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REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE NO. 2

INQUIRY INTO ELDER ABUSE

At Sydney on Friday 18 March 2016

The Committee met at 11.00 a.m.

PRESENT

The Hon. G. J. Donnelly (Chair)

Ms J. Barham

The Hon. S. Cotsis

The Hon. P. Green (Deputy Chair)

The Hon. S. Mallard

The Hon. M. R. Mason-Cox

The Hon. Dr P. R. Phelps

CHAIR: Welcome to the final hearing of General Purpose Standing Committee No. 2 into elder abuse. Before I commence I acknowledge the Gadigal people, who are the traditional custodians of this land. I pay my respects to elders past and present of the Eora nation and extend that respect to other Aboriginals who may be present with us today in Parliament or watching the webcast. This morning we will be hearing from witnesses from the Department of Family and Community Services. Later the Committee will hear from two separate panels of legal representatives—a panel of legal practitioners and then a panel of legal academics and experts focusing on a number of legal issues arising in the inquiry. Before I commence I will make some brief comments about the procedures for today's hearing.

Today's hearing is open to the public and is being broadcast live via the Parliament's website. A transcript of today's hearings will be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I also remind media representatives that you must take responsibility for what you publish about the Committee's proceedings. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside of their evidence at the hearing today. I urge witnesses to be careful about any comments you may make to the media or to others after you complete your evidence, as such comments would not be protected by parliamentary privilege if any person decided to take an action for defamation. The guidelines for the broadcasting of proceedings are available from the secretariat.

There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In those circumstances witnesses are advised that they can take a question on notice and provide an answer within 21 days. I remind everyone that Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. While it can be helpful to hear about individual cases, we also wish to protect people's privacy. I therefore request that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily. Witnesses are advised that any messages should be delivered to the Committee members through the Committee staff.

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HELEN ROGERS, Executive Director, Participation and Inclusion, Programs and Service Design, Department of Family and Community Services, and

MAREE WALK, Deputy Secretary, Programs and Service Design, Department of Family and Community Services, affirmed and examined:

CHAIR: I will now invite both or either of you to make a short opening statement. That will provide us with the maximum opportunity to ask some questions.

Ms WALK: I too would like to acknowledge the Gadigal people of the Eora nation and pay my respect to the elders past and present. Elder abuse is a serious issue—one that the Department of Family and Community Services [FACS] is committed to addressing. Through the Ageing, Carer, Disability and Volunteering Strategies, FACS is committed to addressing elder abuse by reducing ageism, promoting inclusion and addressing social isolation, and through supporting carers in their caring duties and with their own health and wellbeing. FACS also partners with other government and community organisations to increase awareness of legal instruments and planning-ahead documents to empower older people and the community to respond to abuse and to educate service providers and the community about elder abuse.

As part of realising its vision for a healthy, vibrant and active ageing population, the New South Wales Government provides over \$1 million for ageing advocacy across four peak bodies—the Council on the Ageing NSW, the Seniors Rights Service, the Combined Pensioners and Superannuants Association and the Older Women's Network. These organisations conduct a range of activities including community consultations, advocacy, information dissemination, and research and policy development. They assist in identifying and solving issues affecting older people in New South Wales and in keeping the Government informed on emerging issues. Each has been, and will continue to be, involved in helping the New South Wales Government deliver key outcomes from the NSW Ageing Strategy.

FACS is responsible for maintaining the NSW Interagency Policy on Preventing and Responding to Abuse of Older People. The policy addresses the key aspects important for preventing and responding to abuse, and outlines the roles and responsibilities of government agencies, non-government agencies and community organisations in supporting older people. It provides contextual information on abuse and sets out the key concepts in responding to abuse of older people living in community settings. The Government recognised the need for a helpline and established the NSW Elder Abuse Helpline and Resource Unit in March 2013. Since the start of this inquiry in September last year FACS has extended funding of the NSW Elder Abuse Helpline and Resource Unit until July 2017. FACS has also provided extra funding towards its new Elder Abuse Helpline's Train the Trainer program and in 2016 is supporting delivery of training sessions across New South Wales. Training will increase the skills of an estimated 14,000 staff across New South Wales who support older people.

FACS supports calls by the Age Discrimination Commissioner the Hon. Susan Ryan, for a national prevalence study into elder abuse. In December 2015 the Minister for Ageing, the Hon. John Ajaka, MLC, wrote to Commissioner Ryan and to Commonwealth Attorney General the Hon. George Brandis, QC, offering \$50,000 in initial funding towards a national prevalence study. I will be happy to elaborate in further detail on these initiatives and any other notable programs or funding. I thank the Committee for opening an inquiry into elder abuse and calling for submissions. We have been reading the submissions. They raise a wide range of concerns and highlight the complexities around elder abuse, yet it is encouraging to see that there are so many people who are passionate about addressing this issue. I think it has really touched a nerve in the community, which is fantastic. FACS supports a whole-of-community response for addressing elder abuse. During the hearing FACS will answer questions on matters falling within our portfolio. We will be closely following the work of this Committee and we welcome input and ideas on how current measures may be built upon and enhanced to prevent and respond to abuse of older people in the most effective way possible. Of course, there will be a whole-of-government response to the inquiry's recommendations and we look forward to that.

CHAIR: Thank you for a very thorough submission which provides us with useful information that we have used in our deliberation. We have representatives on this committee from the Government, the Opposition, the Christian Democratic Party and The Greens. We have resolved earlier that we will share the questioning in a pretty fluid way between the members to get the maximum out of the questioning opportunity. We will start with the Deputy Chair, Paul Green.

The Hon. PAUL GREEN: We have taken some evidence about different aspects of elder abuse and some of that is in the way that either people have been given power of attorney or where there is an estate issue that so-called loved ones in those situations may separate the elderly, especially those who may not have a power of attorney or power over their situation to, if I can use the term, divide and conquer against their siblings in the fight for the estate or in a fight for some other reasons to be able to have their parent or the elderly person with them, that they are able to isolate them and then control them. Do you have any comments on that alone? Have you had any experiences of that?

Ms WALK: I think the issue you have raised is part of the complexity, because in elder abuse the issue of social isolation is so critical and then the issue of family relationships as well. Those two things together make the response very hard. I think, as an agency, the helpline is very helpful to us to interrogate, if you like, the sorts of calls they get. They have done between 1,400 and 1,500 a year and they give us a bit of a window into those kinds of issues. It also helps us think about what kind of research do we need around this, because we know what gets reported but we do not know really about the prevalence, and it makes it very difficult to work out what might be a good, sound policy setting around this.

The Hon. PAUL GREEN: Given your great experience with that sort of feedback, would you gauge that as an act of abuse to separate, isolate, a person from their ageing in place? Would you be placing that sort of removal of someone out of that area as an act of abuse on an elderly person if that is all they know, that is where their friendships are, that is where their health responses are, that is where they have lived for 50 years and suddenly they are being ripped out of that to be isolated and put in a different place? Would that be an act of abuse?

Ms WALK: We do use the World Health Organization definition around what constitutes elder abuse and I know in many of these areas it is helpful to go back to the definitions to try and work out what is and is not in it.

The Hon. SHAYNE MALLARD: Page 3.

Ms WALK: That is right. We would literally use that as any single or a repeated act, lack of appropriate action occurring within any relationship where there is an expectation of trust. I think the sense about geographically moving somebody.

The Hon. PAUL GREEN: That is where I am going; you have nailed it. I am merely drawing out with your experience that that could be seen, as you are saying, in the right terms, as an act of abuse towards an elderly person—the removal of their sense of belonging, their sense of community. I rely on experience: yesterday there was deep concern from some residents from Millers Point, 80 of them. The department has issued 28 houses; many of those are inappropriate for those people and basically, from what I could see in a letter, they have put a gun to their head and have said, "Either accept it or else". Would that not be a sense of abuse in terms of telling them, "Accept this or you are just going to get what is left"?

That may not be in your community; that might be removed. Would that not be something that one could mistakenly see as an act of abuse on an elderly community that are ageing in place, that have been living there their whole lives—they have got their doctors services and their friends around there—to put them somewhere else across New South Wales? We see this in lots of different personal relationships but this is one example that I want to draw out on a greater agency situation that we have got here where we are going to try and move some people out of their place. How do we say that is not elder abuse whereas in a single issue between, say, a couple of siblings and a parent where they isolate that parent for their own gain this could not be seen the same way, that these people have got no other choice but to be relocated out of their place of ageing and community and friends and so on?

Ms WALK: The decision to relocate tenants from Millers Point was not taken lightly and was made in the interests of a sustainable, fair and social housing system, which currently has over 60,000 families on the waiting list. So working sensitively with tenants of Millers Point and treating them with care is of the utmost importance. This means we are focused on finding tenants new homes that meet their needs, and supporting them at every step of their move. The relocation team are all senior officers and they go out and interview each tenant, assess their supports and make new referrals if needed and the relocation officer goes with the tenant to view the property and, if they accept, spends the whole day with them during the move. The tenants are also offered a relocation package, which includes the packing and unpacking of their belongings so they do not have to worry about this aspect of moving.

Formal follow-ups are scheduled after six weeks into the move, then three and six months after to ensure they are managing to live independently. So, if necessary, there are further referrals made to ACAT or other agencies that have got links to Commonwealth-supported packages. The social impact assessment drew attention to the opportunity to provide improved ageing in place in safer, more suitable properties outside Millers Point, and the individual attention and support offered by the designated relocation officers ensures tenants and older people feel fully supported throughout the change process.

The Hon. PAUL GREEN: Ms Walk, that is a wonderful bureaucratic answer, thank you. The processes that have been put in place by FACS are fair and equitable to give everyone the opportunity to move right through the steps to be re-sited. But my concern is coming to this inquiry, elder abuse, where the agency has put a gun to their head, there is a letter out there, signed by the Minister saying, "It is this or I can offer nothing else", and that is virtually saying, "You accept this, we will make it liveable, comfortable, we will put in dryers if you cannot get to your clothes line, we will put in elevators if you cannot get to the top floor". Is this not a classic example of the agency acting in a way that is probably unscrupulous towards our elderly—many of them that have been there for 50 years—and not allowing them to age in place? Is that not a bit of taking advantage of a situation and making them re-site, as you say?

The agency is probably doing the right thing in many ways to assist many of those that can be re-sited who choose to be re-sited, but there are about 80 people that choose not to be re-sited and there are only 28 residents. Do you not think that it is an act of abuse to be able to say to those that cannot take a tenant in those situations that "You will be re-sited, like it or not"? Is that not an act of abuse on the elderly because they are vulnerable, they are aged and a lot of them are incapacitated? Would it not be fair to say that the agency is using its power on the vulnerable in re-siting them for a government outcome?

Ms WALK: I do not think it comes under the definition of elder abuse.

The Hon. PAUL GREEN: Let me put it to you a different way. We have taken evidence from an individual who forces someone to move away, puts them outside their place of living—all for their own gain, all for a financial outcome in their own interest—removes them from the family, takes control of them, totally isolates them, does not allow access to too much outside influence because it might influence the outcome of that individual's gain. Would you say that was pretty well along lines of abuse, if that was a sibling situation?

Ms WALK: I understand your point but I think I have answered the question.

The Hon. PAUL GREEN: I rest my case but you can see why I am really concerned about this. They are transferrable situations; one is an agency, one is a sibling.

Ms JAN BARHAM: I want to follow up on that and you might be able to clarify for me. The references that are made to "ageing in place"—it is nice language that gets used in media releases and it is out in the public arena. I cannot find any reference to it in any legislation or any document that reveals that there is a practice or procedure that ensures that that statement has any real meaning or function in government, in the actions and delivery of services for government. I am happy for you to take it on notice?

Ms WALK: We will take it on notice and we will do a search for legislative, regulatory or policy documents that might be clearer or sharper around the definition.

Ms JAN BARHAM: Thank you.

The Hon. SOPHIE COTSIS: The NSW Steering Committee—Prevention of Elder Abuse was established in 2013. Has the committee met this year?

Ms WALK: This year yes, it met on 9 February.

The Hon. SOPHIE COTSIS: And last year?

Ms WALK: My understanding is that in 2015 the committee did not meet.

The Hon. SOPHIE COTSIS: Do you know why the committee did not meet?

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Ms WALK: My understanding is that the work of the committee, when it was established in 2012, was first of all around getting the inter-agency guidelines and also about getting the elder abuse up and running. So, by 2015 you had the Elder Abuse Helpline had a year and a half under its belt and it was—

The Hon. SOPHIE COTSIS: Because in 2013 you established the committee and then the Government also established—

Ms WALK: It did the development of guidelines.

The Hon. SOPHIE COTSIS: Yes and the Government also established the Elder Abuse Helpline, which is great.

Ms WALK: Yes, that is right.

The Hon. SOPHIE COTSIS: That was 2013, so did the committee meet in 2014?

Ms WALK: Yes.

The Hon. SOPHIE COTSIS: How many times? Do you have dates?

Ms WALK: We can provide that.

CHAIR: Can you take that on notice?

Ms WALK: Sometimes there was no quorum where attendees were unable to attend, so sometimes there were more committee members.

CHAIR: If you put down all the scheduled meetings, take it on notice and if they did not proceed they can be notated so.

The Hon. SOPHIE COTSIS: In regard to the Government members of the committee, there is no-one here from Attorney Generals. Is there a reason why? Maybe I am missing something.

Ms ROGERS: Are you talking about the steering committee?

The Hon. SOPHIE COTSIS: Yes.

Ms ROGERS: There is a membership from the Department of Justice and there is also membership from the Trustee and Guardian.

The Hon. SOPHIE COTSIS: So there is, from the Trustee and Guardian?

Ms ROGERS: Yes.

The Hon. SOPHIE COTSIS: You did mention, Ms Walk, that you have been following the inquiry and what people have been saying and there are obviously a lot of issues in relation to the Trustee and Guardian and the communication between them and Attorney General, Justice and your department, in regard to Family and Community Services [FACS]. Have you, at this stage, got a broad view of what you think needs to happen in the coordination of that information and the difficulties that people have had in accessing information from the Trustee and Guardian?

Ms WALK: We are just here as FACS to talk about what is in our portfolio and I do not think it is appropriate—those questions are probably better directed to those agencies.

The Hon. SOPHIE COTSIS: That is fine but you are obviously the overarching agency that brings everyone together.

Ms WALK: The Chair of the committee, yes.

The Hon. SOPHIE COTSIS: As you are chair of the committee—you will see from the work that is being done by this Committee—are you looking at maybe some policy changes to determine how you can—

Ms WALK: One of the things that we really welcome from the inquiry will be your recommendations because that will really give us some—we are at the point for our three-year review of the inter-agency guidelines, our policy. So we do not want to leap into that until we receive your recommendations and do that work. So we will utilise that information.

Obviously, it will have a full three years of the Helpline, it will also tell us a little bit more about what might or might not be useful to put in the inter-agency guidelines. And the other is what we are doing in 2016 with the service providers. Because this is an area where you do not want the policy to be too far away from the service providers, you actually want it quite close and very informed by it because it is such a complex area in terms of the site of the potential abuse and the empowerment of the older people. So we would really want to see the sorts of responses we are getting in training. What sort of issues are our professionals raising in this area? What are the things that they are concerned about? Is some type of abuse more common than other emerging issues? So we really want to be able to bring them together.

The Hon. SOPHIE COTSIS: You are the agency that monitors the Elder Abuse Helpline, in terms of you fund it.

Ms WALK: We fund it, yes.

The Hon. SOPHIE COTSIS: You fund it but do you also oversee it? Do they provide you with quarterly reports and do you meet with them?

Ms ROGERS: Yes, with regular reports and we meet with them regularly, yes.

Ms WALK: Can I say though, we don't restrict it. Clearly we have a strong funding and contractual relationship with it but it is an independent agency that will also contact other experts. They have a lot of contact with police themselves and none of that needs to go through us. We welcome them as an external agency that is able to lead and do great work in this area.

Ms JAN BARHAM: I just want to follow up in terms of the information that is provided from them. Is there any evaluation and analysis of what that is revealing? I am particularly interested because a lot of the research refers to the need for specialised teams. You are talking about training. Are you moving to a model of specialised teams and particularly in reference to the fact that evidence suggests that the perpetrators of abuse are often family members, loved ones—it is a closed circuit. How much support is provided to those people and what consideration is there of the potential for them to be perpetrators of abuse?

Ms WALK: The Helpline does two things, and obviously they are better placed to talk about that. One is providing advice to people who ring.

Ms JAN BARHAM: I am interested in what the department does with that information, whether you do any evaluation?

Ms WALK: Yes. So, that information we receive from them, this inquiry has helped us to think about how we are making it available. So ourselves and the committee and the agency, we look at that information a lot but we need to find ways to make it much more available to the interested public of which we are clearly aware.

Ms JAN BARHAM: Perhaps I wasn't clear. I am asking you specifically, what have you been doing with the information? Have you been analysing and evaluating to inform what you do? We have had their evidence, we know what they do. I am interested to know what you have been doing with that information and how that specifically has changed what you are implementing to deal with elder abuse. Very clearly, have you been doing that or is that a process you are now in, where you realise that there is a need to do that?

Ms WALK: A little bit of both, in the sense that certainly, the first year really of establishing a new service like the Helpline is pretty much in terms of its region of—

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Ms JAN BARHAM: I have got further questions so I just want to get some clear answers about what you have done.

Ms WALK: Yes it does inform what we think is in the policy; it has informed what we think should be in the training that we are supporting.

Ms JAN BARHAM: How?

Ms WALK: So it makes us think, "Look we need to do more work around the issue of family members because that is the majority of what we are receiving." Who in the family is it? And what do we do about our carers?

Ms JAN BARHAM: So what does that lead to?

Ms WALK: Some of the discussion that we are engaged in in our ageing strategy, and the issue of social isolation that it is reflecting there, makes us think, "Look we need to do more about social isolation in our ageing strategy." So it might not necessarily be around what we are specifically putting into the interagency guidelines, but rather other areas of our work. The other area of our work of course is our carer strategy.

Ms JAN BARHAM: In the carer strategy are you able to identify when a carer might be at high-risk of becoming a perpetrator of abuse?

Ms WALK: The helpline would not give us that kind of specific information.

Ms JAN BARHAM: No, but do you do anything with that? You talked about training 14,000 staff.

Ms WALK: That is correct.

Ms JAN BARHAM: So is there specific training for workers to identify when a carer may be a potential perpetrator? And would you then have specific programs or support services in place? When we read the research it is pretty obvious the sort of people who could end up becoming perpetrators of abuse if they are the primary carer or the one left with the responsibility of looking after an older person. What is being done? I will be honest here: I could not find anything that refers to that and says that you have that ability to jump in there and provide support as an early intervention to avoid abuse. Sometimes the most vulnerable people are the ones left by family or circumstances with the responsibility of looking after a vulnerable older person. It is always easy to look at a case in retrospect and say, "Well, it was pretty obvious that person was going to be under undue stress that could then lead to them being a perpetrator of abuse."

Ms WALK: There are two answers to give here. The first is to let us have a look at what is in the training package, because it may well have those kinds of identification tools and assessment mechanisms that I think you are asking about. The second thing is that the Department of Family and Community Services [FaCS] is not really a service provider in this area. So our support is around two service providers, who are largely non-government agencies, who are doing this work directly with families—or indeed in terms of carers as well and the carers respite centres. Some of them might be federally funded agencies. So our work in a sense is around the policy setting. But let us have a look at the training package at whether it gives them some more tools.

Ms JAN BARHAM: Okay, if you could come back to us on that then that would be great. I have one final question. Something that was raised by the Older Women's Network New South Wales was the lack of counselling services for older women who had been sexually abused.

Ms WALK: That is not really within the portfolio of FaCS. NSW Health has 55 sexual assault centres in New South Wales. I am sure that they could address the issues around adult survivors using their sexual assault services.

Ms JAN BARHAM: This is where ongoing concerns about government services and the lack of integration and a more holistic approach come into play. If you were made aware that there is a need for support services for older women who have been sexually abused—or older men for that matter; any older person who has been sexually assaulted—would there be the capacity for you to make a referral to the relevant department?

