Submission to Elder Abuse Discussion Paper 47 (IP47)

Submission : 18/08/16

Australian Law Reform Commission http://www.alrc.gov.au/about/making-submission

Name: [redacted]

A personal case study is presented to illustrate the key issues/challenges faced by my mother which impact on her ability to live a dignified, self-determined life free from exploitation.

The submission particularly focuses on family agreements and appointed decision makers.

Main Story – MyStoryALRCSubmission CZ.pdf

[redacted]

Context:

Fact: ~ 70% of elder financial abuse is carried out by a family member.

The following personal case study highlights elder abuse in a case where the persistent disruption and bullying by offspring utilised weak regulation and laws to achieve outcomes that are not in the older person's best interests.

The current powers of the tribunal systems in Australia are inadequate and the cross systemic failures between statutory authorities allow anomalies where the elderly (and their advocates) fall through the gaps.

Policy at higher bipartisan levels, for people to remain independent in their own homes, is being undermined at lower levels by allowing people to slip through the systems at state level.

Financial and psychological abuse is only addressed by State Authorities (Tribunals, Trustees, Public Advocate Guardianship Boards) if it is major ie. large sums of money ($100,000 or removal of older people's names from their titles, or blatant physical abuse, neglect etc).

The following issues are not within the scope of the reference of the inquiry, but in my view are also vital public policy changes needed to protect the rights of older Australians to live dignified and self-determined lives.

The Australian Aged Care Reform recognises that most people want to stay independent, remain living in their home and stay connect to family and community. The reforms have seen significant changes to ensure the aged care system offers choice and flexibility for consumers and the system is sustainable and affordable.

Personally, from experience and observation, to achieve this aim we need not only regulatory changes but we also need to address cultural issues in society.

My concerns are particularly around the lack of:

- respect for older people
- community awareness about dementia, leading to labelling, stigmatisation, engineering people into Aged Care
- knowledge of aged care packages and how they can assist individuals to stay in their homes (this can lead to family disputes, subjective burden and perception that family are too time poor to support elderly relatives in the home).
- power / autonomy for elderly to make the choices to spend their money on living out their lives as desired and inheritance impatience or sense of entitlement by offspring.

This case study provides an example of misuse of public funds and institutions in an attempt to evict an old lady from her home, disrupt best practice in home care and place undue stress on the advocate and primary carer in the hope that the pressure and court costs would become too much to endure so that the advocate would give up fighting for for the older person's rights.

RECOMMENDATIONS summary:

Also see detailed Recommendations **Appendix A**

There should be strict criteria to become a Financial Power of Attorney (POA) and the person signing over POA should have some basic facts spelt out, e.g. ~ 70% of financial abuse is carried out by a family member.

National Register of powers of attorney / administration, and executors be held and monitored for public scrutiny to safeguard against potential conflicts of interest. Perhaps the ATO or Census authority should have jurisdiction.

There needs to be an overview of the various levels and components of the medico / legal system (Civil and Administrative Tribunals, Public Advocate, State Trustees, etc) that govern the care and accommodation of older persons with diminished capacity. At present there are too many cross-systemic gaps and overlaps that allow issues below a threshold to escape scrutiny, claims to be made without question thereby remaining on record while untested for veracity and consistency, and decisions / outcomes to contradict or undo each other.

Contents:

The personal case study is divided in the following sections:

SUMMARY

Our mother's accommodation in her own home is threatened by:

- my siblings' past behaviour (reverse mortgage of mother's house),
- their outdated attitudes to ageing, dementia and institutionalised care (see below), and
- their intimidation of me in my role as her (former) medical power of attorney and advocate.

