Australian Law Reform Commission

Elder Abuse Discussion Paper

Discussion Paper 83 (DP 83)

**Submission on the Elder Abuse Discussion Paper**

Submitted by:

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I compliment the Commission on their in-depth inquiry into elder abuse and their well drafted discussion paper. With respect, I furnish the following recommendations and suggestions.

**Proposal 5-4 (page 8)**

The requirement for a witness to enduring documents to certify that the principal appeared to understand the nature of the document is essential to the validity of the document and proof of the principal’s informed consent and authorisation.

Where the witness is a legal practitioner, the witness can be assumed to have the requisite knowledge of the nature of the enduring document to provide such certification.

I would argue, however, that it cannot be reasonably expected that a medical practitioner, justice of the peace, or police officer of relevant rank will have the requisite knowledge to provide such certification. With medical practitioners in particular, while they might be most suitably places to certify understanding of the nature of an Enduring Guardian, this is not the case with an Enduring Power of Attorney which confers authority to deal with property and enter contracts.

While extending the list of eligible witnesses may make it easier for a person to execute an enduring document, this benefit would be outweighed by the detriment of allowing a person to witness who is not able to confirm that the principal understands the nature of the document because they themselves do not.

That is not to say that every legal practitioner has sufficient understanding of the nature of enduring documents to so certify. However, every legal practitioner should, upon reading the certification clause, be able to identify whether they have the requisite knowledge and, if not, recognise their obligation to withdraw from acting as the witness.

**Proposal 5-6 (page 9)**

I have concerns about the proposal in relation to conflicts of interest between the principal and the attorney, in particular it is very likely that the older person may foresee the particular type of conflict and still give express authorisation, because they are appointing someone they trust and, even if advised of possible misuse of authority, do not believe that their appointee will do so. Therefore, including this provision may do little to address the problem.

I recommend that for any transaction where there is a conflict of interest, that for the transaction to proceed it must be approved by a third party, preferably a legal practitioner but possibly a medical practitioner, public advocate or the tribunal.

**Proposal 5-8 (page 9)**

I recommend including the following to the list of transactions that cannot be completed by an enduring attorney or enduring guardian:

1. Accessing or receiving the original or a copy the principal’s will from a solicitor, bank or other party holding the document in safe custody.

Anecdotally, we have received requests from attorneys to see the original will, to obtain a copy or to have the original released into their custody. We sought the guidance of the NSW Law Society who advised that, unless expressly stated in the enduring document, the attorney is not authorised to any of the above. The will is a confidential document and that confidentiality can only be breached with the express consent of the principal while having capacity.

As well as being a confidential document, this reduces the risk of an attorney seeking to get around the terms of a will by disposing of assets using the Power of Attorney or destroying the original will.

**Proposal 6-1 (page 10)**

Some appointees as attorney or enduring guardian would like further guidance on their role and obligations, in which case an official training guide should be readily available.

However, compulsory training will deter some people from agreeing to act as attorney or enduring guardian, either because they do not have the time for the training, they do not want to do the training or the requirement for training gives them the impression that the appointment may be too onerous for them.

Where you have more people refusing to act as attorney or enduring guardian, this will increase the onus on the public advocate or public guardian to take up the role.

I therefore suggest that an official training guide be readily available and provided to all appointees on acceptance and that the tribunal be authorised, at its discretion, to order an appointee to complete training where they have been shown to be in doubt of their duties or in breach.

**Proposal 8-1 (page 11)**

I strongly agree with the proposal that the tribunals have jurisdiction to resolve family disputes involving ‘assets for care’ or ‘granny flat’ arrangements.

The discussion paper gives a good overview of the difficulty for older persons when such arrangements don’t work out or are ended for whatever reason. At which point, it is important for the older person to be able to seek a resolution that does not require extensive funds (which they may not have) and which is not too stressful or adversarial.

However, this only addresses the situation once it has become a problem. There should be more done to address the situation from the outset. I therefore recommend a requirement that any parties to an ‘assets for care’ or ‘granny flat’ arrangement must first seek independent legal advice before entering into such an arrangement and for the arrangement to be formalised in writing and signed.

The discussion paper notes that Centrelink provides advice on such arrangements, however my experience has been in dealing with clients seeking a resolution where Centrelink has advised them to enter into a ‘granny flat’ arrangement but has provided little or no advice on the advantages and disadvantages of the arrangements.

We support Proposal 10-2 that Centrelink be required to speak directly with persons of Age Pension age entering into arrangements that concern social security payments and recommend that this be extended to any person seeking to enter into an ‘assets for care’ or ‘granny flat’ arrangement and that such advice should either:

1. be far more extensive (i.e. life events that may terminate the arrangement prematurely, available remedies on termination, etc.), or
2. to refer the person to a legal practitioner who will provide the extensive advice required.

Several clients have come to us because Centrelink have advised them to enter into a ‘granny flat’ arrangement and months or years later the older person is seeking legal advice because the arrangement has not worked out and they are now looking to lose their house or/and their pension.

I suggest that:

1. There be a standard advice Centrelink is required to provide to anyone considering an ‘assets for care’ or ‘granny flat’ arrangement. That advice to include that the parties seek independent legal advice.
2. ‘Assets for care’ and ‘granny flat’ arrangements must be formalised in writing and signed by all parties before the commencement of the arrangement. The parties can either adapt a template contract made available to them or instruct a legal practitioner to prepare the document for them.

**Proposal 9-2 (page 11)**

Further to the proposal that witnessing requirements for binding death nominations should be equivalent to those for wills, I recommend that the nomination should, like a will, be binding unless revoked by the testator.

The discussion paper considers the issue of where an older person may have lost capacity and therefore cannot revoke or amend their superannuation nomination. However, this is the same situation for the testator’s will and the discussion paper recognises that a binding death nomination may qualify as a testamentary document under which the older person instructs how their assets are to be distributed after their death.

It is more important for a person making a death nomination to have the assurance that the nomination is binding and that it will continue to be binding even should they lose capacity. A binding nomination should therefore be binding unless expressly revoked or, at the very least, the principal must have the option to make a non-lapsing binding nomination.

**Proposal 11-8**

With regard to the proposal that aged care providers not be able to require a recipient have an appointed decision maker, this raises serious concerns about who the aged care provider can refer to for instructions where the older person does not have the requisite capacity to instruction. This places a difficult burden on the aged care provider, especially in emergency situations where a decision must be made as soon as possible, to locate or identify a person with authority or eligible to make an application to be appointed.

Anecdotally, we have had several clients tell us that they had been meaning to do their wills, Power of Attorneys and Enduring Guardians for years but just never got around to it until the aged care provider insisted on the ingoing resident providing them with copies of the documents. While it places a burden on the ingoing resident, it has worked as incentive for people to execute the documents before it was too late.