

**Submission
No 111**

**INQUIRY INTO INQUIRY INTO ELDER ABUSE IN NEW
SOUTH WALES**

Organisation: NSW Trustee and Guardian

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Tendered by
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Justice
NSW Trustee
& Guardian

7 March, 2016

The Director
General Purpose Standing Committee No 2
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director

NSW Parliamentary Inquiry into Elder Abuse - Report by NSW Trustee and Guardian

Background

NSW Trustee and Guardian (NSWTG) was formed through the merger of the NSW Office of the Protective Commissioner (OPC) and the Public Trustee NSW (PTNSW). The "parent" organisations had existed since 1878 and 1914 respectively. The merger was effected by the *NSW Trustee and Guardian Act 2009*, which came into effect on 1 July, 2009.

NSWTG continues to provide the essential public service that both former organisations had offered over many years. The range of services NSWTG provides helps people deal with some of life's most substantial challenges. People who wish to have an independent and impartial executor, attorney or trustee can make a will, power of attorney or establish a trust with NSWTG. Those who have diminished capacity to manage their financial affairs receive direct or indirect oversight of their estate to protect themselves from exploitation or mismanagement through an Order from the Supreme Court or relevant Tribunal.

The context in which NSWTG provides services is changing. The profile, needs and expectations of clients continues to evolve. This has implications for what services NSWTG provides and how they are delivered.

In relation to issues of ageing the number of people aged 65 and over will more than double by 2050, making it the fastest growing population group in NSW. As the responsible government agency, NSWTG has a key role to drive the uptake of pre-planning instruments (Wills, Power of Attorneys and Enduring Guardianship Appointments). This will be crucial to reducing the demand for state intervention when individuals lose capacity to manage their personal and financial affairs and the number of people who die intestate.

Powers of Attorney

NSWTG executes over a 1,000 Powers of Attorney per year.

Appointments of Power of Attorney (POA) are made when requested by an existing NSWTG client or a member of the public. Currently NSWTG will only act when appointed as sole attorney or substitute attorney for a spouse or de facto spouse or a person living in a close and caring relationship with the principal in the same household, e.g. two sisters caring for each other.

If NSWTG is named as substitute attorney, it will only act under the Power of Attorney if the first named attorney is "unable or unwilling to act".

NSWTG will take instructions, prepare the document and where the Power of Attorney is enduring NSWTG staff act as the prescribed witness. An Enduring Power of Attorney must be witnessed by a "prescribed witness" who certifies that the effect of the Power of Attorney has been explained and understood before it was signed.

NSWTG is changing its service delivery model and under the new model NSWTG staff will be able to make Powers of Attorney without the appointment of NSWTG as first or substitute attorney.

Enduring Guardianship

While NSWTG is not authorised under its governing legislation to act as a guardian NSWTG is able to provide assistance to people by witnessing Enduring Guardianship documents. The role of NSWTG as a witness is to check capacity and explain the document to the extent that the Appointor and Appointee both understand the effect and obligations of the Enduring Guardianship Appointment.

The Appointor and Appointee may attend the same interview or may attend on different occasions. Whilst it is the preference of NSWTG that the Appointor and Appointee attend the same interview, two separate interviews may be required.

Financial Management

NSWTG can be appointed as Financial Manager for clients defined as 'managed persons' under the NSW Trustee and Guardian Act 2009. Terminology under previous legislation was 'protected persons'. This function is named Financial Management.

NSWTG is appointed as a Financial Manager by means of a Financial Management Order (FMO). These are issued for persons with diminished capacity where there is a need for the Order.

People under financial management and their families sometimes oppose the NSWTG being appointed to directly manage an estate. However, NSWTG will only be appointed if a court or tribunal considers:

- that the person has a disability
- there is a problem which cannot be overcome without an order
- there is no suitable alternative manager
- that someone independent needs to be involved in managing the estate, and
- that it is in the person's best interests.

NSWTG works with the managed person, his or her support network (family, friends etc) and service providers when directly managing an estate.

The alternative to NSWTG directly managing the financial affairs of a person under a FMO is for the appointment of a Private Manager. This might be a family member, friend or professional trustee company.

