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Hon Nick Goiran MLC
Chairman
Select Committee into Elder Abuse
Legislative Council Committee Office
Parliament House
WEST PERTH WA 6005

Dear Mr Goiran

INQUIRY INTO ELDER ABUSE

Thank you for the opportunity to provide a submission to the Legislative Council's Select Committee Inquiry into Elder Abuse.

Background

The Public Trustee is a statutory authority created under the *Public Trustee Act 1941* ("the PT Act"). Section 4 of the PT Act establishes the Public Trustee as both an office bearer and a body corporate. The Public Trustee has perpetual succession and is capable of undertaking legal action in its name, and of holding and disposing of real property. Section 4(3) confirms that the Public Trustee is an agent of the Crown.

Section 1A of the PT Act states that its object "is to provide community services in respect of trusts, estates and related matters". The Public Trustee, therefore, was not established for the specific purpose of preventing or investigating elder abuse. However, the Public Trustee's role in respect of managing trusts and estates puts the Public Trustee in a position to respond to elder abuse in the community.

The Public Trustee provides a number of services to the Western Australian public in respect of trusts, deceased estates and related matters, including:

- preparing Wills that nominate the Public Trustee as executor, or that nominate a private executor;
- safe custody of Western Australian Wills in the WA Will Bank;
- preparing Enduring Powers of Attorney ("EPAs") which appoint the Public Trustee or the donor's spouse or partner as donee;
- administering the deceased estates of those who nominate the Public Trustee as executor;
- acting as administrator of some deceased estates which are intestate, or in circumstances where there is no executor appointed, or the named executor is unable or unwilling to act;
- when appointed as administrator by the State Administrative Tribunal ("SAT") under the *Guardianship and Administration Act 1990* ("the GA Act"), managing the financial affairs of people who have been deemed incapable of managing their own financial affairs (for example, due to dementia or brain acquired injury). A person subject to an administration order is known as a Represented Person.;
- acting as trustee for a minor or charitable trust;

- giving instructions in Court proceedings on behalf of people under the age of 18 and/or with a mental disability;
- acting as trustee when appointed by a Criminal Injuries Compensation Assessor to manage monies awarded as a result of criminal injuries compensation for people who are unable to manage the funds themselves;
- acting as trustee when appointed by the District Court to manage monies awarded as a result of personal injuries compensation for people who are unable to manage the funds themselves; and
- providing support and examining the accounts of private administrators appointed by SAT to manage the financial affairs of a person who lacks the ability to manage their own financial affairs.

The Public Trustee employs approximately 160 staff who work in a number of specialised areas to ensure its various services can be maintained for the benefit of the community, including:

- trust managers;
- estate managers;
- legal officers; and
- administrative support officers.

Other Western Australian legislation which the Public Trustee may be subject to in performing its functions includes, but is not limited to:

- *Aboriginal Affairs Planning Authority Act 1972*
- *Administration Act 1903*
- *Freedom of Information Act 1992*
- *Family Provision Act 1972*
- *Legal Profession Act 2008*
- *Non-contentious Probate Rules 1967*
- *Rules of the Supreme Court 1971*
- *Trustees Act 1962*
- *Unclaimed Money Act 1990*
- *Wills Act 1970*
- *State Administrative Tribunal Act 2004*

Terms of reference:

I take this opportunity to address the terms of reference as provided by the Select Committee into Elder Abuse.

(a) Determine an appropriate definition of elder abuse

The Public Trustee is a member of the Alliance for the Prevention of Elder Abuse: Western Australia ("APEA:WA"), an interagency alliance established to raise awareness of and prevent elder abuse. In that role, the Public Trustee had input into APEA:WA's definition of elder abuse in the *Elder Abuse Protocol: Guidelines for Action* ("the Protocol"). The Protocol was launched by the then Minister for Community Services in April 2014 and is currently being reviewed.

The Protocol defines elder abuse as:

"any act which causes harm to an older person and occurs within an informal relationship of trust, such as family or friends".

More recently, the Australian Law Reform Commission's Report *Elder Abuse – A National Legal Response* (May 2017) ("the ALRC Report") noted the most widely known definition of elder abuse is the description by the World Health Organisation, namely:

"a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person".

