THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:ELCSC:PWcm1258288

16 February 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natasha.molt@lawcouncil.asn.au

Dear Mr Smithers,

Australian Law Reform Commission Elder Abuse Discussion Paper

Thank you for your memo dated 13 December 2016 requesting input in relation to the Australian Law Reform Commission's Elder Abuse Discussion Paper. The Law Society's Elder Law, Capacity and Succession, Property Law, Indigenous Issues and Alternative Dispute Resolution Committees contributed to this submission.

2. National Plan

Proposal 2-1: A National Plan to address elder abuse should be developed.

The Law Society supports the proposal to develop a national plan to address elder abuse issues such as national awareness campaigns, elder abuse hotlines, training for people working with older people and future research agendas. Any national plan should be developed in consultation with stakeholders, including Indigenous communities.

The Law Society submits that it is important to ensure that national awareness campaigns and support services are accessible to Indigenous people, particularly in rural and regional areas. In addition, national awareness campaigns should be accompanied by greater funding for community groups and community legal centres. Consideration could also be given to the use of mediation and other forms of alternative dispute resolution to resolve disputes, where appropriate.

The Law Society notes that any legal reform would need to occur primarily at the state or territory level, given constitutional constraints on federal legislative powers.

Proposal 2-2: A national prevalence study of elder abuse should be commissioned.

The Law Society agrees that there is a need for a national prevalence study to explore the nature of elder abuse in Australia, to quantify the size of the problem and to help to guide interventions, which will then need to be evaluated. This should include a separate and distinct category for Indigenous elders, particularly in rural and regional communities.

3. Powers of Investigation

Proposal 3-1: State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:
(a) has care and support needs;
(b) is, or is at risk of, being abused or neglected; and
(c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion.

The Law Society supports the introduction of further measures to assist public advocates and public guardians to investigate elder abuse. However, the detail of those measures requires further consideration including input from public advocates and public guardians, and tribunal representatives.

5. Enduring Powers of Attorney and Enduring Guardianship

Proposal 5-1: A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

The Law Society does not support the proposed establishment of a national register of enduring documents for the purposes of protecting against elder abuse. We are not persuaded that a register would, in itself, operate in any practical or effective way to prevent, or affect, the incidence of elder abuse. The key issue is ensuring that an attorney acts in accordance with his or her fiduciary and statutory duties, and registration will not cure that problem.

Proposal 5-2: The making or revocation of an enduring document should not be valid until registered. The making and registration of a subsequent enduring document should automatically revoke the previous document of the same type.

The Law Society does not agree that enduring documents should only become valid when registered. This would introduce an element of uncertainty into the processes, particularly where there is a delay in registering a document.

Mandatory registration, for a revocation to be effective, is particularly concerning to the Law Society. Currently a revocation of a power of attorney is effective by the principal advising the attorney that the power of attorney is terminated. This can be achieved quickly and cheaply. In due course, if the principal wishes, the revocation can be registered under s 51 of the *Powers of Attorney Act 2003* (NSW).

We also note that in NSW, s 49(1) of the *Powers of Attorney Act 2003* (NSW) provides a strong degree of protection for the principal under a terminated power of attorney by providing that:

> An attorney under a power of attorney that is terminated must not do any act or thing under the power of attorney if the attorney knows of the termination at the time the attorney does the act or thing.
> Maximum penalty: 5 years imprisonment.

Arguably the requirement for compulsory registration of revocations could produce greater opportunity for abuse, where the revocation is deliberately not registered so that the intended revoked power of attorney continues to be available for use by the abuser.

Proposal 5-3: The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered and that unregistered enduring documents remain valid for a prescribed period.

In the event that a national online register is implemented, it would be important to include transitional provisions regarding existing enduring documents. The Law Society notes that there may be practical difficulties associated with notifying existing enduring document holders of the new requirement to register an existing document, so a comprehensive public education and awareness campaign will be needed.

Question 5-1: Who should be permitted to search the national online register without restriction?

The Law Society notes that there may be privacy issues associated with the proposed national online register, which may discourage people from making an enduring document. Further information is needed in relation to the details that would be included on the proposed register.

Question 5-2: Should public advocates and public guardians have the power to conduct random checks of enduring attorneys' management of principals' financial affairs?

