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Committee Chairman, Peter Slipper MP
Standing Committee on Legal and Constitutional Affairs
PO Box 6021
PARLIAMENT HOUSE
CANBERRA ACT 2600

laca.reps@aph.gov.au

Dear Chairman

Inquiry into Older People and the Law

I am pleased to provide comments to the Inquiry in relation to my clients and role as Western Australia's Public Advocate.

The Public Advocate is an independent statutory office holder appointed by Western Australian Government under the *Guardianship and Administration Act 1990* to protect and promote the rights of adults with a decision making disability. This may be because the person has dementia, a mental illness, an intellectual disability or an acquired brain injury. There are about 65,000 Western Australians who have such a disability.

The primary statutory functions of the Public Advocate are set out in the *Guardianship and Administration Act 1990*:

- The Public Advocate conducts investigations to assess whether an administrator or guardian may be required to be appointed by the State Administrative Tribunal (SAT). These investigations are conducted either at the direct request of the SAT or if a member of the community raises concerns about the wellbeing of a person with a decision-making disability.

In 2005-2006, my office undertook some 600 investigations, over half (55%) of which involved a person aged 65 years or older. Of the 600 investigations:

- 47% involved a person with dementia
- 32% involved allegations of abuse
- 67% of the alleged abuse cases related to financial abuse and
- 33% of the alleged abuse cases involved a victim aged 65 years or older.

- The Public Advocate may be appointed the guardian of last resort for an adult with a decision-making disability when the State Administrative Tribunal determines that there is a need for the appointment and there is no one else who is suitable or willing to be appointed.

At 30 June 2006, I was guardian for 256 individuals, 43% of whom were aged 65 years or older. Of the 256 individuals, 38% had an intellectual disability, 31% had dementia, 15% had a mental illness and 12% had an Acquired Brain Injury (ABI).

- The Public Advocate has a role in educating the community and professionals about the guardianship and administration system.
- The Public Advocate advises government and works with government and non government agencies to develop appropriate policies, legislation, programs and services which protect and promote the rights of people with decision-making disabilities.

Demand for the services of my office is increasing, due largely to the ageing of the population, which will bring with it an estimated increase in the number of people with dementia from 17 000 in 2004 to 79 000 in 2050. People with dementia now dominate the total number of investigations and new guardianship appointments.

Elder Abuse

Elder abuse can be defined as any act that results in harm to an older person which occurs where there is an informal relationship of trust. Elder abuse can take many forms such as physical, psychological, sexual and financial abuse or neglect.

The hidden nature of elder abuse presents difficulties in terms of calculating incidence and formulating prevention and intervention strategies. These difficulties are amplified by disability and by linguistic and cultural difference. For these reasons, elder abuse is a priority issue for my Office and for the Western Australian Government.

Office of the Public Advocate (OPA) Research

My Office began to address the need for information on the nature and incidence of elder abuse in Western Australia in 1999 with a study into financial abuse reported by clients of the Guardianship and Administration system. The research found that the majority of victims were female with a primary condition of dementia and an average age of 82 years. Three out of four incidences of abuse involved adult children, a spouse or defacto partner.¹

¹ OPA WA, 1999, 'Safeguarding the Financial Interests of Vulnerable Seniors'

In 2001, the Public Advocate commissioned one of the first independent investigations in Australia on the relevance and appropriateness of the guardianship and administration system to Aboriginal people with decision-making disabilities². It identified reasons for the under representation of Aboriginal people in the WA system, including a lack of cultural relevance and the inherent difficulties for Aboriginal people who come into contact with a statutory system.

This was followed, in 2005, by *The Mistreatment of Older People in Aboriginal Communities*, a consultative project conducted with metropolitan and regional Aboriginal communities focussing on elder abuse in an Aboriginal context. It was recommended that staff working in Aboriginal communities are supported to work in a culturally appropriate manner to identify and respond to elder abuse and that a strategic, interagency response be adopted by service providers along with improved community education.

In order to further address the diversity of older people and people with a decision making disability, in 2006 my office commissioned research to investigate the abuse of older people in culturally and linguistically diverse (CALD) communities. *Care and Respect: Elder Abuse in Culturally and Linguistically Diverse Communities* recommended better resourced and targeted services to CALD seniors in addition to community education and improved interagency cooperation.

