

18 August, 2016

**Our ref: DQuinn/ActingCEO**

Ms Sabina Wynn  
The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

Dear Ms Wynn

**Australian Law Reform Commission Inquiry into Elder Abuse – Submission by NSW Trustee and Guardian**

**Background**

NSW Trustee and Guardian (NSWTG) was formed through the merger of the NSW Office of the Protective Commissioner (OPC) and the Public Trustee NSW (PTNSW). The “parent” organisations had existed since 1878 and 1847 respectively. The merger was effected by the *NSW Trustee and Guardian Act 2009*, which came into effect on 1 July, 2009.

NSWTG continues to provide the essential public service that both former organisations had offered over many years. The range of services NSWTG provides helps people deal with some of life’s most substantial challenges. People who wish to have an independent and impartial executor, attorney or trustee can make a will, power of attorney or establish a trust with NSWTG. Those who have diminished capacity to manage their financial affairs receive direct or indirect oversight of their estate to protect themselves from exploitation or mismanagement through an Order from the Supreme Court or relevant Tribunal.

In relation to issues of ageing the number of people aged 65 and over will more than double by 2050, making it the fastest growing population group in NSW. As the responsible government agency, NSWTG has a key role to drive the uptake of pre-planning instruments (Wills, Powers of Attorney and Enduring Guardianship Appointments). This will be crucial to reducing the demand for state intervention when individuals lose capacity to manage their personal and financial affairs and the number of people who die intestate.

**Powers of Attorney**

NSWTG executes over a 1,000 Powers of Attorney per year.

Appointments of Power of Attorney (POA) are made when requested by an existing NSWTG client or a member of the public. NSWTG will draft and explain POA instruments for people wishing to appoint a private attorney or NSWTG.

NSWTG will take instructions, prepare the document and where the POA is enduring NSWTG staff act as the prescribed witness. An Enduring POA must be witnessed by a “prescribed witness” who certifies that the effect of the POA has been explained and understood before it was signed.

### **Enduring Guardianship**

While NSWTG is not authorised under its governing legislation to act as a guardian NSWTG is able to provide assistance to people by witnessing Enduring Guardianship documents. The role of NSWTG as a witness is to check capacity and explain the document to the extent that the appointor and appointee both understand the effect and obligations of the Enduring Guardianship Appointment.

The appointor and appointee may attend the same interview or may attend on different occasions. Whilst it is the preference of NSWTG that the appointor and appointee attend the same interview, two separate interviews may be required.

### **Financial Management**

NSWTG can be appointed as financial manager for clients defined as ‘managed persons’ under the *NSW Trustee and Guardian Act 2009*. This function is named financial management.

NSWTG is appointed as a financial manager by means of a financial management order (FMO). These are issued for persons with diminished capacity where there is a need for the order.

People under financial management and their families sometimes oppose the NSWTG being appointed to directly manage an estate. However, NSWTG will only be appointed if a court or tribunal considers:

- that the person is incapable of managing their affairs
- there is a problem which cannot be overcome without an order
- there is no suitable alternative manager
- that someone independent needs to be involved in managing the estate, and
- that it is in the person’s best interests.

NSWTG works with the managed person, his or her support network (family, friends etc) and service providers when directly managing an estate.

The alternative to NSWTG directly managing the financial affairs of a person under a FMO is for the appointment of a private manager. This might be a family member, friend or professional trustee company.

NSWTG provides support to the private manager by issuing directions and authorities and monitors annual accounts submitted by the Manager.

A FMO can be issued by the following:

- NSW Civil and Administrative Tribunal (NCAT) – Guardianship Division
- Mental Health Review Tribunal (MHT) (directly appointing NSW TG only)
- Supreme Court.

NSW TG also has an agreement in place to manage the financial estates of missing persons in NSW. NSW TG also has a small legacy of 'banker clients'. These are residents of group homes managed by Ageing Disability and Home Care, where an agreement was reached many years ago for the then OPC to hold the funds in a banker only arrangement. These banker clients are in the process of being transitioned by the Guardianship Division of NCAT to be under an appropriate FMO.

