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15 November 2006

NA

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

Dear Chairman,

### *Inquiry into Older People and the Law*

The Australian Guardianship and Administration Committee (AGAC) is comprised of the Public Guardians, Adult Guardians and Public Advocates, the Boards and Tribunals who deliberate upon applications under guardianship and administration legislation and the State Trustees, Public Trustees or Protective Commissioners. The role of these agencies is to protect adults who have a disability that impairs their capacity to make decisions and manage their affairs and together we offer a range of protective mechanisms for older people.

The purpose of AGAC is to provide a forum at a national level for all relevant State and Territory agencies associated with the protective jurisdiction of adult guardianship and administration. AGAC aims to promote, through its membership, the advancement of common goals, consistency in approach on universal issues, a collaborative focus on matters relevant to the jurisdiction, and the facilitation of information sharing across the relevant agencies of the jurisdiction. A key objective of AGAC is to develop consistency and uniformity in various jurisdictions, as far as practicable, in respect to significant issues and practices.

Recently some Australian delegates from AGAC attended an international conference of guardians and administrators in London. Overwhelmingly the AGAC delegates reported that the Australian system of guardianship and administration has significant advantages over systems elsewhere in the world. In particular, the use of tribunals instead of courts and the ability for guardians and administrators to have hands-on contact with their clients were advantageous.

The overlap between the role of our jurisdictions and the terms of reference for the Standing Committee in this Inquiry is extensive. Accordingly, AGAC members have resolved to outline, under brief headings, the kinds of issues that we have discussed in our national forums and address particular issues at greater length should the Committee invite further submission on any point. In preparing this response, AGAC members are aware that many of the terms of reference do not relate to areas of Commonwealth powers. Where possible, we have targeted our issues to matters that Commonwealth institutions may be able to address.

#### **Fraud and financial abuse:**

Following are some examples of situations that may arise prior to the appointment of an administrator or financial manager:

- (a) **Petty fraud:** Example (1) an elderly person has an informal arrangement with a neighbour, friend or family member to attend the ATM on pension day, withdraw cash using a known P.I.N. and purchase essential groceries and supplies. The 'helper' withdraws \$200.00, purchases \$50.00 worth of goods and hands the person \$50.00 change, pocketing the rest. Example (2) unqualified trades-people making cold-calls on elderly people's homes offering to undertake some task at wildly inflated prices (e.g. paint a roof for \$2000.00 when a qualified person would charge \$900.00 for the same job). Although the work may be done it is frequently grossly sub-standard.
- (b) **Centrelink nominee arrangements:** Applications for the appointment of a guardian or administrator for elderly persons with dementia are frequently made where the person has appointed a nominee for the purposes of receiving Centrelink benefits, but the nominee has diverted all funds to their own account and the recipient receives minimal or no funds. The level of accountability and the potential for fraud in these arrangements has been discussed on numerous occasions at AGAC meetings, including with Centrelink representatives. Alarming, at one meeting, senior Centrelink representatives informed AGAC members that orders made by state and territory tribunals were not binding upon the selection by Centrelink staff of a nominee and nominee arrangements could be imposed even where an administration order had been made with a contrary intention.
- (c) **Undue pressure to make new wills or gifts:** Elderly people can fall prey to relatives or strangers who will suddenly befriend them after the onset of dementia. Playing upon the paranoid aspects of the symptoms of dementia, they can encourage negative attitudes ("they are only interested in your money") about the members of the person's traditional support network in favour of themselves, usually to their own financial advantage either by gift, testamentary gift or appointment under and EPA.
- (d) **The "Granny Flat":** When the elderly person starts to become dependent he or she makes arrangements to build a 'granny flat' on the property of a son or daughter using funds liquidated from the sale of the elderly person's home. When the person becomes more dependent, the family members realise that

they have limited ability to care for or cope with the elderly person and move them to a nursing home with no compensation for the value of the improvement to that property.

- (e) Behaviour of churches and charities: Some charity groups benefit enormously from the loneliness of elderly people, particularly with telemarketing. Older people desperate for company enjoy the regular callers and agree to donate money when at times they are unable to afford the donation. Some religious groups also sign up vulnerable members of their congregation to regular donations (generally linked to a promise of salvation) via direct debit arrangements, limiting their available income.
- (f) 'Free tenancies': After admission to an Aged Care facility, an elderly person's relative remains living in that person's home rent free or well below market rental. Sometimes this is the result of a very clear wish or established practice of the elderly person, but sometimes it is abusive. Because the home is an asset calculated in the person's estate for the purposes of establishing the nursing home fees, but it is not earning income, their ability to meet the levied aged care fees is diminished and their estate can fall into debt. Alternatively at times a younger person lives with the elderly person in private accommodation and allows them to pay all expenses and housekeeping costs.