Ms WALK: Once again, that is not our area. But I am familiar from my own previous work area with the women's health services and the State Government health services. I think they have a very long and good track record in New South Wales of delivering sexual assault services.

Ms JAN BARHAM: I cannot speak for the city-based metropolitan services but I know that in the regions there has been a loss of services dealing with sexual assault. What I am hearing about regional services is that there is no specific funding directed towards dealing with the sexual assault of older persons. So I am wondering whose responsibility is it to raise the issue that this sort of service is needed, because it is often very hard for someone to speak out about this. Who is responsible for raising that issue and ensuring that those support services are there?

Ms WALK: Our colleagues in NSW Health have the funding and jurisdiction to deliver those services.

The Hon. MATTHEW MASON-COX: I want to ask you a bit more about the helpline, which is obviously a wonderful service that the Government has introduced. I particularly want to ask about what you do for follow-up. So if someone calls up, be it a family member or an older person, about a particular issue then you go through a process of "soft coaching"—I think that is the term you used—to try to refer that person to the right area for support. It may be support from an organisation that may be outside of government or it may be support from the police. It depends on the nature of the inquiry. What do you do next in relation to that? Do you follow up that call with that person to see what has happened and what services they did access?

Ms WALK: The helpline gives general guidance; it does not do case management of a particular case, and it could not with the 1,500 or so calls that it gets. I think the thing you are getting to here is the issue of empowerment. We find that older people want to be engaged in what happens and what comes next. That is why I think this is such a difficult issue, because it is not just a matter of, "Gosh, I'm really concerned about what is happening to the woman I see at 53 Smith Street. I'll ring the helpline and then the police or somebody will come out to investigate."

Rather it is a question of that soft coaching and saying, "Well, how might you raise that with the older person themselves? How can they be engaged in the decision-making?" So the role of the helpline is really to coach the caller, who might even be a family member, in how they will talk with their mother, father or indeed sister-in-law about that. If they want to come back for more information and support around that then that is absolutely fine. But we do not do the case management role for that work.

The Hon. MATTHEW MASON-COX: In what circumstances would you report to the police an inquiry or something you have heard through the helpline?

Ms WALK: The question of when the helpline staff would report to the police is probably best directed to the helpline themselves for them to describe those circumstances. I am sure they have a lot of complex cases where they have had either an informal or a formal discussion with police. They would be the best agency to describe that. We see our role as being a supporter and a funder of the helpline. But we really enable them to develop the expertise and the content specialty that they have by literally doing that.

The Hon. SHAYNE MALLARD: Who is running the helpline?

Ms WALK: CatholicCare in central Sydney. So we fund them and we have a very strong working relationship with them. But, like for most agencies that we fund, we like to set the parameters and let them get the specialists. They do not want bureaucrats having too heavy a hand on them. Obviously we are very interested and engaged in the outcome of what they are doing, but we like them to develop independent relationships with agencies such as the police and the guardian.

The Hon. MATTHEW MASON-COX: Have you developed any guidelines with them about those sorts of issues? Or do you just leave it to them to work out when it is appropriate to report or indeed how they manage the day-to-day issues that might come across their desk?

Ms WALK: Ms Rogers might like to comment on that.

Ms ROGERS: We have certainly worked with the helpline on the protocols, but the basis of the work that the helpline does is the interagency policy on preventing elder abuse.

The Hon. MATTHEW MASON-COX: What do you mean by that?

Ms ROGERS: The guidelines are in the interagency policy.

Ms WALK: The foundation document.

Ms ROGERS: It is the foundation document for deciding when a matter would, for instance, be recognised as a matter for the police or when it would be a matter for health and so forth.

The Hon. MATTHEW MASON-COX: So do you know that they actually use those guidelines and that that guides their activity with helpline?

Ms ROGERS: We understand that they do, yes. Certainly from the type of advice that we receive from them about how the helpline is going it would appear that they have very well-trained staff who are able to identify the sort of issue it is that they are dealing with and the sort of referral that, therefore, would need to be made—and certainly able to identify when it looks like it may be a criminal matter and therefore requires referral to the police.

The Hon. MATTHEW MASON-COX: I presume you have a contract with them?

Ms ROGERS: Yes, that is right.

The Hon. MATTHEW MASON-COX: Do we have a copy of that?

Ms WALK: We can provide you with a copy of that.

CHAIR: Thank you.

The Hon. MATTHEW MASON-COX: Any guidelines or protocols that you have developed would be useful.

Ms ROGERS: Certainly.

The Hon. MATTHEW MASON-COX: I would be interested in your view on a customer service matter, if you are willing to proffer one. In relation to inquiries and referrals to the helpline, one of the issues that has arisen consistently in this inquiry is a lack of accountability and support beyond the initial contact and the lack of interagency support and coordination. Perhaps that is in part due to a lack of case management, to use your term. It is about having that contact but not then having follow-up and an understanding of what has happened next. People may need support on a number of different fronts. I see the helpline as being a really important point of first contact that could send up red flags about somebody's circumstances if we were more proactive in how some of the outcomes were managed. It would be good to take a customer service approach to at least find out what happened and where things went. I would be interested in your view on that.

Ms WALK: Customer service is absolutely critical. It helps you to improve your service when you learn from consumers what is helpful and what is not. We are happy to take some of your comments on board about feedback, complaints and other mechanisms we have at the helpline that could improve its work. We could also look at, as you have hinted at, where the gaps might be in the service system. We can look at whether there is a gap between agencies. It is unlikely that a centralised helpline would provide ongoing support for a family member or somebody who is concerned about a member of the community. You would want that to be much closer to where the person was, rather than in a centralised helpline. The helpline is able to identify emerging issues and gaps in the service system.

The Hon. MATTHEW MASON-COX: That is right, and provide a red flag that could inform judgements and decisions that are having an impact on the person's or family's life. It depends on the circumstances. It is that integration that seems to be missing. That is the general feedback that we are getting from a large number of people.

Ms WALK: That is helpful. The other thing one relies on helplines for is to get a sense of where calls are coming from. It allows us to see that we might be getting a lot of calls from the Central Coast, for example, or from a particular area. It helps us to get a sense of whether we have a service system that is attuned to these

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issues or that is addressing the needs of either social isolated people or of carers. It provides information about that.

The Hon. PAUL GREEN: The helpline is an amazing response. Is the Government looking at boosting the hours so that it is available for 24 hours a day, seven days a week? Sadly, most elderly people are awake very early in the morning and would be happy to make that call then.

Ms WALK: The helpline operates from 8.30 a.m. to 5.00 p.m., Monday to Friday, and has an after-hours call-back service..

Ms JAN BARHAM: No, it does not. I have tried. It rings out.

Ms WALK: After hours?

Ms JAN BARHAM: I have been trying for weeks.

The Hon. MATTHEW MASON-COX: You are too young.

Ms WALK: There are between 10 and 20 calls to the after-hours call-back service each month. The volume is not great.

Ms JAN BARHAM: It has been ringing out.

Ms WALK: We did have an issue for a short period of about three weeks. That might have been when colleagues here called. The after-hours line was not switched on. It occurred in early 2016 and is now resolved.

The Hon. PAUL GREEN: That was when Jan rang.

Ms WALK: It was a technical issue.

The Hon. SOPHIE COTSIS: You were jamming the hotline.

The Hon. SHAYNE MALLARD: The basic data that you have given us from the helpline is very informative. I note that the number of calls has doubled in the two-year period. That is on page 16 of the report. Do you attribute that to increased awareness of the issue of elder abuse or to increased advertising of the helpline?

Ms WALK: It is about establishment. The first year of a service does not give much indication of the need. It is about getting the infrastructure right, having the staff on board and developing their expertise. It is then about getting out into the field. Once the helpline gets going, they are generally answering calls.

The Hon. SHAYNE MALLARD: The helpline is basically a responsive tool. It is not proactive. There is evidence of underreporting. Should we be talking about awareness campaigns in the community about the issue of elder abuse? There is an ageing population. It seems to me that a lot of abuse is hidden, unreported, which could be because of a lack of awareness. The second issue I want to talk about is the service's work with other communities, such as the lesbian, gay, bisexual, transgender, intersex and questioning [LGBTIQ] community, the Indigenous community and the multicultural community. They can be very hard to reach. I am aware of the LGBTIQ community campaign at the moment about same-sex elder abuse.

Ms WALK: That is right.

The Hon. SHAYNE MALLARD: Those communities are ageing, like the rest of Australia. What work is going on to help identify the need in those areas and to reach into those communities?

Ms WALK: That is a great observation about those groups. We are working with the Aboriginal community now, with a view to developing a campaign next year. It is the same thing. How you undertake the campaign is important as well. You do not want to alienate people or cause them to not report issues. A point that was raised earlier was that people can end up being perpetrators who, had there been early intervention, might not have done. You do not want to alienate those people. You want to reach the individual in a way that makes them want to reach out and seek support services. We are working with the Aboriginal community on

how to frame this in a way that works for them and their constituent group rather than the way Government might think it is best framed. Helen can talk about the multicultural community.

Ms ROGERS: There are a number of multi-language brochures about the helpline available on the website and in hard copy. They are distributed to general practitioners and community organisations. This year the helpline is looking at producing a multilingual brochure, to cover other languages. It is really important. The helpline offers a telephone interpreter service. There continues to be a challenge in ensuring that there is awareness in all communities. That is something we continue to work on. We welcome the findings of this inquiry. That will guide us and will highlight where the gaps might be that we need to respond to.

The Hon. SHAYNE MALLARD: The data does not report it. It must be very hard to extract information from a sensitive phone call. I know it is hard for Lifeline.

Ms WALK: That is right.

The Hon. SHAYNE MALLARD: You do not want to survey people when you are trying to ascertain the state of their health. I imagine the level of reporting is very low in those communities.

Ms WALK: Yes.

Ms ROGERS: It could certainly look like under-reporting.

The Hon. SOPHIE COTSIS: I want to follow up the question about multicultural communities. Have you engaged with Multicultural NSW on this issue to look at how you can better provide information to different ethnic groups?

Ms ROGERS: We have a very strong working relationship with Multicultural NSW. We are very involved in and excited by the work they are doing to re-establish their regional advisory council [RAC] network. We will work with them on this issue.

The Hon. SOPHIE COTSIS: What about the Ethnic Communities Council, the peak body? It might be good to get in contact with them.

Ms ROGERS: Yes.

The Hon. SOPHIE COTSIS: A number of older people from multicultural communities may not be as literate in their own language, let alone English. They may not have a computer to access information on the website but they will usually be involved in community groups. It is important to reach out to Multicultural NS specifically on this issue and the Ethnic Communities Council.

Ms ROGERS: Exactly the point. I think that one of the keys to reach culturally and linguistically diverse [CALD] communities are general practitioners because often that might be the only contact that an older person from a CALD community may have outside the family unit. The helpline has been working through the Multicultural Health Network with CALD general practitioners to get that information out there.

The Hon. SOPHIE COTSIS: Obviously this will need to be resourced at some point. The Multicultural Resource Centre is understaffed and stretched but it also has very good community contacts.

Ms WALK: The training this year obviously will also cover the service providers in that area to be able to resource in, with mechanisms to be able to do so.

The Hon. SOPHIE COTSIS: I am now wearing another hat as the shadow Minister for Multiculturalism. I am concerned that many of the communities that I deal with, whether they are Italian, Arabic, Greek or our new emerging subcontinent communities, do not get that access to information. So it has not reached into their communities. I have mentioned this to the Minister previously but something needs to be done at a higher bureaucratic level to reach into those communities. They do not get access to information. I have seen that both in the National Disability Insurance Scheme and in this area of elder abuse. I refer to the national prevalence study that we have been talking about and that Commissioner Ryan has talked about. Ms Walk, you mentioned that Minister Ajaka has offered \$50,000. Where is that up to?

CORRECTED

Ms WALK: Obviously we have written to the commissioner and we received a letter back from the commissioner recently. We are waiting to hear federally. I understand that they are looking at doing a scoping study with the Australian Institute of Family Studies. When you do a scoping study it gives you a platform really to move towards a prevalence study.

The Hon. SOPHIE COTSIS: That is on track.

Ms WALK: Yes.

CHAIR: On pages 17 and 18 you have broken down into categories information from the helpline. You have the reported abuse type, age of older person and gender of older person. Do you have a breakdown of cultural or ethnic background?

Ms ROGERS: I would have to take that on notice.

The Hon. SOPHIE COTSIS: If there is no category for ethnicity would you consider including it?

Ms ROGERS: We would certainly look into that, yes. It is to do with what also is a statistically significant number to collect.

The Hon. SOPHIE COTSIS: In "age of older person" in 2013-14 the category between 75 and 84, and 85 and 94 years of age has the highest number of calls. In "gender of older person" you have more females in that age group who are calling in regard to financial and psychological types of abuse. Have you had a look at that analysis and at that information and what have you done about it? You have two years worth of information so what have you done?

CHAIR: I suggest that you take that question on notice.

Ms ROGERS: Yes.

Ms JAN BARHAM: You might also want to take this question on notice. I am interested in your reference to the Aboriginal community. With whom have you been consulting and how have you been consulting? Have you had a session with Aboriginal groups? I did not hear about any ongoing consultations so it would be great to have that information from you.

CHAIR: With the scaling up of the helpline potentially beyond the hours that operate at the moment, it obviously does not require filling a whole call centre with people waiting around for these few phone calls. With modern technology obviously it can be done in a progressive way. You might start off with one or two additional staff and, subject to it increasing over time, it could be scaled up to a greater level to meet the demand. Is it possible to scale up gradually and progressively to meet demand? Presumably if people are aware it is available to be used around the clock, so to speak, they will start to access it. Do you not think so?

Ms WALK: We will take that question on notice. Obviously technology is great and it can help us in this area in regard to telephone calls or any other mechanisms that people want to use to access a helpline as well, particularly if they are not necessarily an older person but indeed are other family members.

CHAIR: I am interested in the progressive scaling up as opposed to opening up for 24 hours immediately. I would like your thoughts on that. Thank you for attending today's committee hearing. Some questions have been taken on notice. The transcript for today's proceedings will not be available until after Easter due to competing demands on Hansard staff. The Committee has resolved that the answers to questions taken on notice will be returned within 21 days. I presume that that will be okay.

Ms WALK: Yes.

CHAIR: The secretariat will contact you and liaise with you in regard to that matter. I thank the department for its important work on behalf of the elderly and the senior in this State.

(The witnesses withdrew)

(Short adjournment)

CORRECTED

PENNY MUSGRAVE, Member, Criminal Law Committee, Law Society of NSW,

LEE CRITCHLEY, Civil Law Division practitioner, Legal Aid NSW, and

RICHARD McCULLAGH, Private legal practitioner, Patrick McHugh and Co. Solicitors, Kincumber, affirmed and examined:

PAMELA SUTTOR, Chair, Elder Law and Succession Committee, Law Society of NSW, and

SARAH BREUSCH, Solicitor, University of Newcastle Legal Centre, sworn and examined:

CHAIR: I welcome our next panel of witnesses. Thank you very much for coming along today. As you are aware, you have been invited today to give evidence as part of a panel of legal practitioners. The purpose of this panel discussion is to help us identify areas of agreement that might inform the committee's recommendations. While members of the committee will be asking questions throughout our discussion, we hope that you have come prepared to discuss the topics together as a group and to propose and debate potential recommendations for policy and legislation.

I commence by thanking you all for your submissions; they were very well prepared submissions and we found them very informative; they will assist our deliberations greatly. Thank you for the trouble taken to put them together. The committee has representatives on it of members of the Government, the Opposition, The Greens and the Christian Democratic Party; so it is quite a representative committee. We would like to make this a free-flowing exercise over the next 45 minutes or so. To get things underway, I invite each of you to make a short opening statement—you can take the submissions as read—to overview your position in general or what you have expressed in your submission or to elucidate a particular point. We will then open it up for questions.

Ms MUSGRAVE: Might I suggest that Pam Suttor, who is the Chair of the Elder Law and Succession Committee, start the opening on behalf of the Law Society. I will then add a few points.

CHAIR: Thank you very much. Please proceed.

Ms SUTTOR: Basically, I think that the attitude of the Law Society is that we already have a lot of safeguards in the general law and that we should not be over-regulating this issue. A lot of the problems arise in the education field because it is that careful, proper selection of a trustworthy attorney which is—

The Hon. SHAYNE MALLARD: Are they not all trustworthy?

Ms SUTTOR: I am talking about the attorney in the sense of the recipient of the power of attorney, and that is where we really get into problems, where people have not thought through that issue significantly of who is to be the attorney, who is trusted, who will do the job acting as a fiduciary acting in the best interests of the donor of the power of attorney. I think the Law Society also takes the view that this is an area of law not to be treated lightly. As practitioners, we see the new clients come in—they are often sent by financial planners—and they want the trifecta of a will and a power of attorney and an enduring guardian, without any real understanding of what these are or the appropriateness of them.

Many people go to their death without the power of attorney ever having been activated. So we are talking really about is it needed and who is the proper person to act in the place of the donor for financial matters? That gets back then, when I look at the problem with the exercise of powers of attorney, to education, and I think there are three strands to that. One is the education of financial institutions. A lot of these breaches, and some of them are egregious breaches, of the fiduciary duty are facilitated by financial institutions, such as banks lending to attorneys on the security of the home.

We need education of the segments of society that are going to sign off on powers of attorney, and that is that community education aspect, and we have, of course, the ongoing education of lawyers, because we are the principal persons who can give the section 19 certificate of the duties of ligations of powers and responsibilities in relation to powers of attorney. That, I think, is the overriding philosophy.

CHAIR: Thank you. Did you want to augment that, Ms Musgrave?

Ms MUSGRAVE: If I can just add quite shortly that the issue that the Criminal Law Committee of the Law Society wants to bring to this committee's attention is the situation of elderly inmates in custody. I appreciate that is probably not an issue that has been brought up by others.

CHAIR: We are grateful to you.

Ms MUSGRAVE: It is considered to be a prison issue for two reasons. The first issue is that the prison population is huge and the other issue is that we have an ageing population. So your percentage of elderly prisoners is increasing. I could talk about increasing sentences also adding to that tension or to that pressure. The Criminal Law Committee has suggested three areas for exploration. They are: how these people are sentenced and whether more needs to be done about recognising people who are either elderly at the time of sentence or becoming elderly through their sentence. That should be recognised and considered in the sentencing process. The second thing is looking at alternatives to traditional sentencing or some way of these people serving custody in the community at a time when their needs as an older person are not being met. The third thing is a further examination of the release of people on parole because of their needs as an elderly person. At the moment the ability to do that is quite limited under the Crimes (Administration of Sentences) Act.

They are the areas that the committee thought were worthy of consideration. It is recognised that that is quite a novel area for this Committee to be looking at, and it may be that it is a recognition of the issue—simply that there may not have been other contributions on the topics. It is a sentencing issue and it may be that it needs to go to the Sentencing Council or something of the like. But to ventilate the issues here and have recognition of a pressing issue which has got some concern for government outside elder law in the sense of resourcing prisons is something that the committee would bring to your attention.

CHAIR: It is an important contribution. That is appreciated.

The Hon. SHAYNE MALLARD: Incarceration is not abuse. The abuse within the incarceration system would be what we would be looking at.

Ms MUSGRAVE: The circumstances in incarceration are not optimal for the wellbeing of older people.

The Hon. SHAYNE MALLARD: Nor was the crime they probably committed in the first place.

Ms MUSGRAVE: No, but if it amounts to abuse because a government agency cannot deliver appropriate care, that is something that is worthy of examination.

CHAIR: They are matters for discussion and deliberation but I understand it forms part of the contribution.

Ms CRITCHLEY: As you can see from our submission, Legal Aid's involvement in the area of elder abuse is primarily casework that deals with what would come within the definition of elder financial abuse. Legal Aid also provides specific services to victims of domestic and family violence, including older people, and those services are outlined in our submission. Elder abuse occurs in a wide range of contexts and I think it requires a whole-of-government response. We welcome the announcement by the Federal Attorney-General that the Australian Law Reform Commission will conduct an inquiry into laws and frameworks to safeguard older Australians from abuse. For example, there are the areas of aged care. Commonwealth-funded aged care is a Federal area, but it is also an area where there is or can be elder abuse.

