

**Resolved to be published by the Committee on the 12 May 2016**

**IN-CAMERA REPORT OF PROCEEDINGS BEFORE**

**GENERAL PURPOSE STANDING COMMITTEE NO. 2**

**INQUIRY INTO ELDER ABUSE**

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**At Sydney on Friday 18 March 2016**

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**The Committee met at 9.45 a.m.**

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**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:** Before we commence I acknowledge the Gadigal people who are the traditional custodians of this land and pay my respects to the elders past and present of the Eora nation and extend that respect to other Aboriginals who may be present with us here. Thank you for all accepting the Committee's invitation to appear at this in-camera hearing. As you are aware, the inquiry is examining the effectiveness of the New South Wales laws, policies, services and strategies in safeguarding older people from abuse, and empowering older people to better protect themselves from risk of abuse. You have been invited, based on your submission. I thank you for those submissions which focus on recommendations for the Government. That is important for our consideration in developing recommendations that we can send to the Government.

The Committee requests that you focus your evidence today on essentially some broad issues. What do you believe went wrong with the system? What could have been done better? What recommendations could the Committee reflect on and think about in its deliberations? As this is an in-camera hearing you are bound by the confidentiality of today's proceedings. Today's hearing is being recorded by Hansard. You have been advised that the Committee intends to publish the transcript of proceedings with the names of witnesses and others identifying information suppressed. The secretariat will consult you regarding the publication of the transcript. However, the decision as to what is or is not published rests with the Committee. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside their evidence at this hearing this morning. I urge witnesses to be careful about any comments they may make to the media or to others after they complete their evidence. Such comments would not be protected by parliamentary privilege if another person decided to take an action for defamation.

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 the privacy of people. The purpose of today's hearing is not to focus on individual stories but on what you have learned. I therefore request that witnesses focus on the issues raised by the terms of reference of the inquiry and avoid naming individuals unnecessarily. There may be some questions that you could only answer if you had more time, or with certain documents to hand. In those circumstances, you can take a question on notice and provide an answer within 21 days. Finally, please turn all mobile phones to silent for the duration of the hearing.

**WITNESS A**, and

**WITNESS B**, affirmed and examined:

**WITNESS C**, sworn and examined:

**CHAIR:** I invite you each to make a two or three minute opening statement. The Committee has received your submissions and they have been studied by Committee members.

**WITNESS A:** I would like to make a short statement to this Committee. As the Committee is aware from my submission, I have lived in a dementia world for the past 15 years as a carer, and just like so many other carers I understand the difficulties that people with dementia face. My own mother who had dementia was subjected to abuse in a variety of forms, such as psychological abuse, financial, verbal abuse and threats of violence from her eldest daughter, my own sister, who held the power of attorney.

When our mother eventually did let us know about her abuse I applied to the Guardianship Tribunal on her behalf. During this difficult period the aged care facility where our mother lived protected and supported our mother. The head of the aged care facility was involved in the tribunal process and I wish to thank all of the staff for their care and understanding. I would also like to thank the police officer who attended the aged care facility to interview our mother. He demonstrated such compassion and his greatest concern was for our mother's welfare and protection.

The support of Mrs Ellen Brown from Alzheimer's Australia was invaluable to my mother and me during this time. My gratitude goes as well to Mr John Watkins, chief executive officer, Alzheimer's Australia, New South Wales for his personal input into the abuse situation. My appreciation is also extended to Minister Constance and the New South Wales Parliament for making me an ambassador so that I can continue to speak for carers and voice our concerns especially in relation to difficult issues. Minister Leslie Williams has also played an important role in highlighting the difficult challenges that people with dementia face, and she has supported me in my endeavors to bring about changes.

I have only learnt about the Elder Abuse Helpline in more recent times. They have guided me to help answer some of my questions in relation to our mother's abuse. They informed me about this inquiry being held and that members of the public can make a submission. Although I faced many challenges in reporting my mother's abuse I am truly thankful to the Office of the Public Guardian for its care and understanding to protect our mother when she was alive. Sitting behind me is my partner of 32 years who has been diagnosed with younger onset dementia. It is people just like him who are easy targets and can be exploited by unscrupulous powers of attorney. I am unable to change the past and the anguish and pain that was inflicted upon my mother by her power of attorney before she died but I am hoping that by being here today before this inquiry that changes will be made to protect vulnerable people in our communities from being abused.

**WITNESS B:** My submission is in relation to the trust we place in solicitors and lawyers to act ethically in dealing with elderly people where capacity is in question especially in the implementation of the enduring power of attorney. There are very clear guidelines outlined by the Law Society of NSW if there are doubts as to a person's capacity. The guidelines outline the red flags and the warning signs in great detail. They stress that these are not exhaustive and should not be used as grounds for a definite diagnosis. The guidelines also note that in some cases it will not be obvious that a person may lack capacity, especially in cases of dementia.

These guidelines stress that it is fundamental that solicitors and lawyers take thorough, comprehensive and contemporaneous file notes when dealing with capacity. They also note that where a solicitor or a lawyer has doubts about a client's capacity to give competent instructions, it is their responsibility to explore the matter further. However, if a solicitor or lawyer ignores these red flags and warning signs and proceeds regardless, the Legal Services Commission can do little more than remind them of best practice, as I found out in my case. Such behavior does not appear to fall within the category of unsatisfactory professional conduct, as defined in the Legal Profession Act 2004. I believe this puts far too much trust in solicitors and lawyers to act ethically when the repercussions for the elderly can be quite disastrous.

