23 August 2016

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| Ms Sabina Wynn Executive Director Australian Law Reform Commission GPO Box 3708 SYDNEY NSW 2001 |  |

Dear Ms Wynn,

**Inquiry into elder abuse: Submission by State Trustees Limited**

I am pleased to enclose State Trustees’ submission in respect of the Australian Law Reform Commission’s inquiry into elder abuse, an issue that is of direct relevance to so many of the Victorians that State Trustees is called upon to help on a daily basis.

State Trustees would welcome the opportunity to discuss the contents of our submission in more detail. In any case, I look forward to the seeing, in due course, the Commission’s recommendations in this very important area.

If you have any queries in the meantime, please contact Adam Wakeling of our office on 03 9667 6022.

Yours sincerely,

Craig Dent **Chief Executive Officer**

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**About State Trustees**

State Trustees Limited (**State Trustees**)welcomes the opportunity to contribute to the inquiry by the Australian Law Reform Commission (**ALRC**) into elder abuse.

State Trustees is the public trustee for Victoria. Elder abuse is a central issue for State Trustees, particularly financial elder abuse.  We are committed to working with the Victorian and Commonwealth Governments and relevant agencies and services to find improved ways to identify, prevent and remedy instances of such abuse.

State Trustees plays a pivotal role in combating elder abuse in the Victorian community.  State Trustees has been appointed by the Victorian Civil and Administrative Tribunal (**VCAT**) as the financial administrator for over 10,000 Victorians who, due to disability, are unable to administer their own affairs.  In many cases, the need for such appointment arises because the older person has been exposed to, or is vulnerable to, financial elder abuse because they have an age-related disability. Many hundreds of Victorians have also entrusted the management of their financial affairs to State Trustees by appointing us under an enduring power of attorney, thereby ensuring their financial resources are protected and applied appropriately for their benefit, even where the person is unable to make decisions for themselves. A further State Trustees service that can involve detection and prevention of financial elder abuse is the examination of the accounts of private administrators appointed by VCAT. Where State Trustees identifies any such irregularities, it is open to VCAT to revoke the appointment of the private administrator and appoint a professional administrator such as State Trustees.

Its activities in these and other areas mean that State Trustees is playing a leading role in combating elder abuse in the Victorian community.

In this submission, we have responded to those questions that relate to areas that State Trustees has most experience and knowledge in dealing with.

**Question 1**

**To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse:**

* **harm or distress;**
* **intention;**
* **payment for services?**

With its focus being on financial and property matters, State Trustees has found the following to be a useful working definition of ‘elder financial abuse’:

Where an individual in a position of trust in relation to another individual who is 65 years of age or older (an ‘**older person’**) exploits that position through the improper and/or illegal (a) use or appropriation of the older person’s finances or property; or (b) interference with their estate planning or succession arrangements; and in so doing causes detriment or risk to the older person.

To the extent that concepts such as ‘detriment’ or ‘harm’ are included in the definition, they should not be viewed narrowly. Unauthorised interference with an older person’s estate planning arrangements (such as their will), even if there is no direct loss to the older person, is harm to that person’s ‘legacy’, and represents an infringement of their rights. For example, if a child of an older person exercises undue influence in getting the older person to change their will in the child’s favour, and the older person dies soon afterwards, the older person may suffer no direct financial or other loss from the child’s actions, but the older person’s intended legacy will be harmed, as their actual testamentary intentions will not be able to be fulfilled.

**Question 5**

**How does Centrelink identify and respond to people experiencing or at risk of experiencing elder abuse? What changes should be made to improve processes for identifying and responding to elder abuse?**

State Trustees is occasionally contacted by social workers from Centrelink concerned about a vulnerable client. In this context, it is State Trustees’ experience that Centrelink staff do not always have access to clear guidelines or procedures in responding to incidents involving potential elder abuse.

State Trustees is aware of one recent example where Centrelink staff made an application to VCAT to request an investigation or the appointment of an administrator. The applicant listed concerns about the ‘financial vulnerability’ of the older person. In this instance the older person was protected from significant financial loss by the appointment of State Trustees as their financial administrator.

To improve processes for identifying and responding to elder abuse we would encourage Centrelink to educate staff on the prevalence and warning signs of elder abuse. If it is identified or suspected then Centrelink staff should have documented procedures and referral options, for example, to police or the relevant State/Territory guardianship tribunal.