As noted above, the Law Society supports the introduction of further measures to assist public advocates and public guardians to investigate elder abuse. However, the Law Society does not agree that this should extend to random checks of enduring attorneys' management of principals' affairs. It may deter proposed attorneys from accepting an appointment if they are unclear as to what is expected of them and are worried about being randomly audited. It will also significantly add to the workload of the public advocates and public guardians. Instead, any audit should be based on reasonable cause.

Proposal 5-4: Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:
(a) legal practitioner;
(b) medical practitioner;
(c) registrar of the Local/Magistrates Court; or
(d) police officer holding the rank of sergeant or above.

Each witness should certify that:
(a) the principal appeared to freely and voluntarily sign in their presence;
(b) the principal appeared to understand the nature of the document; and
(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

The Law Society considers that there may be a number of practical and conceptual difficulties associated with this proposal and we do not support it at this stage.

We do not consider that requiring two witnesses instead of the current requirement for one witness will assist in combatting elder abuse. From a purely practical perspective, it would be

difficult to arrange for both prescribed witnesses to attend and witness the document at the same time, which may lead to uncertainty and delay.

We are also concerned that widening the categories of prescribed witnesses as proposed is not appropriate. It is unlikely that medical practitioners and police officers holding the rank of sergeant or above will have sufficient detailed knowledge of the operation of an enduring power of attorney to enable them to certify that the principal appeared to understand the nature of the document. Legally trained professionals are best placed to explain the operation of enduring powers of attorney and to ascertain whether the principal appeared to understand the nature of the document.

In the Law Society's view, the increased focus on witnessing under this proposal is misplaced. It is more appropriate to include a requirement that the power of attorney must be explained to the principal, such as the requirement under s 19(1)(c)(i) of the *Powers of Attorney Act 2003* (NSW), reproduced below. This requirement assists in educating the principal as to the extent of powers granted and may help the principal refine the extent of the powers granted and limit the potential for abuse. Requiring two witnesses to certify that the principal appears to understand the nature of the document may also be problematic unless education and training on capacity assessment is provided.

Overall, the Law Society considers that this would create an unnecessary burden and that the certification requirements set out in s 19 of the *Powers of Attorney Act 2003* (NSW) provide a better model.

19 Creation of an enduring power of attorney

(1) An instrument that creates a power of attorney creates an enduring power of attorney for the purposes of this Act if:
  (a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and
  (b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and
  (c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that:
    (i) the person explained the effect of the instrument to the principal before it was signed, and
    (ii) the principal appeared to understand the effect of the power of attorney, and
    (iii) the person is a prescribed witness, and
    (iv) the person is not an attorney under the power of attorney, and
    (v) the person witnessed the signing of the power of attorney by the principal.

(2) In this section:
  prescribed witness means:
  (a) a registrar of the Local Court, or
  (b) a barrister or solicitor of a court of any State or Territory of the Commonwealth, or
  (c) a licensee under the *Conveyancers Licensing Act 2003*, or an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the *Trustee Companies Act 1964*, who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or
  (d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or
  (e) any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this paragraph.

Proposal 5-5: State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.

The Law Society has concerns about this proposal. For example, would this apply in circumstances where a guardian sells shares but inadvertently triggers a capital gains tax liability? A strong legislative framework would be needed to protect attorneys, guardians and administrators where transactions are made in good faith.

We also note that there are constitutional limitations on the jurisdiction of State tribunals which will need to be taken into account if this proposal is pursued.

Proposal 5-6: Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or relative, business associate or close friend of the attorney) unless:
(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
(b) a tribunal has authorised the transaction before it is entered into.

The Law Society considers that there should be a presumption of undue influence, based on section 87 of the *Powers of Attorney Act 1998* (Qld).

> **87 Presumption of undue influence**
> The fact that a transaction is between a principal and 1 or more of the following—
> (a) an attorney under an enduring power of attorney or advance health directive;
> (b) a relation, business associate or close friend of the attorney;
> gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence.

This provision has led to findings of undue influence in relation to inter vivos transactions in Queensland (see, for example, *Gillespie v Gillespie & Ors* [2012] QDC 212).

Proposal 5-7: A person should be ineligible to be an enduring attorney if the person:
(a) is an undischarged bankrupt;
(b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);
(c) has been convicted of an offence involving fraud or dishonesty; or
(d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

The Law Society supports this proposal.

