26th February 2017

*)*

**Elder Abuse Enquiry**

web@alrc.gov.au

**Elder Abuse DP3 Submission**

Elder abuse is an issue close to our Family’s heart as we (the Children and Grandchildren) have personally witnessed (**and are still dealing with**) a *disabled* family member being abused by outside friends and strangers and have been legally limited to do anything about it.

To witness strangers applying dependency and siege mentality tactics on our loved one, and for them to be able to successfully isolate this family member against all of us, even young Grandchildren, has been heartbreaking. We all cry every day and miss this person who no longer has the capacity to understand their actions and the effect it has had on us all. We can only watch, our hands are tied.

There is no support and counselling available to families and friends, and innocent victims often watch in horror and are often helpless to act. Abusers come in all forms, family, friends, neighbours, carers, strangers. But we also need to address Institutional forms of abuse (Government Departments and Aged Care Facilities) and controls are *essential and imperative* in this area as well.

No Individual person and no organisation should be above the law when it comes to Elder Abuse.

It must be difficult for Tribunal members to navigate the laws of the land with the realities of Elder Abuse victims appearing in their Chambers. Especially when the victim of the abuse lacks insight and cannot see that they are in fact a victim and are indeed vulnerable. Undue influence is very difficult to establish especially when the victim does not see an issue at all. A big concern for us is those vulnerable members in our society *who still have some form of capacity* yet are *vulnerable to exploitation*. A grey area that needs addressing urgently.

An inquiry should be *publicly* held into Elder Abuse and members who have had direct dealing with Public Advocates and Public Administrators also should be given a voice to address their concerns on how the system is actually *working*, before any proposals are implemented. We have grave concerns with the current system especially how current investigations are being held.

Having seen and dealt with the System first hand, we have some very strong views in these matters:

1. Elder Abusers can be anyone: family, friends, neighbours, carers, strangers, Medical and Government Personnel. The focus should not be on family members alone nor should this always be assumed;
2. We support the creation of an Elder Abuse Department, created at a FEDERAL level, independent from State bodies, that has powers to investigate all complaints (even Institutional cases of abuse) and investigate in accordance with the Rules of Procedural Fairness;
3. We do not support any proposals below that deviate from the rules of Procedural Fairness especially in the areas of a fair hearing, bias in reporting and **probative facts** being submitted only. Section 3-5 is very concerning. Allegations and evidence must be based on facts proven beyond a shadow of a doubt. Anyone making allegations should have reasonable grounds in making those allegations;
4. We do not support State Public Advocates having *dual roles as Investigators and being able to make recommendations appointing themselves or their Department as Guardians.* Nor affiliated Public Administrators. To us, this is a conflict of interest and has the potential of being open to exploitation. People need to have faith in a system that will seriously investigate Elder Abuse without being seen to gain in anyway. Federal Investigators should have no financial or other gain in the process and this is one avenue to explore;
5. We believe stronger criminal sanctions need to be levelled at those who engage in any form of Elder Abuse. We believe that Public Advocates and Administrators and any Government Department should equally be open to investigation by Elder Abuse Investigators;
6. All Professional bodies urgently need to educate their members in areas of Undue Influence, Siege and Dependency mentality tactics employed by Elder Abusers;
7. The Public Advocate as a Guardian should always be a last resort and well as Public Administration. We have np objection to Public Guardians but are concerned that duties are not separated and are possibly open to exploitation. Family relations, where possible, should always be preserved.

We are concerned that most **proposals here do little in protecting the vulnerable and are more about consolidating power to an already strong Public Advocate and Public Administrators**. We are concerned that ‘private’ guardians will be pushed out in favour of ‘public’ ones, which should not be the case. The Public Guardian should exist, as a last resort only.

Serious illness exist, such as Huntington’s Disease, Schizophrenia, Frontal Dementias, Acquired Brain Injuries and Head Injuries and sometime those who suffer from them are vulnerable and become challenging and at risk of exploitation. Families often do their best to support their loved ones from being abused but at times they are faced with challenging behaviours from their own loved ones which make it difficult for the families to provide protection. These issues need to be addressed and support put in place.