As at 31 December 2015, there were 11,162 clients under direct financial management with NSW TG and 3,913 with a private manager appointed.

The work of NSW TG is directly related to the work of NCAT, the MHRT and the Supreme Court.

NSW TG has seen an increasing number of these applications over the years and sees the same issues at the Tribunal in terms of complexity and conflict.

### **Statistics and case studies**

NSW TG's client management systems are currently under review and a new system is in development. The current system does not collect data on elder abuse but the new system will enable this to be done.

A manual investigation of the current computer system elicited the following figures:

For the year 1/2/2015 to 1/2/2016

Of 521 legal litigation matters pertaining to clients under management 65 of these were identified as an older client suffering financial abuse.

Child	Other family member	Friend	Private Manager	Spouse	Carer	Other
27	12	11	6	4	3	2

Of the above categories the following were acting under a Power of Attorney instrument:

Child	Other family member	Friend	Private Manager	Spouse	Carer	Other
15	2	4		2		

For the previous five years the figures are set out below and are approximate numbers only.

**2014 – 2015:** of 546 legal litigation matters 73 could be identified as financial abuse of an older person

**2013 – 2014** of 615 matters 85 could be identified as financial abuse of an older person

**2012 – 2013** of 561 matters 38 could be identified as financial abuse of an older person

**2011 – 2012** of 425 matters 35 could be identified as financial abuse of an older person

**2010 – 2011** of 361 matters 28 could be identified as financial abuse of older person.

As mentioned the client management system is under review and currently does not retain data but it is estimated by staff who are involved in this area of litigation that only about one third of cases identified as financial abuse of an older person results in recovery of funds at some level. In some cases the full amount misappropriated may not be recovered but rather there is a partial recovery. In other cases the matter may not go to full hearing but a result is negotiated.

There are reasons why full recovery is not always possible or why proceedings are not commenced for all matters. In all matters where the client can express their wishes those wishes are followed. Where there is an adult child involved the client does not always wish to take legal proceedings for various reasons, the child may be providing care for the client or the client may be living with the child. Recovery action may result in the child having to sell their home to pay the legal expenses and if the client is living with the child this may result in the client finding themselves without accommodation.

NSWTG must also consider what is in the best interests of the client. For example, if it is identified that the person who misappropriated the funds has expended the assets, has no resources and is unemployed and unlikely to gain employment, it may not be feasible or practical to take legal recovery action. The client may have little resources remaining to them and it may be important to reserve those resources, especially if any judgment against the perpetrator of the abuse is unlikely to result in recovery of any funds.

There are also those cases where evidence does not amount to the level that will meet the evidentiary standard for a civil action. Obtaining evidence for a Supreme Court case is expensive; bank accounts are required, medical evidence and all other financial documents evidencing the trail of misappropriation must be produced.

Set out below are actual cases managed by NSW TG but the identifying details have been removed for privacy reasons. The cases provide the Committee with an insight into the plight faced by these older people.



## Child

A not uncommon fact situation involves the client having appointed an adult child as their attorney. The client later suffers dementia. The adult child or children place their parent into an aged care facility and sell the client's home, which may have been their only asset. The adult child has a gambling problem or is over mortgaged and finding difficulty in maintaining a certain lifestyle including the payment of school fees for their own children. The adult child or children sell the parent's home and misappropriate the sale proceeds. The proceeds may be gambled away or used to pay school fees and support a lifestyle that is not realistic. In one matter the adult son obtained the proceeds of sale of his mother's home and absconded. Despite extensive searches NSW TG could not locate the son and it proved impossible to even take legal proceedings against him to recover the funds.

