

## AUSTRALIAN LAW REFORM COMMISSION ELDER ABUSE DISCUSSION PAPER 83

### Submission by the Estate Planning Committee of Carroll & O'Dea Lawyers ("the Committee")

#### **Proposal 2: National Plan**

- The Committee supports the implementation of a National Scheme as a uniform approach from state to state is desirable.
- Elder abuse is inexcusable – It is the Committee's view that– "*A nation's greatness is measured by how it treats its weakest members.*" – Mahatma Ghandi; "*It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped*" – Hubert Humphrey]
- The Committee raises an overall question of whether legislation is the appropriate means to tackle this "abuse". The nature of the support that elderly persons require is best informed by the moral attitudes and behaviours of those persons in family or community able to give that support.
- The Committee perceives a difficulty in legally defining what constitutes "abuse". Some actions would obviously constitute "abuse" eg physical assault, whereas others, eg not visiting residents of a nursing home, may not.
- Transposing the domestic violence regime to elder abuse may not be appropriate

#### **Proposal 3: Powers of Investigation**

- The Committee agrees in general terms with Proposals 3-1 to 3-5.
- The Committee perceives major issues as how investigations will be funded and who will carry out those investigations.
- We note that when the Guardianship Tribunal appoints a financial manager it can direct the financial manager where there is evidence of dissipation of monies to carry out a forensic review of bank accounts, transfer of assets, expenditure etc etc.

However, if the principal does not have funds to pay for the investigation only a very basic review can occur.

- We note the statistics recorded in paragraph 6.1 of the Discussion Paper, and note the minor percentage (less than 1%) of cases identified as being financial abuse. (ie of 9000 matters dealt with by the GD in 2015, the NSWTAG litigated 521 matters for protected persons and only 65 were identified as dealing with financial abuse)

- The Committee notes that the power to investigate, involves the investigation of documents/ bank accounts/ assets (inanimate objects) and does not necessarily require the co-operation of persons. The investigation of elder abuse requires the latter and hence it is a much more complex and difficult task.

Who should investigate?

The Police? Civil Servants attached to the Public Guardian or a Public Advocate?

If a Public Advocate is chosen, comparison should be made with how the child protection system investigates, for example, its workers, and notice be taken of many shortfalls of reporting in that system.

Low level and low paid public servants are not the answer.

- We understand that such public servants do not want to assume a risk of being exposed to aggression and potentially risky interactions.

Anecdotal evidence suggests many NSW TAG employees are envious of their role as legal personal representative and delay for extensive periods before taking any action despite information being available. We identify this behaviour as extremely risk averse because of possible costs orders.

If, for example, the principal suffers a personal injury, the appointed representative will not progress such a matter unless they hold Senior Counsel's advice that the case has guaranteed prospects of success NOT JUST reasonable prospects of success. This is in contrast to normal practice by a lawyer for a personal injury client, who will start a case where the client has catastrophic injuries, notwithstanding some liability problems, in the hope of a commercial settlement. The NSW TAG is not generally brought in to such a case until it is about to run or commercial settlement has been achieved.

The Committee notes that in Europe eg Italy, France, Germany a secondary police force ( ie Municipal Police) operates.

See link here to Italy and their Vigili

Urbani: [https://en.wikipedia.org/wiki/Municipal\\_police\\_\(Italy\)](https://en.wikipedia.org/wiki/Municipal_police_(Italy))

Urban Vigilants.

The Commission might consider that in order to give the investigators of enduring attorney appointments some standing (rather than a role of "social worker" attached to the Public Advocate) such additional layer of law enforces may be helpful: funding constraints may preclude such a suggestion, however, the Committee also considers,



such a role would be a good starting point for some young police officers, who may eventually move to policing crime.