My concerns (above) are fuelled by:

- two siblings have financial powers for our mother, and are executors of her will.
- our mother requested financial support from us (2000) - some siblings suggested reverse mortgage, some provided regular financial support to prevent reverse mortgage. Mother opted out of reverse mortgage satisfied that our contributions would sustain her.
- siblings supported/arranged our mother's reverse mortgage (2007). I alone opposed the reverse mortgage and provided several options that were rejected outright by all siblings.
- There are two outstanding loans of our mother's money (~$16.5K and $10K) to 2 siblings nominated as 'advanced inheritance loans'.
- my siblings have a conflict of interest over our mother's consistently and continuously expressed wish to stay in her own home of 60 years.

(**KEY**: PP - Mother, BB - Sister 1, MM - Sister 2, AA - Brother, ZZ - Self, CC - Sister 3)

BACKGROUND

Our mother (PP) aged 90, currently resides in her family home in [redacted], built [redacted] by our father who died in 197[redacted] She was formally diagnosed with Alzheimer's Disease (AD) in [redacted] 2011. The Geriatrician believed that AD had probably existed for at least five to six years prior. AD is now well advanced (2016) since inception probably 2005-2006.

Other than her cognitive issues, PP is physically well for a woman of her age. She requires the assistance of a stick or frame for mobility. Activities of Daily Living (ADL) receive various prompts: assistance with hygiene, meal preparation and medication compliance. PP does not require constant care (24/7), and it would reduce her independence of thought and basic planning skills.

Our mother (PP) has informed all of our family over many years that she wishes to stay in her family home, providing it is medically viable.

GUARDIANSHIP (Advocacy)

I (ZZ) am fourth of five children. I am concerned that my siblings and I will be unable to reach agreement about PP's care as her needs advance. In the past five years my siblings spent little time involved in PP's direct personal care and medical treatment. I have been her primary carer, attending emergency department (only twice), liaising with all medical professionals and attending all appointments. Additionally, I began to implement care supports in 2010 and case managed her care, including staff supervision and basic instruction to cater specifically for her needs. PP's general well being is overseen by me and I continue to provide meals and personal care support on four days of most weeks. I am the daily contact person for the Home Care Package [redacted], which I negotiated and secured for PP's care in [redacted]2015. PP regularly travels to my [redacted] home [redacted] where her care needs are met by me or personal care attendants using packaged funds. I initiated community engagement with a number of planned activity groups (exercise, concerts) and am the contact person for all her community-based programs.

My background as a [redacted] nurse, contract writer [redacted] and my post-graduate studies [redacted] keep my medical knowledge current.

In October 2014, I rented out my [redacted] house in order to stay with PP at the family home when necessary. The level of support required by PP varies as AD is dynamic and unpredictable. Care increases following acute medical events (eg. Hip dislocation [redacted], Urinary Tract Infection – Acute Delirium [redacted], which required hospitalisation). There have been no acute hospital admissions since August 2014. Prior to 2014 PP's last hospitalisation was in 2002.

PP is stable enough to allow independence overnight. At other times she is comfortable at home with numerous supports in place and assisted with outings on a daily basis. I occasionally stay overnight for convenience, assistance and/or to gain insight into her needs. Expert advice recommends familiarity (her home) and stimulation (friends, outings). Therefore, I have strategically managed her care with the advice and support from a large medical and allied health team.

[redacted]

[redacted]

[redacted]

Relationship with Siblings

In [redacted]2014 my siblings made attempts to communicate with me about PP's care and welfare. They called a meeting [redacted]which I declined, given the bullying and verbal abuse I was subjected to at the previous two meetings [redacted]. I addressed all their agenda items in writing and sent my apologies for the meeting. I have always provided ongoing communications via SMS, email and verbally to my siblings since 2011 with all issues pertaining to PP's health and wellbeing. I reasserted her wishes to remain in her own home. Notably, the meeting agenda [redacted] itemised alternative accommodation arrangements, and a follow up email [redacted] suggested a tenancy arrangement with CC in PP's home. I believe that would have adversely affected PP's day to day support, upset her confidence and reduced her independence. My passion to support her wishes has been consistent and I re-stated my intention since our earlier family meeting [redacted]. I also highlighted my strategic personal and professional plans in order to make myself available to support PP during this time.