**Proposal**

**2-1** We agree with this proposal in “principal’, however, in practice, we are concerned that more powers will be directed to *Public* Advocates and Administrators over *Families and Private* Guardians and Administrators. Families and carers are in a naturally weaker position than Public Advocates already and our concerns are stronger laws ***separating the duties*** of the Public Advocates are needed and not more power allocated to the Public Advocates. At present, Public Advocates in various States (or Investigator employed by the Public Advocate) can:

* investigate any issues referred to it by the State Tribunal;
* select the Doctors to assess the capacity of a Represented Person;
* select the flow and relevancy of information presented to the State Tribunal; and
* make recommendations, recommendations even in their favour, appointing themselves or associated Public Advocates and / or the State Trustee as Administrators.

Can you see a weakness in this process? *Investigators should not have any ties or be linked to or employed by Public Advocates.* This is a potential conflict of interest that needs to be corrected immediately.

The recommendations made by Public Advocates and their Investigators are naturally relied on by Members of Tribunals. How could a family be able to argue against a recommendation by a Public Advocate when the Public Advocate in fact has control over of the whole investigative, selection and recommendation process (usually recommending themselves and a Public Trustee). How can the public be assured the Public Advocate is acting honestly and independently? Who are the Public Advocates accountable to and how can anyone report them? An Independent body (made up of carers and victims) should also be set up to ensure the Public Advocate is also accountable for their decisions and maintains its independence and is acting honestly in the whole investigation process. And that the rules of Natural Justice are adhere to and followed in any Investigation process.

No one should be above scrutiny when it comes to Elder Abuse.

**2-2** We agree with this in theory but only if the study involves a substantial input from the Public especially people currently under **Public** Guardianship and **State** Administration and other Professional Bodies such as Accountants and Financial Planners who have witnessed other forms of elder abuse (i.e. institutional abuse, family abuse, aged care abuse). This inquiry seems, to me at least, to involve opinions from members of the Law Institute and various State Public Advocates and it concerns me that other groups will be shut out of the process and not have a say or any input. We would particularly be interested in hearing from Families and their experiences dealing with State Trustee Administrators and Public Advocates all over Australia before any proposals are even considered and / or ratified in anyway.

**3-1** We support the *urgent* need for a *separate body* to Investigate Elder Abuse at a Federal Level but do not support any State Public Advocates performing this duty. It is like handing someone a blank cheque. Checks and balances should not be weakened. We *do not* support any Investigator dealing with Elder Abuse issues be affiliated with any Public Advocate or their Departments or related parties or associated parties. This can create a conflict of interest. The duties of the Public Advocates as Guardians need to be separated from any Investigations conducted into Elder Abuse. We believe any investigation process should also have input from all parties affected by the investigation and its conclusions and any recommendations and investigations should strictly follow the rules of Procedural Fairness, including the hearing and bias rules and probative evidence. Common law principles of Natural Justice should always be upheld especially in Tribunals and any Investigations undertaken. Tribunal members should feel confident that the evidence submitted to them is free from bias and is independent.

**3-2** Section 3-2(a) is disturbing. In other words, Public Guardians will not act if abuse is evident and in cases where the older person experiencing the abuse refuses help? This is troubling. Many decisions made by Advocates (especially Family Members) will go against the wishes of the Represented Person especially when the Represented Person lacks capacity and insight into their illness and is putting themselves at risk of breaking the law, harming themselves or others. It is often in their best interest for someone to step in to protect them. Whilst every attempt should be made to respect the wishes of the Representative person, there are times when this is not possible as the ‘wishes’ can be outright unreasonable, illegal or dangerous. Any Carer will tell you this. If a Public Guardian were to follow section 3-2(2) it is possible they may be engaging in a form of Elder Abuse-Neglect. Not to mention a possible Human Rights violation.