In my case we took the matter to the Guardianship Tribunal and the enduring power of attorney was suspended and replaced with a financial management order, subject to the supervision of a State trustee. The

neuropsychological report that was done prior to the tribunal hearing found that the client lacked capacity. We took it through the tribunal, I took it through the tribunal, which I suspect in many cases does not happen. I would suggest that this is probably the tip of the iceberg here. I have made my five recommendations in the supplementary submission that I believe would help in this area. Do you have a copy of that?

**CHAIR:** Yes, we have received that supplementary submission. Thank you for that and for your opening statement. Witness C, would you like to make an opening statement?

**WITNESS C:** I will try to keep it reasonably brief, just giving a personal insight into the way the system can treat a frail person in a family where one sibling has decided to exploit a parent with dementia. As a result of what happened, my wife and my kids did not see my mother-in-law for two years because she was effectively held in custody by the sister because she had obtained an enduring guardianship. Then they saw her very rarely due to the six-hour round trip to visit her in \_\_\_\_\_ for the next three years.

The Guardianship Tribunal appears to be the appropriate place to resolve such issues. Our expectation was that once the facts were shown and the deceit was proven \_\_\_\_\_ would be restored to her former position. No, that does not happen. Because the Guardianship Tribunal does not seek to make findings of fact or blame, they state that they act in the best interests of the person and maintaining family relationships. This is a contradiction in terms. The entire justice system and court system is based on making findings of fact and then determining suitable outcomes. The present system allows for any person with knowledge of the Acts and tribunals to exploit persons with little fear of being caught and punished. Unfortunately, for most people, lay people or people like me, who are unaware of how the system works more than likely they would need legal representation to avoid the usual pitfalls and have any chance of success.

The Guardianship Act must be tightened to ensure that the true facts of the matter are identified and tested by appropriate cross-examination. Time and time again we had evidence of the lawyer of \_\_\_\_\_ that prepared and arranged for the legal instruments signed, was to be contradicted by the evidence of the accountant that was nominated power of attorney executor. It would only be proper that the member clarify with the witnesses at the time the reason for the contradiction and allow for cross-examination. Had this been done the result of the hearings would have been completely different. This also happened when the sister initially denied all advanced knowledge of anything in written submission in initial hearing, which at that stage led to our application being dismissed. That is, they believed the other party. In later hearings she admitted to attending the office, speaking with the lawyer, et cetera. So you have an event and facts given at a hearing and an outcome. Then there are further hearings later on and what was said there is not brought up, not reviewed. She is not held to account in that whole process, nor is the lawyer or accountant who gave evidence. It is a kangaroo court, in a sense. Having the relationships with the family and the best interests of the person at heart is not effective and it is not appropriate for dealing with these matters.

The extent of the ignored facts include that the lawyer certified and witnessed an enduring guardianship appointment that was unsigned. That is a fairly significant legal transgression. The lawyer held information from the Guardianship Tribunal for four years then he spoke to the doctor requesting the assessment but never waited for the response. Four years later he read a transcript of his own file note saying, "Oh yes, and I spoke to the doctor on that day", et cetera. But four years earlier he did not even mention it. The lawyer twice lied to the tribunal that the ensuring guardianship had been signed. It had not been signed. The lawyer did not correct false evidence about the events of the creation of the will and so forth by the accountant when hearing it. There was also the accepted evidence of the lawyer regarding capacity—of effectively overruling evidence of specialists that totally rejected the possibility of the person having capacity. All these facts, if they were brought to bear, would have only led the tribunal to one decision. Unfortunately, they do not really assess the true facts and then make a decision in the best interests and try to preserve family relationships. They used revoked powers of attorney to sign cheques, open bank accounts and operate them.

In such circumstances, where the true facts are discerned and they incriminate a party a decision must follow and apportion culpability. In our case they simply stated there was a friction between the parties, made \_\_\_\_\_ a ward of the State and appointed the Public Guardian and Trustee to manage the affairs. The fees of the department were a new revenue stream and it has the appearance of a job well done. All the doctors, nursing homes and government departments have an interest in having more customers, not less. We should not underestimate what drives a lot of the decisions in these matters.

I have put in my earlier submission that there should be some requirement to have a capacity test for people over 60 to try to draw a line in the sand. I do not think that is going to work. What I think could be done

is having a voluntary system that states if a person wants to maintain the presumption of capacity at the time of execution of a legal instrument and for any future legal hearing concerning those legal instruments then the person should, before they execute or give instructions in respect of those instruments, undertake a test that will give a reasonable assurance of capacity. It should also include a recommendation to advise all your immediate family members of the planned changes. The results of such a test should be requested and seen by the legal professional at the time of executing any documents.

It is not foolproof but the aim is to capture 80 per cent of the problem and is not intended to be absolute. What it does do is provide a prudent person with an avenue to put a line in the sand to say, "I made a reasonable attempt to prove my capacity and I will be presumed to have capacity at the time if the instruments are ever challenged in future." If you do not do this, on the flip side it shows that a person made a deliberate decision of not having a test to prove capacity at the time and therefore will not enjoy a presumption of capacity. While this is a burden, I think from what we experienced over the past six years it is a very small burden by comparison. It will basically rid the system of those professionals who make a living out of living on the edge and being willing to ignore signs of incapacity and so forth in order to get a new client.