Throughout the VCAT hearing phase, and following appointment of the OPA Guardian [redacted], my siblings maintained a constant care surveillance model in an attempt to validate unnecessary residential care admission. This infantalisation and several false claims of anxiety, dependence, fear of the dark, need to be in someone's company at all times, were aimed at creating a false perception that PP needed 24/7 care and must be supervised overnight. They continued to demand overnight care at PPs house until recently, when a number of carers documented that PP goes to bed and remains there until morning, occasionally rising for the toilet. My siblings' lack of respect for PP's dignity of risk has compromised her independence and exacerbated 'learned helplessness'.

ADMINISTRATION issues

My siblings, BB and AA, held an Enduring Power of Attorney (Financial), executed by PP in 1994. (2015 VCAT Ordered - BB/AA as Administrators). I have concerns about their (mis)management of PP's finances under their Power of Attorney / Administration. I believe that BB is largely in control of PP's financial affairs, as AA shows little interest and largely accedes to BB's wishes.

Reverse Mortgage

In 2000 PP requested some financial assistance from her offspring. Some of my siblings suggested a reverse mortgage. I suggested providing regular financial support to prevent the reverse mortgage. MM and AA began contributing with me. PP rejected the reverse mortgage and accepted the financial support. MM ceased support soon after payments commenced. AA ceased in 2010 and I continued payments until 2013 when PP told me to cease paying as no one else was contributing.

In late 2006, BB discussed with all siblings obtaining a reverse mortgage against the family home to fund a trip overseas for her (BB) and PP. At the time, PP indicated an interest in visiting [redacted]. Again, I expressed my disagreement with the proposal of a reverse mortgage and suggested several other viable funding options, but my suggestions were ignored, and BB proceeded to investigate the reverse mortgage. I informed AA that I did not believe PP had the requisite cognitive capacity to make these decisions. Although PP had yet to be formally diagnosed with AD at that time, she was easily

influenced and has always been willing to go along with plans made by a majority of my siblings. Additionally, PP had not worked since her marriage [redacted] and would be unaccustomed to navigating such contractual agreements.

I understand that my sisters (BB, MM) and their husbands facilitated PP to obtain a reverse mortgage for her property in [redacted] 2007 in the sum of approximately $45,000.00. PP executed and signed these documents herself. At all times I objected to this proposal and sensed PP (82years) was being pressured and manipulated (ie. psychologically and financially abused).

The funds from the reverse mortgage were utilised by BB to take PP on a lavish holiday, but not to [redacted] (PP's favoured destination). At the time, PP had over $30,000.00 in savings so I consider it was unnecessary to take such drastic financial action to fund a holiday. The reverse mortgage currently stands at approximately $92,000.00. I believe my siblings at the time of obtaining the mortgage thought that the mortgage would be repaid sooner, and PP would have been placed in other accommodation well before now. However, PP is still comfortable and safe living in her home, given the supports I initiated and continue to monitor.

I repeatedly requested information about the reverse mortgage and the documents were provided to me after the VCAT hearing phase began (October 2014).

Advances of PP's money

$10,000 payment made to CC in Nov 2013

In 2013, I was notified that an advance of $10,000.00 was made to my sister CC, presumably by BB and/or AA as PP's financial powers of attorney. The initial stated purpose of the advance was to enable CC to provide funds for her adult children's health issues. I understand that the advance has been made from CC's "future inheritance". I do not consider this advance was in PP's best interest, particularly having regard to the fact that she has limited cash assets and these funds should have been set aside for her future care and welfare. I further query how the parties can guarantee repayment from an inheritance not yet received.