- The Committee also supports the Scottish model ie an all in approach (see point 3.25).
- The Committee also consider that the issue of "consent" of the principal requires a difficult balancing exercise. The pressure that an at risk adult is under (as described in the paper) in socio/family dynamic terms are tremendous. A perceived or notional "refusal" needs to be closely scrutinised and vetted.
- The Committee notes that when elderly persons come before the Guardianship Tribunal they are usually at a point where they have no grasp at all of the details of their living support needs or the details of their financial affairs. For example, they cannot say how much they have in the bank, how much their pension is each fortnight, what bills they get, the value of their assets etc etc. We therefor query how much weight should be placed on their notional rejection of assistance. See: Scott v Scott 2013 NSWSC Lindsay J on the examination of capacity to make an enduring power of attorney and capacity generally. In essence a statement by a person that they want: "Cousin William" to look after everything" is not evidence of capacity to give effect to an important legal document like a power of attorney.

#### **Proposal 5: Powers of Attorney/Enduring Guardian Appointments**

- Concern that proposed legislative changes will merely duplicate the common law – increase in complexity, unnecessary

##### **1. National register**

- The Committee identifies a National Register as a commendable attempt to tackle elder abuse, but in practice it is not confident that will stop or hinder abuse
- Will be fees associated with registering documents and searching register. A compulsory registration fee may deter people from making enduring documents. There will be an added cost to register revoked enduring documents and new enduring documents which may be prohibitive for principals who may not have the funds.
- Publically available register raises concerns about privacy – the Committee is concerned that the elderly will not want busybodies knowing matters of this personal nature
- Administrative hassle
- Makes attorney feel accountable

## **2. Safeguards against abuse**

### **5.2 Random checks**

- Deterrent
- Desirable, but not practicable considering the current defunding of NSW Trustee & Guardian

### **5.4 Enhanced witnessing**

- According to their website Local Courts and Magistrates Court can only witness enduring documents in some circumstances.
- Not all listed witnesses would have the expertise to advise on the legal nature and effect of an enduring document and also assess capacity from legal perspective in accordance with the common law.

### **5.5 Compensation**

- Currently, there are limited avenues for redress and few consequences for representatives who misuse their powers i.e. currently, in deceased estates, only avenue is to commence proceedings in the Supreme Court, which is not always cost effective
- Unclear what "compensation" constitutes and what it would entail i.e. to put principal in the position they would have been in but for the abuse
- Enforceability concerns and what it would entail to ensure that an order for compensation is legally enforced.

### **5.6 Restrictions on conflict transactions**

- Merely duplicating existing law

### **5.7 Ineligible persons**

- We agree there should be a list of restricted persons to be ineligible to act as an enduring attorney.
- Issue of costs associated with conducting those searches
- Other suggestions: Obligations on lawyers to inform clients who can and cannot act as guardian or attorney; Obligations on lawyers to take full and detailed instructions

### **5.8 Prohibited decisions**

- Merely duplicating existing law

### **5.9 Record keeping**

- Fully support
- Should also be penalties for not keep records for a minimum of 7 years
- Would make it easier for "interested persons" to seek accounts



- Impractical for attorneys and guardians to submit annual financial reports at an added cost to the principal

### **3. Representative agreements**

- The case law of each State/Territory informs the respective enduring documents
- Perhaps push for uniform legislation
- Difficulty having one form containing different appointments as attorney and guardian and substitute attorney and guardian
- Privacy issues perhaps if principal doesn't want guardian to be privy to power of attorney, and vice versa
- Some principals may not want have enduring power of attorney but want enduring guardian, and vice versa