In our case the doctor that she was taken to was not her regular doctor. The lawyer that she was taken to was not her regular lawyer. The doctor was actually recommended to her by the lawyer. You have got all these red flags that this looks like it is a really bodgie thing. We need to have something simple that can be administered by perhaps specially designated GPs or similar. I know there is a whole lot of tests of capacity for different things, but a very simple test that really tries to take care of all those very obvious cases where people are frail and other people are orchestrating things for their own advantage—if you can take all those out then we have done a good thing. I do not think there is any solution to this other than people being more honest in their lives.

These are other issues that came up. The Public Guardian told my wife, when we applied to have her moved from [redacted] to Sydney, that Alzheimer's Australia had done an assessment on [redacted] and found her to be too far gone to move or something. I rang Alzheimer's Australia and they said, "No, we don't do any tests." So we had the Public Guardian telling my wife something. We then had that decision reviewed when they said we cannot move her. They basically did not address that issue, which is quite a serious thing. What they actually said was the decision to refuse was because it would compromise her health and wellbeing and all the allied and health professionals—that is, the nursing home and the doctors who treat her—do not support such a move. That is, it is better for her to stay in the middle of nowhere with no visitors than be close to her family where she would be visited two or three times a week.

Dealings with the trustee started badly when they refused permission for my wife to retrieve anything from her mother's house before they sold it—or not even sold it; before they just emptied it. Nothing. No photos, no jewellery, no nothing. An inventory was not really taken of all the goods because they just stuffed them in boxes. It was totally unsatisfactory. This was her mother's house. Along the way they wanted to sell all of the commercial property assets in the super fund because there was a slight problem, according to the tax office: it is an unintended consequence, I fought it and I won, but it took a mammoth effort on my part to keep them from selling all those assets. Again, selling the principal house, they sold it—the only reason they wanted to sell it was because they needed the deposit for the nursing home. She had enough cash in her businesses to pay for that, but they said, "No, we have to sell it".

They ended up selling it to the tenant of the house—a waterfront property—without going to the market, which I think is pretty unusual behaviour. They paid \$13,000 a year to store the personal effects for four years and then sent us a request earlier last year saying, "What do you want to do with it?" We said we should just take the goods and distribute them between the two daughters because the proceeds of the sale would not even cover the cost of the sale. They rejected that and said, "Oh no, we are going to sell it anyway". So the way that the trustee dealt with the matter was totally unacceptable.

The Office of the Legal Services Commissioner again effectively rejected all the evidence we gave, which was very compelling and worthy of a proper investigation. They simply dismissed it because they said if the lawyer did not have any doubts about the capacity of a person then really all bets are off and there is no need to consider anything else. Even the fact that he signed as a certified witness to a signature, even though it was unsigned, they dismissed it and you think that cannot be appropriate. Chartered accountants; the same thing again. We gave them key evidence of transgressions by the accountant and after two years or three years they still said basically—and did not address the two key allegations—

**CHAIR:** Without cutting you off, we would like the opportunity to have a quite extensive question and answer session. If you could make a last few points I will open up the inquiry for questioning.

**WITNESS C:** Okay, sorry. The criticisms are that it is inappropriate to have a quasi-court not do a proper determination of facts. Orders should be based on the findings. Let us just open it up.

**CHAIR:** I think the questions will lead into the points you have made. I will just explain the format. There are representatives on this Committee from the Government, the Opposition, the Christian Democratic Party and The Greens, so it is a broad cross-section of representation. What we decided to do earlier is to share the questioning in a pretty fluid way. People will jump in, identify themselves and we will move on to the next question. We will start with the Hon. Sophie Cotsis.

**The Hon. SOPHIE COTSIS:** Thank you very much for coming here this morning. I direct my question to Witness C. I want to take you back to the issue of the trustee. You mentioned how they came in and emptied your mother-in-law's place. Did you get any notification? What was the process? How did that happen?

**WITNESS C:** It is very poor and it is going back some years, but basically we were told that, yes, the house was going to be emptied. We said, "Okay, great." We had not effectively been there for some time because            had been living up in            for some time.

**The Hon. SOPHIE COTSIS:** Where is the house?

**WITNESS C:**            . So I said, "Okay, can I go up and participate at the time and oversee that and make sure that we have got an inventory really of what is there?" We were not allowed for occupational health and safety reasons and that was it. They did not even ask us what should we do with all these things. It was clear that            was never going to come out of the nursing home and go back to her home. So at that point of time it would have been sensible to say to the two daughters—because it is only household effects and personal things and whatever—"What do you want to do?" No, it goes into storage.

I believe the trustee has regular suppliers of storage and facilities and real estate agents and all these sorts of things and it is like an ecosystem—that is the way I see the whole elderly sort of industry, if you like. They just said, "Great. We are putting it in storage". Other than the fact that my wife could not take photos and jewellery and whatever else that was there to make sure that it was accounted for, then it was let go and they put it into storage and that was the end of it really.

**The Hon. SOPHIE COTSIS:** Once it was put into storage what happened? Did you guys collect—

**WITNESS C:** No, it stays in storage. They paid \$13,000 a year for four years.

**The Hon. SOPHIE COTSIS:** How much?

**WITNESS C:** Thirteen thousand dollars a year for four years—so, \$40,000, \$50,000 in storage—and the goods clearly are not going to be worth anything. They even told us that the cost of sale will outweigh the cost of the revenue from the sale because they have to de-stuff containers and do all these things. So they spent \$40,000 or \$50,000 to keep things which are going to be basically worthless and then we will have to try to get the photos and all those sorts of things at the time when it is being de-stuffed. It is just ridiculous what goes on.