Recommendation

Issues around elder abuse remain largely unspoken. What research there is suggests the need for improved community education and awareness to dispel this silence. It is recommended that the Committee give consideration to the development of a national community education campaign targeting elder abuse, including a focus on Aboriginal and culturally and linguistically diverse groups.

Financial Abuse

An Increasing Risk

Financial abuse is the most commonly reported form of elder abuse. Of all older people, those with a decision making disability are the most at risk, and our ageing population will bring with it an increase in the number of this group. A study conducted by Curtin University in 2002 found that 75% of reported cases of elder abuse involved a person with a decision-making disability.³

² Department of Justice - Office of the Public Advocate WA, 'Needs of Indigenous People in the Guardianship and Administration System in Western Australia'

³ Boldy, D Prof., Davey, M, Horner, B, Kingsley, B (2002) Elder Abuse in Western Australia: Report of a Survey Conducted for the Department for Community Development -Seniors' Interests Curtin University of Technology: Division of Health Sciences

Research also shows that factors such as carer stress and the dependency of the abused on the abuser can increase the risk of abuse occurring.⁴ Currently only 5% of older Australians are living in residential care facilities; if this trend continues, the aging population is likely to produce a concomitant reliance and stress on family and carer relationships.

Fostering Cooperative Responses

While it is pleasing that the Federal Government has emphasised the prevention of elder abuse in residential care facilities, the increasing risk identified above reiterates the importance of a focus on protecting the 95% of older people living independently in our communities.

There is a necessity for government leadership in drawing public, private and community sector stakeholders together to protect the financial assets and independence of older people and people with a decision making disability.

It is here that there is a role for the banking and financial services sector as one of the 'front-lines' in cases of the mismanagement and abuse of older people's assets. In the US and Britain some banks have taken significant initiatives to address financial abuse by educating both staff and customers.

For example, in Massachusetts, Government agencies worked collaboratively to train bank employees on how to recognise and report financial exploitation of older customers. Training included information on who commonly commits financial abuse, typical scenarios of such abuse and strategies for detecting financial abuse and a model protocol for action.

Similarly, in the UK the Banking industry has worked closely with similar organisations to my own to develop training for staff, protocols for reporting elder abuse and brochures and promotional material on safeguarding older people

Recommendation

It is recommended that the Committee acknowledges the benefit of implementing training strategies and protocols for the prevention of financial abuse within the banking and financial sectors (similar to those trialed overseas) and that it encourages public and private sector partnerships to protect the financial security of older people and people with a decision making disability.

⁴ Wescott, Mary (2006) Research Brief: Elder Abuse, QLD Parliamentary Library

General and Enduring 'power of attorney' provisions

Monitoring and Governance

The benefits of an Enduring Power of Attorney include:

- Unlike a general power of attorney, an enduring power of attorney is not affected by the subsequent legal incapacity of the donor (section 105(1) of the WA Act);
- Provides a safeguard in the best interests of the donor and the estate should the donor lose capacity to make reasoned decisions;
- Provides a mechanism for continuity of management of a donor's financial and property affairs, thereby minimising immediate financial hardship if the donor's decision-making ability is suddenly impaired;
- Provides the means for the donor to impose conditions or restrictions on the exercise of the power based on his or her wishes for the management of the estate;
- Enables the donor to maintain confidentiality in respect of his or her financial property affairs; and
- Reduces the need for an application for an administration order to be made to the State Administrative Tribunal during the period of incapacity of the donor.

When providing training in the use of EPA, my office recommends that the following actions are taken to protect the interests and financial security of the donor:

- that a donee is trustworthy, capable and willing to take on the responsibility to act in the donors best interests;
- that a donor discuss his decision to complete an EPA with their family/friends to help prevent the possibility of family conflict
- that the donee maintains financial and other records of activity taken under the EPA at all times; and
- that originals/copies of the EPA are kept with others eg family doctor.