The role of government intervening in perceived elder abuse I think will vary depending on the circumstances. A primary distinction should be made between older persons who lack capacity to make their own decisions and those who have such capacity. If there is capacity they should be free to make decisions like any other adult—even those that others may consider to be bad decisions. As an example, I had a client where Legal Aid had been prepared to commence legal action against an older woman's daughter who fraudulently transferred her mother's property to herself. However, my client did not wish to proceed; she preferred to maintain the relationship with her daughter even though she was aware of what her daughter had done and the risks involved in not taking action to get the house transferred back to her. She had the right to make the decision even though it was not one that I was comfortable with. As an adult and because she had capacity it was her right to make that decision.

I think that the very vexed question that comes up in cases of elder abuse or alleged elder abuse is this decision and who makes the decision about whether the older person has capacity to decide for themselves or not. I think in making that decision there is always a tension between the urge to protect the older person and their right to make decisions for themselves. The assessment of whether making a bad decision is considered to be their right or is in itself evidence of lack of capacity will never be clear cut. In any event, I think we should guard against taking an overly paternalistic approach to older people by virtue only of their age.

It may be that it is not realistic to expect government to be able to prevent all elder abuse. Much of it happens behind closed doors and involves conflicting emotions and competing attachments between various family members. The government has limits on the extent to which it can empower an agency to monitor and respond to what goes on in the privacy of people's homes without accusations of being an Orwellian Big Brother. The most vulnerable older people are suffering from a cognitive impairment. They cannot recognise or report elder abuse. It currently requires some third party to observe the abuse and to take some action to assist. Raising awareness of those who might be in the position to take action—such as health workers, GPs or care providers—is important to increase the chances that abuse will be observed and reported.

Where older people have capacity they need to know what their rights are and where they can get help. Creating a central agency that can identify the issues and refer older people to services that can deal with their particular circumstances would be a useful approach. Perhaps the Elder Abuse Helpline is making some moves towards this direction insofar as acting perhaps like a triage system, because elder abuse is complex and covers so many different areas of law and social situations. We advocate prevention of elder abuse through education. Legal Aid NSW has produced brochures to assist older people with legal issues, some of which are relevant to elder abuse and they are referred to at page 17 of our submission.

On that page there are also details of the Legal Aid NSW "Borrowers Beware" radio campaign. That project targeted older people in culturally and linguistically diverse [CALD] communities who may be at risk of using their homes as security for loans taken for the benefit of their adult children. It was the experience of one of the solicitors and her own family where she alighted on the idea that the best way to get people in CALD communities was via the radio, because she knew her parents and her parents' friends listened to radio that was broadcast in their own language. They did not necessarily read newspapers or take in information in relation to these issues in printed material or even on television, but the radio station was a very good idea that the solicitor had as a way of getting through to older people in CALD communities.

CHAIR: Thank you very much.

Mr McCULLAGH: As I said, I am a suburban legal practitioner. I work very much at the coalface of financial abuse, and that is the very narrow compass I take today. I supervise the doing of enduring powers of attorney, mostly for retirees and pretty much daily. In only the last month I can recount to you briefly two examples of elder financial abuse in the real world. A granddaughter endeavoured to transfer her grandmother's house to herself for \$1 in return for a verbal assurance that the granddaughter would provide her with care and accommodation without charge for life.

I sent an initial very short letter of advice to the grandmother outlining what could go wrong. Relations may sour; she has lost her main asset; she may have difficulty getting into aged care because they will see that as a gift of her house. The granddaughter shut me down. She rang and said, "No further advice, thanks." There was really no alternative but for me to apply to the Guardianship Tribunal. It is very rare for a solicitor to do that. I did so and there was an expeditious hearing convened. As a result, the power of attorney was suspended and a financial management order was made, in this circumstance appointing the NSW Trustee and Guardian.

The second example is a son attorney who transferred \$50,000 from his parents' bank account into his own account under the power of attorney and refused to comply with a direction of the parents to return it to them. A stern legal letter has seen the money restored and the power of attorney revoked. They are just two real life examples in recent time. As an adjunct lecturer at the College of Law in elder law I read a lot of the case law about this, which I have listed to the Committee. I propose three what I regard as simple measures in tweaking the Powers of Attorney Act to improve the situation for principals.

The first is to make errant attorneys liable to orders available from the NSW Civil and Administrative Tribunal to pay compensation to principals for loss caused by failing to use reasonable diligence to protect the interest of the principal when using the power of attorney. Currently, New South Wales is the only jurisdiction

in Australia that lacks a specific statutory obligation of that nature. Secondly, I would recommend requiring that an attorney's acceptance of their appointment involve a certificate of explanation by a solicitor as to the basic powers and obligations of an attorney. That sort of certificate applies currently in relation to accepting the appointment as an enduring guardian. So I simply seek to extend what already applies in one sphere into another.

Finally, I suggest that there be introduced a requirement that all grants and revocations of powers of attorney by natural persons as from a suitable date are to be registered with a registrar general. This already applies in the current law in relation to the use of power of attorney for dealings with land. I simply suggest that be expanded, primarily because particularly an elder client may forget and not be sure whether they have given the right of power of attorney some years ago. As we know it is a very powerful appointment. The registration would enable keeping track of the granting of that power. I think some of the other submissions today echo some of the goals. Finally, I agree the criminal sanctions referred to in other submissions are a useful supplementary deterrent but not really effective in isolation.

Ms BREUSCH: Like Mr McCullagh, I work on the coal face in this area. Operating as a community legal centre I see a lot of clients where we have people attend drop in advice clinics. The issue of elder abuse is raised frequently. It is only financial elder abuse I am speaking about. My experience is that at the moment it is too easy for an attorney to become a rogue attorney and not have any checks made until things have gone a long way wrong. My concern comes from that point. I think the register for enduring power of attorneys would overcome that, as Mr McCullagh said. I have encountered this issue where people appointed attorneys at numerous times and cannot remember who or when so in making a new appointment you cannot be certain as to the background and who else is out there with this power. It really confuses the issue and muddies the waters in terms of who might be acting.

The idea is that would allow an easy check to see who has been appointed but it would allow someone to record a revocation. At the moment a revocation just takes place by individuals, the previously appointed attorney, in writing saying that their power has been revoked. If we do not know their address there is no certainty that person receives it which means that is also complicated. The compensation scheme for victims who have lost assets through financial abuse, I think something more direct in the Powers of Attorney Act would be far more efficient than trying to recoup that lost money or property. Obviously it will only be a financial solution at the end. Often this might be the abused person themselves but it could be the estate ultimately because often those problems are not fully discovered until the person has passed away. It is actually the estate seeking to recover that money.

This is not something I had in my original submission but I was quite attracted by the submission that mentioned the potential for a reversal of onus of proof in a situation where an attorney is gaining a benefit. There should be a rebuttable presumption that says if an attorney is gaining a benefit the onus of proof is then on the attorney to show why that benefit is, in fact, okay. I think the starting point should be an attorney getting a benefit is a red flag that things are going wrong. My other point related to the compensation in the granny flat area and giving the NSW Civil and Administrative Tribunal jurisdiction to be able to deal with that rather than there having to be an equitable claim in the Supreme Court would make it far easier for people with the granny flat type of financial abuse to be able to access justice.

The Hon. SOPHIE COTSIS: Ms Suttor, you said that education is the key rather than regulation?

Ms SUTTOR: Yes.

The Hon. SOPHIE COTSIS: Can you give us some examples of what type of education?

Ms SUTTOR: I think the financial institutions are a very real problem in that they are far too lax in permitting substantial moneys to come out of financial institutions and they are not seeing the flags. If I want to go to NAB and take \$100,000 out of someone else's account, even though I am the attorney, there is no flag, it just happens. We are seeing mortgages taken out where the banks do not inquire into the purpose of the loan so that suddenly mum's house has been mortgaged by the attorney for a couple of hundred thousand dollars. Who knows where the money trail goes. These are all examples. I am very much a hands-on lawyer working as an accredited wills and estates specialist. I see these sorts of things happen daily. We are seeing financial brokers and other people churning power of attorney's assets and shares but they are not considering the best interests of the donor of the power. There is a failure to focus on the fact—it is in the form—that the attorney must always act in the best interests of the donor and they do not prefer their own financial interests.

The Hon. SOPHIE COTSIS: Do you support the register?

Ms SUTTON: No.

The Hon. SOPHIE COTSIS: Why do you not support the register?

Ms SUTTON: Because it adds to expense and I think that it is sufficient that if you are dealing with land you have to register but you do not have to register if you are going to deal with the bank account. A lot of these frauds happen not with the use of a power of attorney but through informal arrangements where a second signatory has been placed on a bank account, and that second signatory takes the money for their benefit. I think the financial institutions have a very big role to play and they have to have some education about how to deal with these matters.

The Hon. MATTHEW MASON-COX: How would you suggest they deal with that situation?

Ms SUTTON: I think part of the problem is could we restrict online access. I know we have to be modern and I know online access is the name of the game but with online access no-one is checking.

CHAIR: And swipe access?

Ms SUTTON: You are ahead of me, I do not know about swipe access. That makes it easier for fraud.

The Hon. MATTHEW MASON-COX: Are you suggesting over the counter where there is an attorney related to an account?

Ms SUTTON: Yes. And those over the counter people have to be educated in perhaps getting a supervisor in to deal with suspicious transactions.

The Hon. MATTHEW MASON-COX: It is very difficult, is not it? If somebody rolls up to a bank with a power of attorney document and sits it in front of you there is no register to determine whether that is the latest one or whether it has been revoked. The bank has to make a judgement about whether that is something they are able to act upon and what are they going to do. Do they call a solicitor?

Ms SUTTON: Sometimes they do.

The Hon. MATTHEW MASON-COX: Sometimes they do that, sometimes they do not because they might know the person.

Ms SUTTON: I suppose a lot of this is a problem of the loss of knowledge by bankers and financial institutions of their clients. But when you get a very large transaction—and I suppose I am talking about \$50,000 and above—there has to be a bit of thought put into it.

The Hon. MATTHEW MASON-COX: There needs to be best practice about how to handle that issue.

Ms SUTTON: Yes.

The Hon. MATTHEW MASON-COX: Do you think they should also contact the person who granted the power of attorney to seek authority?

Ms SUTTON: They can do that. Sometimes that person still has capacity. The problem arises when that person lacks capacity. Best practice in those circumstances might require production of medical evidence.

Ms JAN BARHAM: Is this where the Law Society has a guideline to deal with that capacity issue in relation to—

Ms SUTTON: Yes.

Ms JAN BARHAM: We have had some representations that have alerted us to that. Can you explain that a bit more and whether or not there is any requirement for adherence or accountability and checking mechanisms.

Ms SUTTON: I did not quite hear you.

Ms JAN BARHAM: I am wanting to know more about it and whether or not those guidelines have any requirements for adherence or accountability and checking mechanism about whether or not they have been used.

Ms SUTTON: They are presently under review. Anything that I learn from here will be taken on board.

Ms JAN BARHAM: I raised that question because from a lot of what we have read in submissions—we have received some really valuable personal experiences—it appears that some legal representatives are not following those guidelines. It reminded me about what happened 15 or 20 years ago—or whenever it was—when ICAC introduced a check list that ensured that there were guidelines and the steps that people had to go through. It was mainly used in the public sector. Someone had to tick the box to say that they had considered or done an assessment and then sign off on it at the end. It was a very simple process but I understand that it was very effective because it provided that accountability. It was a check list saying, "I've got to do this. I've got to do that." We have seen examples of cases where it is obvious that those guidelines were not followed. I understand that they are comprehensive and very valuable but they were not followed where people have raised concerns about processes. Would something as simple as that assist?

Ms SUTTON: I think it could well assist. In my experience often rogue attorneys need the cooperation of rogue solicitor attorneys.

Ms JAN BARHAM: We have heard that evidence. There is lack of accountability in that there is no legal provision to catch them out on that. If you catch them out you need to have some evidence. We are asking whether we can put something in place, out of this inquiry, that provides accountability and the legal framework that means that somebody can be found to be fraudulent in their dealings and the documentation would hopefully prevent that.

Ms SUTTON: Of course.

Ms JAN BARHAM: The carrot-and-stick approach.

Ms SUTTON: The frauds are not only perpetrated by people misusing powers of attorney. The worst matter I ever had was where my client lost her block of four flats to a rogue. We soon recovered certain amounts. The certificate of title had been in my firm's strong room for 40-odd years. There are rogues out there, and that is the kind of thing we have to try and prevent for older people.

The Hon. PAUL GREEN: We took some evidence about numbers of solicitors and things like that but there was evidence of cases where a solicitor has been held accountable. Is it your experience that no-one has been prosecuted for being a rogue attorney or solicitor in these matters?

Ms SUTTON: I do not practice in criminal law and I would not know the answer.

Ms MUSGRAVE: I do not know. I assume the Office of the Legal Service Commissioner may know. The simple answer is that we do not know the answer to that question, and I doubt we are the best ones to answer that question.

Mr McCULLAGH: One of the submissions—I cannot recall which one—quoted a number of cases where solicitors were "prosecuted", if that is the word, by the Office of the Legal Service Commissioner for just this sort of activity.

Ms SUTTON: Certainly, there seems to be reluctance by the police to deal with white-collar crime. While the matter of the Maroubra flats was referred to the police I do not believe any criminal prosecution followed.

The Hon. Dr PETER PHELPS: Many of the things we have been hearing about relate to disputes that have arisen, particularly between siblings, in relation to a single power of attorney being granted to one of their siblings, normally over their aged parent. How would you feel about a mandatory requirement that, prior to any power of attorney being granted, close family members be notified? Then you could not the situation where one unscrupulous child decided to seek power for themselves without any other close family member knowing. In other words, there would have to be some sort of mandatory notification process.

CHAIR: Perhaps each representative could respond to Dr Phelps's question.

Ms SUTTON: I would think that that is over-regulating. I go back to my starting suggestion that the attorney has to carefully select the trustworthy person, whether it is a family member, an accountant or the like, who they believe will be able to deal with the financial assets in the best interests of the donor of the power of attorney and respecting the fact that they are acting in a fiduciary capacity. To throw it open to all the family as to whether they think Joe or Jean is best, I do not think would resolve anything.

I do a lot of work as a litigator in post-death families. Some families are going to fight anyway. To add another layer of regulation to say that the family members have a choice as to who the attorney is would not be very productive. It would detract from the ability of the donor—mum, dad or granddad—to exercise their own right of choice.

Ms CRITCHLEY: I agree with Ms Sutton on that. I think we are working on the presumption that the principal has capacity and that they can make a decision about who it is that they want to be their attorney. They may not want the other children to know that that is who they have appointed. It could cause a lot of family conflict without any real safeguard. I am in two minds about the registration.

The Hon. Dr PETER PHELPS: I am not in favour of registration. We have clearly seen cases where the power of attorney has been granted but it turns out that it has been granted to demonstrably the wrong person. I do not think solicitors have enough day-to-day contact with people to make a valid assessment of their capacity, ability, their willingness or their good-heartedness towards their parent. In that regard, if you are going to have a fight, then at least the family fight should take place before any legal arrangement has been entered into, before any disposition of property has been entered into and before any financial arrangements have been altered. If you are going to have a fight, then at least have it upfront when presumably the applicant is still compos mentis, not eight years down the track where he or she might be in the middle stages of dementia and cannot make an accurate assessment about who they actually want to have at that stage. Surely if you are going to have a family fight, at least have it upfront before things are set in stone.

Ms MUSGRAVE: Could I ask a question, Dr Phelps? What would be the process of resolution in that situation? So there is a notification of the family members and just in terms of that actually being useful, what would be the process of resolution?

The Hon. Dr PETER PHELPS: I think that my mother should have power of attorney. She agrees. We then, either of ourselves, contact my siblings and we go to the solicitor's office ourselves or alternatively, if that does not happen, the solicitor satisfies themselves that the family members are in concordance with the idea that an attorney should be granted to a particular person.

Ms MUSGRAVE: So the solicitor is being put in place as an arbiter.

The Hon. Dr PETER PHELPS: Well, they are put in place to make sure that everyone who might have a relevant interest in this matter is at least informed that it is taking place and has the opportunity to raise concerns. It might well be the case that I am abusive towards my elderly mother but she is so afraid of me that she does not want to say anything whereas the other members of the family would know that I am abusive. If I go along and convince her, if not necessarily physical but with emotional and psychological coercion to hand over power to me, then my siblings may well say, "We don't think that this is a good idea" and it should be halted at that stage.

Ms SUTTON: Dr Phelps, often people are doing their wills, giving instructions for wills, at the same time as they give instructions for powers of attorney. A good solicitor will have got instructions as to who is the family, what are their needs, perhaps if they are any relationships, if there are mental health issues but ultimately having given that advice, it is the attorney and the will-maker's decision not that of the children. I mean, it is not for the children, for instance, to say, "Well look, you should give X to Mary Jane and something else."

The Hon. Dr PETER PHELPS: But the solicitor has a duty of care to their client?

Ms SUTTON: Yes.

The Hon. Dr PETER PHELPS: If they can see that there is a clear dysfunction in the relationship within the potential people with power of attorney over that person, surely that would give pause to say, "What's going on here?"

Ms SUTTON: I think we go back to Ms Critchley saying they have a right to make a bad decision.

CHAIR: I invite Mr McCullagh and Ms Breusch to respond to Dr Phelps' question?

Mr McCULLAGH: On balance I do think the principal should be in control of who knows or does not know about the attorney. If disclosure is mandatory it may invite a family conflagration which you allude to that could happen down the track, I acknowledge that, but it may invite a family conflagration at a point where the elder just cannot do with it; they would find it worse to bring on the conflagration now than there possibly being one down the track. I would just add to the issue that if it is blatantly apparent that there is a dysfunction occurring, a solicitor in that position would probably allude to the possibility that there is an issue of capacity on the part of the principal that they are not capable at the moment of discerning and acting in the best interests and suggesting, if that is the case and there is dissension in the family about how to deal with this, the family should approach the Guardianship Division of NSW Civil and Administrative Tribunal [NCAT]; that is exactly their function where there is an issue of capacity.

CHAIR: Thank you. Ms Breusch?

Ms BREUSCH: I am also of the view that it would be unworkable. I work with a lot of clients from very low socio-economic backgrounds. The types of family dysfunction I see are usually the parent coming in—and I see that client on their own obviously without the person they are proposing to appoint as the attorney—and often they are picking the one child whom they see as being on the track, so to speak. So we might be ruling out this one because of a gambling problem and this one because of a drug problem. If we throw it out there to have to notify all those other kids who have all been written off by the principal themselves by what might be very reasonable assessments because obviously they know their family better than I do, I just think it would be opening a can of worms at a point where my gut feeling is my client's response would be, "I won't do this at all. It's actually too hard because I don't want to open this big bunfight that is going to result from me raising this."

The Hon. SHAYNE MALLARD: Yes, dysfunctional families.

Ms JAN BARHAM: I might have missed that because I was a bit confused about Dr Phelps was saying. Are you saying that the register is not made known to all parties?

Ms BREUSCH: I think one of the benefits of the register would be where someone comes into, say Westpac, and says, "Here is the power of attorney; I want to do this", their starting point could be: "Wow, is this a legitimate document?" At least they have somewhere to check that. They could try to contact the solicitor who signed off on it. That solicitor may no longer be practising, alive, contactable. At least with a central register it would be somewhere to start. The bank obviously should know where their customer is anyway but it at least begins a train of process. How much of the register would be public, I am not really determined on that.

Ms JAN BARHAM: Has anyone determined that and is that some of the reason why the Law Society is opposed to it? I am interested in hearing your experience because I am very interested in hearing your experience of working with the socio-disadvantaged?

Ms BREUSCH: I really have not thought about how public the register should be.

CHAIR: Perhaps you could take that on notice and think about it.

Mr McCULLAGH: I would just say on that point that currently, because you do have to register a power of attorney, if the attorney is to do any dealing with land, that is to say, a transfer, mortgage, lease, it is already there; it is already on the public record for that purpose. I am just suggesting that purpose be expanded to keep track of those grants.

Ms JAN BARHAM: Could you explain a little more about why the Law Society does not support a register?