**The Hon. Dr PETER PHELPS:** I have got questions for each of you but I will start with Witness A. Presumably, in relation to your mother, there was a single power of attorney granted.

**WITNESS A:** Yes.

**The Hon. Dr PETER PHELPS:** At what stage of dementia was that power of attorney granted?

**WITNESS A:** My mum was diagnosed in 2002. At that time she had a power of attorney put in place and the power of attorney that is in question in relation to the abuse was 2009 to 2012.

**The Hon. Dr PETER PHELPS:** Just for you and for Witness B as well, at what stage in the process were you brought into discussions with your relatives and with the lawyer in question about the granting of powers of attorney?

**WITNESS A:** We were not brought into it at all.

**The Hon. Dr PETER PHELPS:** Witness B?

**WITNESS B:** Not at all.

**The Hon. Dr PETER PHELPS:** That leads to my next question. If one of the recommendations were to be along the lines that there should be a mandatory requirement of the notification for spouses' partners and children, if that were to have been in place, do you believe that many of the problems you face could have been averted at that stage, or do you think that there was something inevitable about the granting of a single power of attorney? What I am trying to say is that if you discussed it beforehand, would the outcome have been the same or would it be better to work to a system where you have, if you like, two people with a power of attorney which requires consensus?

**WITNESS A:** I feel that we need to have two people especially and both to sign. That way they are both protecting the person. We just found that our sister, with the 2009 power of attorney, she did not even tell our solicitor that mum had dementia. So if it had been discussed with any of us at that stage—or me, as I was the carer—I would have just went straight to the doctor and somebody and said, "Excuse me, this has been made. We are now looking seven years down the track", because we had so many medical reports, "could we please stop this until we have a look at all of this process?"

**The Hon. Dr PETER PHELPS:** Witness B?

**WITNESS B:** It is not a family one for me, if you have read the submission. I do not think it would have helped in this case because what simply happened was we had it in process: we had a multidisciplinary team involved, there was a medical assessment being done, a neuropsychological assessment was to be done—all of that was to take place. The clinical nurse had organised for an appointment with the State Trustee because of the financial exploitation taking place. But the solicitors, lawyers, involved ignored all of those red flags completely and utterly and put the power of attorney in place. At the time we thought it was only an enduring guardianship order. We did not find out until just before the tribunal hearing that they had put a power of attorney in place as well. So I do not think it would have—the elderly cousin of 85, I suppose had he been notified beforehand or something, he certainly would have objected to that. No, I cannot see that it would make a lot of difference in this case. The lawyers ignored it all.

**WITNESS A:** Maybe if their doctors were notified and if the solicitors realised that they were under a specialist, that might be a way of helping it go back the other way, so there is somebody looking, the general practitioner looking at that protection.

**WITNESS B:** In my case, I had taken the elderly gentleman to the GP. He had referred off to the multi-disciplinary team et cetera and so on. Sure, what you put—and it would be really nice if the lawyers had some medical indication of what had actually gone on—but, in my case, they knew what was going on and they disregarded it completely and just went ahead. So that is why I have suggested, in my suggestions here, when I was with the department we had mandatory reporting procedures for child abuse and so on. It did not matter whether you were a lawyer or God, you still had to actually do it. So I am suggesting that those guidelines that are put in place by the Law Society should be mandatory. If there is a question mark over capacity, then there should be a capacity assessment, with neuropsychological input. Because the diagnosis and understanding the problems that people with dementia have with planning and comprehension and so on, you know, you are not necessarily going to get that from a lawyer interviewing or something at any rate.

That was why I put down that I felt there should be a mandatory component. There is so much elderly abuse happening and we have the abuse with children, so it is mandatory reporting. If there is any question over capacity, then right from scratch the lawyers have to involve an independent person who checks for capacity.

**The Hon. Dr PETER PHELPS:** An independent medical person.

**WITNESS B:** Yes, an independent medical person, the multi-disciplinary team from the hospital et cetera and so on.

**The Hon. SHAYNE MALLARD:** Mandatory reporting of the situation to whom?

**WITNESS B:** Well, I mean, in the case of the lawyers I suppose if they didn't but once they are aware of the problem and that maybe they need to look at it, if they went ahead, so if that had been the case and I took that through to the Legal Commissioner, there would have been an offence. But in this case, if there is practice, it is not seen as anything more than the best practice. So, you leave it there for unscrupulous people to basically do whatever they want. And I saw that in more cases.

**WITNESS C:** They should be prohibited from executing the documents if there is a question of capacity and it has not been resolved.

**The Hon. Dr PETER PHELPS:** But is there not always a question of capacity at that stage? Is that not one of the problems?

**WITNESS C:** We had a person who, we had gold-plated expert medical evidence, uncontested, to say this person could not have had capacity. The Legal Services Commission accepted the evidence and so did many other people along the way because this lawyer simply said, "She was deliberate, articulate and decisive"—absolutely everything. Mind you, the next day this same lady could not request a capacity assessment from a doctor and the same lawyer had to tell the doctor, "She needs a capacity assessment" which the doctors never did, in fact, that day.