#### **Enduring powers of attorney:**

Enduring Powers of Attorney (EPA's) are a useful tool when used well and a less restrictive alternative than appointment of an administrator. EPA's are by no means uniform across Australia and with many elderly people being quite mobile between states there may be a need for them to register or execute numerous differing kinds of documents according to their needs and the legislative requirements of the states and territories in which they reside whether permanently or temporarily. Such a lack of uniformity can also promote misunderstandings about their lawful use. For example a gift from a donor to an attorney is deemed to be the product of undue influence in Queensland<sup>1</sup>, but would be permissible in Tasmania<sup>2</sup>.

In each state and territory there is provision under state law for the appointment of an attorney under an EPA. Most tribunals and boards have jurisdiction for the review of invalidly executed or improperly used powers. Trustees and administrators are frequently appointed in circumstances where financial abuse has occurred from misuse of an EPA. A study recently undertaken in University of Queensland showed that elderly people with EPA's are equally susceptible to financial abuse as elderly people without EPA's<sup>3</sup>. Where an EPA is abused, recovery of lost assets or income is extremely difficult. The production of evidence or promotion of a prosecution for stealing under an EPA is often impeded by the perception that it is a 'civil' and not a Police matter.

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<sup>1</sup> Section 87 *Powers of Attorney Act 1998 Qld*

<sup>2</sup> Section 31(3) *Powers of Attorney Act 2000 Tas*

<sup>3</sup> *Access to assets: Older people with impaired capacity and financial abuse*. Journal of Adult Protection - May 2006 [Vol.8/ No.1]

A major and continuing weakness however in respect to EPA's is the test of competence at the time of signing an EPA and again at the time of activation.

### **Barriers to Older Australians Accessing Legal Services:**

In all of the relevant Boards and Tribunals, the majority of applications relate to persons over 65 years. Accordingly, because such Boards and Tribunals have been given legislative licence to dispense with formalities, procedures that encourage meaningful participation of people with disabilities have been encouraged. These procedures include the use of inquisitorial style hearings, where background information is gathered by the Tribunal staff and then shared in the hearing. Hearings usually proceed in an informal discussion rather than formal examination and cross-examination of witnesses. Hearings may be held in nursing homes or hospitals where necessary and many hearings are undertaken around conference tables rather than in court settings. Clearly not all legal fora are so accessible for elderly persons.

One of the concerns of AGAC is the limited understanding of legal practitioners in preparing wills and EPA's of dementia or the level of capacity required for valid execution of such deeds.

A major concern is that elder abuse is so rarely addressed in the criminal justice system because proof of crimes is so difficult when the principal witness/victim's memory is significantly impaired by dementia and where there is limited capacity to pay to bring the matter before the courts. The guardianship and administration system can respond by preventing further abuse, but frequently applications for the appointment of a guardian or administrator occur after the abuse has been perpetrated and all that is left to be protected is the elderly person's future entitlement to Commonwealth benefits. An administrator or financial manager might report financial abuse to the Police or attempt civil proceedings for recovery, but success of such actions is rare.

In most states and territories, legal aid funding is limited to criminal or family law matters. Therefore access to free legal independent advice about future planning is limited. Where people have not made structured future plans in advance, or where those plans fail in operation, their matters are then referred to guardianship Boards and Tribunals if disabilities such as dementia begin to undermine their decision making processes.

Elderly people with dementia are rarely legally represented in guardianship and administration proceedings, despite the fact that making an order may result in significant changes in their accommodation, financial wellbeing and independence. Although all Board and Tribunals aim to make proceedings accessible and informal to enhance an unrepresented person's participation, this is not an alternative to having access to independent legal advice and representation.

AGAC recommend investigation into the provision of legal aid funding for elderly people appearing before Boards and Tribunals. Other jurisdictions provide such representation through legal aid schemes. Under the *Adults with Incapacity (Scotland) Act 2000* a hearing takes place in the Sheriff's Court and the adult is entitled to free legal aid for representation; alternatively, if the sheriff has concerns

he/she can appoint a 'safe-guarder' who is usually a lawyer. Such representation is funded by the state. Additionally in Ontario, Canada the *Substitute Decisions Act 1992* and *Health Care Consent Act 1996*, which contain the guardianship and health care substitute decision making laws, each have a mechanism that permits a Judge or the tribunal to direct that the person whose mental capacity is in issue in the case have a lawyer appointed to provide him/her with legal representation. If the person cannot afford to pay for the lawyer, the legal aid system will subsidize the provision of legal services to the person.

