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South Australian Law Reform Institute

Powers of Attorney

Fact Sheet 5 – Abuse of Powers of Attorney: Current Legal and Practical Remedies

Abuse of Powers of Attorney

Considering the power given by principals to their chosen decision-makers through Powers of Attorney (POAs), coupled with the fact that South Australia's aging population controls the majority of the state's private wealth, it is unsurprising that these documents can be subject to abuse. However, the level of abuse suffered by victims is difficult to quantify.

Financial elder abuse arises through the abuse of POAs. Instances of abuse are often undetected, and even if the principal is aware of impropriety, older Australians may be reluctant to report abuse for fear of damaging the relationship. This is especially true for attorneys who are family members, or if the attorney also provides care services to the principal. Due to the gravity and importance of the position, the principal would fully trust their attorney, meaning it is unlikely that significant limitations will be put in place.

Consequently, attorneys are provided with significant scope to make virtually any decision they see fit. Principals who execute an enduring Power of Attorney may not necessarily understand the details and implications of complex financial decisions and are often socially isolated and highly dependent on those around them. This creates substantial inherent risk and allows attorneys ample opportunity to abuse their position of power and defraud incapacitated individuals.

Instances where attorneys have abused their role to receive an 'early inheritance' or otherwise misusing the principal's funds, often occurs when the attorney is aware the principal lacks capacity and/or the ability to monitor their actions. Examples include draining bank accounts or transferring the family home into the attorney's own name. The effect of financial impropriety on a principal's financial security can be an 'often permanent and life-threatening setback'.

Currently, there is ambiguity in the reporting processes for abuse. In the context of medical practitioners, the absence of a clear protocol or process is disempowering. At present, possible cases of abuse are reported to the Office of the Public Advocate in the first instance. A streamlined process which is easily accessible to lawyers, medical practitioners and members of the public would help alleviate confusion.

Current Legal Remedies

There are relatively few legal remedies available for an abuse of a POA in South Australia. As set out below, the available remedies may be derived from the *POA Act*, in equity or the criminal law. However, there are a range of reasons why they may be seen to be inadequate, and these inadequacies are discussed below.

Remedies under the POA Act

The *POA Act* sets out various statutory obligations owed by attorneys. A failure to comply with those obligations establishes a right for the principal (or their executor/ administrator) to apply for compensation for any loss associated with that failure.

The *POA Act* also allows for the Supreme Court of South Australia (SASC) to remove the power of attorney, or for the South Australian Civil and Administrative Tribunal (SACAT) to appoint an independent administrator.

The *POA Act* also makes it an offence for an attorney to fail to keep and preserve accurate records and accounts of dealings and transactions relating to the POA. If found to have committed such an offence, the attorney will be liable to pay a penalty not exceeding \$1,000.00.

Equitable remedies

Separately, there are three equitable grounds upon which the SASC may award an equitable remedy—a breach of a fiduciary duty, unconscionable conduct and/or undue influence:

- A breach of a fiduciary duty may occur where an attorney obtains a profit for themselves, or a related party, in conflict with the principal's interests.
- Unconscionable conduct may occur where the attorney, as the stronger party, has enforced, or retained the benefit of, a dealing with the principal as a person under a special disadvantage.
- Undue influence may be seen to occur if it can be established that the attorney procured the POA by undue influence. A principal (or their executor/administrator) must demonstrate that they trusted, or were in some way, dependant or vulnerable, and the attorney exerted ascendancy or control in order to benefit from the transaction.

Each of these grounds requires that a principal (or their executor/administrator) make a formal application to the SASC in compliance with the relevant court rules. Any such application would most likely need to be pursued following formal legal advice and with legal representation.

The equitable remedies available for the above actions may include that:

- there be equitable compensation for a breach of a fiduciary duty by the attorney;
- there be an account of profits;
- an attorney must hold any gains on constructive trust for the benefit of the principal;
- restitution be payable to the principal; and/or
- an offending transaction be rescinded.

Criminal Remedies

There is currently no specific criminal offence of elder abuse concerning financial exploitation through a POA in South Australia. No agency oversees POAs to make sure attorneys are doing their job properly. Impropriety by attorneys is generally prosecuted as a property offence, including theft or fraud. The penalties imposed for these offences may result in imprisonment, but will vary, depending on the nature of the offence.