**The Hon. Dr PETER PHELPS:** Are you suggesting he was lying or that—

**WITNESS C:** Oh, absolutely.

**The Hon. Dr PETER PHELPS:** Witness A, I think you had something to say?

**WITNESS A:** Can I say something here? When we are looking at dementia, that is why my partner and I travel around the State talking about dementia. Anybody that has dementia, especially in some of the earlier stages, I think I could walk into the Supreme Court today, sit him in front of a judge and I could actually get the judge to think he had capacity, okay? The solicitors, it is not their fault. Somebody, on a good day with dementia—and mum was in an aged care facility when she was taken there. So that is why I am saying, a simple medical certificate by the GP would alert, them, the unscrupulous power of attorney is hiding this diagnosis.

**The Hon. Dr PETER PHELPS:** So you are actually suggesting something a little more stringent than—if you believe there is a problem, it should be, if you go for power of attorney, you have to produce some sort of medical certification to that effect.

**WITNESS A:** Like we have in an advanced care directive. There is just a page there that says: This person has capacity; they understood it. And all I was suggesting, if you just put their medication—the medication is a big factor for some, like dementia, some of the medication will show that they already had dementia, then you could not hide if they are under a specialist.

We have got 27,000 younger people with dementia. So no solicitor, if you take somebody—and we have got somebody who is 19 years old up in our area—into a solicitor's office, would you suspect, on a good day, that that person has dementia? That is all I am trying to get to.

**The Hon. Dr PETER PHELPS:** I think there is a lot of merit in that and it also obviates the argument from solicitors, ex post facto, that: Oh, I thought she was fine, I had no reason to believe it. Because I remember my own grandmother who had dementia, some days she was perfectly lucid, as she would have been 20 years ago and other days she was just terrible.

**The Hon. SHAYNE MALLARD:** Or the morning.

**The Hon. Dr PETER PHELPS:** Yes.

**WITNESS A:** And that can change from hour to hour. We know that with

**The Hon. Dr PETER PHELPS:** One more question on the same thing, from Witness C. One of the recommendations which we are probably looking at is a Victorian-style arrangement where the Guardianship



Tribunal has its independent—or attached to the Guardianship Tribunal—investigative body, so you do not have to prepare case load for it. You could actually say, "I believe something dodgy is going on." And then they have their own investigative procedure which then goes for subsequent assessment. Do you believe that such an independent authority, Government-created authority, would have been able to address the problems which you faced if they had their own independent investigative authority?

**WITNESS C:** Would that take place during or after the hearing that you have?

**The Hon. Dr PETER PHELPS:** At any time immediately that you considered there was something wrong with the arrangements in relation to your mother-in-law. In other words, you could formally complain to them.

**WITNESS C:** As opposed to going to Guardianship Tribunal?

**The Hon. Dr PETER PHELPS:** If you like. The Guardianship Tribunal becomes the end result of an investigative process that you set in train earlier with an independent authority attached to the Guardianship Tribunal, but not actually the Guardianship Tribunal, if you like.

**WITNESS C:** I think that if the Guardianship Tribunal had a mandate to find matters of fact and apportion blame and those sorts of things and you had qualified people to do that, you would probably not need to go that path. If you wanted to leave the Guardianship Tribunal the way it is, and then have this external thing, it could work. But what we found is that so much of the evidence, you cannot get a hold of it. It took us four years to get a copy of the will.

**The Hon. Dr PETER PHELPS:** But that is because you are a private citizen whereas a Government authority which had subpoena powers—

**WITNESS C:** Yes, that is true, because they have got some authority to request things. I think certainly you have got to change the status quo, with the baby boomers out there with so many billions of dollars worth of assets transferring, you have got to decide.

**CHAIR:** Did you have a comment?

**WITNESS A:** I was just going to say, if they worked together with them, then any things that you could not get hold of, or any errors that may have taken place, they could investigate that. The whole system is not working together, instead of, we are feeling it is in isolation.

**WITNESS B:** If I can make one comment? I think that is a wonderful idea and it would take a lot of pressure off people. But the cost of that?

**The Hon. Dr PETER PHELPS:** Victoria has not had a problem with it. We asked them about that. It is definitely doable.

**WITNESS C:** You could offset the cost. I have had probably 15 hearings and reviews on this over five years. It must be a million-dollar case for the State. I think you can say it will offset a lot of cases. Not everyone goes as hard and as far as I do.

**CHAIR:** Yes. There is an offsetting effect.

**The Hon. PAUL GREEN:** Witness A, in your submission you have said that anyone can be a POA without a police check. Someone with a history of violence can intimidate a vulnerable person to appoint them as a POA. Would you like to comment on that? That is recommendation 4 in your submission.

**WITNESS A:** Yes, I realise that. I have been involved with carers for a long time and have attended many carers meetings. When I brought up the topic of my mum there were fewer than 30 of us in our carers meeting and six of us brought up the topic of abuse that day. My sister was arrested for assault on a 77-year-old lady a couple of years earlier, and we did not realise that. We do not know at this stage whether mum was intimidated in that way. If there had been a basic step in place, such as having a statutory declaration, and if my sister had signed a statutory declaration to say that she did not have a criminal history then that would have been a point of law we could get her on.

**The Hon. PAUL GREEN:** We are contemplating the idea of having a working with elderly check, rather like the working with children check. It is a traffic light system. A person may not have committed a serious crime, but an orange light would flag that it needed to be looked at. Do you think that would be helpful?

