

NSW TRUSTEE & GUARDIAN: AN UPDATE

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In previous editions of *Elder Law Review*, I have written about the merger of the former Public Trustee NSW and the Office of the Protective Commissioner and Public Guardian. We now approach the fifth anniversary of the merger of the two organisations into NSW Trustee & Guardian and this anniversary heralds some important changes in our organisation and strategic direction.

As always, one of our major remits has been to increase the uptake in preplanning mechanisms. This has been a long standing and traditional role of trustee organisations throughout Australia. 2014 represents the 100th year of providing will-making services to the people of New South Wales by NSW Trustee & Guardian and its forbear Public Trustee NSW.

This is a significant landmark for us and a very important event to celebrate. One of the ways in which we will do this is by launching a wills bank initiative in New South Wales.

The NSW Trustee & Guardian ‘Wills Safe’ will provide a secure repository for individual’s wills, and to the extent that anyone attempts to destroy a prior will and replace it with one drafted after a person has lost capacity, or is at best in fluctuating capacity, this provides some level of assurance to the community.

Perhaps more importantly has been the highly successful ‘Get it in Black & White’ campaign, which has been on television and digital and print media in NSW regional and city areas, variously from November 2013 to March 2014. The campaign has encouraged people to seriously consider planning for the future by making a valid will, an enduring power of attorney and an enduring guardianship instrument.

Readers of this journal know that making those instruments is not necessarily a preventative step to elder abuse. However, aligned with this is the community education campaign about making careful choices when initiating these instruments.

We conducted national research¹ to underpin the ‘Get it in Black & White’ campaign and the results, whilst not surprising to readers of the journal, remains concerning. 98 per cent of people surveyed thought that making all three instruments was very important and ‘a jolly good idea’, however further probing reveals that behaviour does not follow intent. Many Australians are not prepared if something adverse were to happen to them. For example, 43 per cent of Australians have not prepared a will, 78 per cent of have not made a power of attorney and 91 per cent of Australians have not appointed an enduring guardian. Overall our research revealed that an astounding 45 per cent of people surveyed have never given any serious thought to what will happen if they die or become incapacitated.

Reasons for not taking steps to plan ahead include the old chestnuts of ‘it’s not an issue currently’, but, significantly, 30 percent identified the issue of trust as a key inhibitor.

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¹ *Are Australians Planning for Later Life?* Study of 1016 Australians aged 18 years or older. Lonergan Research, September 2013.

Focusing on that last statistic this is indeed an area for extensive work in the future. It is a delicate balance between encouraging people to make these instruments, while at the same time warning them of the risks associated with an ill thought through process, the problem of undue influence and of course the ever-pervasive cultural norm of entitlement.

We are currently undertaking follow-up research to determine the impact of the campaign on people's behaviour i.e. the change in the percentage of people who have made a will, a power of attorney or enduring guardianship instrument.

One other impediment is the lack of portability or recognition across jurisdictions of these all important instruments. The Australian Guardianship and Administration Council (AGAC) has long recognised the need for a national approach to enduring powers of attorney and enduring guardianship. NSW Trustee & Guardian is a member of AGAC and as such has continually pressed for harmonisation of instruments across the country.

We have reinvigorated our approach and have most recently written to the Commonwealth Attorney-General George Brandis raising our concerns. In this context we will also address the issue of the risks of abuse of such instruments and the need for greater oversight.

Five years on and NSW Trustee & Guardian has evolved to a point where we have two key strategic directions:

1. Our ever present community education initiatives to increase the uptake of pre-planning mechanisms. This is important because it allows people to plan for their future in a way in which they would like to see their affairs and personal decision-making managed. A failure to do so inevitably leads to a tribunal or Supreme Court hearing in the event that they are alive but lose capacity, or a complex process under intestacy legislation.
2. Our second strategic goal is to see an increase in the number of people who are able to take on the role of a private financial manager, should an order be needed. This goal needs to be accompanied by legislative change that would safeguard the affairs of a person under a financial management order to a far greater extent than has previously been possible. To this end, we are investigating the potential for a bond scheme similar to that used in the United Kingdom that effectively ensures against default by a private manager. Unfortunately, such schemes have not yet been applied to powers of attorney in other jurisdictions. As I write, it is hard to conceptualise how this might occur. Such schemes need to be commercially viable before they will be offered by brokers. Perhaps one day...keep tuned.