Inadequacies in current available remedies

There are various legal, procedural and social reasons why the potential remedies listed above may be inadequate in protecting elderly South Australians. In particular:

Legal inadequacies	<ul style="list-style-type: none">• The complexity of the existing laws may be too great.• The commencement of legal action may require a standard of proof that is impracticable.• There may be evidentiary difficulties, due to the frailty and/or cognitive ability of the principal.
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	<ul style="list-style-type: none"> • The existing laws tend to pre-suppose an ability of the principal to be aware of financial impropriety by the attorney, when this awareness may not be present. • The potential remedy may end up being minimal or inconsequential, or impact the principal negatively (eg, a criminal conviction of the attorney may mean that the principal is left isolated in aged care).
Procedural inadequacies	<ul style="list-style-type: none"> • By its nature, litigation can be costly, time consuming, stressful, and with no guaranteed outcome of success, meaning that it may not be attractive to pursue. • There is a possibility that police may fail to investigate and subsequently prosecute potentially criminal conduct. • Where the principal dies, the responsibility of commencing legal action would rest with the executor of their estate. Therefore, it is not guaranteed and may be problematic—the executor and attorney may be one and the same.
Social inadequacies	<ul style="list-style-type: none"> • The principal may be forced to use their only remaining assets to fund the purported litigation, making it inaccessible. • The principal may not wish to pursue legal action against the attorney in circumstances where they are also their primary carer, or in a relationship of trust and/or reliance with them. • The elderly often wish to maintain their privacy, meaning that the financial impropriety by attorneys may go unreported. • Affording, travelling to, and even making initial contact with a lawyer may prove impossible for a principal, particularly where they are socially isolated. • There may be other social matters (eg, ethnicity, language and gender), which may prevent a principal from pursuing a remedy.

Practical Measures to prevent Abuse

Although not prescribed in legislation, a number of practical measures can be employed to prevent the likelihood of financial abuse, some of which have been set out in recommendations made by the Legal Services Commission of South Australia.

These measures can include:

- Increasing community awareness of the role of POAs;
- Ensuring the principal and attorney/s have signed the document with full knowledge of their rights and obligations;
- Only allowing the use of the POAs when the appropriate conditions have been met i.e. a loss of capacity by the principal;
- Including as conditions in the POAs:
 - The principal undertakes a capacity assessment, with POAs only to be activated one the principal is deemed to be legally incapacitated.
 - Prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
 - The principal and/or another nominated individual, receive copies of account statements on a regular basis;
 - The principal's finances be audited annually, with a report sent to nominated persons.

Additionally, the principal can take steps to add additional oversight from within their immediate support network, such as:

- Notifying others of the appointed attorney;
- Ensuring the POAs include statements of wishes which are well known in regard to the management of financial affairs and payment for medical treatments;

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- Provide copies of the enduring power of attorney to others, including financial institutions and legal representatives.

These measures are attempts to safeguard the principal's interests by implementing checks and allowing for oversight on the use of POAs.

These practical measures acknowledge the need to ensure that POAs remain effective and not overly bureaucratic, but still requiring providing accountability by the attorney/s as well as necessary safeguards not only for the principal but also for the Attorney.

Discussion Questions

1. What is the level of abuse of POAs?
2. How are POAs abused?
3. Who are the victims?
4. Who are the perpetrators?
5. How can abuses of POAs be better detected, reported and investigated?
 - a. Should a referral system as outlined in the *ACD Act* be applied in the context of POAs?
6. What mechanisms can be implemented to provide oversight of an attorney's conduct, to identify and address abuse?
7. What measures should be implemented to prevent abuses?
8. How can data collection processes be improved to obtain accurate figures of abuse?
9. What measures can be adopted to better protect vulnerable populations, specifically CALD individuals and Indigenous and Torres Strait Islander individuals?
10. Are the current legal remedies adequate?
11. How might the existing legal remedies be improved/reformed in order to prevent abuse?
12. Are the practical remedies being used?
13. How useful are the practical remedies in preventing abuse?
14. Should any of the practical remedies become a legal remedy?

<p>Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.</p>
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