Following VCAT proceedings, several affidavits and submissions to the State Trustees, the reasons for the advanced inheritance loan have been changed three times. According to BB's affidavit, a payment was made from PP's account to CC for the purpose of conducting medical procedures for CC's adult children [redacted]. However, MM's affidavit explains the payment as being for their top-level medical insurance. A final affidavit from BB stated that the funds were used to provide funeral services for CC's ex-husband [redacted]. Regardless, this payment was advised earlier as an advance from CC's share of inheritance from PP's estate. I (ZZ) query whether this is an outstanding "loan" or "advance". When BB and AA were required as Administrators to account for PP's assets, the "loan" was omitted from the FSP. Following my review of their statements and substantial submission to the State Trustees, the Administrators were made accountable to itemise it. Additionally, I (ZZ) queried whether there was any agreed interest payments for this $10K payment, any agreed repayment date, and supporting documentation. There was a hand written loan agreement witnessed by one of BB's adult offspring.

$16,500 loan made to MM [redacted] 1998 – the FSP itemised a $16,500 loan to MM. Whilst this was declared, it is not transparent whether there was any agreed interest payments for this loan, any agreed repayment date, and no substantiating documentation. This loan was outstanding to PP when this sibling assisted in orchestrating the reverse mortgage in 2007.

Additionally, PP had a $30K term deposit in the bank in 2007 when she was encouraged to take out the reverse mortgage, and no sibling suggested or accepted that this was an option to fund her holiday.

For the reasons set out above, I sought that the Enduring Power of Attorney — Financial be suspended until such time as proper disclosure was made in relation to PP's finances and the managing thereof, or an investigation undertaken by the Office of the Public Advocate (OPA). It is my belief that only after my siblings' financial control over PP is removed can her current care and accommodation in her home be secured. My siblings, especially PP's Administrators, have a clear conflict of interest, "inheritance impatience".

My trigger for applying for guardianship in [redacted] 2014 was that it was made explicitly clear to me that my siblings were not prepared to support PP in her own home.

Outcome sought at VCAT for Guardianship and Administration (2015) Refer Appendix B.

I feel that my siblings and I will NOT be able to reach agreement as to PP's care and I consider it would be sensible that only one person be appointed as her guardian. I am already PP's primary carer and was her most recently appointed medical power of attorney. I have made significant sacrifices to ensure she is well cared for in her home. I believe I am the appropriate person to act as her guardian and have supporting recommendations from PP's GP.

As PP no longer has capacity to execute an Enduring Power of Attorney or Guardianship, I seek the assistance of the Tribunal to appoint me as Guardian of PP, so that I can extend my support to protect her lifestyle and accommodation desires as long as medically practical. If the Tribunal deems appropriate I would also seek that the Enduring Financial Power of Attorney held by my siblings BB and AA be suspended until such time as full disclosure of PP's financial affairs has been made and/or an investigation by the OPA has taken place.

OVERVIEW OF GUARDIANSHIP AND ADMINISTRATION (Events/Status)

Following my original application to VCAT for Guardianship [redacted], my siblings claimed that they wanted to be involved in PP's care, but I would not allow it. At the initial hearing [redacted] they requested (via their barrister) a roster of PP's care. As a good will gesture I began providing weekly rosters to reassure them.

During the initial hearing phase [redacted] all five siblings contributed time to cover PP's care, and claimed they all wished to support her in the home.

Following the appointment of the OPA Guardian [redacted] they confirmed that they would like roster circulation to continue. I am now approaching my 90th roster of PP's care (personal carers, social inclusion, volunteer visits and family) for my siblings.

Since early 2016, all of my siblings have dramatically reduced their hours of care for PP. Some have completely ceased and pay only occasional visits. As they reduced their direct care support, especially on weekends, I nominated myself, or my family members, to fill the gaps in care.

PP's medical condition is uncomplicated. She requires support with personal care and meals. Her medication is minimal. She poses no risk to herself or others. Her demeanour is exceptionally sociable and consistently grateful.

Now my siblings have all notified the OPA guardian that they wish to place PP into residential care, not support her in her home as they portrayed in VCAT. During the hearing phase, following the initial adjournment requested by them [redacted], one of the Administrators (AA) made enquiries about financing residential care whilst the other Administrator (BB) concurrently continued to portray an image that she wanted to be a Guardian. The appointment [redacted] and letters from the Aged Care Financial Solutions [redacted] clearly indicate that both Administrators were in agreement about PP's accommodation, and their plan to remove her from her own home, despite their portrayal in the VCAT.

