

COSTANTINO & CO

L A W Y E R S

Our ref: RMR:PSC:174370L6/sg
Your ref: Elder Abuse Discussion Paper

10 February 2017

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY WA 2001 By Email: elder_abuse@alrc.gov.au

Dear Sir

ELDER ABUSE DISCUSSION PAPER¹

We are a small law firm in Perth which has had a variety of dealings concerning older people who are no longer able to fend for themselves.

We set below our issues in relation to the matters raised in this Discussion Paper:

A. Main Issues

The main issues are:

- (1) How to supervise and control Enduring Power of Attorney (EPA) and Enduring Power of Guardianship (EPG) holders in relation to financial and care matters, and enforce those controls.
- (2) To impress on the EPA and EPG holders the extent of their responsibilities.

B. Assumptions

We make the following assumptions:

- (1) The main issues are growing problems in the community;
- (2) The inevitability of temptation;
- (3) Many family members will not want to take on the often very necessary role if it is made too onerous.

¹ **Discussion Paper** – www.alrc.gov.au/publications/elderabuse-dp83

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C. Need for effective supervision and penalties

- (1) The ordinary court system does not work for the reasons set out in paragraph 8.14 of the Discussion Paper. In particular, the ordinary law of undue influence, suspicious circumstances and the like is inadequate, the best main evidence usually being incompetent or deceased.
- (2) The present Tribunal system in WA (State Administrative Tribunal SAT) also does not work in this field; because it does not appear to be geared to work as a form of investigating magistrate, and it cannot order appropriate remedies, including compensation.

This is perhaps the single most important matter to be dealt with.

D. Documents and training

In general, an EPA or EPG holder needs to be made more aware of the responsibilities than is often the present case. (See 6.1)

Turning now to the particular issues raised in the Paper:

1. Proposals 3-1 and 3-3

We strongly agree. Proposal 3-2 item (c) is clearly right but (a) and (b) could add a layer of uncertainty.

2. Proposal 5-1

We do not see how a national register will help. Experience with ASIC and PPSA and other national registers is not encouraging, as they tend to become too automatic and bureaucratic. There does not seem to be any real justification for or benefit flowing from this Proposal except possibly to limit the number of EPA's and EPG's at one time. Consequently we do not agree with paragraph 5.15.

3. Paragraph 5.3

We do not agree that the EPA and EPG should be combined. The holders may be different sorts of people. Also, in WA, they take effect at different times, an EPA either immediately or on loss of mental faculties, which the donor can choose when it is signed; and the EPG only on loss of mental faculties. There is good reason for the difference. An elderly person may want help with his or her affairs immediately but not want to have someone else decide on living issues at the same time.

4. Proposal 5-4

The enhanced witnessing requirements now apply in WA. The "certificate" would be new and perhaps difficult for the non-qualified witness.

5. Paragraph 5.7 - Who cannot be witnesses

We think the Queensland approach may not be suitable.

6. Proposal 5-5

We agree that SAT should have clear power to order appropriate compensation.

7. Proposal 5-6

In principle, we agree with the comments about conflicts of interest, but inevitably conflicts will arise that are understandable and in the patient's best interests. Qualification (a) is unlikely (patient's foresight in authorising) and (b), official authorisation, may be the norm.

8. Proposal 5-7

We agree but SAT should be able to authorise; as the particular person may be the nearest relative and the issue be one of care.

9. Proposal 5-8 Prohibited decisions

In WA, Items (a) and (b) are not possible. Items (c) - (f) seems obvious. The roles of trustee and director (unless specifically authorised by statute, e.g. superannuation) should also be excluded. These roles are not the function of a representative.

10. Proposal 5-9 Records

We agree and we always so advise clients.

11. Proposal 5-10

We agree that nationally consistent laws should be introduced but this is not essential.

12. Proposal 5-11

We prefer "Legal Agent". It suggests legal authority which is the case. We agree the "Attorney" is inappropriate (paragraph 5.121.)

13. Proposal 5-12

A specific model agreement may help but it will need to be simple and easily understood or many legal agents will not sign it. The present simple statutory obligation in the standard WA forms is clear and usually acceptable.

14. Proposal 5-13

We doubt that this will help the main issues.

15. Proposal 6-1

Our view is that there needs to be some form of formality before an EPA/EPG can take effect, such as attendance at a formal education session geared to the kind of person who will be present, or formal advice from a senior lawyer which is certified as having been given.

16. Proposal 6-2

In WA, legal agents already sign a brief undertaking. We do not favour a bond system because it would be too frightening for many legal agents.

17. Question 6-3

Where the person/patient has capacity, he or she is already involved by signing the EPA or EPG.

18. Question 7-1 Self-Managed Superannuation Funds

- (1) It is not necessary to have a corporate trustee in all cases, which would add expense and formality;
- (2) Agreed;
- (3) Not necessary – the scene is already much too complicated; and
- (4) Probably not, as it is remote and another cause of expense.

19. Proposal 8-1

SAT should be able to deal with Assets for Care type questions. No formal definition of "family" will be useful in today's great variety of circumstances. The WA Guardianship and Administration Act refers (s109(1)) to "a person with a proper interest in the matter", which seems to work.

20. Proposal 9-1 Wills

In WA, current Continuing Legal Education courses cover these issues. Attendance at a particular course of courses should perhaps be a requirement for work in this field and the lawyer should be a "senior lawyer".

21. Proposal 9-2

In WA, any two adult persons, surprisingly even not independent persons, can witness wills.

22. Proposal 10-2

It should not be necessary for Centrelink to speak directly to the person/patient as this is often not practicable.

23. Aged Care

No comment.

24. Other Issues

No comment.

Yours faithfully
COSTANTINO & CO

R Reynolds

Per: RICHARD REYNOLDS