**3-3** In theory this sounds reasonable however, in practice this system has a fundamental flaw. Public Advocates in various State can determine the relevancy of information and can withhold information if they believe it is not relevant, from State Tribunals, Doctors and even family members. This can potentially adversely affect an investigation and the outcome of an Investigation. This is a lot of power in the hands of Investigators and appropriate controls and duties need to be separated and avenues of appeal need to be set in place to ensure the investigation process is reliable and independent and easily open to appeal in cases of dispute.

We believe any reports, before they are submitted to any Tribunal, be forwarded to all relevant parties involved in the investigation process to ensure all information furnished has been presented, to give relevant parties an opportunity to address any issues, and ensure that Procedural Fairness has been accorded to all parties involved.

**3-4** This section is concerning as it accords strong powers to the ‘public guardians’ but nowhere are these same rights given to ‘private guardians’. As stated elsewhere, the Public Advocates already have enormous powers in selecting Doctors and ACAT teams (a power families do not have in an investigation process) and this selection process has the potential to be exploited especially if the Doctors are also selected by the Public Advocates. We propose that other parties in the investigation process be accorded the same rights to select or **have a say in Doctor selection (or a second opinion)**. Families and friends should be a natural part of this process as well and all attempts should be made to preserve family relations. We are concerned with this prevailing view that vulnerable persons are only at risk from family members and that only ‘public’ guardians can offer a solution. Unfortunately, this is not always the case, vulnerable persons are at risk from anyone who has access to them. This can involve institutional abuse as well.

**3-5** **Under no circumstances should this proposal be allowed**. Natural rules of Justice should be followed in all investigations and any allegations made by anyone should be fully scrutinised and subject to questioning. That does not mean an investigator cannot enquire into suspicious behaviour. But at no point should anyone be above the law of defamation and innuendo is not evidence and should not be treated as such. *Procedural Fairness (hearing rule), Bias and Rules of Probative Evidence must always be upheld in any investigation. This is essence of Justice.*  If section 3-5 was to become law, then any Individual, Professional or otherwise, could make any wild unsubstantiated statement free from scrutiny and not be subject to any form of reprimand. This section would give Health Care workers, and the like the right to make any unsubstantiated statements without the fear of prosecution.

Even allegations by cognitively impaired individuals must be investigated and not assumed as fact. It is not uncommon for an individual suffering from Frontal Lobe Impairments due to diseases like Huntington’s, Schizophrenia and Dementia to accuse innocent family members, friends and even Health Care Professionals of wrong doing and my fear is such unsubstantiated statements will be used against ‘Private’ guardians as evidence to appoint ‘Public’ Advocates.

***This is a most dangerous proposal.*** *Any allegations should be investigated and evidence provided must be verified before it even makes it way in any report or submitted to any Tribunal member.* What is next? Will false and misleading statements just be accepted as fact and lodged as evidence to Tribunals? Will misleading medical information also be submitted without scrutiny and Doctors be free from Professional Misconduct laws? Procedures of Fairness need to be adhered to ensure Investigations are independent and honest. Statements must be backed with probative facts.

**5-1 to 5-3** We agree with a national register and ensuring the validity of Enduring Powers of Attorney. We will add, valid Powers of Attorney should not be easily revoked unless the Attorney has been proven to have abused the powers and premorbid personality and wishes stated in Powers of Attorneys should not be ignored or disregarded.

**5-4** There is an inherent problem with this clause in the fact that it assumes that witnesses must ensure the Principal understands and freely signs any Enduring Powers. This can only be successful if the witnesses have some prior knowledge of the Principal, which this clause does not address. The witnesses should be made up of two people who know the Principal over many years and understands any conditions or disabilities this person may have. *This clause does not prevent an impaired person from signing Enduring Powers of Attorney so in effect this clause is useless.*

**Capacity should be the test used *before* Powers of Attorney are prepared and signed, not worrying about witnesses.** The Principal must prove they have capacity to sign before entering into any Powers of Attorney and after that is established, any witnesses can be used.