When the aged care facility does not receive payment for the parent's accommodation, the fees or accommodation bond goes into arrears and interest accrues. In desperation the manager of the aged care facility makes an application for a financial management order through the Guardianship Division of NCAT for revocation of the power of attorney and appointment of NSW TG. NSW TG is appointed with the mandate to investigate and seek recovery of assets/funds. In the case of the adult child who has gambled the entire funds, recovery is not possible as the adult child is unemployed and exists on benefits. In the case of the adult child who used the funds to pay for a certain lifestyle there may be assets available which make a legal action for recovery possible. However if the adult child is an only child and the sole beneficiary in the parent's will the child may have a certain inheritance expectation and negotiating family dynamics can be difficult.

In one such case the client appointed her adult son her attorney. The son had a mental health issue as well as a gambling problem. When the client developed severe dementia and was placed in support case accommodation the son sold her northern suburbs home and misappropriated the entire sale proceeds. The client's accommodation bond fee with interest was never paid. The client owed \$380,000 to the facility where she was living. The son absconded and could never be found. Recovery action became impossible.

*Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes [2011] NSWSC 702* and *Cohen v Cohen [2016] NSWSC 336* are two examples of reported decisions involving adult children acting in breach of their duty as attorney to their parent who suffered aged related incapacity. In one case the son sold his mother's home and misappropriated the sale proceeds. In the other case the son transferred the home into his own name for consideration of \$1.00. In both cases the son allowed his mother's nursing home fees to go unpaid.

### **Other family member**

In one case the client's grandson would take him on 'outings' from the nursing home where he was residing. Nursing staff became suspicious when he would return from these outings with little or no money remaining in his wallet. It was discovered that the grandson had withdrawn money from his grandfather's account during the course of a number of such outings and eventually left his account in debit. In addition the grandson lives in the client's home and refuses to leave. The home needs to be sold to pay for the client's needs and pay for the bank debit. The grandson has a disability and there is difficulty in getting him to vacate the premises for it to be sold.

What often happens in similar matters is that the family member appeals the decision by NSWTC to sell the client's property and the matter is heard by NCAT. This takes time and in the meantime if the client is in an aged care facility and a bond or fees are owing interest is accruing and the client's financial hardship is compounding.

### **Friend**

The client made a power of attorney in favour of two friends who misappropriated almost \$200,000.

### **Private Manager**

There are a few cases where close family members are appointed financial manager and misappropriate the funds of those whom they manage. There have been cases involving misappropriation of a client's funds by a mother, another involving a client's father and others have involved misappropriation by siblings.

In the case of *Woodward v Woodward [2015] NSWSC 1793* the Guardianship Tribunal appointed one of Mrs Woodward's sons her financial manager. While acting in this capacity the son transferred funds from her account and used the monies to repay some debts, buy a car and carry out building works on his matrimonial home. Upon his mother's death the executor of her estate was successful in obtaining a Supreme Court order for an accounting by the financial manager.

### **Spouse**

The client won the lottery and placed the winnings in a joint account with the spouse. The client suffered cognitive impairment as a result of domestic violence. The spouse removed all the client's winnings from the joint account. The client was removed from the family home and placed in an aged care facility and now requires funds for an accommodation bond. The client has no funds to pay for the bond.

### **Carer**

A carer misappropriated over \$100,000 from the client and then disappeared. Recovery of these funds is impossible as the carer cannot be located.

## Other

Staff of a local club frequented by the client 'befriended' him and managed to take possession of his keycard and account number and misappropriated almost \$100,000.

*HAP [2014] NSWCATGD 4* involved a case where NCAT appointed NSWTG to investigate alleged misappropriation of \$400,000.00 by the client's neighbour of many years.

In the case of *HLT [2014] NSWCATGD 5* NCAT found that the legal practitioner acting for the client did not provide independent legal advice nor follow the Law Society Guidelines. NCAT found the legal practitioner executing costs agreements with her own firm in her capacity as attorney, and lack of prior discussion or provision of those agreements to Mrs HLT failed to meet the Law Society guidelines.