### **Proposal 6: Guardianship and Financial Administration Orders**

- The Committee agrees in general terms with Proposals 6.1 and 6.2
- The Committee does not agree with Questions 6.1 (a) to (b) or 6.2. as we believe mandatory education and surety bonds will alienate potentially suitable persons..
- The Committee is aware of an existing NSWTAG general surety bond policy which has now been suspended and varied to a case by case basis.
- One of the members of the Committee has direct experience on the Guardianship Division of a very supportive sister of a man with chronic mental illness ( a very difficult and stressful role per se),who for a period of 10 years had been his financial manager to his benefit and had always complied with the directions of the NSWTAG. There were no questions at all about her competence and ability to properly fulfil that role. The surety bond request was made of her and she resigned her position. Our member considered that a terrible outcome for the brother. Often, the practice and implementation of workable strategies on the ground is very different to hypothesis of the best practice.
- Finally the Committee observes on point 6.50. One of the NCAT guiding principles is to be "just, efficient and cheap".
- Hearings often (for cost reasons) are by video, or phone rather than in person. It is difficult for frail and elderly persons or persons with various physical, cognitive and other health issues to come in person to the JMT in the legal precinct of Sydney. Sometimes it is not in their interests to do so because of the distress it causes them. Occasionally the Tribunal will go to them.

- A hearing with the person present, when they may be suffering some cognitive impairment and they cannot contribute in any meaningful way or understand the process they are involved in (hence distress causing potentially) requires exercise of discretion to proceed with a hearing which may deny the person strict procedural fairness. This only happens where there is general consensus from family and doctors that capacity to contribute meaningfully to the inquiry predicates the exercise of that discretion to proceed with the hearing in the best interests of the person.

**Proposal 7: Banks and Superannuation**

No comment

**Proposal 8: Family Agreements**

No comment

**Proposal 9: Wills**

**1. Undue influence**

Proposal 9.1

- Summary: Pressuring older people to change their will to benefit those exerting the influence is financial abuse.
- Agree with proposal
- Challenges:
  - Homemade wills.
  - Beneficiaries drafting homemade wills.
  - The proposed guidelines would be useful to protect elderly persons from undue influence when preparing a will at a solicitor's office.
  - Should it be mandatory for wills of persons over a certain age be prepared by a solicitor?

**2. Death benefit nominations**

Proposal 9.2

- It is suggested that it might be worthwhile to require a member to obtain a certificate of independent legal advice prior to making a superannuation death benefit nomination.
  - What would the legal advice entail?
  - Would this advice be required each and every time a member completes a death benefit nomination?
  - What would be the effect if a member failed to obtain legal advice?

### **3. Death benefit nominations and substitute decision makers**

#### **Proposal 9.3**

- Agree with the proposal that the SIS Act and the SIS Regulations could be amended to make clear that nomination cannot be made on behalf of a member by a person exercising powers under an enduring power of attorney.
- Challenges:
  - Whether an attorney's authority extends to making a nomination remains a matter of debate.
  - Superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.
  - Enduring powers of attorney are focused on lifetime transactions and the needs of the person. It is not appropriate for an attorney to make a binding death benefit nomination that is will-like.

#### **Proposal 10: Social Security**

No comment

#### **Proposal 11: Aged Care**

Concern re overregulation – area is already heavily regulated, duplication

##### **1. Compulsory reporting**

- Whistle blower protections positive
- Broadening of a reportable complaint to include reportable incidents is positive.

##### **2. Employment screening**

- Comparisons are made to the NSW Working with Children Checks, but there is a risk the number of checks, across several states, is an onerous burden
- Possible “adverse findings” have significant consequences for other employment opportunities
- If an independent organisation, other than existing professional bodies, example nurses registration board, may dilute the role of such bodies, and create another layer of compliance that aged care employees are burdened to satisfy.



**3. Code of conduct**

- Many aged care workers are already subject to the Codes of Conduct of their professional organisations. Unnecessary duplication.

**4. Restrictive practices**

- Regulate use of restrictive practices and review the situations in which they can be used: is supported.

**5. Decision making**

An aged care facility should not impose a compulsory obligation on a resident to appoint a representative, unless, such appointment is very narrowly restricted to the situations where care for the resident will be completely impeded if they cannot speak for themselves.

**6. Visitors**

- Too great a burden for visitors and volunteers

**7. Health professionals**

No comment

**8. Confidentiality and privacy**

The Committee supports the Commission suggestion that all health care workers should be trained in the privacy obligations they have when dealing with a residents personal information.