Proposal 5-8: Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:
(a) making or revoking the principal's will;
(b) making or revoking an enduring document on behalf of the principal;
(c) voting in elections on behalf of the principal;
(d) consenting to marriage or divorce of the principal; or
(e) consenting to the principal entering into sexual relationships.

The Law Society suggests that a prescriptive list of prohibited transactions should not be included in the legislation as this would exclude other inappropriate transactions which may

need to be determined on a case by case basis. However, an inclusive list may be appropriate.

Proposal 5-9: Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.

The Law Society supports this proposal. We note that clause 7 of the prescribed form for the enduring power of attorney (set out in Form 2, Schedule 2 to the *Powers of Attorney Regulation 2016* (NSW)) requires the attorney to sign the form and in so doing accept, among other things, that (b) "I must keep my own money and property separate from the principal's money and property".

Proposal 5-10: State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision maker.

The Law Society supports the harmonisation of powers of attorney and guardianship laws in each state and territory. At present there is no consistency in state and territory laws and instruments of powers of attorney and enduring guardianships. Uniformity would reduce the existing complexity and overlap in this area.

Proposal 5-11: The term 'representatives' should be used for substitute decision makers referred to in proposal 5-10 and the enduring instruments under which these arrangements are made should be called 'Representative Agreements'.

No comment.

Proposal 5-12: A model 'Representative Agreement' should be developed to facilitate the making of these arrangements.

No comment.

Proposal 5-13: Representatives should be required to support and represent the will, preferences and rights of the principal.

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

(a) Any proposal to apply a formal legal framework to informal family arrangements should not necessarily replace informal arrangements, unless appropriate. At present, we understand that the Guardianship Division of the NSW Civil and Administrative Tribunal avoids making a guardianship order, if possible. This recognises the benefits of informal arrangements for many people with disability and their families.

(b) Supported decision making models should enhance the decision making capabilities of people with disability, not expose people to potential abuse.

(c) The practical aspects of the structure of such a decision making model. Issues relating to how a person would be supported in practice needs to be determined.

(d) A model of supported decision making is likely to be resource intensive and costly. In order for its practical implementation to work, there must be adequate supports and funding allocation.

(e) A legal framework for the appointment of a supported person and the scope of the powers of such an appointment need to be determined. What is the role of legal practitioners in this framework and what is their exposure to liability? What is the exposure of the support person to liability?

(f) The model of decision making to be employed for people whose will and preferences cannot be determined because of cognitive impairment or serious mental illness, particularly in relation to decision making about financial management. Given the complexities of financial management and the realities of elder financial abuse, the Law Society is reluctant to entirely abandon the "best interests" model that currently operates in NSW in those circumstances.

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

6. Guardianship and Financial Administration Orders

Proposal 6-1: Newly appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.

The Law Society supports this proposal. It is essential that newly appointed non-professional guardians and financial administrators are provided information about the scope of their roles, responsibilities and obligations.

Question 6-1: Should information for newly-appointed guardians and financial administrators be provided in the form of:
(a) Compulsory training;
(b) Training ordered at the discretion of the tribunal;
(c) Information given by the tribunal to satisfy itself that the person has the competency required for the appointment;
(d) Other ways?

The Law Society suggests that this information should be provided to newly-appointed guardians and financial administrators when they are appointed. It should also be made available online.

In addition, the tribunal should be empowered to order a guardian or financial administrator to attend training where appropriate.

Proposal 6-2: Newly appointed guardians and financial administrators should be required to sign an undertaking to comply with their responsibilities and obligations.

The Law Society agrees that this may help to reinforce the obligations of the guardian and financial administrator and the seriousness of the role. However, the consequences of breaching such an undertaking would need further consideration.

Question 6-2: In what circumstances, if any, should financial administrators be required to purchase surety bonds?

The Law Society notes that NSW introduced a surety bond scheme in March 2015 which required all private financial managers to obtain a surety bond. The cost of the bond depends on the value of the estate:

Clients with assets:

- under $25,000 – one-off Surety Bond fee of $150
- $25,001 to $50,000 – one-off Surety Bond fee of $350
- over $50,001 – ongoing annual Surety Bond fee charged at 0.4% of the value of estate (excluding funds lodged or invested with NSW Trustee & Guardian, real estate, motor vehicle, furniture, accommodation bond and superannuation for managed people under 65 years)

In August 2016, the Law Society wrote to the Attorney General raising concerns about the implementation and operation of the scheme (copy attached). In summary, the Law Society's concerns include:

- The policy rationale for the scheme
- The mandatory application of the scheme
- The cost of the scheme, and
- Unintended consequences resulting from the implementation of the scheme.