**Question 6**

**What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?**

The responsibilities of payment and correspondence nominees are well-documented on the Department of Social Security website and in the *Social Security (Administration) Act 1999* (Cth). For example, the payment nominee is required to keep a record of expenditure of the principal’s payment. State Trustees is unaware how the Department ensures compliance with these frameworks, nor are we aware of the consequences of non-compliance. Furthermore, we are not aware of any case where non-compliance has meant that Centrelink have made an application for appointment of a financial administrator.

State Trustees recommends tighter reporting requirements be put in place in instances where the payment nominee is not acting under a power of attorney or other formal substitute decision-making authority. There is considerable risk that the nominee will misuse the principal’s income, especially in cases where the principal does not have capacity.

We recommend that in instances of non-compliance protocols require employees to refer the matter to an appropriate authority or for further investigation.

**Question 8**

**What role is there for income management in providing protections or safeguards against elder abuse?**

State Trustees uses income management when administering the financial affairs of a person without decision-making capacity. However, it is a restrictive approach to combating elder abuse. Whilst income management can protect an older person from financial elder abuse it does not guarantee the elder abuse will stop. Given the effectiveness of income protection cannot be guaranteed and it is restrictive of a person’s human rights, it should not be relied upon as the default method of protection for older people with capacity. Irrespective of a person’s capacity, the focus should be on the perpetrator of the elder abuse. Needless to say, older people with capacity need the option of being able to nominate a trusted attorney who may assist with income management if the older person so instructs.

Another protection and safeguard available is the *Family Violence Protection Act 2008* (Vic)which defines ‘economic abuse’ as a type of family violence. In cases where the person who has perpetrated the violence is a family member, the use of an intervention order specifically prohibiting further economic abuse may be an appropriate safeguard. If it is breached, then the perpetrator can be charged under criminal law.

**Question 11**

**What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?**

State Trustees is aware of examples of elder abuse committed against older people in aged care facilities. The following example is illustrative of how substituted decision-makers or family members more generally can perpetrate financial elder abuse against those in care homes.

A resident of an aged care facility, whose niece was acting as his financial attorney, liked to sit in the sun and read. The manager of the facility asked the niece to advance $30 so that the resident could have a hat and sunglasses to protect him from the sun. The niece advised that her uncle could not afford even this small expense. This naturally aroused the suspicion of the manager, and when he had no success in getting further information from the niece he brought an application to the Guardianship List of VCAT for revocation of the enduring power of attorney. When the niece refused to appear before VCAT, the tribunal revoked the enduring power of attorney and appointed State Trustees as her uncle’s administrator. The subsequent investigation revealed that, while acting as attorney, the client’s niece had sold his house and car, purchased in her sole name three penthouse apartments as investment properties, and then collected the rental income for her own use.

In this instance, the remedy for the abuse was relatively straightforward. There was a clear breach of trust by the niece in her use of the enduring power of attorney for her own benefit and to the financial detriment of her uncle, and the assets that were the product of that breach of trust were still held by her, and were therefore readily recoverable, being held on trust for the donor.

Perhaps the most troubling aspect of this case is that if the niece had in the first instance simply dispensed $30 to the aged care facility for a sunhat and sunglasses, it is likely her financial abuse would never have come to light. Cases like this reinforce the perception, which is obviously difficult to definitively verify, that the cases of elder financial abuse that are actually detected represent the tip of a very big iceberg.

**Question 12**

**What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?**

One of the common indicators of financial elder abuse is a resident’s aged care fees being substantially in arrears. It is State Trustees’ experience that many facilities do not seek the appointment of a Tribunal-appointed administrator until such time as the fees are in arrears by amounts in the many tens of thousands of dollars. While it is appreciated that accommodation facilities may be reluctant to involve themselves in difficult family dynamics, State Trustees believes that facilities should be more proactive in viewing fee arrears as a potential symptom of financial elder abuse.

**Question 14**

**What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?**

Today’s older people are spending less time in residential aged care than the previous generation. We accept to the extent a person wishes to, and is able to, stay in their own home and receive consumer directed care they should do so.

There is risk, however, that the older person becomes more vulnerable by an increased reliance on a small number of service providers. Whilst evidence suggests the majority of cases of elder abuse is perpetrated by family members, consideration needs to be given to the increased risk older people may be exposed to when cared for in their home by service providers. Isolation and cognitive decline are risk factors for elder abuse. State Trustees has concerns there is potential for service providers to perpetrate a variety of forms of elder abuse.