### **Privacy:**

AGAC has participated in a number of discussions with the Office of the Privacy Commissioner about overzealous use or misuse of privacy laws in particular by financial institutions and Centrelink. While the Committee does not believe that there are inherent deficiencies in the privacy legislation or associated regulations, there may be a case for minor amendment. There would appear to be significant room for improvement in how a range of service providers interpret and apply the legislation in cases involving people who have a decision-making disability and their family members and allies. The evidence suggests that it is this group of citizens who are disadvantaged by the legislation.

The following examples about issues with privacy laws were derived from a response by AGAC to the OPC's review in 2004:

The Guardianship and Administration Tribunal (Qld) reports that banks allow formal administrators to conduct personal banking (ie over the counter) but will not permit them to conduct ATM or internet banking. Many administrators are aged or ageing. The requirement to personally attend at a bank is onerous and sometimes impossible, particularly with the reduction of banking outlets in regional and rural areas over the past decade or so.

Carers Victoria reports significant anecdotal information from its members that a range of service providers are very cautious in disclosing any personal information for fear of breaching privacy legislation. Situations cited include:

1. Denial of access to health care information about elderly relatives in aged care facilities, unless a formal order exists. This includes denial of the right of the carer to support their relative through a health care assessment or care planning process, on the grounds of privacy.
2. Denial of access to the right to negotiate financial matters on behalf of the person with a disability. Specifically, difficulties have been reported by "many carers" for people with a decision-making disability in negotiating payments with Centrelink, even when the carer is the authorised representative.

A family in Toowoomba reports its difficulty in having telephone and electricity disconnected from the unit in which their elderly mother had been living. The mother had dementia and was being transferred to a nursing home. Neither utility (Telstra and Ergon Energy) would agree to the disconnection because they refused to accept

information provided by the family on privacy grounds. The family eventually resorted to subterfuge, when the son pretended to be his father, and succeeded in having the telephone disconnected.

With respect to telecommunication service provision, Dr Chris Atmore of the Communications Law Centre in Melbourne has been conducting research into "Telecommunications: Disability and Unfair Practices". Dr Atmore reports that a small number of surveyed organisations report difficulty in being accepted by the telecommunications service provider as an advocate for the person, because they are neither the person's formal guardian nor administrator.

#### **Other unnecessary requirements for formal authority:**

**Department of Health and Ageing:** A form, *Request for Assets Assessment*, issued by Centrelink on behalf of the above Department since 1.7.05 for the purpose of financial assessment of potential residents of Aged Care facilities is another example of an onerous requirement for a formal representative where an informal arrangement should be equally appropriate.

On 1.7.05 an arrangement commenced whereby Centrelink is delegated to undertake these assets assessments on behalf of the Department of Health and Ageing. Previously assessment was undertaken by nursing homes. This form was issued as part of that arrangement. Of particular concern for us is 'Section H *Authorised person*' on page 19 of the form that requires an authorised person to attach documentation of their legal authority. This section has prompted numerous calls, particularly to Boards and Tribunals seeking the appointment of an administrator or guardian merely for the purpose of completing the form.

These callers refer to the requirement for:

*"A copy of the power of attorney order  
A copy of the guardianship order  
Other statement/details of authorisation"*

We have been advised that much lesser forms of authority are actually acceptable. AGAC wrote to the Department of Health and Ageing and is now engaged in a process of consultation for the re-drafting of this form.

**Medicare:** Proof of Authority: Pursuant to a Medicare policy an administrator or enduring attorney acting on behalf of a person without capacity (the majority of whom are elderly people with dementia) must re-submit their proof of authority (i.e. a copy of the EPA or the order of the Board or Tribunal) to a Medicare every 12 months, as records will be assumed to be out of date after that period. This can be quite burdensome on a person supporting an elderly person.

**Conclusion:**

Some members of AGAC have indicated that they will be submitting responses on behalf of their agencies.

If you require further information on any aspect mentioned above or about the operation of guardianship and administration/financial management jurisdictions, please do not hesitate to ask. AGAC would be pleased to send a delegate to any hearings that may be convened by the Standing Committee.

We look forward to hearing from you.

Yours faithfully

Anita Smith  
AGAC Chair