The ALRC adds that elder abuse can take various forms, such as physical, psychological, emotional, financial or sexual abuse, and neglect.

The Public Trustee supports the broader definition of elder abuse which incorporates abuse perpetrated by paid caregivers as well as friends and family.

On 1 October 2017, Senator the Hon George Brandis QC, Attorney-General of Australia, announced a range of initiatives to better protect the rights of older Australians. One of the initiatives was \$590,000 funding to the Australian Institute of Family Studies ("AIFS") to study the prevalence and nature of elder abuse. AIFS states on their website that component one of the study comprises AIFS *"working in conjunction with the National Ageing Research Institute (NARI) to engage with key stakeholders to develop a nationally accepted and usable Australian definition of elder abuse"*.

(b) Identify its prevalence

As mentioned above, the Commonwealth Attorney-General's Department has commissioned AIFS to conduct the Elder Abuse National Research Strengthening the Evidence Base – Stage One project.

Component One of the study is outlined above. AIFS' website states that Components Two and Three of the study are:

"Component Two - working with the Social Research Centre (SRC) to develop and test instruments to measure elder abuse against the Australian definition; and

Component Three - working with the Social Policy Research Centre (SPRC) to develop a data analysis plan and conduct secondary data analysis to answer key research questions on elder abuse".

The Public Trustee supports this study and looks forward to reviewing its findings.

The Public Trustee captures its own elder abuse statistics and reports on new investigations into financial elder abuse of clients in its annual reports.

In the year ending 30 June 2017, the Public Trustee undertook 51 new investigations into financial elder abuse (identified as abuse perpetrated against a person aged 65 or older). This was a 38% decrease from the 81 new investigations undertaken by the Public Trustee in the year ending 30 June 2016. However, a decrease in new investigations by the Public Trustee does not necessarily mean an overall decrease in elder abuse over this period.

The Public Trustee generally deals with financial elder abuse after the SAT has appointed it as administrator of the estate of an older person under the GA Act, following an application by a third party that a person who lacks the capacity to manage their own financial affairs may have been the victim of financial exploitation or if, upon review of the annual accounts of a private administrator, financial elder abuse is suspected.

The SAT can only make or review an administration order if someone makes an application to it. Additionally, the person subject to an administration order must be unable, by reason of a mental disability, to make reasonable judgments in respect of matters relating to all or part of their estate, and there must be no less restrictive option than an administration order available. As a result, it is difficult to say how much financial elder abuse actually takes place as some of it may go unreported, and many victims of financial elder abuse, even those with a decision-making disability, are not subject to an administration order under the GA Act.

It can also be difficult to distinguish between a financial transaction that is elder abuse and one that is not. If an older person gives \$500,000 to an adult child who has been looking after them for the past decade, is that a just reward for what may otherwise be an onerous task, or is it the exploitation of someone in a vulnerable position? It could depend on other factors, such as how much money the older person has, and whether it is likely to be enough to maintain them for the rest of their life.

(c) Identify the forms of elder abuse, including but not limited to neglect

When appointed as administrator, the Public Trustee will immediately secure and safeguard the person's bank accounts, assets, and income, and place a caveat over any property to prevent any further loss to the Represented Person. The Public Trustee then determines if any misappropriation has taken place and, depending on the outcome of any investigation, may seek further legal advice or, where appropriate, report the matter to the Western Australian Police.

As set out above, the Public Trustee principally deals with financial elder abuse. Financial elder abuse can take many forms, including:

- abusing an EPA;
- using an older person's Bankcard and PIN to make large cash withdrawals from the person's bank account through an ATM, or to make purchases for themselves in supermarkets, liquor stores, etc.;
- obtaining access to an older person's internet banking details and transferring funds from the account;
- becoming a signatory to the older person's bank account and withdrawing money for themselves;
- abusing functions as administrator under the GA Act;
- forcing someone to make a Will; and
- forcing or inappropriately encouraging an older person to transfer valuable assets such as real property or shares into another name.

Sometimes, when appointed as administrator by the SAT in circumstances where financial elder abuse is alleged or suspected, the SAT will make specific directions for the Public Trustee to undertake investigations into potentially misappropriated funds or assets.