Research and anecdotal information has suggested that there may be a correlation between EPA, donor dependency and financial abuse, eg. there is an increasing number of older people having their assets managed by a non professional care giver⁵, and elderly people with EPA are equally susceptible to financial abuse as those without⁶. However, there is no direct evidence of this relationship. Further research is required to 'unpack' this relationship in

⁵ Tilse, C, Setterlund, D, Wilson J & Rosenman L (2005) Minding the money: a growing responsibility for informal carers. *Ageing & Society*, 25, 215-227

⁶ 'Access to assets: Older people with impaired capacity and financial abuse', *Journal of Adult Protection*, May 2006, Vol 8 No 11

order to assist government to protect the interests of vulnerable older people and those with a decision making disability.

Recommendation

It is recommended that the Committee promotes further research in regards to EPA, commencing with the collation of Public Advocate, Guardian and Tribunal data in each jurisdiction to quantify the number of EPA, demographic information about donors and donees and any disputes arising subsequent to their enactment.

In WA, for example, this information could be gathered:

- when an original EPA is lodged at the Western Australian Department of Land Information (DLI) because the donee may be required to make property decisions on the donor's behalf;
- when records of financial transactions made on behalf of the donor are requested by the State Administrative Tribunal as part of a formal inquiry; and
- when EPA executed in other States are formally recognised by the WA State Administrative Tribunal.

This data will allow governments to improve management of the EPA system and to develop strategies and solutions to further protect the financial interests of older people and people with a decision making disability.

Uniformity and Recognition

The Australian Guardianship and Administration Committee has made a submission to the Inquiry recommending that steps are taken to ensure greater consistency in EPA procedures, including the test of competence and registration requirements, and promoting mutual recognition of EPA's across States and Territories. I support these recommendations which will increase the utility of EPA's while similarly improving their governance.

Promoting Education

There are some common inconsistencies in the acceptance of EPA by banking and financial institutions. Examples encountered by my Office include:

- reluctance to recognise the authority of the attorney to transact on credit card accounts because of the contractual arrangement between the bank and the account holder contained within the conditions of use;
- reluctance to accept attorney authority to raise accommodation bonds for aged care accommodation – a preference for an Administration Order in preference to an EPA; and
- preference for attorneys to act as third party signatories on forms executed by account holders rather than using their authority under EPA.

Neither is it widely known in the sector that, under the *WA Guardianship and Administration Act 1990*, EPA provide a much stronger legal obligation than a signatory authority.

Recommendation

It is recommended that the Committee consider promoting education and training in the banking and financial sector about the purpose and utility of EPA.

Barriers to accessing legal services; Discrimination

Many older people have limited mobility and this is compounded amongst those with a disability. Older people also have lower incomes than the broader population. These factors in themselves reduce the capacity of older people to access legal services.

In Aboriginal communities, these barriers are compounded. The 2005 *Overcoming Indigenous Disadvantage Report - WA* identified that Aboriginal people age more rapidly than the non-Aboriginal population due to inter generational health and socio economic deficits. In Western Australia, significant numbers of Aboriginal people live in regional and remote communities where access to legal and other services and information can be extremely limited. And mainstream services vary greatly in their cultural and linguistic relevance to Aboriginal communities. Together, these factors severely reduce the capacity of older Aboriginal people to access legal services.

To help improve the accessibility of guardianship and administration services to Aboriginal communities, my office:

- developed protocols with agencies that have a regional presence and which work closely with Aboriginal people;
- commissioned research focussing specifically on understanding and responding to elder abuse in Aboriginal communities;
- will employ and Aboriginal Communications Officer in order to improve awareness of the office's services amongst local and regional Aboriginal people; and
- has had acknowledged recommendations to the Law Review Council of WA inquiry into Aboriginal Customary Law that
 - the protection of elderly Aboriginal people from abuse remain a high priority for government; and
 - culturally appropriate assessment procedures and guidelines are developed for guardians and investigators, State Administrative Tribunal members and representatives of the Public Trustee working with Aboriginal clients.

Recommendation

It is recommended that the Committee actively encourages a strategic approach across government, private and community sectors, to the identification of barriers to legal services for older people and to reducing discrimination in service design and delivery.

Thank you for the opportunity to contribute to this important Inquiry. I would be happy to provide further information on this submission; should this be of assistance, please contact myself

Yours sincerely

Michelle Scott
Public Advocate

6 December 2006