The cases that come to NSWTG for administration demonstrate that financial abuse does not discriminate. It is perpetrated upon the elderly in both the city and regional areas and upon persons who have small estate and upon those with large estates including family trusts and companies in their asset structures. The case of *Szozda v Szozda [2010] NSWSC 804* is an example of a case involving company and trust structures. The central issue of this case went to Mrs Szozda's ability to grant a general and enduring power of attorney. Mrs Szozda and her husband came to Australia from Poland in 1950. They had two children, a son, Andrew, and a daughter, Barbara. They built up real property assets over the years and the family assets were held in companies and trusts. After Mr Szozda died the son took the leading role and his own death left a void. From 2004 to 2007 Mrs Szozda made three general and enduring powers of attorney appointing different family members each time followed by three revocations of those powers of attorney. The court found that Mrs Szozda did not have capacity to make the third power of attorney. A financial manager was appointed to manage her affairs.

## The dilemma of promoting Powers of Attorney and responding to this type of abuse

NSWG carries out community education campaigns for planning ahead documents. While promoting the importance of making a power of attorney NSWTG does stress the need to carefully consider who to appoint as the attorney. There is the option available to people to appoint NSWTG as an independent attorney.

NSWTG takes every opportunity, such as media campaigns held during Seniors Week, to inform people about elder abuse and how to detect, prevent and exercise their legal rights.



## Law Reform Measures

### Compulsory registration of powers of attorney

Many people believe that registration would be helpful and at the very least registration would provide data about the number of powers of attorney in existence. The collection of this information would be very helpful for future studies and to determine the percentage of cases of reported abuse against the number of overall powers of attorney. Collecting data about the number of abuse cases is a difficulty.

Currently in NSW powers of attorney are only required to be registered if the attorney will be dealing with real estate. Registration takes place at the Land and Property Information Office.

Many people believe national registration would be preferable. In today's mobile society and ownership of assets in different jurisdictions a national register would be the ideal. Also many financial institutions operate on a national level. I am informed that Banks would prefer a national register for this reason.

However each state and territory has different legislation and different preplanning instrument forms. Some states have one form that comprises both a financial power of attorney and a medical power of attorney. In NSW there are separate forms for powers of attorney (financial) and enduring guardianship appointments (health and lifestyle). Lack of uniformity makes national registration difficult. National registration would be an incentive for a move towards uniformity of documents.

This leaves state based registration. To make registration of all powers of attorney compulsory the *Powers of Attorney Act 2003* would require amendment.

### Uniform preplanning documents throughout Australia

While perhaps not a deterrent to abuse, the making of preplanning documents uniform throughout Australia would promote greater awareness and better understanding of these documents by clients and the various professions. This would require uniformity in the governing legislation.

### Legislative reform to the NSW *Power of Attorney Act 2003*

NSWTG would be supportive of reforms to power of attorney legislation in line with the Victorian model. These reforms include the following provisions:

- Prohibition on conflict of interest transactions, unless authorised or ratified by the principal or the relevant Tribunal. This means that the attorney has a duty not to enter into transactions if the transaction is one in which there is or may be a conflict between the duty of the attorney to the principal and the interests of the attorney, or a relative, business associate or close friend of the attorney.
- Increased Tribunal powers to order compensation for any loss caused by the attorney contravening the relevant power of attorney legislation.



- The creation of new indictable offences for dishonestly obtaining or using the power of attorney for which there is punishment of imprisonment.
- More stringent execution requirements of powers of attorney. This could involve the introduction of similar measures available for NSW Enduring Guardianship Appointments such as requiring a prescribed witness for execution of the document by the attorney thereby enabling the witness to explain the duties and responsibilities of an attorney and the consequences of failure by the attorney in their duty to the principal.
- Create the role of supportive attorney.