In undertaking any investigations as administrator and determining whether further action needs to be taken, the Public Trustee will consider the best interests of the Represented Person in light of factors such as the facts of the case, the evidence available, the recoverability of any misappropriated funds, and the funds available to take any legal action.

(d) Identify the risk factors

In the Public Trustee's experience, while the victims and perpetrators of elder abuse are varied, some risk factors include:

- the victim having a cognitive impairment, such as dementia or an acquired brain injury;
- dependence of the victim, due to a lack of experience with management of finances, or illness or injury;
- the victim being single or widowed;
- the victim being isolated, either due to having no family or as a result of intentional isolation by the perpetrator; or
- the victim having adult children or grandchildren who collude to remove assets from the older person due to their need or greed, or to safeguard their 'inheritance' from being used to care for the older person in an aged care facility.

(e) Assess and review the legislative and policy frameworks

The GA Act is the main legislative framework set up to protect people with decision-making disabilities but is not specific to older persons or those suffering abuse.

However, it does offer some protections to people with a decision-making disability with respect to their finances. These include:

- i. section 84 requires that all administration orders are reviewed by the SAT at least every five years. Reviews can also be sought as a matter of right under section 86 or with leave of the SAT under section 87;
- ii. section 64(3) can require an administration order to be subject to conditions or restrictions, including requiring security to be provided (although in the Public Trustee's experience, the requirement for security rarely if ever is ordered, and the requirement for security does not apply to the Public Trustee);
- iii. under section 68, the Public Advocate can be appointed as administrator of last resort if there is no one else willing and suitable to be appointed (although the Public Trustee is usually willing and suitable to be appointed as administrator);
- iv. under section 80, a private administrator must submit annual accounts to the Public Trustee for approval, unless exempted by the Public Trustee from doing so. If, on a review of the accounts, the Public Trustee determines that a loss has occurred, the Public Trustee can issue a certificate of loss. The Public Trustee can also seek a review of the order appointing the private administrator and, if the Public Trustee is appointed as the substitute administrator, then it will seek to recover the loss either through negotiation with the former private administrator or through the commencement of legal proceedings. The Public Trustee would also consider if the matter required reporting to the Police but that would depend on the circumstances of each matter;
- v. section 97 gives specific powers to the Public Advocate to, amongst other things:
 - a. make applications to SAT;
 - b. investigate whether any person is in need of a guardian or administrator (or is under an inappropriate guardianship or administration order); and
 - c. provide information and advice to proposed guardians and administrators as to the functions of guardians and administrators;
- vi. the regulation of EPAs under Part 9 of the GA Act. EPAs are not supervised as a matter of course. However, under section 109, the SAT can intervene on application and can:
 - a. require the donee of an EPA to file records and accounts;
 - b. require such records and accounts to be audited; and
 - c. revoke or vary the terms of an EPA; and
- vii. under section 108, when the SAT appoints an administrator and an EPA is already in place, the SAT can revoke or vary the EPA.

As required by section 14 of the *Acts Amendment (Consent to Medical Treatment) Act 2008*, a statutory review of the GA Act was undertaken in 2013. The report on the review was tabled in Parliament on 2 December 2015. Recommendations in the report which are relevant to this inquiry include that the GA Act be amended to:

- increase the penalty from \$1,000 to \$5,000 for failing to submit accounts or other relevant documents to the Public Trustee as required under section 80;
- increase the penalty for a donee who fails to act properly under section 107 from \$2,000 to \$5,000;
- require that the donee of an EPA must date as well as sign the document;
- require that the witness to an EPA under section 104(2)(a)(ii)(l) must not be a person who is appointed to be the donee or substitute donee of the EPA (other than a staff member of the Public Trustee or a trustee company that is the donee); and
- increase the time period that the SAT may set aside a transaction under section 82 from two months to six months (although the Public Trustee would prefer a twelve month period).