**WITNESS A:** I think that is an excellent idea.

**The Hon. PAUL GREEN:** I want to turn to the legal side of things. It seems that in one of the cases there was a conflict of interest for the solicitor and the loved one who had power of attorney. They declared that. As soon as the person passed away they re-established the relationship, probably for pecuniary reasons. It is a concern. Does anyone have experience of this? My understanding is that there is not always a set fee for a lawyer who is involved in deceased estate proceedings. They can get a percentage of the estate. In your case was there a set fee to address the estate?

**WITNESS A:** I do not know. We have not been able to get any answers. The estate is not settled. We have not had any answers from the solicitor except for that letter.

**WITNESS C:** There is the option to use letters of administration. They appoint a trustee and they are paid on a percentage basis. I have not gone through it myself.

**The Hon. PAUL GREEN:** I will have a look at that.

**WITNESS C:** Certainly if you have a trustee company and it is a sizeable estate then there is a lot of cost involved.

**The Hon. PAUL GREEN:** That is right. I want to come back to that. It seems that the lawyer in this case should have declared an interest, either professional or pecuniary.

**WITNESS A:** Yes, I know.

**The Hon. PAUL GREEN:** But this does not seem to be the standard. Would you welcome the recommendation that solicitors should say whether they are representing the same side?

**WITNESS A:** Yes.

**The Hon. PAUL GREEN:** Similarly, if someone has a relationship with the doctor, they might be put in the position of totally controlling the situation by using their professional influence. Would you welcome a recommendation that there should be a declaration to all siblings of professional or pecuniary interest with a POA or deceased estate situation?

**WITNESS A:** In my mum's situation, the solicitor represented both my mum and my sister. I felt that it should not have happened. He declared a conflict of interest and when my mum died he jumped back on board and is now representing my sister again. I think that needs to be investigated and looked into.

**The Hon. Dr PETER PHELPS:** There is a problem with that. Even in my case, my solicitor represents me and my in-laws because he is the family solicitor. Rather than having to go to a different solicitor, you could have a system of declaration. I suggest it would be better to have a system of compulsory notification so that if you are going to have a fight that fight happens at the first meeting.

**WITNESS A:** Okay.

**The Hon. Dr PETER PHELPS:** That is just my view. I am not sure that anyone is going to move away from the family solicitor.

**The Hon. PAUL GREEN:** I am open to that.

**The Hon. Dr PETER PHELPS:** If you can at least, in the first instance, say that there is a problem then that stops it from happening three or four years down the track when the legal framework is in place and people ask, "Why did not I know about this?"

**The Hon. PAUL GREEN:** I am saying exactly that. There should be compulsory notification of all siblings or all those who are involved in the estate settlement. The solicitor and power of attorney should all be declared.

**WITNESS A:** Yes.

**The Hon. PAUL GREEN:** Witness C, thank you for your story. I hear your frustration, hurt and pain.

**WITNESS C:** It is still going on. We are fighting over where she will be buried. It is with the coroner. That is how bad it is. It is unbelievable.

**The Hon. PAUL GREEN:** It is not acceptable.

**WITNESS C:** No.

**The Hon. PAUL GREEN:** Your presentation today will be part of the solution. While you are experiencing this pain and frustration we are doing our best to ensure that others do not end up in that situation. Thank you for your evidence. I think you worked through the trustees or the guardianship board. It seemed to me that they were being clinical about the financial outcomes rather than being compassionate and hearing what the whole family's goal was. They said, "The proceeds will not fix this. We need to do this." You had a more intimate understanding of the situation and of your mother's finances—the shares and the superannuation fund—and you were very aware that those funds could have provided the answer. From what I can see, the trustee was very blunt and said that the easiest way to do it was to sell the house and settle the debts. Is it fair to say that?

**WITNESS C:** The New South Wales trustee says that that it does not look after business assets, but it does control the estate. I have learned all this through the process. I did not know about it before. We knew there was enough cash in the companies to pay the bill. But because when she lost capacity there was no-one to fill the position of director or trustee they said they could not possibly take it. We were open to them fitting into that position for the time being. The home is excluded from fees for the New South Wales trustee. When you sell it the proceeds become chargeable for fees.

**The Hon. PAUL GREEN:** Okay.

**WITNESS C:** So there is an interest there for the New South Wales trustee to do all these things. It is the same with selling the assets. There would have been a transaction fee to sell X million dollars worth of property. They started spending money on all sorts of experts and solicitors. You have no say in it. Finally I was able to push the case so far that they did not sell all those things. It was not the intention of the Parliament to punish a person who develops dementia through making their super fund non-compliant and forcing them to sell everything. That clearly is not the intention. They listened to what I said, but it cost many hours and thousands of dollars to get the point. They are not compassionate. They were paying the sister a thousand dollars a month as comfort money while the mother was in the nursing home. She did not spend anything on her. For three years she was on that arrangement, then we got the amount reduced. Once the trustee forms a view about which people are goodies and which people are baddies you can forget it. They just listen to one side. Because they are up here and you are down there, you have no hope.

**The Hon. PAUL GREEN:** That is the problem.

**The Hon. Dr PETER PHELPS:** It is because they have no independent capacity.

**The Hon. PAUL GREEN:** That is why we need the independent body.

**WITNESS C:** That trustee is appointed. They are very focused on the bottom line. They advertise for customers. That is their business.