During a home visit with the VCAT member [redacted] BB maintained her desire to be PP's guardian. At the hearing [redacted] the Member announced a plan for co-guardianship between BB and I. Immediately, during the break out mediation session, BB told her barrister that she did not want to be a guardian, and that MM & CC should undertake it. As the member had visited PP with the understanding that BB and I both wanted to be guardians, and had in principle approval for this order, I committed to co-guardianship with BB. BBs 'new' position was consistent with my knowledge that she had never wanted to be involved in PP's care at that level. Within one week of co-guardianship BB was orchestrating letters with legal connotations and threats to take me back to VCAT. Emailed bullying and intimidation ensued for months.

BB's possible rationale for undermining co-guardianship:

1. To obtain an ACAS to have the residential care approved. (Current valid ACAS was in place for respite. Residential care approval can be obtained within 24 hours (urgent) or 1 week, so ticking the ACAS residential care box was presumably for leverage with potential providers, leasers, buyers, etc.)

2. To disallow PP sleeping in her own house of 60 years over night without surveillance, following assistance to settle. If agreed, this decision would support (1) above. (No medical, carer evidence or request for overnight care by PP was tendered in support).

Both rationales (1 and 2) have now been proven unnecessary (by me) but due to the constant contact and submissions to VCAT by my sister BB and her legal representatives PP's care was placed under the OPA [redacted].

My professionalism and extensive experience with managing in home care and disability support services holds me in good stead to ensure PP has the most responsive care at all times. Additionally, when PP and I arranged for me to be her medical power of attorney (attended also by CC) we all agreed

that I had the experience and dedication to support her in her home and prevent acute, and subsequently residential care admission. PP often stated to other members of the family that it makes sense for this arrangement as I have all the experience. We organised this prior to any formal diagnosis of AD's and when the existing old medical powers were not being actioned to assist PP with her health care.

Now following 12 months under the OPA (approximately 26 weeks without the guardian on duty, due to 1) awaiting initial appointment, and 2) annual or other leave, all the remainder of the family are complying with the decision by the OPA guardian to allow PP to remain in her own home with extensive support services in place. The disruption to the care at home has subsided (for now).

I firmly believe that it is in PP's best interests for me to be sole Guardian so that I may continue to manage her care without disruptions during this palliative phase of her wonderful life. Naturally, before initiating my Guardianship application, PP and I discussed the plan, and we were fully supported by her GP of several years.

In CONCLUSION

This story provides an example of misuse of public funds and institutions in an attempt to evict an old lady from her home, disrupt best practice in home care, and place undue stress on the advocate and primary carer in the hope that the pressure and court costs would become too much to endure, so that I (ZZ) would give up fighting for PP's rights.

APPENDIX A

SUMMARY RECOMMENDATIONS:

There should be strict criteria to become a Financial Power of Attorney and the person signing over POA should have some basic facts spelt out, e.g. ~ 70% of financial abuse is carried out by a family member.

National Register of powers of attorney / administration, and executors be held and monitored for public scrutiny to safeguard against potential conflicts of interest. Perhaps the ATO or Census authority should have jurisdiction.

There needs to be an overview of the various levels and components of the medico / legal system (Civil and Administrative Tribunals, Public Advocate, State Trustees, etc) that govern the care and accommodation of older persons with diminished capacity. At present there are too many cross-systemic gaps and overlaps that allow issues below a threshold to escape scrutiny, claims to be made without question thereby remaining on record while untested for veracity and consistency, and decisions / outcomes to contradict or undo each other.

RECOMMENDATIONS in Laws Lag Social Progress in Caring for Elderly at Home.zip
<http://wyrebank.com/LawLagsDisabilityAged.zip>

The following seven (7) recommendations address deficiencies identified above in responder systems intended to redress abuse issues in the context of caring for elders with disabilities at home:

1) Elder abuse requires a single clear pathway through the available responses, ie. the public needs to be able to navigate the primary, secondary etc responders / providers / agencies and the tribunal / civil / criminal court options.