When the Public Trustee acts as administrator of a person, that person is also subject to the following extra forms of protection:

- The Public Trustee has an indemnity insurer (RiskCover) and an Indemnity Reserve. The Consolidated Account of the State of Western Australia can also be used, and amounts can be written off.
- The Public Trustee is subject to the *Financial Management Act 2006* and the *Auditor General Act 2006* with respect to financial administration, audit and reporting (section 48 of the PT Act).
- The Public Trustee has an obligation, in certain circumstances, to provide accounts and other documents to a person who has an interest in an estate that the Public Trustee is administering (section 47 of the PT Act).
- The Public Trustee is subject to the *Freedom of Information Act 1992*.
- The Public Trustee is subject to Ministerial oversight. The Attorney General can access the Public Trustee's records and request information (section 46 of the PT Act).
- The Treasurer can (and does) set guidelines for the investment of moneys in the Common Account and Public Trustee Investment Funds (PTIFs) (sections 39D and 47B of the PT Act).
- The Treasurer needs to approve the terms and duration of any contract or arrangement between the Public Trustee and a person who manages the Common Account or a PTIF. The Treasurer also needs to approve the person (section 40 of the PT Act).
- The Common Account is government guaranteed (section 42 of the PT Act).
- The Ombudsman of Western Australia can investigate and resolve complaints about the decision making of the Public Trustee, and then make recommendations and report to the Parliament of Western Australia (*Parliamentary Commissioner Act 1971*).
- The Public Trustee is a statutory authority that can make independent decisions. Generally speaking, it does not have a special interest in a particular estate. The private administrator of a Represented Person may be a close family member who may end up benefiting personally from the Represented Person (for example, by inheriting part of the estate after death). Public Trustee employees do not have any personal stake in the estates that they administer; therefore the chances of making decisions for personal gain are mitigated.
- The Public Trustee has internal checks and balances against fraud and approved policies and procedures to prevent poor or arbitrary decision-making. Junior employees, for example, must refer certain matters to senior employees.
- Alleged misconduct by Public Trustee employees can be referred to the Corruption and Crime Commission (*Corruption and Crime Commission Act 2003*).

(f) Assess and review service delivery and agency responses

Public Trustee as Administrator of a Represented Person's Financial Affairs

When appointed as administrator under the GA Act by the SAT, the Public Trustee can be appointed to make all or some of the Represented Person's financial decisions. The Represented Person is assigned a trust manager, who acts on their behalf in accordance with the powers of the SAT order and with the administrator's beliefs as to the best interests of the Represented Person. The trust manager undertakes many financial tasks on behalf of the Represented Person, which may include the collection of income, the payment of bills and expenses, and the sale and purchase of real estate.

The Public Trustee may also undertake investigation and commence, continue or defend legal proceedings on behalf of a Represented Person.

As at 30 June 2017, the Public Trustee managed the financial affairs of 3,795 people under SAT administration orders. This included 693 new appointments by the SAT during the year ending 30 June 2017. The total number of clients under a SAT administration order managed by the Public Trustee in the year ending 30 June 2017 was an increase of approximately 7% from the previous year. Of the Public Trustee's current clients under SAT administration orders, 1,606 (or approximately 42.3%) are aged 65 years or older.

Public Trustee's Role Examining the Accounts of Private Administrators

The Public Trustee's Private Administrator Support team provides guidance and support to private administrators appointed by the SAT. Under section 80 of the GA Act, a private administrator is required to submit annual accounts to the Public Trustee for review, unless exempted by the Public Trustee from doing so. The Public Trustee may:

- allow the accounts;
- disallow any amount paid; and
- determine that there has been an amount or asset omitted, or that a loss has occurred.

Where the Public Trustee disallows an amount or determines that an amount or asset has been omitted or that any loss has occurred, and determines that there has been a loss to or a diminution of the estate, the private administrator is liable to the estate for such loss or diminution, except to the extent that the Public Trustee relieves the administrator of the liability.

For any loss or diminution for which the private administrator is liable, the Public Trustee may issue a certificate of loss and may recover the same from the administrator.

A person aggrieved by some of the decisions made by the Public Trustee under section 80 may apply to the SAT for a review of the decision/s.

During the year ending 30 June 2017, the Public Trustee conducted 1,334 examinations of the accounts of private administrators, where total assets managed by private administrators exceeded \$1.5 billion. In the year ending 30 June 2017, five certificates of loss were issued with total losses of approximately \$2.8 million. In the previous financial year ending 30 June 2016, there were no certificates of loss issued by the Public Trustee.

(g) The capacity of the Western Australian police to identify and respond to allegations of elder abuse

The Public Trustee, where appropriate, refers matters involving misappropriation of assets to the Western Australian Police.