**5-5** We believe this clause should also apply to all Financial Administrators esp. Public Administrators. Private Administrators can easily be audited and forced to pay compensation but how would this law apply to State Financial Administrators? Would the vulnerable be compensated if the Public Trustees recklessly incur substantial losses on investments? Who would determine any reckless investment behaviour, if it occurs, and oversee this and how would realities of this clause be implemented?

This clause would be difficult to apply to Public Trustees. Public Trustees should not be above scrutiny and paying compensation either.

**5-6** No conflicts of interest should exist in theory; however, this clause does lack some practicality especially in situations where an Attorney is a family member of the Principal and there exists joint business ties, joint assets and trusts. Decisions made will affect the whole family in some cases, will these decisions be treated as conflicts of interest? This needs to be clarified. Also, is it a conflict of interest for Public Trustees and Public Advocates to prepare Powers of Attorney for Individuals, nominating *themsel*ves as Guardians/Administrators? This is currently happening. Will this issue be addressed also?

**5-7** If a person has reasoned capacity to prepare Powers of Attorney then they have capacity to appoint any person they wish to be their Attorney. However, I can see the value in appointing a trustworthy person.

**5-8** We disagree with this clause. If a person has reasoned capacity to prepare Powers of Attorney, then they should have the right to explicitly list and/or give any power to their chosen attorney. If one loses Capacity, then the Attorney should be bound to follow the premorbid wishes of the Principal.

**5-9** The laws in each state already require strict transaction recording procedures for Private Attorneys. In some states, audits are randomly conducted by State Tribunals and yearly forms on how funds are distributed and spent are lodged. This rule needs to be applied to State Trustees in various states as well and they should show how funds are spent and particularly **how monies are invested** and be subject to strict audit controls and investigations by vulnerable persons and concerns raised by their families. What about jointly owned assets, how will this be addressed?

**5-10 to 5-12** We have no objection to a national system. We are worried though who will overlook and ensure the ‘national system’ has sufficient controls and rules of fairness in place and how effective they really are.

**5-13** In theory this seems reasonable however in practice it is difficult to implement. As most carers know, trying to deal with the demands of disabled people can be difficult. We have always believed the rights of those impaired should always be upheld except where they are acting in a manner that will endanger themselves, others or break the law.

In such cases, the preferences of the Individual needs to be balanced with reasoned judgement and that can only be made by a reasonable Guardian. Family and friends should be sort first to determine the Represented Persons premorbid preferences. A problem faced by carers with Dementia patients and those with Brain Damage for instance is a change in their premorbid personality and their current views may not reflect who they once were. We do not feel a Public Advocate can successfully handle this role without family input and this clause concerns me, as do all these proposals, as it seems family members and ‘private’ guardians are being left out of the equation all together.

**6-1 to 6-3** Our concern with these proposals is that one would need to hold a Masters’ Degree before they can be appointed in looking after the affairs of family or loved ones. Most Estates are simple affairs and do not require courses and compulsory training. Paying an Electricity bill and filling out a form can be completed by the anyone with an IQ above 70 (and sometimes even below) so we do not understand the need for such detail and intense training unless it is an attempt to make the appointment of a ‘private’ Guardian (over a Public Guardian) more difficult.

The only training required is a comprehensive list of what Attorneys can and cannot do under the law. Most State Tribunals already offer such training to new Guardians and Administrators.

**7-1 to 7-2** We will always agree to rules that protect and minimise fraud and embezzlement of money, however strict measures are already in place at a State Tribunal level and Attorneys are required to submit detailed forms to State Tribunals yearly on how money have been distributed and spent. Anything questionable activities during these yearly audits *should be investigated immediately*.

We *strongly disagree* with the provisions of a Corporate Trustee being appointed to Self-Managed Funds. As Accountants (who happen to have a Superannuation Background) and who manage their own Self-Managed Fund, Self-Managed Funds are independently audited every year and Audit Clearance Reports are attached to Yearly Annual Reports. There is no need for a Corporate Trustee to be appointed and we do not see how this measure, apart from adding a further cost to funds, would benefit anyone nor reduce the risk of fraud. An easy solution here is that the yearly Audit Clearance Report also be submitted annually to State Tribunals for review in line with the normal yearly paperwork.

