australian in the years to come.

- **Fiduciaries and Decision-Makers**: In each of the jurisdictions visited the capacity to appoint or have appointed another person as one's decision-maker upon a loss of capacity (or support or co-decision maker in the case of Canada) is important in the context of financial elder abuse. Often it is those who are appointed who represent a vital barrier to others abusing vulnerable adults. The capacity for appointments differ between jurisdictions — all share the capacity to appoint another person by way of instrument — power of attorney. In the jurisdictions visited however, unlike Australia, appointments after a person has lost decision-making capacity is by way of a Court Order (Australia appointments are made typically by Tribunals).

- **Prudential System to Oversight Decision-Makers**: It is an unfortunate reality that whilst substitute, support or co-decision makers are often a vital step in advancing and protecting the interests of older adults with decision-making incapacity it is sometimes those who are appointed who are the perpetrators of abuse.

Comprehensive and effective prudential oversight of those decision-makers differ as between the countries visited and represent a key to preventing elder abuse.

Bonds and oaths are required but are not typical within Australia. All appointed fiduciaries are required often to periodically report their activities but there are differences in intensity of the extent to which that reporting and oversight occurs. Experts agree though that effective oversight (a review of reports and accounting) is an essential feature of a system which prevents financial abuse.

- **Attorneys**: Powers of Attorney feature in all jurisdiction — enduring past the point of incapacity (called lasting powers in England, enduring or durable in Canada and the United States). Work particularly in the United States has identified some essential features for the legislative scheme which might operate to prevent financial abuse. Clear statements of duties and responsibilities for attorneys is required.

There is a strong suggestion that attorneys (who by and large are not subject to any other oversight after they are appointed) should only have significant powers if they are clearly expressed in the instrument creating the attorneyship.

- **Reporting**: There are differing approaches to whether the reporting of elder financial abuse as a subset of elder abuse generally should be mandatory. In some jurisdictions in the United States mandatory reporting is legislated.

A review of the experience in Canada and in particular British Columbia suggests that if mandatory reporting is not to feature the legislative scheme surrounding reporting needs to be carefully crafted to include capacity for all those who might come into contact with elder financial abuse a capacity to report (a facilitative scheme), that whistle blowing is protected and that after reporting that there is clear responsibility usually on State agencies to investigate and act.
• **To Criminalise or Not:** Great debate is had as to whether criminalisation of elder abuse serves as a deterrent. Whether a discreet crime is legislated or a civil wrong legislated specific crimes or civil roles in relation to elder abuse including financial abuse should feature as part of a comprehensive response.

• **Professional Fiduciaries:** A mature trend in the United States and an emerging one in England is the emergence of individuals carrying on business and professional fiduciaries. Not unlike the need for clear legislative oversight of substitute decision-makers the Californian experience is instructive; mandatory licensing coupled with continuing education for professional fiduciaries is likely to lead to an ethical and professional industry.

Similarly clear practical and considered professional standards must accompany the emergence of professional fiduciaries – and will benefit lay fiduciaries as well.

• **Education:** A key in preventing financial abuse is for society to have its consciousness of the issue raised with the appropriate level of repugnance for it. Those who were likely to come into contact with it should know and appreciate the signs and the appropriate responses to the malady. Fiduciaries, substitute decision-makers should be educated and knowledgeable in relation to their obligations and powers.

• **Overall:** There needs to be a clear legislated scheme accompanied by appropriate educative and social policy to inform society about elder financial abuse and provide for its detection, investigation and prosecution.

This paper has drawn out some of the distinctions between Australian and the jurisdictions considered; each of these areas are worthy of greater consideration in the Australian context.

At a personal level I hope to advance consideration of these and the other issues briefly reviewed in this paper through my professional role as Deputy Public Trustee and Official Solicitor in Queensland.

I hope to further disseminate the knowledge through professional papers both for the Queensland Law Society, the Society of Trusts and Estates Practitioners and more broadly.

Through the forum of Public Trustees and Guardians and other professional bodies of which I am a member I will advance further discussions.
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