State Trustees regularly encounters cases where those providing care to older people, both ‘in home’ and residential care, have derived a financial benefit from their relationship with the older person. This includes financial gifts, bequests in the older persons will, and outright theft. Whilst the vast of majority of service providers in this area are extremely ethical and view elder abuse as abhorrently as we do, safeguards need to be put in place to ensure that carers or those providing consumer directed care to older people are not able to benefit financially from their relationship with the older person.

Admittedly, these safeguards would require significant amendments to diverse areas of law which may impact on the practicalities of implementing such safeguards. As an interim measure we recommend that all employment contracts specify that the worker is not to derive any financial benefit from their relationship with the older person.

**Question 20**

**What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?**

State Trustees supports any steps to increase levels of advocacy available for older people. We believe that community visitor schemes have the potential to help identify and respond to elder abuse and should be supported.

**Question 24**

**What evidence is there of older people being coerced, defrauded, or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and redressed**

Although State Trustees has not had to investigate this specific issue there is no reason to assume that superannuation assets cannot be misappropriated like other assets.

There would appear to be two distinct opportunities to exploit superannuation entitlements.

The first would be where a third party actively asserts control over a person’s superannuation entitlements such that receipts of income are directly misappropriated. This is in essence no different from a misappropriator asserting improper control over a person’s bank account.

The second opportunity is a little more insidious and possibly a little harder to identify: this is where a third party manipulates a person into nominating them as a binding death benefit nominee.

It is unclear to what extent this happens but it should be considered a potential issue to be managed. Given that the binding death benefit nomination only takes effect after the death of the principal, disproving that the nomination was not valid would be very difficult. It is possible that this risk of misuse of binding nominations can be minimised by requiring there be witnesses to verify that the person appeared to have capacity when the nomination was made.

**Question 25**

**What evidence is there of elder abuse in banking or financial systems?**

State Trustees has seen many examples of third parties using the banking and financial systems to perpetrate financial abuse against the elderly.

Many of the allegations of financial abuse investigated by State Trustees are based on a third party accessing the elderly person’s bank accounts. It is clear that at some stage the elderly person has granted the third party access to the account, either by permitting them to be registered as a signatory or by disclosing their PIN. To some extent the fact that the elderly person has voluntarily granted access to the bank account makes it harder to substantiate an allegation of misappropriation.

**Question 26**

**What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?**

Mandatory reporting requirements are conceptually appealing but may be seen by the elderly as intrusive and patronising. There would need to be significant community consultation to manage tensions between the need to protect the elderly from abuse and the need to leave the elderly with the dignity to be accepted as capable of seeking assistance from third parties without such assistance being automatically perceived as potentially exploitative and thus reportable.

**Question 27**

**What evidence is there that older people face difficulty in protecting their interests when family agreements break down?**

A family agreement is designed to document specific legal relationships between a number of parties. Each of the parties to a family agreement usually assume defined obligations and responsibilities. What is often missing from a family agreement, even assuming honest intentions at the time of entering the agreement, is a mechanism to uphold interests in the event of a change of circumstances.

A common term in a family agreement states that the elderly parent will advance funds or transfer property to a child in exchange for the child taking care of the parent. Unfortunately what ‘taking care’ actually means is rarely defined. When the elderly person has to move into alternative accommodation the change in circumstances usually triggers an end of the ‘taking care’.

The elderly person is by this stage deprived of their home or without their capital. The family agreement rarely addresses what is to happen following the change in circumstances, and it rarely incorporates a mechanism to ensure the elderly person’s legal entitlements is protected.

Even with a subsequently-appointed administrator in place it is often impossible to interpret or enforce the family agreement. In many cases it is not clear that the elderly person willingly entered into the agreement or had the capacity to do so.

**Question 28**

**What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?**

It should be noted that the majority of the family arrangements that eventually prove disadvantageous to an elderly person are drafted without input of legal advisers. They can usefully be described as the outcome of legally unqualified people trying to document a common-sense undertaking. They often fail to account for changes in circumstances.

Given that the law cannot change the family agreement after it has been signed, it is suggested that there may be an opportunity to require that family arrangements involving a party who is elderly (to be defined) are only valid if prepared in a particular format, such format by definition inclusive of mechanisms to address obligations and duties following a significant change in circumstances.