**8-1 to 9-1** We strongly disagree with these two provision. Family agreements are just that. Family agreements. They should stay in place and Public Advocates should honour the premorbid wishes of individuals. These agreements have been made when the principal had capacity. Once capacity is lost, then any contracts made prior to the loss of capacity should be honoured. *No one should have the right to override decisions made by a person who made a will or agreement whilst they had capacity. Once capacity is lost, the attorney takes over and carries out those wishes. It should be that simple.* Any serious matters (i.e. Will Challenges) can be dealt with at the Supreme Court.

For Instance, we have made specific Wills and Powers of Attorney which prevent any Public Advocate from ever taking over my affairs. We want our wishes honoured and want our Family to take over ALL our affairs if or/and when we lose decision making capacity. I have a 50% chance of inheriting a specific dementia that can lead to poor judgment and impaired decision making. We have left specific instructions on how we would like our family to handle our affairs. And we do not want these decisions overridden by anyone.

Undue influence is particularly important especially when it comes to members of the Legal profession. Laws should be tightened in how wills are prepared, who can be an executor and conflict of interests should be taken more seriously. Any Lawyer who has been proven to act or take advantage of an impaired individual should be investigated and disbarred if found guilty. This is another form of abuse that needs to be investigated seriously.

**9-2 to 9-3** We do not agree with this clause. A person who has capacity to make decisions has the right to appoint their nominated attorney to make a binding death nomination. They should have the right to allow their attorney to make any decisions as they see fit. At best, decisions made when one had Capacity should be upheld.

**10-1 to 10-4** Centrelink issues and how money is spent should be and would be picked up in the annual audit by the relevant State Tribunals. In fact, most banking and Centrelink issues should be picked up in the yearly State Tribunal yearly audit.

We do not have any issues with Centrelink staff asking Attorneys to explain any anomalies. Rules of fairness need to be applied and unfounded allegations must be substantiated and the opportunity to explain any issues be afforded.

**11-1 to 11-11** As we do not work in the Aged Care Industry, we will not make many comments regarding this area. However, we do believe there are current sufficient arrangements in place where Individuals working with the vulnerable are vetted. We do agree with a national screening process. We do believe an incidents registrar should be in place and any Investigation should be conducted with Investigators not in any way associated with the State Public Advocates Office and always with Procedural Fairness Rules in mind. Public Advocates and Investigators should not have the only say in Doctor selection

**We are concerned these proposals do not really address Elder Abuse and, in our view, are just a legal attempt to make ‘private’ Guardianship and Administration more difficult for family members. We are particularly concerned about:**

1. **the fact that section 3-1 gives Public Advocates the power to perform *dual roles* of Investigations as well as appointing themselves or members of their Departments as Guardians and associated Departments as Administrators. This dual role is open;**
2. **section 3-2(a) which openly allows Public Guardians to ignore abuse. This is neglect. We have a duty to protect the vulnerable from exploitation and protect them from abuse. Rights of protection should not override the right to choose, esp. in cases where abuse is obvious and the Elder person is vulnerable, lacks capacity to make decisions and/or lacks insight;**
3. **no proposals have seriously tack Elder Abuse, focusing on physical investigations and criminal charges *being* enforced. Currently, Elder Abuse is endemic in Australia, everyone I know has a story to tell and families are struggling to help family members and friends who are victims of these crimes (sometimes by other family members or Institutional abuse) and are forced to watch, powerless to act;**
4. **any sections in these proposals that override the inherent common laws rules of Natural justice (Procedural Fairness - hearing, bias and Probative evidence) must be not be allowed to proceed as Statute law. Sections 3-5, is particularly concerning in the fact there will be no accountability for those making unsubstantiated statements.**

Regards