**The Hon. PAUL GREEN:** That is right.

**Ms JAN BARHAM:** Thank you for coming along and assisting the Committee. It is a very difficult inquiry. Your evidence is valuable. I want to ask about the centralised data system. Do you believe that that would have made a difference to your individual situations and improved the outcome?

**WITNESS A:** We need to have a centralised data system. I did not know the power of attorney had been revoked and even when the tribunal—where my sister was ordered not to access Mum's money between the hearings. She went and opened a new account. So the bank at that stage had no way of knowing that the tribunal had made those orders and directions. So nobody seems to know when a power of attorney is revoked; the only person who knows is the person who has been sent a letter. There are people out there still using revoked powers of attorney and if we do not have a centralised system then nobody is going to know. I could walk into the bank with that revoked power of attorney, and the bank does not know that I have got the letter, and I can still get money out of that person's account before it is all changed and they are notified. There is no time frame—

**Ms JAN BARHAM:** I have some further questions. I want to work through in the initial stage whether you think that would have assisted in your situation?

**WITNESS A:** Yes.

**CHAIR:** And then I will ask some further questions about how it could be done. Witness B, what about in your case?

**WITNESS B:** In my case that would not have been relevant because there was no previous power of attorney. But I think it is absolutely crucial that we have a centralised registration for powers of attorney, the revocation of them and so on. Otherwise you get a situation where people take them out and exactly what Witness A has said can happen. I fully agree that that is an excellent suggestion.

**WITNESS C:** I was not aware of the recommendation but it sounds like a good one. The banks, the land titles office and a few other instrumentalities would have to search things. Certainly in my case the funny thing was that the Guardianship Tribunal did not find it a problem that she used a revoked power of attorney. It was a case of, "Oh, yes, she needed to pay the accountant; that's okay." Obviously under the power of attorney Act it is illegal and there is a penalty of up to five years imprisonment. So a central registry would be good. In my case she actually closed an account after the power of attorney was revoked and after all the assessments about capacity were completed. She closed the bank account, opened up a new one and put herself on as a signatory. We did not find that out for a year or two. It is ridiculous how loose it all is.

**Ms JAN BARHAM:** The issue has been raised about the cost involved in having a registration system. There are two elements: there is the cost involved and then there is the administrative oversight of who would have access to that information. The authorities might have access but it is unclear whether or not you could access it. There are still some administrative questions around who has access to that information to be able to check.

**WITNESS A:** One of my suggestions was that if somebody presents to a bank with a power of attorney and they are taking out a huge amount—like \$250,000 in one day as was taken out of my mum's account—surely the bank, to cover their customer, should be able to say, "Look, we need to protect our customer and ourselves here. We're not sure about this. It is a large amount of money." What if the bank had to pay an administration fee? They could check a centralised system to make sure the power of attorney is okay. At that time they could also register that large amount. So they would not have to do these two things separately. If everybody had to pay a set amount to have a power of attorney registered in the first place then it would all be there. With computer systems surely we can make things a lot easier.

**Ms JAN BARHAM:** Yes, I agree.

**WITNESS A:** We could have a fee attached to those things and that would cover the costs.

**Ms JAN BARHAM:** I think what we are hearing from all of you is that the complications have resulted in huge costs.

**WITNESS A:** Yes.

**Ms JAN BARHAM:** So a system could in fact save a lot of money as well as all the angst and the upset. The other question I have is in relation to Witness B's position. I think he went there with what I was asking about the Law Society's guidelines. He was saying that there needs to be mandatory system there.

Witness B, are you aware that the Independent Commission Against Corruption [ICAC] once produced a set of guidelines that had to be ticked off on? Someone who was doing transactions or undertaking certain activities had to tick those boxes to say that they had considered and undertaken those steps, and then it had to be signed and dated. Would that sort of thing assure you that that was being taken seriously and that the process and the guidelines were being addressed respectfully?

**WITNESS B:** That would be excellent but it is clearly not being used.

**Ms JAN BARHAM:** Yes, you have made that clear.

**WITNESS B:** If it is being used then I cannot understand how we still have this problem. I actually read Lise Barry's submission, and I believe the Committee is going to look at it. I will just read one paragraph from that submission, it says:

NSW has the largest proportion of lawyers in Australia (41.6%), yet no lawyer in NSW has been prosecuted for the way in which they have taken instructions from an older person.

She goes on to explain that by saying:

One of the difficulties of pursuing these cases is that there are no clear regulations in NSW regarding the procedure for taking instructions for a power of attorney or enduring guardian appointment, or in situations where an older person's capacity to give instructions is in doubt. For instance there is no binding requirement that a lawyer follow the guidelines set down in the NSW Capacity Toolkit or the Law Society's own guidelines. There is not even an absolute requirement that the lawyer maintain file notes of the manner in which they took instructions or of how they ascertained that an older person understood the ramifications of appointing an attorney or guardian.

In my case, I have a letter that was sent to the solicitors saying, "Please review for guidelines; please document how you take the steps", et cetera. Despite that, that was all that happened. I honestly believed that I had the lawyers by the throat. I thought, "I will pursue this. They must be in trouble." I even went to the Supreme Court and spoke to the duty solicitor in there. He said, "Take it back to them." So I did—I took it back to John McKenzie again. It did not make any difference.