Another approach may be to allow a common-sense interpretation to be extrapolated from the context of the family arrangement such that a significant change of circumstances will not undermine the fulfilment of the arrangement that the elderly person can be assumed to have been committing to.

**Question 29**

**What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?**

(This answer applies to both Questions 29 and 32)

State Trustees has identified many cases where perpetrators of elder abuse were administering the affairs of the victim under a power of attorney or administration order. In research on cases of financial elder abuse under investigation by State Trustees in February 2016, of which there were 128 cases, we found that:

* 49% of alleged perpetrators had no legal authority to act for the victim.
* 27% of alleged perpetrators had a power of attorney.
* 20% of alleged perpetrators had an administration order.

In a review of the outcomes of investigations into alleged cases of financial elder abuse for the period from January 2014 to December 2015, the results of the investigations were as follows:

* In 23% of cases the alleged victim died during the course of the investigation.
* In 39% of cases there was not sufficient evidence to prove misappropriation of client funds.
* In 11% of cases the matter was resolved, with the client due to have funds returned to them.
* In 2% of cases the matter was resolved and the client had actually received the funds as of December 2015.
* In 2% the matter was resolved with no funds to be returned to the client.
* In 20% of cases State Trustees did not pursue the matter due to legal advice.
* In 3% of cases State Trustees’ authority to act for the client was revoked.

Frequently, the cases of misappropriation involve an attorney or administrator selling the client’s property and taking part or all of the proceeds, placing the client’s funds into bank accounts held in their own name, or making withdrawals from the client’s bank account for their personal use. Some examples of cases which were under investigation as of February 2016 (de-identified for privacy and confidentiality) include:

* A case where a brother of the client, acting under a power of attorney, sold a property owned by the client. At the time of the investigation, it could not be established what had happened to the proceeds of the sale.
* The client’s son, acting under an administration order, lending himself $20,000 of the client’s money, which was not repaid.
* Following the administration of a client’s affairs by their son under a power of attorney, the client’s boat could not be found.

While the majority of attorneys are honest and fulfil their duties with integrity, State Trustees acknowledges that the risk of misappropriation needs to be better addressed. To some extent, the issue of redress has been addressed in Victoria with VCAT being granted legislative authority to determine that an attorney has breached their fiduciary duty and to additionally impose an Order that the attorney compensate for any loss suffered. Previously such an outcome was restricted to a higher court, a higher court that may not have been accessible to the elderly person for want of access to funds. But this is after the event.

The more difficult issue to be addressed is how to stop the financial abuse being perpetrated in the first place. It cannot be addressed by isolated measures. It is important to continue to educate the wider community as to the prevalence of the issue, and encourage the wider community to denounce the practice of financial abuse. Elevating the issue from the civil to the criminal jurisdiction should also be considered.

**Question 30**

**Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?**

As there is no public register of substituted decision-making documents, third parties may not be aware when someone is acting as an attorney or administrator. However, creating a public register of such documents presents significant privacy and confidentiality issues. For example, it will become a matter of public record that a particular individual lacks capacity to manage their own affairs.

If a register did exist it would need to be correctly maintained by a suitably-resourced agency: there is no convincing evidence to suggest any current agency is better placed than any other agency to administer this function. But there would probably need to be community acceptance that such an agency would have to charge a fee for registration to ensure the agency was appropriately resourced.

Given these concerns, more consultation on this particular topic would be required should government at any level decide to proceed with this register.

**Question 31**

**Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?**

There should be no objection to the statutory duties of attorneys and other appointed decision-makers being expanded to give them a greater role in protecting older people from abuse by others: however, it should not be overlooked that it is indeed attorneys and other appointed decision-makers who are more likely to be offenders.

**Question 32**

**What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?**

Refer to the answer to Question 29 for specific examples.

There is plenty of evidence that VCAT appointed administrators are guilty of financial abuses of represented persons. State Trustees has no reason to assume that VCAT appointed guardians are not also equally guilty of offending. Some general measures against elder abuse are discussed in the answer to Question 29.

One of the more distressing features of State Trustees’ investigations into allegations of financial abuse is that often, by the time the issue has been identified, an application made to VCAT, and an administrator appointed, the offender has squandered what was misappropriated and there are no assets to recover.

