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THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: ELSC:CLC:GUel1112452

6 May 2016

The Director  
General Purpose Standing Committee No. 2  
Legislative Council  
Parliament House  
Macquarie Street  
Sydney NSW 2000

By email: [gpsco2@parliament.nsw.gov.au](mailto:gpsco2@parliament.nsw.gov.au)

Dear Director,

### **Inquiry into elder abuse in New South Wales**

Thank you for providing the Law Society of NSW with supplementary questions after its appearance at the Inquiry into elder abuse in NSW ("Inquiry") on 18 March 2016.

The Law Society's response to the supplementary questions is provided below.

#### **1. What is your view of the Australian Bankers Association's guidelines for bank employees on identifying financial abuse of older people?**

The Law Society has reviewed the Australian Bankers Association industry guidelines *Protecting Vulnerable Customers from Potential Financial Abuse and Responding to Requests from a Power of Attorney or Court-Appointed Administrator* ("guidelines") and considers that these documents provide a useful resource for banking employees with general information about how to identify and respond to financial abuse of vulnerable people.

The Law Society notes that the guidelines do not specifically address electronic or online banking and the increased use of online banking for personal transactions. Specific safeguards or measures aimed at protecting older people from financial abuse due to the misuse of online banking facilities by attorneys or family members would be beneficial.

The Law Society notes that the Australian Bankers Association is a voluntary member organisation and not all financial institutions currently operating in Australia are members. Further, while the guidelines serve a useful educative purpose for banking employees, they are not binding and have no legislative force.

The Law Society is aware that banking institutions maintain their own internal procedures and policies and considers that a uniform best practice approach to the identification and responses to potential financial abuse of older people would be beneficial. A mechanism to monitor and report on compliance with an agreed best practice approach may also serve to protect older people from financial abuse.

## 2. What is your view on supported decision making?

The Law Society does not object, in principle, to moving towards a model of supported decision making, but notes that there may be issues in practice that will require further consideration. These issues include:

- (a) Any proposal to apply a formal legal framework to informal family arrangements should not necessarily replace informal arrangements, unless appropriate. At present, we understand that the Guardianship Division of the NSW Civil and Administrative Tribunal avoids making a guardianship order, if possible. This recognises the benefits of informal arrangements for many people with disability and their families.
- (b) Supported decision making models should enhance the decision making capacity of people with disability, not expose people to potential abuse.
- (c) The practical aspects of the structure of such a decision making model. Issues relating to how a person would be supported in practice need to be determined.
- (d) A model of supported decision making is likely to be resource intensive and costly. In order for its practical implementation to work, there must be adequate supports and funding allocated.
- (e) A legal framework for the appointment of a support person and the scope of the powers of such an appointment need to be determined. What is the role of legal practitioners in this framework and what is their exposure to liability? What is the exposure of the support person to liability?
- (f) The model of decision making to be employed for people whose will and preferences cannot be determined because of cognitive impairment or serious mental illness, particularly in relation to decision making about financial management. Given the complexities of financial management and the realities of elder financial abuse, the Law Society is reluctant to entirely abandon the “best interests” model that currently operates in NSW in these circumstances.

We note that this issue will be explored in greater detail by the NSW Law Reform Commission in its review of the *Guardianship Act 1987* (NSW). The Law Society anticipates making a more detailed submission to that review in due course.

### **2(a). Should supported decision making be used to give someone capacity to make a power of attorney?**

The Law Society understands that this question relates to the role of a supportive attorney, introduced in Victoria on 1 September 2015 by the *Powers of Attorney Act 2014* (Vic) (“Powers of Attorney Act”)<sup>1</sup>.

Importantly, it is noted that at the same time the role of a supportive attorney was introduced, the legislative provisions for enduring powers of attorney and enduring powers of guardianship were also consolidated into a single enduring power of attorney, with powers for financial and personal affairs<sup>2</sup>. The Law Society notes that the role of a supportive attorney enables a principal to appoint a person to support them in making

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<sup>1</sup> *Powers of Attorney Act 2014* (Vic) Part 7.

<sup>2</sup> Kaspiew, R., Carson, R., Rhoades, H. (2016). *Elder abuse: Understanding issues, frameworks and responses*. Melbourne: Australian Institute of Family Studies 30.

and giving effect to certain decisions involving financial matters and personal affairs, while still retaining their own decision making authority<sup>3</sup>.

The Law Society notes that the Powers of Attorney Act does not define the term “supported decision” or “supported decision making”. However, a supported decision under the Powers of Attorney Act appears to be limited to:

- (a) Accessing, collecting and obtaining personal information for the principal<sup>4</sup>; and
- (b) Communicating information relevant to a supported decision of the principal<sup>5</sup>.