### **Establishment of a Public Advocate**

Another reform measure supported by NSW TG is the establishment of a Public Advocate in each state and territory with powers in respect to people with impaired decision making ability, including those people whose affairs are being managed under an enduring power of attorney. Such measures being promoted include:

1. The Public Advocate to have the function of receiving and investigating complaints in relation to:
  - a. the abuse, neglect or exploitation of people
  - b. the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles.
2. Where the Public Advocate believes that an investigation is warranted she/he should be able to conduct an investigation on her/his own motion in relation to the above.
3. The power to investigate complaints should be supported by the following additional powers:
  - a. serve a written notice on a person requiring them to give the Public Advocate specified documents or other materials relevant to an investigation being undertaken
  - b. serve a written notice on a person requiring them to give written answers to questions
  - c. require a person to attend a conference for the purposes of seeking to resolve a matter being investigated.
4. It should be an offence for a person to refuse or fail to provide information, or to attend a conference or interview, when directed by the Public Advocate to do so.
5. The Public Advocate should have power of entry and inspection.

6. The Public Advocate should be permitted to apply to the appropriate Courts and Tribunals for a warrant authorising entry to any premises when she/he believes that a person who is on the premises is being abused, exploited or neglected. The appropriate Courts or Tribunals should be permitted to issue a warrant authorising entry to any premises in these circumstances if they are satisfied that it is appropriate to do so.
7. The Public Advocate should be permitted to give the Chief Commissioner of Police a report concerning any investigations she/he conducts and allow the Chief Commissioner to have access to any evidence gathered during the Public Advocate's investigations if she/he believes that the Chief Commissioner should consider initiating criminal proceedings against an alleged wrongdoer.
8. The Public Advocate should have the function and power to advocate for the rights and interests of all the people of the respective state or territory with impaired decision-making. The Public Advocate should also have the power to engage in both individual and systemic advocacy.
9. The Public Advocate's advocacy powers should include seeking leave in any Court or Tribunal proceedings when the rights and interests of a person with impaired decision making are in question.

### **Review of *Real Property Act 1900***

Fiduciary relationships are not shown on the NSW Torrens Title Register: s82(1) *Real Property Act 1900*. As a result NSW TG comes across real estate held by executors and trustees dealing with the property as their own and not as fiduciary. A review of this section of the Act may prevent such abuse. This is a purely state based matter, what takes place in other states and territories is not known to NSW TG.

### **Legislative amendment to the forfeiture rule**

Several states in the USA have expanded their forfeiture legislation as it applies to an unlawful killing to disqualify persons from inheriting if they have been involved in abuse or financial exploitation of the deceased.<sup>1</sup> Elder abuse is often linked to the abuser's right to inherit; the term inheritance impatience has been coined. The reason for expanding the forfeiture legislation in the USA to financial abuse cases is to help prevent and reduce elder abuse. Family members often stand to inherit from the victim and by recognising elder abuse as a matter of succession law, the aim is to deter elder abuse by those who are likely to gain from the death of an elderly person. The introduction of such measures in Australia are worthy of investigation and evaluation.

---

<sup>1</sup> <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2922&context=lawreview>;  
<http://www.jaapl.org/content/43/3/369.full.pdf>;  
<http://www.austlii.edu.au/au/journals/ElderLawRw/2006/8.html>

### **Legislative reform to the common law presumption of advancement**

Susan Barkehall-Thomas in her article, 'Parent to Child Transfers: Gift or Resulting Trust?' (2010) 18 *Australian Property Law Journal* 75 provides another idea for legislative reform. The article promotes reform to the operation of the common law presumption of advancement to a presumption of trust, where the arrangement is between parents and adult children.

### **Definition of Elder Abuse**

One of the questions posed in the Commission's Issues Paper is about the definition of elder abuse. The definition of elder abuse most frequently referred to is the definition coined by the World Health Organisation. This definition has been influenced by work done in Canada, US and UK. Definitions used in other parts of the world, for example China and Norway reflect the cultures of those countries.<sup>2</sup> A re-examination of the definition of elder abuse is timely but it should be studied and defined within the Australian context.

Yours sincerely

A handwritten signature in black ink, appearing to be 'DQ' followed by a long horizontal stroke.

**Damon Quinn**  
**Acting Chief Executive Officer**  
**NSW Trustee and Guardian**

---

<sup>2</sup> [http://www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap5.pdf](http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap5.pdf)