Ms SUTTON: Again, the Law Society does not support this overregulation. Land dealings are a public document in any event and essentially a power of attorney is a commercial document. It enables the attorney to deal with the financial assets of the donor of the power. Therefore, it enables by registration, where it deals with land, a purchaser to be certain that the person signing off on the contract or the transfer, has a legal title. To go further is to breach privacy and a lot of people do not want the existence of a power of attorney. It adds to cost and expense because many of these documents are never acted on. They are sort of sitting in my strongroom, for instance, against a rainy day.

Ms JAN BARHAM: We have heard that revocations are not recorded. We have had examples where people have used powers of attorney that have been revoked but it is not known that they are. Are these matters that come up for you?

Ms SUTTON: Revocations can be registered.

Ms JAN BARHAM: But it is not mandatory.

Ms SUTTON: No, it is not mandatory.

Ms JAN BARHAM: Would a mandatory revocation register be of value?

Ms SUTTON: It could be.

The Hon. MATTHEW MASON-COX: I would like to hear your views on the issue of determining capacity. As a solicitor you have to make a judgement when somebody comes before you. It has been put to us that the guideline is that you must make a judgement about whether they have the mental capacity to give the power of attorney or enduring guardianship to someone. That could be a difficult judgment to make. We were given the example of somebody with dementia who might be having a good morning. You would not be able to judge how capable they were generally. It has been suggested that a medical opinion should also be presented when those important documents are on the table, ready for signing. That would allow the issue to be dealt with objectively. What do you think about that?

Ms SUTTON: Capacity is not a medical opinion. It is the opinion of the lawyer who is preparing the will and the power of attorney. The responsibility of the lawyer preparing the power of attorney has been dealt with in *Szozda v Szozda*. The onus is the same as for a will. One has to have that high level of capacity. Solicitors are used to dealing with clients. It is becoming harder. Some come into the office at 95. One has to form that opinion. One starts from the presumption that everyone has capacity. One recognises that capacity is limited. The capacity to buy a dozen oranges or to decide what to have for lunch is very different from the capacity to enter into legal transactions. If there is doubt then that is when one seeks a medical certificate or examination. It is not something that should be done every time.

The Hon. Dr PETER PHELPS: Would it not give lawyers a degree of surety that their own assessment is not required, that they have received the expert opinion of someone who is not directly part of the transaction that this person has the capacity to undertake the transaction?

Ms SUTTON: When one has seen as many one-liners from general practitioners as I have, one can be unconvinced. That one-liner certificate from the general practitioner is not necessarily a binding document. The lawyer must use their expertise to assess whether there is that capacity. Sometimes lack of capacity is flimsy. I ask you where you live, you tell me that you live in Dunedoo and the family tells me that that was 50 years ago. There is not a relationship to time and place. You might not need to go to a doctor before coming to the conclusion that that person lacks capacity. It is horses for courses.

The Hon. SHAYNE MALLARD: On a slightly different tack, I would like to take advantage of Mr McCullagh being here. You are an expert in retirement village law.

Mr McCULLAGH: Yes.

The Hon. SHAYNE MALLARD: The Government is doing a review at the moment of retirement village legislation, through NSW Fair Trading, in the context of the growing volume of retirement villages and investment in them. Are you aware of any institutional exploitation of aged people in the sector? I do not mean of individuals. I am talking about the companies running retirement villages. Is there an issue with administration fees, for example?

Mr McCULLAGH: No, not really. The current legislation allows operators some commercial freedom, such as what is the lump sum that will be paid for the unit and what sort of formula will be used for what they call a departure fee. That is very common in villages. Areas like ongoing costs, which are called recurrent charges, somewhat like strata levies, are very highly regulated. The law is that, should the operator incur a deficit, he cannot increase recurrent charges next year to make that up. He must find other funds. Conversely, if there is a surplus that has to be distributed to residents if they vote for that. It is very tightly regulated in an ongoing way. It was not well regulated 15 or 20 years ago, and that is why the legislation was introduced.

The Hon. SHAYNE MALLARD: Thank you for that. We might contact the department for the results of the review.

The Hon. Dr PETER PHELPS: No doubt you are aware of the Victorian model, with the independent authority to investigate complaints about guardianship. What would be your view if the Committee were to recommend a comparable model for New South Wales?

Ms SUTTON: The Law Society has not compared the models. The Law Society is content with the way that the guardianship tribunal operates.

The Hon. Dr PETER PHELPS: The guardianship tribunal would still operate via the New South Wales Civil and Administrative Tribunal [NCAT]. But, additionally, there would be a component to it that would allow for complaints to be made and for investigations to be undertaken by an executive agency rather than the material having to be prepared by the applicant to NCAT themselves. In other words, if you had concerns about the existing guardianship arrangements you could complain to this authority. It would then have full executive powers to investigate the matter, rather than relying upon an applicant.

Ms CRITCHLEY: Could I ask how those investigative powers would be used and to what extent? Take, for example, a neighbour or a sibling whose mother is living with their brother. They allege that mum is being exploited and/or she does not have capacity. What happens? Can they knock on the door and demand entry to talk to the older person?

The Hon. Dr PETER PHELPS: My understanding is that the Victorian system works in exactly that way. It has full subpoena powers, full discretion.

Ms CRITCHLEY: That is pretty strong. How do we distinguish adults from children in the powers that a government agency has to go in and intervene, to investigate the older person, on the say-so of a third party that may be making a mischievous complaint?

The Hon. Dr PETER PHELPS: The point that was made in the Victorian evidence was that the level of vexatious complaint was extremely low. A significant number of cases were legitimate complaints about who had been appointed as guardian.

CHAIR: Would anyone else like to comment on the point that Dr Phelps has made?

Ms BREUSCH: I think that could quite well address the gap between having concerns about what is happening and something being full blown enough to go to the tribunal. There is also the issue of someone being willing and able to take that to the tribunal. It could be worth considering, especially given that there is a model operating in Victoria.

Mr McCULLAGH: I would agree with that, in that the institution you are referring to could operate as a supplementary form of deterrent.

The Hon. MATTHEW MASON-COX: One suggestion is that it may well operate in conjunction with the elder abuse helpline, which has no advocacy or follow-up role, but as a referral role similar to the

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Public Advocate process in Victoria. That would mean we would end up with a first point of contact for many people, being the helpline, and then follow-up and an investigative role where red flags would go up appropriately with well-articulated protocols.

Ms CRITCHLEY: And with the power to remove the person from the premises or the perpetrator from the premises?

The Hon. Dr PETER PHELPS: They would essentially help prepare the argument for guardianship and then NCAT would re-evaluate the situation.

Ms CRITCHLEY: But that does not deal necessarily with the person's current situation in terms of the fact that they are living with that.

The Hon. Dr PETER PHELPS: But the current situation does not help in that regard either.

Ms CRITCHLEY: There could be retribution if there is a situation where there is investigation but the older person is not removed from being with that person and they would be very fearful of what might happen to them.

The Hon. Dr PETER PHELPS: Presumably advice would be given to them in relation to DVO applications and things like that.

The Hon. MATTHEW MASON-COX: In an emergency situation obviously the normal protocols would apply, so it is addressing the current gap identified by Ms Breusch in the difficulty of bringing some of these situations for resolution to somewhere like NCAT. They simply drift into the never-never.

Ms CRITCHLEY: I agree that that is a problem. It can be particularly difficult for solicitors because you do not really want to be the one to make the application to the guardianship tribunal about your own client but nobody else is prepared to do it. I had a case where I could not continue to represent the older person because he lacked capacity but no-one was prepared to step in and make the application or there was nobody appropriate to do it.

The Hon. MATTHEW MASON-COX: But every fibre of your body may be screaming that something has to be done.

Ms CRITCHLEY: It was very difficult, yes.

The Hon. MATTHEW MASON-COX: If you had somebody who could take that opportunity—

The Hon. Dr PETER PHELPS: And who specialised in that area.

Ms CRITCHLEY: I agree it would fill that gap. I suppose I am being a little cautious in relation to powers of an agency to interfere in people's lives. There may be a situation where there is no abuse and it is quite traumatising for everyone.

The Hon. Dr PETER PHELPS: That is why I specifically asked the Victorians about the rate of vexatious complaints.

Ms MUSGRAVE: Can I add two things—the big area for examination is the extent of powers. It is one thing to request to produce documents, particularly in a financial context, but it is another to allow entry to someone's house. The other side of that is the concern that you may be dissuading people from taking on the responsibility of being an attorney if those powers are excessive and they feel they may interfere with the way they run their lives. It is a consideration.

The Hon. Dr PETER PHELPS: It is a consideration, yes.

Ms JAN BARHAM: Do you have an awareness of abuse of people by way of physical or chemical restraint in the home or in facilities? Does that come up often?

Ms CRITCHLEY: I think that is more in the realm of care providers rather than solicitors.

Ms JAN BARHAM: I wondered if anyone had heard of it. I am interested in what is arising in terms of abuse in granny flats, as we see them as an important form of affordable housing. Do you support the role of Seniors Rights Victoria—I do not have a copy of the role here?

Ms BREUSCH: Yes, of NCAT getting some jurisdiction to allow those issues to be resolved at that level.

Ms CRITCHLEY: Yes, I have read the Seniors Rights submissions and in our submission we say that currently the only remedy is in equity in the Supreme Court. Legal Aid can provide grants of aid for these sorts of matters in fairly narrow circumstances, pretty much only where it comes within our guidelines in relation to loss of dwelling. But other circumstances where there are disputes about finances and things like that would not come within the circumstances.

Ms JAN BARHAM: But for loss of dwelling you can assist?

Ms CRITCHLEY: Yes, but we also have to apply a merit test. In almost all the circumstances there is no written agreement, it is done on trust, and because the property is not in the older person's name, you have to invoke equitable principles to assert some right that the older person has in relation to the property. A lot of the law we use to apply to these cases is not strictly on point because it is often law pre the de facto Property (Relationships) Act, *Baumgartner v Baumgartner* and various other cases. We are really dealing with de facto cases. Basically the agreement is, "I give you the property or I give you money and you care for me for life". Judges have difficulty with that because they can take a narrow interest and say, "All you had was a life interest" and value the life interest as nothing more than what was put in 10 or 20 years ago, without capital gains. They are then in a position where they may get their money back, but it is not sufficient to buy another property.

Ms JAN BARHAM: What would be your recommendation for remedying the situation? I am concerned that intervention does not happen early enough. Granny flats or secondary dwellings are allowed under planning rules, but I have seen situations where people's children make them do what they do not want to do, and that is the point when people should know their rights and the way to avoid future abuse. Should legal centres or another body make that information readily available and try to align services? Should local government be involved in informing people of their rights?

Ms CRITCHLEY: Can I say something about local government—a granny flat arrangement does not necessarily involve building a granny flat. It can involve the older person transferring their property and their adult children moving in. Most of the cases I have dealt with do not involve physically building a granny flat.

Ms JAN BARHAM: My point is that there is now quite an extensive move towards the physical building of structures or modification to allow secondary dwellings. You do not have to be a legal practitioner or academic to recognise that this could create an opportunity to take advantage of an older person, so why not educate people about how to avoid a problem?

Ms CRITCHLEY: Back in 2008, when we started the Older Persons' Legal and Education Unit we produced some brochures that particularly deal with moving in with the family, as one example. The brochure gives the situation and says people need to get independent advice and think about the consequences. The difficulty is getting to older people when they have capacity because it is not something they necessarily want to think about. They particularly do not want to think that they may not be able to trust their own children. There may be psychological blinkers on it.

Ms JAN BARHAM: Yes, I get that. But is it possible for us to do more and how broadly could this advice be made available? My next point is about whether legal services are available in the community to assist people if they want to go down that path—and I am talking about community legal centres and legal aid—in the form of education and support work to avoid crisis. I like avoiding crisis, and I think there is not enough done in terms of early intervention models to avoid things, because you can see that there is a train wreck coming so why not try to avoid it.

The Hon. Dr PETER PHELPS: Why would you burden legal centres when a person who owns their own home would clearly have the capacity to be able to go and see a private solicitor?

Ms JAN BARHAM: Because not all homeowners are rich, and I think we are talking about trying to avoid a problem that happens for the whole of society when there is abuse. There are ways to very effectively educate and support people. I spent 13 years in local government living in area that was once a low socio-economic area. Now some of those properties are worth millions of dollars because they are coastal. I have seen unfortunate situations where people are being abused, because we live in a changing world.

Mr McCULLAGH: One of the great difficulties with granny flats is that, like the de facto cases that Ms Lee Critchley referred to, they originate with the greatest of good intentions, and they often start out wonderfully, but, like family relationships, they can break down. Typically from a lot of the reported cases, it is usually either a parent or child de-partnering or re-partnering that tears the whole thing asunder. That is when it is discovered that in fact a mixture of equity or money and land occurred, and that is what the courts try to separate out when it breaks down.

Ms JAN BARHAM: I also think what is happening more and more, and I think we can all feel proud to say that this inquiry has played a part here, is that there is a discussion going on. People are now saying, "Gee, I wish I had known. Is there information available?" The awareness factor is growing. People are now saying, "Maybe I should be better prepared. Where do I go?" That is all I am putting forward—that I think there are opportunities to try to avoid some of these problems.

Ms CRITCHLEY: It is not within the scope of legal aid to be providing a legal service where we are drafting family arrangements; that is for the private sector to do.

Ms JAN BARHAM: I was referring more to community legal centres and the like that could perhaps do some education work or provide some information to people.

Ms SUTTON: I think it is very much an education process, but it is not necessarily a financial arrangement with granny flats. The eldest son and his tribe of four kids might move in. He says, "Mum, we're going to help you". Mum eventually ends up living in the garage. It can become very upstairs downstairs. You can get an abusive situation or bullying like that without money changing hands.

The Hon. Dr PETER PHELPS: I would like to pursue this a little further, and the idea of pursuing a de facto equitable relief through the extension of the powers of the NSW Civil and Administrative Tribunal [NCAT]. How much extra work would that entail? We cannot actually work it out because there is not exactly a herd of people thundering towards the expense and time of the Supreme Court to seek it out. I suppose I am going to have to rely on the practitioners and their anecdotal evidence. What sort of additional workload would those sorts of cases create for NCAT?

Mr McCULLAGH: First of all, the tribunal is not a fully legal tribunal. The three member guardianship tribunal is probably the appropriate path to deal with it. Secondly, there is the restriction on legal representation. Thirdly, there is the problem of cost. So often it may be that the Supreme Court is the best and cheapest in the long run one, because there is the probability of all of the proper principles being brought to bear.

Ms CRITCHLEY: It is really difficult. I do not think you can expect the tribunal to be applying case law and equitable principles. It is quite complex. It is whether you put in some legislation some basic principles to deal with these common sort of situations—whether it is in the Property (Relationships) Act or whatever it is that simplifies it. I do not know whether, by simplifying it, it is going to mean that there is not going to be a just or less just outcome. It is just a difficult area. I just think that having equity as the only remedy for these situations makes it very unworkable for a lot of older people because of the cost and indeed the formality of the proceedings—the fact that you have to put on affidavit evidence in a particular form. Taking affidavit evidence from older people, when you are going back 10 years or so in relation to family relations, is very labour intensive and it is quite stressful for the older people as well.

Ms SUTTON: But you do have the benefit of a structured mediation process.

Mr McCULLAGH: I just endorse what Ms Critchley was saying. She referred to the Property (Relationships) Act. That in fact does have something of a statutory codification of these complex equitable principles we are talking about—that is to say, if there is a falling out then they basically look at to what extent the two people brought assets to the relationship, how they increased in value over time and what should be done now that the relationship is finished. Unlike succession law or family law, it does not look to the future

needs of the people; it just says, "Well, they brought these assets and now they have separated". So if there was some facility for that Act to come within the tribunal's jurisdiction then that is a possibility, but it is complex.

Ms CRITCHLEY: Also I think in that Act, and I am not completely up-to-date, the definition of domestic relationship, which would cover the adult child and parent relationships, is circumscribed by the fact that there has to be some dependence—a relationship of dependence. In some of these cases that is not necessarily the case. They do not need care; they are just living in the same place. I have looked at matters and said, "Can we get them within this definition?" Very often we cannot because there is not that relationship.

The Hon. Dr PETER PHELPS: When you stretch dependence to mean anything, because that is the only way it reaches, then it has its own problems at that point.

Ms CRITCHLEY: Yes.

The Hon. PAUL GREEN: Given the fact that we do not work in this area of law in terms of dealing with estates and property can anyone enlighten us as to the processes available to a solicitor or the law fraternity in terms of how they charge? What are the options and how do they charge for such services? For instance, are there set fees? Are they getting a percentage of the estate? Where does that cross over? I want to get an insight into how the pecuniary interests in these matters evolve.

Ms CRITCHLEY: In relation to dealing with granny flat disputes?

The Hon. PAUL GREEN: I am just talking generally about estates and power of attorney handovers. We heard some evidence earlier about conflicts of interest where the person representing the estate did not tell anyone that they were doing that. They also had power of attorney. When they dealt with the power of attorney and they were found out they obviously dropped the estate issue. Then once the person died they picked up the estate again. So I am just trying to get an understanding of how people on the legal side of things are recompensed financially for their services and what options are available to them. Do they get a percentage of the estate as trustees or executors? How does it work? I am looking for a bit of a breakdown of how it all works.

Ms BREUSCH: I am from a non-charging background. Community legal services do not charge. But I suppose what we need to fundamentally separate out here is that if someone is acting for an estate as an executor then the person has died. So you cannot have someone acting with power of attorney and being an executor of an estate concurrently because death is the fundamental difference. Charging for estate work would be done by cost-agreement situations.

The Hon. PAUL GREEN: So could you elaborate on that for us?

Ms SUTTON: Charging for estates to get up to the stage of a grant of probate is still a prescribed scale which does depend on the value of the estate. In my practice, however, where the principal asset is a home which is quite valuable in the Sydney market I always charge less than the scale that is available to me. Essentially though what solicitors have to sell is the time taken in a matter multiplied by their experience and knowledge. It is that sort of magic that might get some people to charge small hourly rates and it might get other people to charge large hourly rates. But that is the basic equation.

The Hon. PAUL GREEN: You spoke about rogue operators earlier?

Ms SUTTON: We will not talk about them.

The Hon. PAUL GREEN: We want to speak about them, that is why this inquiry is here.

Ms CRITCHLEY: I think she was talking about rogue people that would defraud older people, not rogue solicitors.

CHAIR: Rogue behaviour?

Ms CRITCHLEY: Yes.

The Hon. Dr PETER PHELPS: Cads?

Ms CRITCHLEY: And bounders.

Ms JAN BARHAM: Unfortunately we have had some people write to us and indicate that there may in some circumstances be collusion between a legal representative and a family member or someone else.

The Hon. PAUL GREEN: There are no rogue solicitors apparently?

Ms MUSGRAVE: It is really a question of misconduct, over charging conflicts, those types of things, which is regulated. There is a uniform Legal Profession Act and the Office of the Legal Services Commission is probably the person best placed to talk you through that overarching framework and how it is audited and what the responses are to misconduct, what the training is for certain things. There is a whole framework around it.

The Hon. PAUL GREEN: I guess my point is, I am far less educated in this, but I always hear anecdotal evidence where someone has been ripped off, the estate has been ripped off and the solicitor has got a large chunk of that by their services. Is that substantial? Is that a fair comment? Are they able to charge whatever they want? Are they able to put a percentage on that estate of whatever they want? Are there guidelines? Is there law?

Ms SUTTON: Not related to percentages. The only one that is related to the value of the estate is the charge up to the grant of probate.

The Hon. PAUL GREEN: Can you speak English for me? What was that, a grant?

Ms SUTTON: Ascertaining the assets, verifying.

The Hon. PAUL GREEN: Can you put it in a word picture for me? If I got \$20 for this it means this.

Ms CRITCHLEY: What it means is if you die you have a will and you appoint an executor, then the executor is the one responsible for administering the estate according to your wishes in the will. In the legal process the first step that they must take is to apply to the Supreme Court Probate Division for what is called a grant of probate, which is the court saying, yes, the will is valid. You have to advertise so anybody who objects can come in and object and then once you have that grants of probate—it is done on the papers, it is not somewhere where you have to front up and have a hearing with a judge—the executor has the legal authority. They become the owner of the estate and then they have the legal authority to administer the estate according to the will. If there is a house they are registered on the title via transmission application. They then have the authority to sell the property and divide the proceeds. The grant of probate is the first step that the executor has to take.