NSWTG provides support to the Private Manager by issuing directions and authorities and monitors annual accounts submitted by the Manager.

A FMO can be issued by the following:

- NSW Civil and Administrative Tribunal (NCAT) – Guardianship Division
- Mental Health Review Tribunal (MHRT) (directly appointing NSWTG only)
- Supreme Court.

NSWTG also has an agreement in place to manage the financial estates of missing persons in NSW upon request. NSWTG also has a small legacy of 'Banker Clients'. These are residents of group homes managed by Ageing Disability and Home Care, where an agreement was reached many years ago for the then OPC to hold the funds in a banker only arrangement. These Banker Clients are in the process of being transitioned by the Guardianship Division of NCAT to be under an appropriate FMO.

As at 31 December 2015, there were 11,162 clients under direct financial management with NSWTG and 3,913 with a Private Manager appointed.

The work of NSWTG is directly related to the work of NCAT, the MHRT and the Supreme Court.

NSWTG has seen an increasing number of these applications over the years and sees the same issues at the Tribunal in terms of complexity and conflict.

Statistics and case studies

NSWTG's client management systems are currently under review and a new system is in development. The current system does not collect data on elder abuse but the new system will enable this to be done.

A manual investigation of the current computer system elicited the following figures:

For the year **1/2/2015 to 1/2/2016**

Of 521 legal litigation matters pertaining to clients under management 65 of these were identified as an older client suffering financial abuse.

Child	Other family member	Friend	Private Manager	Spouse	Carer	Other
27	12	11	6	4	3	2

Of the above categories the following were acting under a Power of Attorney:

Child	Other family member	Friend	Private Manager	Spouse	Carer	Other
15	2	4		2		

For the previous five years the figures are set out below and are approximate numbers only.

2014 – 2015: of 546 legal litigation matters 73 would be financial abuse of an older person case

2013 – 2014 of 615 matters 85 would be financial abuse of an older person case

2012 – 2013 of 561 matters 38 are identified as financial abuse of an older person

2011 – 2012 of 425 matters 35 are identified as financial abuse of an older person

2010 – 2011 of 361 matters 28 are identified as financial abuse of older person.

As mentioned the client management system is under review and currently does not retain data but it is estimated by staff who are involved in this area of litigation that about one third of cases identified as financial abuse of an older person results in recovery of funds at some level. In some cases the full amount misappropriated may

not be recovered but rather there is a partial recovery. In other cases the matter may not go to full hearing but a result is negotiated.

There are reasons why full recovery is not always possible or why proceedings are not commenced for all matters. In all matters where the client can express their wishes those wishes are followed. There are clients who do not wish to take legal proceedings against their children for various reasons, the child may be providing care for the client or the client may be living with the child. Recovery action may result in the child having to sell their home to pay the legal expenses and if the client is living with the child this may result in the client finding themselves without accommodation.

NSWTG must also consider what is in the best interests of the client. For example if it is identified that the person who misappropriated the funds has expended the assets, has no resources and is unemployed and unlikely to gain employment, it may not be feasible or practical to take legal recovery action. The client may have little resources remaining to them and it may be important to reserve those resources, especially if any judgment against the perpetrator of the abuse is unlikely to result in recovery of any funds.

There are also those cases where evidence does not amount to the level that will meet the evidentiary standard for a civil action. Obtaining evidence for a Supreme Court case is expensive; bank accounts are required, medical evidence and all other financial documents evidencing the trail of misappropriation must be produced.

Set out below are case examples taken from real life matters which are included in the above statistics but have been anonymised. The cases provide the Committee with an insight into the plight faced by these older people and the work undertaken by NSWTCG.