We are also concerned that it is unfair to impose such a regime on financial administrators when there is no such equivalent scheme for attorneys, even though they are doing the same job.

We understand that this scheme is no longer mandatory. Instead, the requirement to obtain a surety bond is now determined on a case by case basis.

Question 6-3: What is the best way to ensure that a person who is subject to a guardianship or financial administration application is included in this process?

No comment.

7. Banks and Superannuation

Proposal 7-1: The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training of staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

The Law Society supports this proposal and considers this would be an important preventative measure.

The Law Society also supports the following recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 2007 report, *Older people and the law*:

> **Recommendation 5**
> The Committee recommends that the Australian Government work in cooperation with the banking and financial sector to develop national, industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions. The experience of Canada in this area should be drawn on in developing such protocols.
>
> **Recommendation 10**
> The Committee recommends that the Treasurer, in conjunction with his state and territory counterparts, initiates discussions with credit providers to mandate that guarantors be advised regularly of the progress with the loans they have provided surety for, and notified should any default occur. Such guarantees should not be enforceable if this advice has not been provided.

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

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

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

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

The Law Society is concerned that this remains an area where older people are particularly vulnerable to financial exploitation and suggests that this area be given high priority in the development of reform recommendations.

Proposal 7-2: The Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

No comment.

Question 7-1: Should the *Superannuation Industry (Supervision) Act 1993* (Cth) be amended to:

(a) require that all self-managed superannuation funds have a corporate trustee;
(b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;
(c) impose additional compliance obligations on trustees and directors when they are not a member of the fund; and
(d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds.

No comment.

Question 7-2: Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?

No comment.

8. Family Agreements

Proposal 8-1: State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.

No comment.

Question 8-1: How should 'family' be defined for the purposes of 'assets for care' matters?

No comment.

9. Wills

Proposal 9-1: The Law Council of Australia, together with state and territory law societies, should review guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:

(a) common risk factors associated with undue influence;
(b) the importance of taking detailed instructions from the person alone;
(c) the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and
(d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.

The Law Society notes that any such guidance should also address powers of attorney. The Law Society runs a continuing professional development program for solicitors and offers a range of seminars, courses and other educational events on topics including wills and estates, powers of attorney and enduring powers of attorney, legal capacity and other related issues. The Law Society's Elder Law, Capacity and Succession Committee provides guidance and commentary for solicitors on powers of attorney and enduring powers of attorney and capacity issues. This is available on the Law Society's website.

Proposal 9-2: The witnessing requirements for binding death benefit nominations in the *Superannuation Industry (Supervision) Act 1993 (Cth)* and *Superannuation Industry (Supervision) Regulation 1994 (Cth)* should be equivalent to those for wills.

The Law Society supports measures to increase the involvement of solicitors in the binding death benefit nomination process.

Proposal 9-3: The *Superannuation Industry (Superannuation) Act 1993 (Cth)* and *Superannuation Industry (Superannuation) Regulations 1994 (Cth)* should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.

The Law Society does not support the introduction of a blanket prohibition on attorneys making a binding death benefit nomination. There are circumstances where it may be appropriate to do so, for example, where the will and preference of the donor are well known and for estate planning and tax purposes. However, the Law Society suggests that the reverse onus of proof should apply to any binding nominations which are made in favour of the attorney or a relation, business associate or close friend of the attorney.

10. Social Security

The Law Society does not wish to comment on these proposals other than to note that training for Centrelink staff on how to prevent, identify and respond to elder abuse would seem desirable.

11. Aged care

Proposal 11.7: The *Aged Care Act 1997* (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:

(a) when necessary to prevent physical harm;
(b) to the extent necessary to prevent the harm;
(c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and
(d) as prescribed in a person's behaviour management plan.

The Law Society notes that there are existing state based regimes regulating the use of restrictive practices in residential aged care. Further consideration is needed about how these state based regimes would interact with the proposed Commonwealth provisions.

Please do not hesitate to contact Chelly Milliken, Principal Policy Advisor, on 02 9926 0218 or chelly.milliken@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

Pauline Wright
President