The Hon. PAUL GREEN: What sort of percentage would the legal profession endorse as the executor?

Ms CRITCHLEY: As Ms Suttor is saying, the costs of getting the grant of probate are regulated and the scale costs are based on the value of the assets.

The Hon. PAUL GREEN: I understand that but that was not my question.

Ms CRITCHLEY: I am not sure I understand what your question is.

The Hon. PAUL GREEN: I am trying to work out how likely it is that someone who employed a solicitor as their executor rather than a relative, for instance, I am trying to get the percentage.

Ms CRITCHLEY: I would say mostly it is relatives, it is not solicitors.

The Hon. PAUL GREEN: Yes.

Ms CRITCHLEY: Would you agree Ms Suttor?

Ms SUTTON: Yes.

Ms CRITCHLEY: Mostly it is not solicitors that act as executors of people's estates.

Ms SUTTON: No. If you are the executor it is because, (a) there is no-one, or (b) there is sure to be a fight.

The Hon. Dr PETER PHELPS: In relation to where there has been demonstrable misuse of POA for financial gain by that person, in your experience what has been the reaction of the police, the willingness of the police to treat this as a criminal matter as opposed to a civil matter?

Ms SUTTON: You heard me when my lady lost her block of flats?

Ms CRITCHLEY: The police did not get involved. They regard it as a civil matter because there is a power of attorney, so it is not fraud.

Ms SUTTON: There was not a power of attorney.

Ms CRITCHLEY: There was not a power of attorney. If there is a power of attorney and they exercise the power of attorney, currently there are no criminal sanctions if someone has abused the power of attorney[POA]. Someone could apply to the garnishee tribunal to get it reviewed and that person replaced.

The Hon. Dr PETER PHELPS: It is not even implicitly fraudulent behaviour if the action is so demonstrably outside the reasonable use of a POA?

Ms CRITCHLEY: It is not criminal. There have been suggestions in some submissions that there should be a criminal provision for abuse of power of attorney.

The Hon. Dr PETER PHELPS: Your views on that?

Ms CRITCHLEY: I think that would be something that would be useful and could act as a deterrent but it also may put some people off, but maybe they are the ones that should be put off. Otherwise, for abuse of power of attorney, correct me if I am wrong anyone, it is a breach of fiduciary duty and you go to the Equity Division of the Supreme Court to try and claw back whatever assets the attorney has taken, which may have been dissipated.

Ms MUSGRAVE: The question really is what is the criminality? If dishonesty is involved the fraud provisions are available and it is worth noting that the fraud provisions have been modernised and there has been a slight increase of police use of them, though whether they are necessarily in this area I do not know. When you are talking about abuse of a power of attorney it is crystallising the nature of the abuse in order to determine whether or not it is appropriate to ascribe that as criminal behaviour or whether the civil response is still the appropriate response. The difficulty of course with any criminal action is that you have a higher standard of proof and you do not necessarily get any recompense.

The Hon. Dr PETER PHELPS: Surely there are situations where you can invoke Wednesbury principles where the behaviour is so unreasonable. If you take \$200,000 out of mum's account to go to Randwick and gamble it on the races that is so manifestly unreasonable that surely—I am arguing for a civil action, am I not?

Ms CRITCHLEY: Currently it is a civil action.

The Hon. Dr PETER PHELPS: If you took it from her house, if it was physically under her bed and you took it and you went down there?

Ms CRITCHLEY: That would be different because you would not be using your power of attorney you would just be stealing. It is not abuse of power of attorney because you did not need the power of attorney to steal the money.

Ms MUSGRAVE: There are a couple of factors.

The Hon. Dr PETER PHELPS: You take it from her account without her having conscious knowledge of it?

CORRECTED

Ms CRITCHLEY: And you have power of attorney.

The Hon. Dr PETER PHELPS: If you took it without her conscious knowledge, it seems to me it is the same sort of problems.

Ms JAN BARHAM: A dual signatures situation?

Ms MUSGRAVE: What you are searching for is a means of responding to the behaviour.

The Hon. Dr PETER PHELPS: A deterrent so if you are going to do something dodgy with your POA it will not simply be three years of civil action in the Supreme Court it will Constable Bloggs knocking on your door saying, please accompany me down the station we would like you to help us with our inquiries.

CHAIR: Would Mr McCullagh and Ms Breusch like to comment on this issue of the sanctions and whether or not there is a need to look at that?

Mr McCULLAGH: With the criminal sanctions I would agree with what has been said by other contributors and because of the standard of proof and criminality quite often the parents do not want to go there. They do not want to be seen to have their children convicted in that way. They would like their money back. They know what they have done is wrong but I think criminality is a supplementary deterrent. A lot of families don't want to go there. I am submitting that an easier route to compensation where an attorney has been clearly delinquent, if not intentional, in using the money in a way they should never have done so, it would be simpler and cheaper for every one if the NSW Civil and Administrative Tribunal [NCAT] could address that rather than the supreme court. Notwithstanding the complexity.

Ms BREUSCH: I agree with Mr McCullagh's comments on that.

The Hon. MATTHEW MASON-COX: Does the Law Society agree with that as well?

Ms SUTTON: I do not think the Law Society agrees with the expansion of powers needed for NCAT.

CHAIR: We have gone over time but it has been valuable to have you before us this morning to provide us with an opportunity to ask questions off the back of your valuable submissions. Just a couple of matters before I wind up. The transcript for today's proceeding will not be available until after Easter and that is due to extraordinary demands on Hansard staff at the moment. Usually it is up a lot quicker than that but there will be a delay in the uploading of the Hansard for today's hearing. The Committee has resolved prior to you coming that we would provide 21 days return to questions on notice. There are some questions on notice that have arisen from the questioning of you today but also the Committee themselves, after looking at Hansard, might have additional questions. They will be provided to you and the secretariat will liaise with you over the matter of the questions on notice. If after leaving today there are some additional points you would like to reiterate, highlight or an additional matter that should be drawn to our attention we invite you to forward those and they will be gratefully received. On behalf of the Committee thank you very much for coming along, it has been a valuable panel. Thank you for the great work you do and the advocacy and representation of seniors and elderly in the State in your different roles.

(The witnesses withdrew)

(Luncheon adjournment)

CORRECTED

LISE BARRY, Senior Lecturer at Macquarie University, sworn and examined:

WENDY LACEY, Dean of Law at the University of South Australia, and

CARMELLE PEISAH, Conjoint Professor, University of New South Wales, and medical practitioner, and

NICK O'NEILL, Professorial Visiting Fellow at the University of New South Wales, Faculty of Law, affirmed and examined:

CHAIR: As you are aware you have been invited along today to give evidence as part of a panel of legal experts. The purpose of this panel discussion is to identify areas of agreement that might inform the Committee and that we should reflect on in our deliberations about what recommendations we produce. I have been thinking about that. It may also help the Committee to identify areas of disagreement. While members of the Committee will be asking questions throughout the discussion, we hope you have come prepared to discuss the topics together and to propose and debate potential recommendations for policy and legislation.

The Committee has received your submissions. I commence by thanking you for the detailed work that has gone into preparing those submissions for the Committee. We are grateful for them, the Committee has incorporated them and you can take them as read. Although this Committee is waiting for a couple of members to arrive, it comprises representatives from the Government, the Opposition, The Greens and the Christian Democratic Party. Earlier the Committee decided to share the questioning in a fluid way so the questions will come through me in an orderly fashion. Please respond to the questions but feel free to add particular points as we go along as we would like to make the discussion as free flowing as possible. The Committee would appreciate it if you elucidate any points you think need to be drawn to its attention. Do you want to make a short opening statement?

Ms BARRY: My submission relates to research that I am undertaking as part of my PhD, so I should emphasise that it is not finished yet; it is still a work in progress. It might also be worth mentioning that I have experience as a guardian ad litem, sometimes as a representative for older people in various courts and tribunals in New South Wales, and also as a mediator with the Community Justice Centre. I think that comes out a little in some of the recommendations in my submission. My research, as you know, has looked at capacity complaint about lawyers to the Office of Legal Services Commissioner. I guess I would like to emphasise that the kinds of complaints that are made about lawyers we might also have the same behaviour for other witnesses, for instance, of enduring powers of attorney. But we do not know, perhaps, what practice they undertake or if they are registrars, licensed conveyancers operating as witnesses for enduring powers of attorney.

It might be that what I found in relation to solicitors also applies to other witnesses but I do not know that. A few themes have come out of my research. Firstly, witnesses to enduring powers of attorney in particular are not always well trained for the task. Their client interview techniques could be improved upon and, in particular, their questioning of older people to really understand how the older person comes to be before them wanting an enduring power of attorney or wanting to make changes to a will. Often those two things go hand in hand. The bulk of the complaints about lawyers relate to enduring powers of attorney and changes to a will, again often hand in hand.

The other aspect is that although there were 35 complaints in the period of two years that I have examined, a complaint requires somebody interested enough to make that complaint and with enough time on their hands to make that sort of complaint. Some of them run to hundreds and hundreds of pages. It is a very time-consuming process. Quite a lot of them also involved Guardianship Tribunal hearings, so complainants have to be very invested to make a complaint about a lawyer in these circumstances. I am just speculating, but I am speculating that there are plenty of other examples that could be brought to the attention of the Office of the Legal Services Commissioner but which are not because the complaints process itself is very burdensome and time consuming.

There is the lack of skills, but the other key aspect underlying nearly all of them is that the levels of family conflict are intense and they are not well addressed at any stage of the process. Because I had access through my research to quite a lot of Guardianship Tribunal transcripts as well, I was able to read through those. Granted, I do not know what has gone on over the phone, for instance, between staff of the Guardianship Tribunal and people bringing a complaint or applying for a change in attorney, but it does seem that more could be done in addressing family conflict. Also more could be done in training witnesses to ensuring powers of

attorney—as I say in my submission—about the impact of family conflict and being alert to that. I would recommend that witnesses to enduring powers of attorney are trained to identify elder abuse in all its different manifestations and that their questioning should be designed to screen for that as well so that they can at the very least provide information to the older person about the steps that they can take to address that abuse.

I would recommend better training for witnesses. I would also recommend that lawyers must keep documentation, a file note, of the questions that they ask. There is no absolute requirement in New South Wales along those lines at the moment. They could use the opportunity to screen for abuse. A slightly tangential recommendation is that similar offences to those found in part 9 of the Powers of Attorney Act in Victoria be adopted in New South Wales

CHAIR: Thank you very much.

Professor LACEY: Thank you for the opportunity to give evidence today. By way of background, my experience and expertise in elder abuse really stems from my involvement in South Australia with the safeguarding strategy. I was heavily involved with the Public Advocate's office in South Australia in drafting the Closing the Gaps report and have been on various steering committees of the Minister for Ageing since that time. I have been heavily involved in looking at those issues. I do not purport to be an expert in New South Wales law, whether that be guardianship or powers of attorney. My background is really in public law and human rights and so that is where I will speak to today.

Some of the key points in my submission that I would like to highlight for the Committee are the importance of adopting a rights-based approach to the area of elder abuse. It is all too easy to fall into an ageist approach when dealing with older persons and to just see that age alone means that people are automatically vulnerable. In any framework that is adopted for addressing elder abuse it is essential that we put the rights of the older person at the heart of whatever strategy is adopted. That includes respect for dignity, autonomy and the self-determination of the older person and empowering older people to exercise their rights as fully as possible for as long as possible. I come very much at this issue from that perspective.

From my point of view as a public lawyer and a human rights lawyer, the biggest gaps that are currently present in the protective frameworks in Australia are the fact that they are based in various weak policy instruments. Those instruments are largely based on referral arrangements between key agencies and also with the use frequently of a hotline or a phone line for calls for elder abuse. But in no State or Territory in Australia is there an agency with the power to investigate of their own motion a complaint or a suspected case of elder abuse, nor the power to compel other agencies and providers to actually participate with that investigation and to provide information. Those gaps mean that basically you have a situation where early intervention cannot take place because privacy laws basically require legislation to actually get around it—unless there is an area where there is a pressing urgency or a situation of medical emergency.

The issues that we faced in South Australia in dealing with the key stakeholders is that too many people are falling through the gaps either because the Mental Health Act, guardianship law or the powers of the Public Advocate do not extend to them because they still have capacity or partial capacity, or it is a situation where elder abuse does not amount to a crime. In those situations we were seeing agencies push the boundaries of their statutory mandate to try to provide solutions for individuals. That puts the government at risk and departments at risk. The consensus with the key agencies in South Australia was to push for comprehensive adult protection legislation, similar but slightly different to the Scottish adult protection Act. But that is not the only mechanism that any State could adopt.

Alternatives could be through piecemeal legislative change to things like the Powers of Attorney Act, guardianship laws and public advocates or public guardians—however you wish to describe them. We could look at our criminal laws, for example, our Corrective Services Act and even our coronial inquests legislations. Many cases of suspected elder abuse are actually going through without the question even being asked, "Could this possibly have been a case of elder abuse that led to the death of this older person?" Because of a lack of education and awareness we are not even asking those questions. From my perspective we need to look comprehensively at all relevant pieces of legislation.

Probably the easiest way of dealing with elder abuse from a legislative perspective—if you wanted to go down that path—would be either to adopt something comprehensive like Scotland or to go down the path of British Columbia, which is what John Chesterman recommended in his report. That was to modify and amend the guardianship and administration legislation, which could then empower the Public Guardian or Public

Advocate to exercise those powers of investigation and coordinate an interagency and multidisciplinary response across government and with key providers that would enable both early intervention and, hopefully, a practical solution for the victim of elder abuse.

I do not have a personal preference either way. I think that the States and Territories have within their power the capacity to adopt different models and to test those models. One of the good things about being in a Federation is that we can learn from the experiences of other jurisdictions. However, what we need is at least one agency—whether it is a Public Advocate or a new unit within Family and Community Services or something like that—with the power to control an investigation and to compel other agencies to share information at an early point in time so that early intervention is promoted.

Education and awareness is critical to promoting understanding about this, but it needs to be backed by an effective legal and policy framework. I would recommend that this Committee consider adopting something a bit more than the interagency protocol which is currently in place for New South Wales. As good as those documents are, they still do not empower agencies to take control of an investigation and to intervene in a timely and early manner.

CHAIR: Thank you.

Professor PEISAH: I am Professor Carmelle Peisah. I am a Conjoint Professor Clinical Associate of the University of New South Wales and Clinical Associate Professor of the University of Sydney. I am president of Capacity Australia, a medical practitioner and an old-age psychiatrist with a role as the clinical director of an older persons mental health service for one of our local health districts, so I bring expertise as an academic, a clinician and a manager of frontline health professional staff. Firstly I want to thank the Committee for inviting me to participate in this panel. I am deeply honoured to have been given this opportunity particularly because the remit of the Committee targets the very issues that prompted us—including Mr O'Neill and Jenna McNab—to establish Capacity Australia in the first place in 2011.

In fact, our registered charity name is ACCEPD—the Australian Centre for Capacity, Ethics and the prevention of Exploitation of People with Disabilities. It is just that it was a bit of handful. Nobody knows what ACCEPD means but people know Capacity Australia. But it goes to the heart of why we set it up in the first place. We had a particular focus on older people with disabilities, particularly coming from our areas of expertise, particularly those with dementia and with a particular focus on financial abuse.

With the Committee's permission I would like to speak to the aspects of our submission and of the discussion topics allocated to the panel today that address other recommendations beyond legislation—I am not a lawyer; I am a doctor—and that fall within my areas of expertise. I understand that the Committee is specifically seeking a focus on recommendations. I would like to see a more rigorous pursuit of engagement in this issue of all three professional sectors that interface with older people—namely finance, health and legal sectors.

This builds on the discussion that occurred between Kerry Marshall from the elder abuse hotline and Ms Bronnie Taylor during the hearing held in November 2015. Ms Marshall suggested there needed to be an "eyes wide open" approach, if you recall that phrase. I think that is a particularly useful phrase. I can give evidence to the Committee that out there across health, finance—including the banking industry—and law, as Ms Barry will testify, unfortunately not only are there no eyes wide open but in some cases eyes are shut tight. So how do we open eyes? We do so firstly by strongly encouraging government, private, community and professional organisations in health, in banking, in finance and in law to take the issue seriously—that this issue is important and part of their mandate. And then we provide education. Certainly Capacity Australia finds resistance—we set up and run or develop educate programs but nobody is interested. Nobody feels it is their mandate. We cannot succeed with education without the strong mandate first.

I noted that one of the matters the Committee is inquiring into was identifying strength based initiatives which empower older persons to protect themselves, which Professor Lacey referred to. This is dear to my heart both as an academic interested in healthy ageing but also part of the dual remit at Capacity Australia to ensure people with disability are encouraged and supported to make the decisions they are capable of making. I know that the Elder Abuse Helpline and Resource Unit have got it right with regards to these strength based initiatives. Their anti-ageism approach and campaign is key and should be supported and strengthened.

I think the community needs to know that elder abuse although certainly common is not normal and it is not to be expected. Nor should older people be ashamed of being victims of elder abuse or feel that it is a sign that they have failed as a parent by opening up and admitting it. We know from the scientific literature that older people who have been abused by their family members—and we all know that this is the most common scenario—often do not even see it as abuse. They feel deeply ashamed and they will not report it. So this is the issue: We are seeing the pointy end, the terrible end of the cases. It is particularly so for our older Australians from culturally and linguistically diverse backgrounds. I understand that Ms Cotsis addressed this in the November hearing as well. We need more promotion and public awareness campaigns to push less ageism—which Professor Lacey brought up in the first place—certainly less shame and more of this message that it is not on to abuse older people. Some of the elder abuse hotline campaigns are targeting that message. Thank you.

CHAIR: Thank you very much, Professor. Mr O'Neill, would you like to make an opening statement?

Mr O'NEILL: Thank you. I am very keen to talk about the matters that you have put on the agenda today but I am just going to open briefly with a point that has already been made to you this morning and probably often enough at other times. Not everything is elder abuse, even though some things look very much like it in the eyes of other people. I will just cite one recent example of this which is found in a Queensland civil and administrative tribunal case by the name of DBU [2015] QCAT 495 in which a man became the enduring attorney of his long-term partner and they continued to live a lifestyle that they had always lived but there were in that what the Queenslanders call conflict transactions. But when the tribunal looked at it they could see that this was a continuation of a lifestyle that existed. Whilst technically elements of it involved conflict transactions they did not see the need to remove the power of attorney from the man involved.

That contrasts rather markedly with the very clearest of cases. One I remember from my early days in the Guardianship Tribunal where a son became his father's attorney. He then immediately put his father in a very lousy nursing home and transferred all his father's resources to him. When his sister brought this to attention—and of course she realised that she was going to lose out on her inheritance and that is a genuine and appropriate concern—his explanation to the tribunal was that his father did not want to have any tax problems and therefore he succeeded in achieving that for his father by taking all his father's money. That was sorted out of course by the tribunal and the Supreme Court very appropriately.

One of the key things that you raise today is the issue of uniform legislation or mutual recognition. The second story I want to tell you is that in the early 1990s the then Public Guardian of Western Australia, Imelda Dodds, who is now in New South Wales as the public trustee and guardian, Ron Cahill, who was the chief magistrate of the Australian Capital Territory, and I set up what was called the Interjurisdictional Committee and is now the Australian Guardianship and Administration Council, which covers all the guardianship, public trustees, public guardian and public advocate people. One of the things that we tried to achieve during that time with limited success—but it is still worth trying—is the mutual recognition concept. In fact most guardianship orders and financial management orders—they are called administration orders—elsewhere are recognised within the system. So are enduring empowers of attorney although there has been a hiccup in New South Wales due to a black letter law rather than a purpose consideration of the matter, but that can be fixed. The other areas are covered as well.