Child

A not uncommon case is where a client appoints an adult child or children as attorney. The client later suffers dementia. The adult child or children place their parent into an aged care facility and sell the home, which was the parent's only asset. The adult child may have a gambling problem or is over mortgaged and finding difficulty in maintaining a certain lifestyle including the payment of school fees for their own children. The adult child or children sell the parent's home and misappropriate the sale proceeds. The proceeds may be gambled away or used to pay school fees and support a lifestyle that is not realistic. The aged care facility does not receive payment for the parent's accommodation, the fees or accommodation bond is in arrears and interest is accruing. In desperation the manager of the aged care facility makes an application for a financial management order through the Guardianship Division of NCAT for the appointment of NSWTCG so that NSWTCG can investigate the recovery of funds. In the case of the adult child who has gambled the entire funds, recovery is not possible as the adult child is unemployed and exists on benefits. In the case of the adult child who used the funds to pay for a certain lifestyle there may be assets available which make a legal action for recovery

possible. However if the adult child is an only child and the sole beneficiary in the parent's will the child may have a certain inheritance expectation and negotiating family dynamics can be difficult.

Other family member

In one case the client's grandson would take him on 'outings' from the nursing home where he was residing. Nursing staff became suspicious when he would return from these outings with little or no money in his wallet. It was discovered that the grandson had withdrawn money from his grandfather's account during the course of a number of such outings and eventually left his account in debit. In addition the grandson lives in the client's home and refuses to leave. The home needs to be sold to pay for the client's needs and pay for the bank debit. The grandson has a disability and there is difficulty in getting him to vacate the premises for it to be sold.

What often happens in similar matters is that the family member appeals the decision by NSWTCG to sell the client's property and the matter is heard by NCAT. This takes time and in the meantime if the client is in an aged care facility and a bond or fees are owing interest is accruing and the client's financial hardship is compounding.

Friend

The client made a Power of Attorney in favour of two friends who misappropriated almost \$200,000.

Private Manager

There are a few cases where close family members are appointed and misappropriated the funds of those whom they manage. There have been cases involving misappropriation of a client's funds by their mother, another involving a client's father and others involving siblings.

Spouse

The client won the lottery and placed the winnings in a joint account with the spouse. The client suffered cognitive impairment as a result of domestic violence. The spouse removed all the client's winnings from the joint account. The client was removed from the family home and placed in an aged care facility and now requires funds for an accommodation bond. The client has no funds to pay for the bond.

Carer

A carer misappropriated over \$100,000 from the client and then disappeared. Recovery of these funds is impossible as the carer cannot be located.

Other

Staff of a local club frequented by the client 'befriended' him and managed to take possession of his keycard and account number and misappropriated almost \$100,000.

The dilemma of promoting Powers of Attorney and responding to this type of abuse

NSWG carries out community education campaigns for planning ahead documents. While promoting the importance of making a power of attorney NSWTG does stress the need to carefully consider who to appoint as the attorney. There is the option available to people to appoint NSWTG as an independent attorney.

NSWTG takes every opportunity, such as media campaigns held during Seniors Week, to inform people about elder abuse and how to detect, prevent and exercise their legal rights.

Possible law reform measures

Reforms to the *Power of Attorney Act 2003* may help prevent abuse of this important document. The Committee might consider recent reforms made to the Victorian *Powers of Attorney Act 2014* :

- Prohibition on conflict of interest transactions, unless authorised or ratified by the principal or the Guardianship Division of NCAT. This means that the attorney has a duty not to enter into transactions if the transaction is one in which there is or may be a conflict between the duty of the attorney to the principal and the interests of the attorney, or a relative, business associate or close friend of the attorney.
- Increased Tribunal powers to order compensation for any loss caused by the attorney contravening the *Powers of Attorney Act 2014*.
- The creation of new indictable offences for dishonestly obtaining or using the power of attorney for which there is punishment of imprisonment.
- More stringent execution requirements of powers of attorney. This could involve the introduction of similar measures available for Enduring Guardianship Appointments such as requiring a prescribed witness for execution of the document by the attorney thereby enabling the witness to explain the duties and responsibilities of an attorney and the consequences of failing their duty.
- Create the role of supportive attorney.

While there are calls for national registration of powers of attorney it is acknowledged this could be problematic from the perspective of finding an organisation to maintain

the register and would introduce a cost factor. It is believed by many that this would not act as a deterrent to abuse.

While perhaps not a deterrent to abuse, the making of preplanning documents uniform throughout Australia would promote greater awareness and better understanding of these documents by clients and professionals.