A well-signposted pathway through elder abuse cases should cater for both rural and metro cases, and be culture sensitive with minimal red tape. Such a pathway should reduce the need for higher court proceedings, given their prohibitive costs, especially for the elderly.

2) Legal action to address elder abuse should only be available after mediation is exhausted, except where safety first and / or criminal conduct is suspected.

This is not intended to curtail legal redress but rather to ensure the potential client (usually an older person or their representative) is first made aware of other options. The need to 'tick off' mediation (say, by a justice of the peace, magistrate or lawyer) also facilitates regulated collection of data on elder abuse cases. This grass-roots monitoring of elder abuse cases may inform new initiatives.

3) The Enduring Power of Attorney / Guardianship / Administrator and FAA provisions should be realigned to reduce overlaps and gaps, simplify each party's obligations and powers, and add practical procedures to resolve issues (including raising them to the next higher level).

The above assumes a nationally standardised assessment of mental capacity is introduced to provide legal certainty (Brayley et al, 2011; Johnson, 2010; Lacey, 2014; Victorian Parliament, 2010), a standard with sufficient flexibility to accommodate the fluid capacity exhibited by many older persons (Fogarty, 2012).

4) Where EPAs / Guardians / Administrators are to be appointed with co- / joint- / several- powers, it should be mandatory to first seek legal advice to ensure all parties know their legal obligations to communicate and cooperate. The required legal advice should record the parties to each appointment, and include from the outset an independent arbitrator in case of disagreement.

Implementing the above regulation also facilitates registration of parties involved in all the co- EPA / Guardian / Administrator arrangements in Australia. Out of date arrangements can be updated expeditiously. This step satisfies in part the calls for an auditable national register of donors / donees for all EPAs / Guardians / Administrators to assist accountability and transparency (Clare et al, 2011). Random sample auditing may suffice.

5) Where an older person wills their estate to their family, and a family member is their EPA / Guardian / Administrator or is involved in their FAA, the family's right to sue in civil court over inheritance needs further clarification and uniformity across Australia.

Where family members wish to barter their expected inheritance shares before the promised Will can be executed, it should first be necessary to get legal advice resulting in a formal contract. Before negotiations commence, the Will's contents should be disclosed to all involved, not mere hearsay. Any subsequent change to the Will should be notified to all, and contract renegotiation triggered. The contract should also provide legal certainty on questions such as the following: Can an EPA / Guardian / Administrator or FAA holder (X) draw a loan from the represented person's assets (estate) against X's claimed future inheritance? Must the assets involved in the Will be verified at loan time? What if loans significantly erode the estate, placing the represented person's wealth, health or accommodation in jeopardy?

6) No matter how well FAAs can be regulated uniformly across the nation (as discussed under Solutions above), an insurance scheme could be an option to mitigate the risk of considerable asset loss if family disagreement occurs.

Once FAAs are mandatory, setup fees could help build a future fund for the recommended insurance scheme.

7) Various reports concerning elder abuse have made recommendations that require Federal or State legislative amendment (Sykes, 2013; Fogarty, 2012; Advocare, 2014; Brayley et al, 2011; Johnson, 2010; Chesterman, 2013; AGAC, 2015; Victorian Parliament, 2010; COTA, 2013). In particular Lacey (Lacey, 2014) has singled out the Commonwealth Charter of Rights and Responsibilities for Home Care (listed in part in the above section 'Federal Aged Care Legislation'). Legislation is needed to give the Charter teeth to protect elders not only in residential care, but also in home care where the vast majority live.

At present only the elderly at home who are supported by federal funding are covered, and then only in principle. This constraint should be loosened to explicitly cover all elders at home, eg. merely as recipients of federal pharmaceutical benefits.

Appendix B

[redacted]