There has been a step forward regarding uniform legislation. The Health Practitioner Regulation National Law is an example of an achievement of that. It may now be more possible to achieve a uniform set of legislation throughout the Commonwealth but not involving the Commonwealth itself. Professor Lacey has pointed out in her article what can be done but also some of the limitations that are involved. It would also be possible for the States under section 51 to refer their powers to the Commonwealth and under section 31 placit and 37 they would be able then to legislate in this area. But I think that is politically unlikely so I would not be pressing it. But the experience of the States and Territories in the health area, whilst there are hiccups and differences and problems, is that it is really maturing and it could be worth considering.

As to some of the matters already raised, I agree with Professor Lacey about the need for the review of criminal provisions. In her article she refers to a particular case from Queensland. Perhaps that case highlights one of the problems where criminal activities have occurred that are not pursued. That is in relation to the provision of necessities to people. There is no follow-up in relation to the investigation and the follow-through that really the police forces and the prosecutorial authorities in the States have to be encouraged and, if you consider it appropriate, maybe in your report you might talk about that sort of issue. We from Capacity Australia strongly recommend the adoption of the powers of attorney legislation from Victoria, which is also based on Queensland. If that were done, you would have great similarity down the east coast and it would probably be the

case that the Australian Capital Territory and Tasmania would then join in on this. I can tell you that one of the things I did as president of the Guardianship Tribunal was to seek to get the current recent changes into the powers of attorney legislation, but they were related much more to the tribunal having power to deal with the problems arising with enduring powers of attorney. It is an appropriate time now to move forward in the ways suggested and provided for in the Victorian and New South Wales legislation.

I know that the NSW Law Reform Commission is looking at this matter but encouragement from this Committee for them to get on with that task I am sure would be well worthwhile. I am happy to discuss the reasons for the detail of that and why it is a good idea. I note that you have heard from John Chesterman from Victoria about this matter. A final matter as way of introduction I want to raise is that this morning there was a question raised in relation to banks and financial institutions being tardy about doing things in relation to protection of people from financial abuse. Capacity Australia, as you will see in our submission, has developed a program to deal with this issue and my colleague, Professor Peisah, will be able to talk further on that should you wish to ask us more about that issue, which we would highly welcome. Thank you.

Ms JAN BARHAM: I am interested to hear more about what I always call early intervention and crisis avoidance. We are talking a lot about what to do once problems happen. In fact, the discussion about elder abuse is getting exposure and people are talking about it. Is now the right time to do a lot more to raise that conversation, expand it and, hopefully, avoid some of these problems? I am very much interested in support, education and those sorts of things that can be done.

Professor PEISAH: It is certainly something that we are trying to encourage in Health and it goes again to this issue of eyes wide open and eyes wide shut. On a daily basis I am trying to encourage staff across our district and generally, when we deal from a state level, to look out for it, to see it. It is part of your job. Your job is not just taking blood pressure and making sure people find the right nursing home; it is more: Is it happening? What does it look like? We do have a responsibility to do that. Professor Lacey mentioned the interagency protocol, it is an extremely—she used the word in her report—"weak" framework. I can tell you, in Health no-one has ever heard of the interagency protocol, and I can give evidence to that. That is a real shame. It cannot just be me saying, "Have you heard of the interagency protocol? Do you know your responsibilities?" I totally agree, but I think we have got to find it first. We have got to see it. And older people have to be not ashamed to put their hand up and admit that it is happening in their family.

Ms JAN BARHAM: I am hoping that this inquiry will also support perpetrators. We need to provide them with the wraparound services they need. Some of the members of this Committee were involved in the registered nurses inquiry last year. We need to make sure that professional people are in place to recognise and offer the support that people might need before they find themselves in the situation of being a perpetrator. I have said those things because I want to raise something that no-one is really referring to—chemical and physical restraint of older people. I asked the Guardian and they said, "No, we do not hear about it." But so many older people out there in the community are fearful of that and of sexual abuse, yet there seems to be so little information about it. I would be very grateful if you can enlighten me as to what you know about it and what you think should be done.

Mr O'NEILL: I think Professor Peisah is in the best position to talk about this matter because she was the author of a very significant paper that was done under the auspices of Alzheimer's Australia which deals with chemical restraint issues in considerable detail. We would be happy to make available a copy of that to the Committee. But as the author of it and very much the promoter of it, although it is very strongly supported I know within organisations like Alzheimer's generally, nationally and in all the States and Territories, the Council for the Ageing, National Seniors, et cetera, and amongst a growing number of doctors. Indeed, a number of aged care facility organisations are very keen to show their understanding of this issue and the need to reduce the unnecessary use of medications in older people and, secondly, to be very aware of physical restraint problems as well.

Professor PEISAH: Thank you so much for bringing this up. Mr O'Neill wanted to bring this up but I would not let him.

Ms JAN BARHAM: I have been bringing it up and people go—

Professor PEISAH: Did he ring you beforehand? I am so delighted and thank you for bringing it up.

CHAIR: It is called a Dorothy Dixier. It is a classic question in which you are asked what you want.

Professor PEISAH: We would be delighted to provide you with information. It is an area of my research in addition to something that Mr O'Neill and I have worked on with, as he said, Alzheimer's Australia.

Ms JAN BARHAM: It is increasingly disturbing. During the registered nurses inquiry we heard that was a sector with a lot of profit opportunities—namely, expanding profit margins and reducing the level of care in its commercialisation, which is when, as I understand it, these practices come into play. If you have any information about that I would be very appreciative. But I also know that it happens in the home. Yes, we might be able to regulate facilities but what do we do about those caring for older people who are living with them and they themselves might be under pressure? This is where I am looking for a more holistic community-based approach, where we recognise that it is probably a bit of cry for help for people who are perpetrators. It is no easy job looking after someone with dementia. Family and Community Services were here earlier but I do not think they are really looking at the whole person, the whole family and the whole community approach. How do we get around that? How do we make sure that we are looking after everyone in a safe, healthy community and not just picking at these individual bits?

Professor LACEY: I might just jump in. South Australia has decided to include chemical and substance abuse as a separate category of elder abuse—the safeguarding strategy. Most States and Territories, most jurisdictions, treat it as physical abuse whether it is over medication or under medication. You are absolutely right; often it is carer stress or a lack of resources. In Canada, they have community networks for adult protection at the state or province level. Basically, that is where schools, churches, veteran groups—members of the community—can become members of that community network. That is what we need in Australia. It is well and good to have great laws and policies, but if people do not know about it and do not see it before it becomes critical, you will not have that early intervention or the self-recognition that, "I am a carer; I am suffering from stress and I am not coping". Plus we need support services for respite care and things like that. We do not have the level of resourcing that we need or the level of awareness and education.

Professor PEISAH: Certainly we know that the person often left with the care of the older person with disabilities, specifically dementia, is often the most vulnerable person. I have gone on many home visits where the 46-year-old son, Johnny, who happens to be suffering from drug and alcohol abuse, or a chronic mental illness, is up the back in his room and cohabiting with mum. They are the least functional person of the family by virtue of still living with mum, and they are the person who is most vulnerable. In November you talked about tick boxes. I hate to talk about tick boxes in health because we do not need anymore, but it is about this notion of red flags and risk factors and staff identifying. Again, I think it might be useful if we can put on notice another document that might be useful. I wrote an international paper on risk factors for undue influence. It was about wills but it goes across all areas of abuse and document preparation. For example, in the context of family conflict, being on your own, being frail, being cognitively impaired, perhaps recently bereaved, so that if people, frontline staff or, indeed, from a legal situation, these risk factors will be identified, and people will be alerted immediately in regards to prevention. That might be of use. If that is alright, I can send it to you.

Ms JAN BARHAM: I would ask all of you to think about if there are any others. I am interested in a whole-of-government approach. These issues have a knock-on effect. What we are not doing in one place we then find another problem. I love to read a good paper.

Professor LACEY: Can I add one more thing? When we did our research and looked at some of the critical cases that were highlighting where the gaps were, like the Cynthia Thoresen case, which was the Queensland case that we referred, the medical evidence was astounding—absolutely shocking—yet a prosecution was not brought. When I did some research into prosecutions that had successfully been brought in Australia, they were criminal neglect cases where the carer was a child, often living in a dysfunctional family environment, either on the spectrum disorder or with serious mental health issues. The parent was often an overly antagonistic, bullying character.

So the child had grown up in a dysfunctional intimidating environment all their lives and when their parent refused care, they did as they were told, which they had done all their lives. Yet they were the successful prosecutions where serious jail terms were handed down. Both cases were appealed and the sentences were reduced, but if these are the cases that are being successfully prosecuted, yet we are not capturing the ones where it is blatant, there is something seriously wrong either with the criminal laws or the discretion exercise by public prosecutions. We need to look more into that.

The Hon. Dr PETER PHELPS: I have a two-part question. The first part relates to evidence that we received from the Law Society of New South Wales. It has no issues whatsoever about the capacity of any solicitor in this State to adjudge the mental capacity of an applicant. From a medical point of view, can you let me know what you think about that? Secondly, I do not know who raised the additional requirement for a more comprehensive notation in files. Was that you, Ms Barry?

Ms BARRY: Yes.

The Hon. Dr PETER PHELPS: What would you think of a proposal for not necessarily a mandatory form but a standardised form which could be used for those people who do not feel they have full confidence in their ability to adjudge the mental capacity of a person? A template form, if you like, not necessarily a mandatory form. Professor Peisah first.

Professor PEISAH: It is something we have been suggesting and recommending for years. In fact, the NSW Trustee had a pro forma template for their will-taking. I always used to say, "Use that." I would totally endorse and ensure Ms Barry—

The Hon. Dr PETER PHELPS: To go back to the a priori point, much as we love the solicitors of New South Wales, there are better mental health experts than your average suburban solicitor. Would that be an unfair thing to say?

CHAIR: That is a leading question.

Professor PEISAH: I do not know what you want me to say. I will leave that.

Mr O'NEILL: As an Australian lawyer, not an Australian legal practitioner, I suppose I can step aside and say, look, this is something that the Law Society and all solicitors has to take much more seriously to realise that they have limited capacities in this field. Secondly, they also need to appreciate that they need to be much more careful in taking instructions and in taking down conversations they have on this issue. If they need any assistance, I suggest that they have a look at the article from a colleague, Lisa Barry, who has written about this issue today, and there are even more recent cases. There is a case of a solicitor called Given in Queensland. One of the reasons he was found to be acting in an unprofessional manner—unsatisfactory professional conduct—was because of his failure to take notes.

I have had solicitors effectively saying to me in hearings in the past that they are doing a Nelson act—putting the glass to the blind eye—because if they take a view of concern, the person will go down the road to the next solicitor in the country town or wherever, or they say, "I know the family and I know the person who is being appointed, so it will be all right." You even get wills done that way at times. It is time to blow the whistle on the profession to be more professional about this issue. It is expected of doctors and psychologists. It is becoming more expected of solicitors and if they are doubtful here, tell them to go across the Tweed and have a look over there.

The Hon. Dr PETER PHELPS: Ms Barry?

Ms BARRY: Queensland has 15 per cent of Australia's lawyers and has had four prosecutions of lawyers for a failure to follow the guidelines in this respect.

CHAIR: Over what period of time?

Ms BARRY: All of those have been over the past 10 years. The first one, I think, was 2009, Ford, and the most recent one in 2015 was Penny. There have not been any in New South Wales, although we have 41 per cent of Australia's solicitors. One of the issues in New South Wales is that the guidelines are seen as guidelines, so it is not mandatory to take notes. The Office of the Legal Services Commissioner [OLSC] has sometimes written in its responses to complainants, yes, we are aware of the guidelines, but they are just guidelines. So a failure to follow the guidelines cannot lead to any disciplinary action. There are five difference guidelines on the New South Wales Law Society website as well, and I think that causes confusion for lawyers who are seeking guidance. In some respects the guidelines are contradictory. In one set of guidelines it says you could consult a medical practitioner, a local general practitioner. In other guidelines, it says that you must go to a specialist for an assessment. One set of guidelines says you must take note, another set of guidelines does not mention taking notes at all.

So you cannot go to the current guidelines in New South Wales to find a single guideline. They need a clean-up, from my perspective. It is very difficult for OLSC to pursue any complaint in that regard when the guidelines are not consistent. The Law Society has a disclaimer on the guidelines, that they do not vouch for the accuracy of anything in them, that they are just guidelines, that there is no obligation on lawyers to follow them—and lawyers will say that as well—and the complaints come back to the OLSC, "I didn't follow the guidelines because they are just guidelines; it is not mandatory".

The Hon. MATTHEW MASON-COX: Rather self-serving, is it not?

Ms BARRY: So there is definitely, from my perspective, an issue there in terms of having one clear set that everyone could look to. I would think, as a minimum, that keeping a file note about the questions that you have asked or having a document, whether it was a tick a box "Yes I asked this. Yes I did that. Yes", rather than what we currently have, which is certification about are you sure—did the person appear to understand? "Did you understand?" "Yes, I understood".

The Hon. Dr PETER PHELPS: I do not like the idea of a mandatory requirement because I worry it then becomes tick a box. I like the idea of a template which you use, but if you do not use it you, as a lawyer, in your comprehensive file note should say why you believed at the time that the authorised template was inappropriate for your particular client, and set out in detail why it was not used. As I said, I am loath to support the idea of mandatory things because I do not want one-size-fits-all, because it may well be that this person plays bowls with them and sees them two times a week and knows full well that they have the mental capacity, and they can say that "I am in a close personal friendship with them, I see them every day and my association with them is that".

But for those people who do not feel confident about their capacity to make an accurate assessment, they can say, "I didn't and so I did this and I did it comprehensively and I then formed an opinion based on that", or alternatively they can say, "I did not follow this, but I did it for these reasons and the comprehensive file note provides an explanation". Is that something which would be amenable?

Ms BARRY: Yes, absolutely, and certainly there is a wide variety of circumstances on the files and there are certainly complaints that, from my perspective, are completely unjustified because the lawyer was acting for a person in absolute good faith and had made the necessary inquiries or was continuing to protect that person's legal rights while they made inquiries about capacity. I do not want to represent that all of the complaints are poor lawyer practice, because they are not, by any means.

Could I also perhaps talk to the point on that thing of whether lawyers are the best people in relation to assessing people's mental health? It is quite clear to me from some of the files as well that doctors in many of these cases were also not trained for this task. They would report back to the lawyer that they knew the person had capacity to make enduring power of attorney, for instance, because Mrs so and so was bright as a button and dressed well.

The Hon. Dr PETER PHELPS: Previous witnesses have made comment about one-line doctors' submissions.

Ms BARRY: That is where I think sometimes you could use a pro forma where you have a clear form that says, "This is what I need a report about. This is what is involved in understanding an enduring power of attorney" or "This is what is involved in making a will". Of course, plenty of lawyers do have those pro formas where they are asking for a report, but other lawyers do not use them, particularly if they are not specialists in elder law, because they do not have them on hand.

Professor PEISAH: Can I add to that? It is not fair to focus solely on legal practitioners; doctors have equal responsibility to show due diligence in regards to report writing. Certainly from my experience in teaching lawyers about capacity assessment and interaction, that medico-legal interface over many, many years, part of that kind of checklist or, indeed, going back before that, education of lawyers, is understanding what an expert looks like and who is an expert and how to instruct an expert. You gave me an example of the one-liner, "Mrs Smith has dementia and can't look after her affairs", which we certainly saw at the Guardianship Tribunal all those years ago. The other one coming from a lawyer was, "Please tick yes or no, can this person write a will?" and there is a very nice little box there for "Yes" and a nice little box for "No", and that is not an unusual practice.

So I think part of this education of lawyers is to understand that very important medico-legal interface and that contacting the GP may not be the most appropriate avenue, depending on the GPs expertise in this area.

The Hon. SOPHIE COTSIS: Thank you for being here this afternoon. Professor Peisah, you mentioned the interagency protocol. There is an interagency steering committee; have you been involved in advising or providing information—

Professor PEISAH: No.

The Hon. SOPHIE COTSIS: The Department of Family and Community Services were here earlier today and gave evidence. I asked them how many times that committee had met. There are apparently representatives on it from health, police, justice and some non-government organisations. They said that they had not met in 2015 but they had met in 2014. What is your view in terms of that sort of across the board making sure that the agencies are working in a coordinated way but getting that information out there? I have got a real concern in terms of ethnic communities where we have older people from ethnic communities who are not literate in their own language let alone English and they are being told, "This department has got stuff online". They do not have computers.

A previous group talked about having radio information, because a lot of members of older ethnic groups listen to the radio as a form of communication. From your point of view, how do we get that information out to the grassroots members of the community?

Professor PEISAH: I spoke about what you mentioned in November's hearing and I echo everything you say; it is certainly on the agenda for Capacity Australia's approach to this issue, particularly targeting culturally and linguistically diverse communities, so much so that I know that Sangita Bhatia from our organisation spoke on ethnic community radio to raise awareness about this issue. It is about normalisation, stigmatisation, addressing shame—what I was talking about before. So I totally agree with that. I think there is a general issue with our culturally and linguistically diverse families about accessing services and we know that in regards to, say, dementia services. It is hard enough for culturally and linguistically diverse families to access many health services and many dementia services let alone to ring up a hotline and say, "My son just ripped me off".

The Hon. SOPHIE COTSIS: It is not going to happen.

Professor PEISAH: It is not going to happen. So this is what I mean about public awareness, promotion, normalisation out there and integration into the ethnic communities. We have certainly done some work with the ethnic community councils, but they are all small organisations like ours. So if we could have a more concerted macro response from government that would be certainly very helpful for our work.

The Hon. SOPHIE COTSIS: I mentioned to FACS earlier about working with Multicultural NSW—that government agency that has the networks—coordinating the information and then spreading it out. Radio is a good medium for some of those older members of the community and, of course, ethnic papers. It needs ongoing work. With you organisation collaborating with some of the ethnic groups and with government we can get that message out there. As the shadow Minister for Multiculturalism, I am telling everyone here now that people just will not ring up a hotline; there is taboo, there is shame, and we are so far behind in raising that awareness. People just want some help, they want some justice, they want assistance and they do not know where to go.

Professor PEISAH: I agree with everything you say.

The Hon. SHAYNE MALLARD: My question is directed to Professor Lacey but I invite the other members to speak. We are looking at law reform in this area. In your submission you talked about rights—"a bill of rights" is probably the wrong term; it will alarm some people—and codifying the rights of older people. Would you propose that that be in legislation? Could you outline those rights as you see them. Are there other jurisdictions in Australia or elsewhere that we could have a look at that have successfully done that?

Professor LACEY: No. I do not think we should be codifying specific rights. One of the things we have an issue with in South Australia is the idea that if we start advocating for codification of rights for one

group of people when we do not have a general charter of rights in South Australia for everyone, we will not get anywhere.

The Hon. SHAYNE MALLARD: That might have been where I was heading, anyway.

Professor LACEY: I am a proponent of protecting rights but I think that rights are protected by preventing their breach. It is not about providing legal remedies in courts of law. I have written about this in other forums. I think that we need to draft our legislation with the rights in mind and think about how we actively enable people to realise their rights. That is a completely different question to just articulating, "You have the right to free speech," or something like that. It is about looking at the mechanisms that need to be in place to safeguard people, to provide early intervention and to make sure that we are not jumping to paternalistic assumptions when we make decisions to support older people—to avoid ageist assumptions infecting the way we view things.

In South Australia I drafted the Charter of the Rights and Freedoms for Older People, which is a schedule to the safeguarding strategy. So, it is contained in a policy document. That does list all the rights. It has some bizarre quirks. For example, at the time, we had a Minister's advisory board on ageing. Maggie Beer was on that board. She was not happy with "adequate nutrition". That was not good enough; it had to be "adequate nutrition to sustain you both physically and emotionally," thinking about the social and cultural aspects of food. I call it the Maggie Beer amendment.

The Hon. SHAYNE MALLARD: More chocolate.

Professor LACEY: Yes, or paté. I think it is important to have instruments like that for awareness raising. I think they should be simple enough that a 10-year-old could understand them. In terms of embedding it in legislation, I think there are better ways to go.

The Hon. SHAYNE MALLARD: We have done charters before. Could you provide a copy of that charter to the inquiry?

Professor LACEY: Absolutely.

The Hon. SHAYNE MALLARD: Professor Lacey, you talked about the community networks in Canada for adults. Have you got some more information about that?