The Powers of Attorney Act also appears to put in place important safeguards, including:

- (a) Depriving the supportive attorney of any role in assisting the principal with a significant financial transaction<sup>6</sup>;
- (b) Depriving the supportive attorney of any remuneration for acting as a supportive attorney<sup>7</sup>; and
- (c) Making a person ineligible for appointment as a supportive attorney if, in broad terms, the person is insolvent, dishonest or a care worker, health provider or accommodation provider for the principal<sup>8</sup>.

In NSW, the *Powers of Attorney Act 2003* (NSW) makes provision for a person (the “principal”) to appoint another person (the “attorney”) to do on behalf of the principal anything that the principal may lawfully authorise the attorney to do, subject to any conditions or limitations set out in the instrument appointing the attorney<sup>9</sup>. A “general power of attorney” gives the attorney the authority to manage the principal’s legal and financial affairs. It ceases when the principal loses “mental capacity”. An “enduring power of attorney” gives the attorney the authority to manage the principal’s legal and financial affairs where the principal loses “mental capacity”. A power of attorney cannot be used for decisions about health, personal and lifestyle decisions. These decisions can only be made by an “enduring guardian”. An “enduring guardian” may be appointed under the Act by an appointor. A guardian can be appointed by the Guardianship Division of the New South Wales Civil and Administrative Tribunal or the Supreme Court of New South Wales.

A limited (or special) power of attorney may be used and designed for a particular purpose<sup>10</sup>. For example, where the principal is absent at a time when a financial transaction, such as the sale of property, needs to be completed<sup>11</sup>. A limited power of attorney may, in theory, be a general or enduring power of attorney. The attorney is subject to a fiduciary duty to act in the best interests of the principal and to account for the property of the principal at all times<sup>12</sup>. A power of attorney provides certainty in financial transactions.

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<sup>3</sup> Ibid 30.

<sup>4</sup> *Powers of Attorney Act 2014* (Vic) s 87(1).

<sup>5</sup> Ibid s 88.

<sup>6</sup> Ibid s 89(1).

<sup>7</sup> Ibid s 90(2).

<sup>8</sup> Ibid s 91.

<sup>9</sup> *Powers of Attorney Act 2003* (NSW) s 9.

<sup>10</sup> See, for example, *Sydney Concrete & Contracting Pty Limited v Bnp Paribas Equities (Australia) Limited* [2004] NSWSC 530 at [58] and [92].

<sup>11</sup> Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2012) p 390.

<sup>12</sup> Ibid p 391.

The Law Society suggests that any examination of the role a supportive attorney in NSW should take the current legal framework and varied use and design of general powers of attorney into consideration.

The Law Society notes that it has not had an opportunity to examine the Victorian supportive attorney provisions in detail. The Law Society is available to consider any proposed recommendations for amendment to powers of attorney legislation in NSW should this be of assistance to the Inquiry.

We note that the terms of reference of the NSW Law Reform Commission's review of the *Guardianship Act 1987* (NSW) includes an examination of the relationship between the *Guardianship Act* and the *Powers of Attorney Act 2003* (NSW) and models of decision making that should be employed for persons whose will and preferences cannot be determined. Please refer to the response to question 2, above.

**3. Some have argued that care recipients who have received poor or inappropriate care should use legal avenues to seek redress for the poor care. What is your view on this?**

The Law Society understands that this question relates to care recipients living in residential aged-care facilities. The Law Society notes that residential aged-care facilities are subject to a legal framework that provides appropriate avenues for redress should complaints about the standards of care arise.

The Law Society refers the General Purpose Standing Committee No 2 ("GPSC2") to the *Aged Care Act 1997* (Cth) ("Act"). This Act provides for the accreditation of service providers and aged care standards, Aged Care Principles (Quality of Care Principles, Accountability Principles, User Rights Principles and Charter of Care Recipients Rights) non-compliance provisions, an Aged Care Complaints Scheme and an Aged Care Complaints Commissioner<sup>13</sup>. The Law Society considers that a regulatory framework that provides for the accreditation of aged-care providers and minimum standards of care should be the primary focus in the aged-care sector.

We note that the Australian Senate Community Affairs Reference Committee is conducting an inquiry into the future of Australia's aged care sector workforce ("Inquiry"). This Inquiry is due to report by 30 June 2016.

**4. Are there examples in other jurisdictions or countries that address this issue or provide a higher standard of accountability and/or oversight?**

The Law Society refers GPSC2 to a recent report of the Australian Institute of Family Studies which provides an overview of Australian State and territory-based frameworks and international approaches to elder abuse<sup>14</sup>.

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<sup>13</sup> Kaspiew, R., Carson, R., Rhoades, H. (2016). *Elder abuse: Understanding issues, frameworks and responses*. Melbourne: Australian Institute of Family Studies 38.

<sup>14</sup> Ibid Chapter 6 and Chapter 8.

Should you have any queries in regard to this submission, please contact Emma Liddle,  
policy lawyer on . . . . . or by email to

Yours sincerely,

~Gary Uiman  
**President**