**Question 33**

**What role should public advocates play in investigating and responding to elder abuse?**

In Victoria, the public advocate role is filled by the Office of the Public Advocate (OPA). State Trustees supports OPA in investigating and responding to allegations of elder abuse that are not financial. However, OPA’s functions do not currently give it the necessary skill set to investigate financial abuse issues. Unless OPA’s functions are changed it is recommended that there be a strict demarcation between investigations of abuse that are financial and that are not financial.

**Question 39**

**Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?**

Currently a person alleging they have been the victim of financial elder abuse has to pursue their legal remedy in Court. Depending on the value of the misappropriated assets this may mean anything from initiating a claim for recovery in the comparably inexpensive Magistrates’ Court to the more costly Supreme Court.

One of the more frustrating outcomes of an investigation into alleged financial elder abuse is having to abandon pursuit of recovery of the misappropriated assets because the elderly person has no money to fund legal action.

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In Victoria, section 77 of the *Powers of Attorney Act 2014* allows VCAT to “…order an attorney under an enduring power of attorney to compensate the principal for a loss caused by the attorney contravening any provision of this Act”.

As VCAT is cheaper than the courts, this is a welcome development in the jurisprudence of financial elder abuse, but it is limited to abuse by attorneys acting under a power of attorney. It does not cover abuse by Administrators, Guardians, or those who perpetrate financial elder abuse without legal authority over the older person’s affairs through coercion or fraud. State Trustees recommends that VCAT and its equivalents in other states be empowered to resolve all matters relating to financial elder abuse.

**Question 40**

**How can the physical design and procedural requirements of courts and tribunals be improved to provide better access to forums to respond to elder abuse?**

In our experience, it may sometimes be necessary for a VCAT member to meet a potential elder abuse victim in a non-threatening one-on-one environment to properly ascertain whether they need a guardian or administrator and whether the proposed applicant is suitable. VCAT’s design and procedure should facilitate this.

**Question 41**

**What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services, and where should they be located?**

In State Trustees’ experience the availability of Alternative Dispute Resolution (ADR) mechanisms as a response to elder abuse is limited. A more important question is whether ADR mechanisms are an appropriate response to elder abuse. In considering the promising approaches and potential pitfalls of elder mediation, Joan Braun (2013) notes “…the potential benefit of mediation is negligible if the legal rights of the older adult participant are not protected throughout the process.”[[1]](#footnote-1)

State Trustees supports the use of ADR as mechanism to resolve disputes within families in relation to matters affecting an older person. Extreme caution however should be used with respect to the use of ADR mechanisms directly involving the older person who is a victim of the elder abuse.

We acknowledge that many older people do not seek to remedy matters through police involvement or more adversarial methods, however we need to be mindful as a society that our legal frameworks should not consist of mechanisms that implicitly or explicitly accept the use of abuse or violence against older people. Involving older people in ADR processes where they are the victim of the violence has the potential to do this.

We have concerns that in such circumstances, the ADR process could become a tool of abuse rather than a remedy. This position is consistent with the position with respect to intimate partner violence, where an imbalance of power can play out in the ADR process, leading to a potential perpetuation of the violence and further distress to the affected person.

Increasingly VCAT is using ADR as a method of resolving family conflict in cases where the older person has impaired capacity. Some of these applications involve elder abuse or allegations of elder abuse. In these cases the alternative dispute resolution process usually arises after an application for guardianship to VCAT.

There is an opportunity to broaden and formalise the pathways to ADR mechanisms prior to parties making guardianship applications by increasing the availability of ADR mechanisms available to families. This could free up the resources of guardianship lists. Careful protocols and assurances need to be in place to ensure that cases diverted to organisations responsible for conducting ADR should ensure that there is no current abuse occurring. If there are any signs of abuse, then immediate interventions should be used to ensure it ceases. Further, the cost of the ADR intervention should not be bore by the older person.

In summary, ADR mechanisms may be an effective approach to resolving cases of family conflict which relate to the care needs and access to services or people for the older person. Quite often in cases of family conflict there are allegations of financial elder abuse. This will generally occur in cases where the older person has impaired capacity. Extreme caution should be taken when it comes to involving the old person affected by elder abuse in the ADR process.

1. Braun, Joan --- "Elder Mediation - Promising Approaches and Potential Pitfalls" [2013] ElderLawRw 2; (2013) 7 Elder Law Review - Article 2 [↑](#footnote-ref-1)