Professor LACEY: It is mainly run through local governments. Local governments pretty much sponsor them. You just sign up. So if you are religious group, a church or a school you might become part of the community network. It is about raising awareness. It is based on the notion that elder abuse is everybody's business and that you need to be looking out for your neighbours and the people in your street. You need to be aware of what the signs of elder abuse are.

The Hon. SHAYNE MALLARD: It is not just elder abuse, though, is it?

Professor LACEY: It is elder abuse specifically. They are community networks for adult protection so it is mainly vulnerable adults. Elder abuse comes into that but it also picks up people who are adults with disabilities. They have been highly successful in raising community awareness and getting buy-in from groups within the community who actively promote safeguarding vulnerable people in their communities. I think that is probably the best way to go to get local action plans in place. That is how you are going to spot the vulnerable person who may look as if they are malnourished or have signs of physical abuse or neglect. They are often the best people to keep a close eye on our most vulnerable.

The Hon. Dr PETER PHELPS: My question is for Mr O'Neill, but anyone else can jump in if they want to. I want to talk about guardianship. One of the surprising things to come out of the hearing so far has been the lack of extra-territorial application of guardianship between the States. You have spoken about a possible reference to the Federal Government. I think you have zero chance of that.

Mr O'NEILL: I agree entirely. I just raised it as a possibility that is there.

The Hon. Dr PETER PHELPS: Failing that, is there a possibility of informal arrangements between the various guardianship tribunals around the nation for a presumption of recognition of existing guardianship arrangements?

Mr O'NEILL: It has to be done by legislation, and that legislation is now State and Territory legislation, and will stay that way, I am sure, as a matter of practicality, as you point out. The recognition provisions are there in relation to guardianship orders, financial management orders—also called administration orders elsewhere—for enduring powers of attorney, which now have various names. That was part of the problem. One of the recognition provisions was not updated when the South Australians and the Victorians changed things. We are grateful for the South Australians changing things because they have been the leaders in the area of modern guardianship in this country, starting the modern process, and in introducing enduring guardianship to the country, which was picked up by us in New South Wales, and then went to Victoria, Tasmania and elsewhere.

Unfortunately, the South Australians have changed their law to "advanced care directives". That has left us all a bit breathless, catching up with that. You can see the problem, in that little story, about getting uniformity. Uniformity can mean sticking with what we have because it is uniform, and not moving in ways that the South Australians have moved, which are certainly worth looking at.

The Hon. Dr PETER PHELPS: One of the things we heard about was literally stealing your parent—taking them across a border and then seeking a particular order on them. My view would be that, in the absence of uniformity you could at least have a presumption that any existing order made in another State would be replicated or at least would not be overturned without a clear reason.

Mr O'NEILL: There is a Federal statute that could be put to use here. It might be more readily done these days with the civil and administrative tribunals existing in all the States and Territories because they are headed by a judge. One of the problems previously was that tribunals were led by people like myself, who are not judges. That was seen as an issue, but the problem of recognising situations like that, which might continue to occur—say in the Northern Territory and it certainly does in the Australian Capital Territory—may bring up a constitutional issue with respect to the separation of powers. I have not looked at it. The issue does not exist in the States but does in the Commonwealth.

There are complexities about this automatic issue that you are talking about but there are much better ways of communicating between the States and the Territories since the development of the internet and electronic communications, and it may well be possible for the Australian Guardianship and Administration Council [AGAC] to set up a set of arrangements by which they tell each other precisely who is under guardianship and what their names and addresses are. If there is an issue of this kind it can be reported into the system so that if what we call "granny-napping" has been going on it is known, so that if an application is made for guardianship then something can be done.

Often enough what happened was that the public advocates in those States which had them, who had investigative powers—that is something that is being asked for in New South Wales—

The Hon. Dr PETER PHELPS: That was going to be my next question. What is your view in relation to the establishment of a guardian advocate?

Mr O'NEILL: It is a long-held view—I have held it since the early days of the guardianship system in New South Wales, when I was the first Deputy President of the tribunal for five years, and then for 10 years its President—that the office of the Office of the Public Guardian in New South Wales should be given broader powers to take on an advocacy role that would be similar to the Queensland or the Victorian system.

I am not up to date on the South Australian situation but there are really good examples of things that can be done and it is not expensive. The argument that has always won the day in the past is—it is a twofold argument: first, we don't want to put any more money in here and, second, we don't like investigative bodies. It is time to get past that in everyone's interests because these investigative bodies do act very carefully; they are very aware of how you go about these things quietly and sensibly, so I very strongly support it.

The Hon. Dr PETER PHELPS: And you would have no concerns about vexatious complaints?

Mr O'NEILL: Vexatious complaints have to be dealt with. I am not a person who says you have got to work on them until you find that speck of truth at the bottom of it all. I am a bit more robust about these things but when people turn up with cases full of stuff or keep on pressing issues, you have to deal quickly and honestly with those things. I have certainly been of that position and done that on occasions, certainly in other areas. You have got to be fair dinkum about that because they soak up resources.

Professor LACEY: Can I just add to that question?

CHAIR: Please.

Professor LACEY: Section 118 of the Federal Constitution says that full faith and credit must be given to the laws and judicial decisions made in another State so there is actually a Commonwealth constitutional issue with regard to actually giving full faith and credit to either a valid law or a lawfully binding decision of a judicial proceeding. Whether that extends to tribunals is another question.

The Hon. Dr PETER PHELPS: That is the problem. They are not judicial proceedings; they are tribunals in the majority of cases.

Mr O'NEILL: Tribunals exercise the judicial power of the States but you cannot, as a non-judge, exercise the judicial power of the Commonwealth and there is a distinction and it is going to stay in place; there is no pressure to change things in the States.

The Hon. MATTHEW MASON-COX: I wanted to explore a bit more the idea of adding some investigatory powers to the Public Guardian—call it Public Advocate, call it what you will.

Mr O'NEILL: Yes.

The Hon. MATTHEW MASON-COX: Particularly in New South Wales where we have the elder abuse helpline, we have Family and Community Services [FACS] with responsibility for the interagency ageing strategy and we have, if you like, a range of other agencies with some responsibilities for various elements of that. It is quite a stovepipe type of approach to a problem where people are seeking to get some responses as early as possible but people are falling through the cracks at various times for various reasons. Evidence to the inquiry is that the elder abuse helpline has been very effective as a triage in working out, "Well, we need to go here. Because of this urgent issue; we need to deal with this now".

But then people get lost between the cracks because there is no advocacy service to pick up their case to go to the Guardianship Tribunal or elsewhere to seek resolution of their ongoing problems. If we were to go down that pathway would it be better to locate this—Professor Lacey addressed this issue directly—as a new institution, a separate statutory authority, or should it be something located in the existing Public Guardian or in the department with a whole-of-government perspective driving outcomes across the whole agency level? They are the sorts of issues about how we would implement that approach but what would be the most effective way to ensure that we drive the best possible outcomes?

Mr O'NEILL: It probably has to be limited to investigations in relation to people who obviously would not be able to make decisions for themselves or are marginally that way for reasons that are obvious to all of us otherwise everyone would be under investigation forever and no-one is interested in that. That makes the Office of the Public Guardian a good place to start because those officers have developed very good expertise in dealing with people with decision-making difficulties who are put under their guardianship and have very good policies in relation to trying to give them as much say in life decisions as possible but also being realistic about what needs to be looked at. I believe they would be the best place for doing this. It would allow the people who are running the hotline services—and Alzheimer's New South Wales is one of those that I am aware of; I was a director until the end of last year and for 11 years prior to that—would have somewhere to direct people who are making the inquiries to. I think that is the crux; there really is not anyone to pick up and run with the problem. The granny-napping, if you like, is one of the problems.

Professor LACEY: Obviously in South Australia when we were doing the research for the Closing the Gap report it was unanimous—and we interviewed well over 100 key stakeholders from across the State. The steering committee unanimously held that we support a comprehensive adult protection Act. We did not want to give the power to the Public Advocate in South Australia because the views of the committee were that that would undermine the independence and advocacy role that the Public Advocate plays in South Australia. In

hindsight, though, I think with the advent of the Advance Care Directives [ACD] Act in South Australia and the fact that they now conduct a dispute resolution process where there is ACD involved, they do tend to develop more investigation and running of inquiries, so they feel less uneasy about perhaps taking on that role.

I think one of the strengths about giving it to a department like [FACS], which has a whole-of-government approach, is the benefit that you do have that reach across government and across agencies. I think that giving it to a department rather than an independent statutory authority would allow greater accountability through the Minister and into Parliament. Having said that, I think there are merits in both approaches. I think each State should really adapt what it perceives to be the appropriate framework for itself, although I think that a comprehensive approach with a new unit—and you can easily relocate your phone line; that can go anywhere and if all it is doing is a referral service, you are not filling the gaps. All you are potentially doing is raising the expectations of older people that there will be a solution and sometimes there are not solutions because either the agency does not have the statutory mandate to take it on board or they do not have the powers to actually follow it through to a successful resolution.

The Hon. MATTHEW MASON-COX: Part of our challenge is that each State has grown up in different ways. There are certain similarities but there are serious differences. Clearly we want to ensure the best practice and the best outcomes, and the model is important in driving that because it has been a real problem—a stovepipe approach—particularly in this State, and how you drive outcomes across government is an important deliverable for us.

Professor LACEY: I agree with that and I think one of the challenges is getting away from the silos of the various agencies. Irrespective of where you locate this particular power to conduct the investigations and follow it through, you need to also empower that agency or authority to compel other agencies or departments to cooperate, to share information, to aim for early intervention. It is the powers that you actually confer upon that body and how they are actually framed that are really important so I think it is the stuff around it; it is not just where you locate it; it is what you actually do to empower that body that is very important.

The Hon. MATTHEW MASON-COX: Which is why you think that perhaps the department is the place to drive the change?

Professor LACEY: That is how we concluded the discussions in South Australia.

Mr O'NEILL: Could I put a slightly contrary perspective on this, just by way of a change?

CHAIR: We call those dissenting statements.

Mr O'NEILL: It is only in relation to the independence issue. A statutory appointee has more independence in reality than the head of a departmental group because they report to the departmental head and to the Minister. No Government likes controversy. These things cause problems. Sometimes these matters are aired on the more interesting early evening television programs that like to run shock-horror stories. They have learnt over time that they really have to do their homework on guardianship because they have found that they have backed the wrong horse. Nevertheless, there is a culture of avoiding the problem. There is a big risk of that if it is within a departmental structure. The powers that Professor Lacey referred to, of enforcing cooperation, could be given to a statutory appointee as well. I do not want to have fisticuffs. I know that Professor Lacey has thought about this issue in great detail. I acknowledge that.

Professor LACEY: I would like the right of reply. By "independence" I meant independent as an advocate for the older person. I meant the role that they play in looking after the interests of the older person in the tribunal and in advanced care directive hearings. It was not about independence from government. I take on board the points that you make. It was really about how conferring those extra powers upon the Public Guardian will work. Will that undermine their independence to play their other advocacy roles?

CHAIR: I will direct this question to Ms Barry, but others might wish to comment as well. The Committee heard evidence this morning that the Office of the Legal Services Commissioner [OLSC] did not do enough to respond to complaints about solicitors. From your research, would you agree with that statement? If you agree with the proposition, do you have any suggestions as to how the OLSC's powers and actions could be enhanced and improved?

Ms BARRY: I do not think there is a simple answer to that question. From my perspective, the OLSC takes these complaints very seriously. To me, the fact that it has invited me in to look at these files is evidence that it is completely transparent about how it has dealt with them. In 2012 it introduced capacity as a specific complaint area so that it could begin to count how many complaints of that type it was getting. The OLSC is constrained by the uniform legislation and the high level of misconduct that is required in order to take any disciplinary action against a lawyer. These cases are always dealt with as consumer disputes. They are not professional misconduct. The OLSC is constrained in that way by the legislation. These complaints do not rise to the level where they can always be prosecuted.

In the Queensland cases that have gone to the tribunal there has been a perfect storm of events where the lawyer has not followed the guidelines and it has led to a dire outcome. Someone has been prepared to make that complaint and the situation has been clear. Unfortunately, most of these cases are not that black and white. The OLSC does not have powers to investigate. It does not have powers to go in and look at the files, interview in depth and meet all the people involved. It does not have the resources to do the things that complainants clearly want it to do sometimes. People say, "This is urgent." You can see the passion coming through in the files. These are people who are at their wits end, trying to protect an older person. They are going to the tribunal and they are going to the OLSC but there is nobody with the power to look into it.

I have observed in the files a couple of times that people go to the guardianship tribunal with an expectation that the tribunal will look into the background of the cases as well and that the tribunal might examine the actions of a lawyer. Instead, the tribunal will treat it as a new application for guardianship rather than as a review of the old enduring powers. The tribunal will say, "We do not need to look at that because we will treat this as an application for guardianship rather than as a review of the powers of attorney."

The OLSC will look at that and say, "The guardianship tribunal did not make any criticism of the lawyer. Therefore, we cannot take this any further." It is catch 22 in that respect. The OLSC might be relying on the guardianship tribunal but the guardianship tribunal is following a different process. The two do not marry. I could imagine that that would be extremely frustrating to a complainant and could lead people to think that the OLSC was not doing enough. The different way that the bodies deal with these issues and the different ways that the complaints come to the bodies can lead to that perception.

The Hon. Dr PETER PHELPS: To be fair to the OLSC, there may be five variations on what it can do in a given situation, one of which might be to do nothing, and there are only recommended guidelines. If one put oneself in the shoes of the OLSC, one would say, "How can I possibly have a material effect on that solicitor's career? He or she has kind of done the right thing. It may not be what I would have done."

Ms JAN BARHAM: You do not have to defend them.

The Hon. Dr PETER PHELPS: You cannot blame the OLSC for saying that there is not enough evidence to throw the book at them for a material, obvious and serious case of misconduct.

Ms BARRY: That is right. If you have limited resources to take these matters to the NSW Civil and Administrative Tribunal then you are going to throw those resources at the upper end. It would take someone to be doing things like writing a will when they are a beneficiary or acting in a conflict of interest. Some of those matters that have also involved capacity complaints have gone to the tribunal. They have been acted on, but the OLSC will throw the resources at the higher level offence where the evidence is clear. As you would know, capacity questions are not always that clear. You can see on the files that there are conflicting medical reports. One doctor says, "Yes, they have capacity." Another doctor says no. One lawyer will say, "No, they do not have capacity." Another says they do. For the OLSC to get under all of that is difficult.

The Hon. Dr PETER PHELPS: With no investigate power itself.

Ms BARRY: Absolutely. It is almost an impossible task.

Ms JAN BARHAM: Do you have a position on mandatory reporting in relation to residential care facilities? Do you think it is a good thing or a bad thing?

Professor PEISAH: I understand that we have been pushing mandatory reporting, through Health, for some time. It certainly galvanises presenters at international conferences. Americans get up and say, "We have

mandatory reporting and of course we would act in this case." Most of us in Australia sit on our hands. It is something that we would support.

Ms JAN BARHAM: People have told the Committee that it would take away someone's right to not report. Where does the responsibility sit? When does Parliament, government or society step in to support the interests of somebody who may be experiencing intimidation? It is a tricky question. Different people have given different views. I am happy for you to take the question on notice if you have information to relate. The other issue is the registration of power of attorney. We have heard conflicting evidence on that too. These are areas where we are trying to decide the best option.

Professor LACEY: Obviously under the Aged Care Act only physical abuse and sexual abuse are subject to mandatory reporting. They constitute crimes under State law anyway and potentially under Federal law, but it is mainly State law that is involved. I have not had any experience of people being overly concerned with that, but they have been quite concerned about potentially expanding that to other forms of abuse, especially where there is capacity and the older person should be able to make a decision as to whether they wish to report other forms of abuse or even where they have capacity in regards to reporting physical abuse. The South Australian agencies I worked with all came away absolutely opposed to mandatory reporting. They think it is ageist and does undermine the dignity and self-determination of the older person. They said it was not about mandatory reporting but about having a mandatory response framework at the State level and that the State has an obligation to provide a solution and early intervention and to safeguard the older person from abuse. It is not necessarily about prosecuting. That is presenting the views of stakeholders in South Australia.

Ms JAN BARHAM: Within a facility where someone is under another level of pressure to report means they could bring upon themselves further abuse or intimidation.

Professor LACEY: I do not think there should be a discretion on the part of the caregiver or a careworker. It is not their decision to make, but if the older person still has mental capacity then they should be consulted about whether they wish to prosecute an offence. I would not like to see the discretion handed to the caregiver.

CHAIR: The question of mandatory registration has been brought up by a number of witnesses. Do you have any thoughts on that issue?

Professor LACEY: I have no problems at all with a register. I know that not everyone on this panel would agree. I think it can be a safeguard, particularly if you forget whether you have a power of attorney in place and you have multiple powers of attorney. You can have very large sums of money that do not involve land and if people are vulnerable in both circumstances then why do we not have a register for all major transactions. I do not have a problem with that but others have different views.

Mr O'NEILL: There have been some strong points made. Professor Lacey made two points and this morning the Hon. Matthew Mason-Cox asked about registration. I am concerned about whether the relevant department would be willing to take this on as it would need a lot of monetary support to do the job properly. I am more concerned about an issue raised by Imelda Dodds, the chief executive of the NSW Trustee and Guardian, and that is the chilling effect of this. The more problems you put in the way of making an enduring power of attorney, the harder it is to make.

One of the reasons why we made changes to the power of attorney legislation and the way we have been promoting it for the last 15 or 20 years is to have people making their own decisions about who they want as their financial managers when they lose capacity or are tiring of doing it. If enduring powers of attorney become fairly common, we will have many more applications for financial management orders and they are much more expensive for government and difficult for families. That is my reason, but I respect the validity of the other points. The now Trustee and Guardian will be able to tell you of cases where there was registration of the power of attorney but the land was sold anyway inappropriately and totally contrary to the interests of the principal.

The Hon. Dr PETER PHELPS: Following on from that, if you do not have a system of mandatory registration, should you at last have a system of mandatory publication of deregistrations so that the utilisation of existing powers of attorney cannot be done fraudulently? That would mean you could find out which powers of attorney are no longer valid even if a person claims to operate that power of attorney. That would get away from the problem of the privacy issue, people not wanting to know that someone has a power of attorney in

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relation to them, but it offers some surety that a revoked power of attorney will not be used for nefarious purposes.

Mr O'NEILL: There are great practical problems and the main one is that is that the revoker, the principal, is likely to be in the weakest position to take the necessary administrative action to get that recorded. They may revoke the power of attorney and not do the rest of it.

The Hon. Dr PETER PHELPS: Surely that revocation comes through a solicitor?

Mr O'NEILL: I am not a no-registration absolutist, but there are some real problems in forcing registration, particularly if it carries with it the validity of the enduring power of attorney. The stronger and more beneficial ways of going about this would be to adopt the Victorian approach, which requires it to be explained to the person who becomes the enduring attorney, what his or her obligations are, and then signing off that the person understands that. Secondly, for the person administering this to sign off that the person appeared to understand it and that they had met their obligation to explain it to them. So you have two people in the firing line if things go wrong who are not there now plus the compensation arrangements that have been adopted in Victoria. That is where I would go first and I would you strongly encourage you to press for that because that would be a useful advance.

CHAIR: Thank you for coming along this afternoon. With respect to reviewing the transcript of today's proceedings, because of some concurrent commitments of Hansard the transcript will not be available until after Easter. I am sure there will be some questions on notice that have arisen today's proceedings and members may wish to send you some additional questions. We ask that answers to questions on notice are provided within 21 days and the committee secretariat will liaise with you about any additional questions. We thank you for the work you do in research, writing and advocacy on behalf of our seniors not just in New South Wales but at a national level. We understand the need for such work to help push important discussions about this issue in our community.

The Hon. Dr PETER PHELPS: Good luck completing your PhD, Ms Barry. I believe 80 per cent of the work in completing a PhD is in the last 20 per cent. I leave you with that happy thought.