Another reform measure that is being promoted by many parties is the reinvention of the Office of the Public Guardian into a Public Advocate's Office with extended powers in respect to people with impaired decision making ability, including those people whose affairs are being managed under an enduring power of attorney. Such measures being promoted include:

1. The Public Advocate to have the function of receiving and investigating complaints in relation to:
 - a. the abuse, neglect or exploitation of people
 - b. the misuse of powers by private individuals or organisations appointed to substitute decision-making, co-decision-making and supporter roles.
2. Where the Public Advocate believes that an investigation is warranted she/he should be able to conduct an investigation on her/his own motion in relation to the above.
3. The power to investigate complaints should be supported by the following additional powers:
 - a. serve a written notice on a person requiring them to give the Public Advocate specified documents or other materials relevant to an investigation being undertaken
 - b. serve a written notice on a person requiring them to give written answers to questions
 - c. require a person to attend a conference for the purposes of seeking to resolve a matter being investigated.
4. It should be an offence for a person to refuse or fail to provide information, or to attend a conference or interview, when directed by the Public Advocate to do so.
5. The Public Advocate should have power of entry and inspection.
6. The Public Advocate should be permitted to apply to the appropriate Courts and Tribunals for a warrant authorising entry to any premises when she/he believes that a person who is on the premises is being abused, exploited or neglected. The appropriate Courts or Tribunals should be permitted to issue a

warrant authorising entry to any premises in these circumstances if they are satisfied that it is appropriate to do so.

7. The Public Advocate should be permitted to give the Chief Commissioner of Police a report concerning any investigations she/he conducts and allow the Chief Commissioner to have access to any evidence gathered during the Public Advocate's investigations if she/he believes that the Chief Commissioner should consider initiating criminal proceedings against an alleged wrongdoer.
8. The Public Advocate should have the function and power to advocate for the rights and interests of all the people of NSW with impaired decision-making. The Public Advocate should also have the power to engage in both individual and systemic advocacy.
9. The Public Advocate's advocacy powers should include seeking leave in any Court or Tribunal proceedings when the rights and interests of a person with impaired decision making are in question.

As CEO of NSWTCG and former Protective Commissioner I have always supported the establishment of a Public Advocate in NSW, a legislative change that I believe is long overdue.

Staff Training

NSWTCG staff undergo training and capability building to ensure they provide a quality service. Staff also undergo a Ministerial approved training course to become prescribed witnesses so they can explain and check capacity for the witnessing of powers of attorney and enduring guardianship appointments. Specific training is also provided in relation to Will making including how to check for testamentary capacity.

The legal staff who deal with the cases of financial abuse which come into the legal department at NSWTCG must comply with continuing legal education requirements. The legal staff at NSWTCG are experienced at running these types of cases and are dedicated to investigating and exploring every aspect of recovery where practically possible so that the client can meet their future needs.

The various issues relating to financial abuse are incorporated into all the training provided to staff by NSWTCG.

Policies and procedures

NSWTCG's policies and procedures are considered and written in a way that identifies the risk of abuse of clients from both an internal and external perspective.

The Future

The NSW Government has approved a transformation of NSWTCG to respond to client feedback on the quality of its services and to secure its future and ensure vulnerable

people have access to improved services. The transformation of NSWTG will make sure all clients receive the same high quality services from NSWTG regardless of their geographic location or level of need.

NSWTG will continue offering its crucial services and is implementing changes that better meet client needs and improved service.

The new model will comprise:

- a consolidated network of branches focused on face to face client interaction (both in the branch and through a strengthened outreach system)
- centralised client service centres where staff will carry out the estate and trust administration and the management of estates for clients who require assistance with their affairs
- online functionality for pre-population of pre-planning instruments and document submission
- targeted Financial Management services for high needs across NSW, supported by partnerships with financial institutions and non-for-profit organisations to provide cash handling and comprehensive case management services
- a streamlined Service Advisory group to provide core specialist services (such as legal and property services), supported by strengthened panel arrangements with external service providers.

The transformation is a response to the needs of clients and will modernise the way NSWTG delivers its services. It is essential that NSWTG be ready for the changes in society and is strategically placed to meet the needs of the ageing NSW population.

Yours faithfully



Imelda Dodds
Chief Executive Officer
NSW Trustee and Guardian