**Ms JAN BARHAM:** I say congratulations to you for your tenacity and for showing your genuine care for this situation. It has highlighted something that I think is fundamental, and that is why I raised the ICAC guidelines. It is a simple process where you can catch someone out because they have to sign to say that they have done those 12 steps or whatever it is. That is the point where you would catch them out because it has to be signed and dated that they had considered those things.

**WITNESS B:** Right.

**WITNESS C:** They signed, certified and witnessed an unsigned document; and the Office of the Legal Services Commissioner says that is okay.

**Ms JAN BARHAM:** That was going to be my next question because I find that extremely disturbing.

**WITNESS C:** It is unbelievable. I got a letter from them this week.

**The Hon. Dr PETER PHELPS:** I am very surprised at that.

**WITNESS C:** Apparently Neville Wran could not practise law again because he did something similar.

**Ms JAN BARHAM:** It is disturbing. Can you clarify how far you took that to seek some sort of redress?

**WITNESS C:** I went all the way. It was about two years worth of correspondence. I had the decision reviewed when it first came out. It was like I had to use a criminal level of proof to get them to just investigate the matter. Rather than saying, "Okay, there's about 100 red flags here; I think we should talk to this guy," they relied on the one letter—

**The Hon. Dr PETER PHELPS:** Yours is not an isolated case, Witness C.

**WITNESS C:** They relied on the one letter which said she was deliberate, et cetera. He held back some of the file notes when he gave his response to the Legal Services Commission back in 2010. Four years later he said, "Oh, there's another file note here," in evidence to the tribunal. I told them and they said, "Oh no, that's okay; he did not have to do that." They apply the letter of the law, which we would not even understand or know about, and they say, "You cannot really say that about him simply because he did not dispute the fact that the accountant said he told the lawyer about the dementia at the meeting and gave instructions."

**Ms JAN BARHAM:** My follow up from the great evidence given by the three of you is that the system is failing because it does not have the accountability.

**WITNESS A:** That is right.

**Ms JAN BARHAM:** If that could be delivered—I agree that technology gives us the capability to do that—a simple list with those legal representatives at the point that they take action, they have to list the documents that they are accessing and considering for those purposes. It should be recorded somewhere. That accountability has to be placed on the people who have the authority to set the actions in motion.

**WITNESS B:** As I said, the fifth point I put down as:

Finally if a solicitor fails to comply with the above then such non-compliance needs to fall within the definition of unsatisfactory professional conduct

As the legal commissioner said, he could not take it any further because he did not have proof to do so. We even had this problem of contemporaneous testing. When the neuropsychologist did the report clearly he fell well below the two cut-off lines for dementia. Cut-offs are 88, 82. We had 72 as the score. Yet there was the suggestion that maybe he had capacity two months earlier than when it was done which is fanciful but that is the proof they had. I would imagine, even if I had the money and had gone through the Supreme Court and taken it there, I would have failed there. I will just read this bit that I think you guys will be speaking to further:

When a lawyer or other authorised authority witnesses the appointment of an Enduring Guardianship or the Attorney they must certify that—

This is what they have got to certify—

the appointer appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence.

I promise you could drive a truck through that— what rubbish to understand the effect of this instrument and voluntarily executed the instrument in my presence.

What rubbish.

**Ms JAN BARHAM:** That is exactly why it has been highlighted. In your case it illustrates that there is a problem and we need to avoid it escalating. For me it sounds very much like corruption a dozen or more years ago when everyone started realising that something was wrong. The check lists, the accountability and the requirement to document everything mean that you can get to your point 5. If the guidelines are set out and they have not complied it is misconduct.

**CHAIR:** I am sure the Committee will have further questions on notice. I thank you most sincerely for appearing today. It is one thing for the Parliament to receive broad submissions from organisations outlining general propositions but these have been heartfelt examples. You have opened up your hearts by putting in submissions in the first place and then you have voluntarily agreed to give in-camera evidence before the Committee which enables us to probe and question you further into matters that have been difficult and no doubt very distressing to you, to your families and to your loved ones.

On behalf of the Committee and the Parliament we thank you most sincerely for doing so. It is not an easy thing to do and it has provided the Committee with some great insight into issues that had already been flagged and that have become intimate examples of the difficulties. We will do our very best to take these matters into account and reflect on them. They will guide us into looking at the types of recommendations we can send to the Government to hopefully bring about change that will help to redress some of the difficulties that we have addressed today.

**WITNESS C:** Do not underestimate it. If the Guardianship Tribunal was forced to deal with revocations, that is, the capacity of a person to legally revoke an existing appointment, be it a will or a power of attorney, it would have found that she lacked capacity at the time; therefore, the revocations are not valid and any appointments that took place are also invalid. It would have put the person back to where they were at the beginning which is really where you want them to be rather than what transpires which is, "We will deal with new appointments and give it to the trustee"—the whole shemozzle. They told me specifically in their decision, "We don't have the power to do that." If you read the Act most people would say "There it is." You cannot revoke without legal capacity and they accepted that but they could not decide on it.

**CHAIR:** The Committee has resolved to allow 21 days for answers to questions on notice. I think some questions arose directly from your questions this morning, but I am sure that more will arise when we have a chance to study the transcript. The secretariat will contact you and liaise with you on that issue. After our questions to you this morning and after dealing with various other issues and matters, if you have additional material that you would like to put to the Committee we would welcome it and take it into consideration.

**WITNESS A:** I would like to leave this document with you today.

**(The witnesses withdrew)**

**(Conclusion of evidence in camera)**

**(Public hearing resumed)**