However, referral for criminal prosecution can be difficult due to a number of factors, including:

- the person with the best evidence (the person who has had their assets misappropriated) may not have sufficient capacity to give evidence;
- an older person may not want the person who has misappropriated their assets to be prosecuted, particularly if the person is a family member;
- the person who has misappropriated assets may be providing care and support to the abused person and there is a risk the care and support could be withdrawn; and
- there may be threats made against the person being abused, for example that they will no longer be able to see their grandchildren.

The Public Trustee supports the recommendation of the ALRC Report that no new offences need to be introduced to deal with elder abuse, as there are already appropriate criminal offences, including stealing, fraud and assault.

(h) Identify initiatives to empower older persons to better protect themselves from risks of elder abuse as they age

The Public Trustee believes that education is integral to empowering older persons to better protect themselves from the risks of elder abuse as they age. The Public Trustee conducts community education seminars to provide information and education to older persons, their relatives, their caregivers and nursing homes.

In the year ending 30 June 2017, the Public Trustee conducted 26 public seminars with a total of 1,582 attendees on matters including Wills, EPAs and deceased estates. In conjunction with the Office of the Public Advocate, the Public Trustee also undertook four training sessions for private administrators, to assist them with information and advice about their role and responsibilities.

The Public Trustee also conducted information sessions with some community groups, professional service providers and government agencies relating to the role of the Public Trustee, financial administration and elder abuse, and was involved in a number of Continuing Professional Development sessions for legal practitioners.

The Public Trustee notes that planning documents, such as Wills and EPAs can be both tools to prevent abuse, but also unfortunately vehicles of abuse. The Public Trustee believes that older persons having access to affordable and appropriate legal advice in relation to such planning documents can greatly assist with these documents being tools to prevent abuse.

In the year ending 30 June 2017, the Public Trustee drafted 2,456 Wills for clients. The Public Trustee also drafts EPAs for clients, in which they can appoint either their spouse or partner, or in some cases the Public Trustee as donee of the EPA.

The Public Trustee also believes that greater community awareness of existing services, such as the Advocare Incorporated ("Advocare") Elder Abuse Helpline, can assist older persons at risk of abuse to obtain information and support to help reduce the incidence of elder abuse.

(i) Consider new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse

The Public Trustee notes that the State Government of Western Australia made an election commitment to introduce a register of EPA documents.

The ALRC Report made a recommendation for a national register for EPAs and Enduring Power of Guardianship documents, together with guardianship orders and administration orders made by State Tribunals.

(j) Consider any other relevant matter

In Western Australia, people with a decision-making disability who have an administration order made by the SAT have a substituted decision maker with respect to their financial matters. The person appointed to act as administrator on behalf of the person subject to the Order must act according to their opinion of the best interests of the Represented Person.

Currently, there is an international shift away from substituted decision making to supported decision making related to guardianship and administration. Canada and the UK have been at the forefront of putting in place these new supported decision models. The aim is to provide people with a decision-making disability to be able to access supporters to assist them to make decisions.

This paradigm shift came from the 2006 United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) to recognise people with disabilities as persons before the law and their right to make choices for themselves. The emphasis is on ensuring the will and preferences of the person must drive decisions that they make and that others make on their behalf.

The New South Wales Public Advocate is currently conducting an 18-month pilot study into supported decision making. The Public Trustee will be interested to see the findings of this study and whether supported decision making could be a feasible option for consideration in Western Australia.

That said, the GA Act already requires that an administration order is not to be made when there is a less restrictive alternative available. In some cases, a less restrictive alternative may be a person managing their own finances with the help of another person or organisation; in effect an informal supported decision-making arrangement. The GA Act also indicates that one of the factors an administrator can consider when determining the best interests of a Represented Person is that person's wishes.

Conclusion

Elder abuse is an extremely concerning social issue, which is currently and deservedly receiving attention at a State, Commonwealth and international level. The recommendations made in the ALRC Report are being examined by a working group of the Council of Attorneys-General ("CAG"). The working group will report back to CAG on priorities and potential changes to legislation by late 2018.

Yours sincerely



Brian Roche
PUBLIC TRUSTEE
13 November 2017