(The witnesses withdrew)

NGILA BEVAN, Human Rights Adviser, and Manager, Advocacy and Communications, People with Disability Australia, and

MEREDITH LEA, Project Assistant, Violence Prevention, People with Disability Australia, affirmed and examined:

CHAIR: I welcome witnesses from People with Disability Australia. I thank them for coming along today and for their submission. It has been received. It is a very comprehensive submission so I thank you very much for that, and you can take it as read by the Committee members. We have on the Committee representatives from the Government, the Opposition, the Christian Democratic Party and The Greens. We will keep this pretty fluid to maximise our opportunity to ask you questions that are exercising our minds. I do invite you to make an opening statement, either both of you or one of you, to get things underway.

Ms LEA: First of all, I thank the Committee for the invitation to appear before it. Elder abuse is a significant issue for older people, and particularly for those with disability. Disability rates amongst older people increase dramatically with age. In New South Wales 25 per cent of 55- to 59-year-olds have disability, which goes up to 83 per cent of those over the age of 90. This means that it is essential to take a disability lens when tackling issues of violence against people with disability and older people in particular.

As people age and acquire disability they frequently move into group homes, boarding houses, disability services, respite centres, residential institutions, hospitals, nursing homes, aged-care facilities or hospice care. People with Disability Australia has extensive expertise regarding these kinds of facilities and the risks of violence for those who live there. This is drawn from a long history of individual advocacy across New South Wales. We have also engaged in both mainstream and disability specific violence response policy development both at a New South Wales and a national level. From this experience I would like to tell the Committee about how violence may happen to an older person with disability.

Imagine you are an older person who is gradually acquiring physical disability. Support services cannot be provided to you in your home so you are forced to move into a residential facility. In this facility you do not get to choose what you eat for dinner, what time you get up or even what you wear. You find this very upsetting but there is nothing that can be done about it. You are provided with support for intimate personal care by a member of the opposite gender, which you find very confronting and quite upsetting.

When this staff member inappropriately touches you, you do not know how to respond to this. First you think you might complain, but the staff member is well liked; and, besides, you could lose your basic rights such as going out to social events if you complain. Eventually you tell your daughter when she comes to visit, but when she speaks to the staff on your behalf they tell her that you are experiencing the onset of dementia and that she might need to consider guardianship.

To assist with the Committee's deliberations we would like to make the following five points. Firstly, it is essential to understand that violence against older people is heavily shaped by ableism and discrimination against people with disability. Elder violence is frequently enabled by the deprivation of autonomy, agency and rights that becomes possible as people acquire disability, including being forced into residential facilities rather than ageing in place and substitute decision-makers being appointed. People with disability have been fighting to have their rights, agency and autonomy recognised for many decades, often in the face of ongoing human rights violations. Consequently there are many policy developments regarding elder abuse that can and should be adopted and adapted from policy regarding violence against people with disability.

Secondly, important policy developments regarding violence against people with disability include the recent report emerging from the Federal Senate inquiry into violence, abuse and neglect of people with disability in institutional and residential settings. It made a number of recommendations which relate to the scope of this inquiry, including elements with State and territory responsibilities. For instance, the Senate inquiry recommended that each State and territory implement a disability justice plan and that they work alongside the Australian Government to develop a nationally consistent approach to disability oversight mechanisms.

Thirdly, institutions for older people bear many similarities with disability specific settings, and indeed many younger people with disability end up residing in nursing homes. Many of the shared characteristics are factors that tend to heighten the risk of violence. They are closed, so they are closed to ordinary oversight mechanisms. They tend to organise people's lives around staff rosters rather than the individual's needs and

desires. And they routinely override people's autonomy and their decision-making capacity. A lack of independent oversight mechanisms and public scrutiny allows violence to flourish in these settings, with older people with disability often disproportionately experiencing this violence. Related to that, we recommend a Royal commission into violence experienced by people with disability in all settings as well as a national independent watchdog body to investigate violence perpetrated against people with disability.

Fourthly, in regards to domestic violence, New South Wales currently leads Australia in the inclusivity of our Crimes (Domestic and Personal Violence) Act 2007. The Act includes in its definitions of domestic violence those forms of violence perpetrated by co-residents of residential facilities as well as by paid and unpaid carers. However, despite this legislative definition, services including the police often rarely identify violence perpetrated by those staff members or co-residents as domestic violence. This evidently deprives older people, including people with disability, of access to referral pathways and key support pathway services.

Under the "It stops here" reforms a number of changes have been made to the domestic and family violence service system. But these have, unfortunately, been inadequate in addressing the issue of violence against people with disability and older people—let alone addressing the intersectionalities involved in that, especially in cases of domestic violence in institutional and residential settings. People with Disability Australia urges New South Wales to ensure equal access to domestic and family violence services and responses to people with disability.

Finally, one aspect of the shared concerns of older people and people with disability lies in the denial of legal capacity and capacity more generally. This denial drastically increases how vulnerable older people with disability are to violence. To protect people from violence of this kind we must prioritise a supportive decision-making framework that provides whatever supports are required to enable people with disability to assert and exercise their legal capacity in line with the Convention on the Rights of Persons with Disabilities.

Education should also be provided to all older people residing in institutional settings to ensure that they are aware of their rights and capacity, the supports they are entitled to in expressing their will and preferences and pathways for reporting violence. Violence against people with disability is a problem of epidemic proportions. Given the dramatic increase in disability amongst older people it is important to recognise that the drivers of violence against people with disability intensify as people age. These drivers are complex and difficult to deal with but the disability rights sector has been advocating for transformation in this space for a very long time.

It is essential that the views of older people, including older people with disability, are included in any consultation reform or attempt to address the systemic drivers of violence. This issue is huge and urgent and we must act. We encourage the Committee to take a disabilities lens in developing recommendations ensuring that New South Wales remains one step ahead, bearing in mind the recently announced Australian Law Reform Commission's inquiry into elder abuse. By learning from recent investigations into violence against people with disability this will ensure that the recommendations you make are efficient and effective and do not come at the cost of the rights of people with disability.

CHAIR: Thank you Ms Lea. That is a detailed opening statement and covers a lot of ground that I am sure will agitate some questions.

The Hon. SOPHIE COTSIS: Thank you for being here this afternoon. You have a comprehensive submission and there is a lot for us to take in and to put into our report and advocate to Government. On page 6 in your submission you talk about torture, extreme, inhuman and degrading treatment or punishment. Can you give examples of elder abuse of people with disability that constitute torture?

Ms BEVAN: Torture is obviously a very high threshold. I think we are really, in the majority of cases, talking about inhuman or degrading treatment or humiliation, for example. However, the use of restrictive practices against people with disability has been deemed to constitute torture in general by the UN special rapporteur on torture. The reason for this is because when a person is discriminated against, for example, because of disability acts of violence towards them fall into the remit of possible constitution of torture and ill-treatment. There are many experiences that people with disability have and particularly older people, who we are talking about today, which derive from their legal capacity as a driver of that. We do talk about that in the report.

It is key for us to understand what happens, the consequences for older people with disability, when they are deprived of their legal capacity, as it can lead to them being moved into places such as institutions, aged care facilities or psychiatric facilities. Because they are deemed to not have capacity to speak on their own behalf any more they end up in situations where they are at a much increased risk of experiencing violence and abuse such as restraint. Chemical restraint is clearly an issue in many places where older people with disability reside, such as nursing homes. Chemical restraint often is not considered to be restraint but over medication does have the consequence of behaviour control on people. If people are heavily medicated then they are as a consequence of that unable to answer questions about what they would like or be active in engagement or discussions about their will and preference on other matters.

The Hon. SOPHIE COTSIS: What is your recommendation now if we were to put something to the Government in terms of what you are talking about?

Ms BEVAN: There are a range of things. Firstly, it is the reform of legal capacity legislation which is being undertaken at the moment. At the moment there is a New South Wales law reform inquiry into the forming of the Guardianship Act 1987. I can talk about that separately if you like. Secondly, we do require an overall complaints mechanism to deal with all matters of violence, abuse and anything against people in institutional settings. That would include people with disability and people without disability in aged care settings. We do not advocate for there to be separate systems. We do believe they need to be together and disability and aged care policy really does need to be synergised, especially around prevention of violence and abuse. It does not make sense for them to be separate because the overlap in that cohort is huge.

The Hon. SOPHIE COTSIS: Where do you complain now? You are talking about having a complaints system, where do you complain now?

Ms LEA: At the moment there is the reportable conduct scheme run by the New South Wales Ombudsman. That is one avenue through which violence against people with disability can be collated. That is only in supported accommodation settings. That could be extended as well.

The Hon. SOPHIE COTSIS: That could be expanded?

Ms LEA: Yes, that could be expanded to all institutions in which people with disability reside. I think in the year that it has been operational the scheme has seen 618 reports come through. Unfortunately only 12 of these have resulted in criminal charges. That is another issue, I guess.

The Hon. SOPHIE COTSIS: Further to this, I read in one of the fact sheets in terms of the incidents with the reportable conduct scheme, it stated that once the National Disability Insurance Scheme [NDIS] is in New South Wales and disability services are transferred to the feds that scheme will no longer apply, is that right?

Ms LEA: I am not certain of that.

Ms BEVAN: I am not certain on that either, partly because the quality and safeguards framework for the NDIS has not been finalised yet. We are not really sure where that is going to sit.

The Hon. SOPHIE COTSIS: I will take that to the Minister.

Ms BEVAN: The other issue is around the police. The first point of call for any person would be to contact the police. There are many barriers to accessing justice for people with disability. We need to, when we are thinking about older people and policy around older people, we must refer to existing disability policy and problems that advocates have raised in terms of disability, because very obviously many older people have disability. Whether they identify as such may not be the case but as they age that is clearly what happens, whether it is chronic ill-health or acquired disability related to aging such as dementia or degenerative physical state, a lot of older people will have disability. It is not like we can think of these cohorts as separate because they are very much the same, even though they may be separate in terms of the way that we develop policy or the service system operates. As human beings they are the same cohort of people as. It must be done in an inclusive way.

CHAIR: When you say contact the police do you mean dialling triple zero or other contact with the police?

Ms BEVAN: Any contact with the police. There are many barriers to justice for people with disability having allegations of violence investigated by the police. There are many reasons for this. Frequently they are not viewed as being credible witnesses and that goes for people with disability per se. For older people with disability there is that age discrimination aspect in there as well. Even when they are considered to be credible witnesses in terms of prosecution and the probability of a successful prosecution, even when investigations are done cases may not proceed simply because they do not think they are going to win and that is the standard that police work to with all of their cases.

For people with disability it means that lot of claims are not investigated or they do not get to prosecution. It means that sometimes evidence is not taken from people with disability, especially older people with disability, it means that their allegations are not always considered to be crimes but considered to be incidents that are happening in a service setting and termed abuse rather than violence or crime. Often they are referred back to disability services to be investigated internally as opposed to being police matters. As you can see from some of the statistics that Ms Lea related about the disability reporting incidents scheme, out of some hundreds of cases only 12 have been proceeded with into criminal charges. There is something going on here which we do need to look at further.

The Hon. Dr PETER PHELPS: One of the early controversies that is still seemingly unresolved is the mandatory reporting of peer-on-peer violence within institutions. What is your view in relation to the mandatory reporting of peer-on-peer violence in those settings?

Ms BEVAN: Why would it be different?

The Hon. Dr PETER PHELPS: Because adults are not children.

Ms BEVAN: But if somebody is committing an act of violence on another person that gets reported. It also falls within the domestic violence legislation in New South Wales. So people who have disability who are co-residents, whether it is in an institution or a group home and they experience violence from another person, a co-resident, that falls under domestic violence legislation here. I just do not see why you would not report violence in that situation.

CHAIR: For example, a person who might have onset dementia—it could be at different stages—who wanders into somebody's room and there is what perhaps could be described as a small altercation and someone might trip, fall or be pushed. The judgement is about whether that action is one that really warrants a formal report. That is the type of example that has been raised.

Ms BEVAN: There is the reporting and then there is the response to the reporting. So in that kind of situation it might be reasonable for that report not to go any further. But if it was the same situation and a staff member pushed that person then you would report it. The act is what the act is. It is the incident that gets reported, not the sort of subjective judgement of how important the incident is. It is assault; somebody has pushed somebody over.

Ms JAN BARHAM: Another issue that arises is the level of care that is provided in a residential facility and whether there are enough staff or appropriately trained staff to recognise things. In the example of someone entering a room, is the staff person fully trained to understand that someone may be indicating that he or she is unwell? A trained person might recognise that but an untrained person might not. The Committee held a registered nurses inquiry that looked at whether the level of training makes a difference and whether risk and danger can be avoided to vulnerable people in any of those residential facilities. I want to ask a question about sexual abuse that has arisen in the royal commission and I have heard a lot about in the community. Will you inform the Committee about the vulnerability and the risk of sexual abuse of older people with disability?

Ms LEA: We do not have hard and fast facts on it. It would obviously be underreported if we do not have, as Ms Bevan was mentioning, the avenues to report that kind of assault. But it goes back to what you were saying about recognising the behaviours because that is vitally important. If we have staff that are trained to recognise that this person is acting in a peculiar way, maybe something has gone on with them, and being able to implement support around that rather than just saying that is challenging behaviour and we need to restrict or restrain that person. Having staff that are trained to be able to identify that and notice the different ways in which violence is perpetrated against older people with disability is vital in that area, especially in regard to sexual assault, I would feel.

Ms JAN BARHAM: Many people with disabilities have decisions made for them by the Public Guardian. Can you provide any insight into how the Public Guardian decides what is in the best interests of those people? How does that work? How do they know what is in the best interests?

Ms BEVAN: I can take that question on notice. I think our manager of individual advocacy will have more detailed information on that process. However, I would take this opportunity to say that I expect there to be a lot of reform in the area of guardianship legislation and around legal capacity in general in New South Wales over the next few years. As I am sure you are aware, in 2014 there was the Australian Law Reform Commission inquiry into legal capacity and its report has come out. Also there have been a lot of developments following the instruction of the United Nations Convention on the Rights of Persons with Disabilities.

I imagine there has probably been quite a lot of talk about capacity throughout today but the understanding of legal capacity has really changed considerably from when a lot of the legislation that we have around capacity in New South Wales was written. The days when a medical doctor can look at somebody and decide on the basis of a diagnosis that they do or do not have capacity are over. Legislatively they are not over.

The Hon. Dr PETER PHELPS: What about a lawyer.

Ms BEVAN: Definitely a lawyer. The idea that somebody can walk into a lawyer's office with their family, present themselves, sit there and the lawyer looks at them and says, "No, you don't have capacity" will not happen for much longer.

The Hon. Dr PETER PHELPS: The problem is it is the other way around, that is, they look at the person and say they have capacity to make the enduring power of attorney or the will.

Ms BEVAN: Either way, who are they to make that judgement? In many cases who are doctors to make that judgement? The idea that doctors, psychiatrists, psychologists, lawyers and any other sort of medical professionals can make that judgement about a person has been turned on its head.

The Hon. Dr PETER PHELPS: Who can we rely on in that instance to provide an assessment as to whether a person can make a rational and conscious decision in relation to their own future?

Ms BEVAN: The way that the discussion is developing is we assume that all people have legal capacity or legal agency; they have rights and they have the capacity to exercise those rights. The reason the sort of incapability or incapacity does not come from them, it is not inherent in them, but it comes from the support that they are provided with to communicate their will and preference.

Ms JAN BARHAM: Or not provide it.

The Hon. Dr PETER PHELPS: Or lack thereof, yes.

Ms BEVAN: Or not provide it. A very simple example is if a deaf person is talking to you today and you are trying to participate in this conversation. If they do not have the support of an Auslan interpreter then there is no communication. So that person cannot make decisions in that situation. They are incapable. Similarly, a blind person may require Braille or any other supports. When it comes to people with cognitive impairment they also have a right to be provided those supports, the same as a person with any other disability would. It is just that we are not so used to doing that. Our systems are not set up to provide those people with those supports. So in those instances, those people require decision-making supports. It is the quality of those decision-making supports that determine whether the person has capacity or not in any given situation.

In the case of a person presenting in a lawyer's office they may have their family, friend, independent advocate or supporter who is there explaining to them in terms that they understand, simple terms, "Is this where you want to live? Do you want to live in this house? Do you want to live in that house? Yes or no?" That person understands, they are communicating, they are the ones to make the decisions that they want to make about their future. And that may seem very longwinded and a long process but that is what is possible, and that is what international law has said. It is what the Law Reform Commission has said needs to happen. Many of the State and Territory reviews that are going on at the moment, and Commonwealth reviews of laws, all steer us towards that direction of having to implement supportive decision making which New South Wales has been doing. There has been a pilot of supported decision making which should be expanded. There are costs involved in

that. But when we talk about older people not having capacity in a throwaway sense of, well, this person was fine and then this incident happened and now they no longer have capacity and we are writing them off, that is just not the way that it would be dealt with in the future

Ms JAN BARHAM: Does the Public Guardian have a unit or a procedure for ensuring that they respect people's rights and capabilities in those situations?

Ms BEVAN: My feeling is that they do make attempts to involve people in those decisions but it is not really within their mandate to do that. The legislation is there for them to make best-interest decisions for another person, so that is what they do. We would prefer to see a system whereby people are supported to make decisions and are included as much as they can be to make those decisions and when that is ultimately not possible the decisions that are made on their behalf are based on their existing will and preference rather than their best interests.

Ms JAN BARHAM: Is there anything in particular around the quality monitoring framework that is being developed for the National Disability Insurance Scheme [NDIS] that you think we need to be aware of in this inquiry?

Ms BEVAN: One of the main things will be it will only apply to people in the NDIS who are under 65. One of the difficulties we have between the new world of the NDIS and the existing world of aged care is that one of the drivers of the NDIS is about promoting and encouraging social and economic participation of people with disability. There are a lot of additional supports being invested to achieve that around things like ageing in place, for example. People who are getting older and who have a disability are going to have access to a lot more supports to stay in their own homes. The people who are just on 65 are not going to have access to those more sort of social disability supports to enable them to stay at home, to stay in their communities—to stay in contact with their lives, essentially. The provision of aged care services is very different and we are already noticing quite big disparities between services in the site so far.

The second one would be around restrictive practices, which we touched on a little bit earlier. I think the NDIS is still a bit reluctant to go there. We would advocate that there should be a separate national monitoring regulation towards elimination of restrictive practices in all service areas in general, not just disability services. We all know that restrictive practices happen in aged care and all other different places, so there is definitely a crossover there. I could probably think of more but I will leave it there.

Ms JAN BARHAM: If you do think of more please send them to the Committee.

The Hon. SOPHIE COTSIS: With respect to the Ombudsman's disability reportable incidents scheme, from December 2014 to now you are saying that there have been 618 reportable incidents in supported accommodation, both government and non-government?

Ms LEA: As far as I am aware, yes.

The Hon. SOPHIE COTSIS: There have been 12 prosecutions only. It is about expanding it to cover everything else.

Ms LEA: A wider range of settings, yes.

The Hon. SOPHIE COTSIS: Have you spoken to the Government or the Minister in relation to why there have only been 12 prosecutions?

Ms LEA: I have spoken to the Deputy Ombudsman about it but it has not really gone further than that. There was not really an answer for it either.

CHAIR: I will conclude by thanking you both for coming this afternoon. People with Disability Australia does some marvellous work for people and your advocacy on their behalf this afternoon has been very good. We will add that to the material that has come in through the submissions. We are very grateful for it. Due to concurrent demands on Hansard the transcript of today's proceedings will not be available until after Easter, so there will be a slight delay. I think there are some questions on notice and there may be some additional ones from the Committee. They will be provided to you and the secretariat will liaise with you about returning the

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answers within 21 days. There may be some additional questions arising from the questions this afternoon. If there any additional points that you wish to cover or elucidate further you may send that to the Committee.

Ms BEVAN: Can I just mention one really small thing, because I assume you are aware but I do not know? The Legal Services Commission, I think it is, is introducing a uniform law between New South Wales and Victoria on some aspects of professional conduct. As part of that they have done a whole piece of work on power of attorney and the way that lawyers interact with clients.

CHAIR: Are you able to provide us with a reference to that on notice?

Ms BEVAN: Yes.

CHAIR: That would be great. Thank you again.

(The witnesses withdrew)

(The Committee adjourned at 4.46 p.m.)