FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

27 February 2017

Ms Sabina Wynn
The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Email: elder_abuse@alrc.gov.au

Dear Ms Wynn

Elder Abuse

The Financial Planning Association of Australia welcomes the opportunity to provide feedback on the Australian Law Reform Commission discussion paper on Elder Abuse (DP83).

There is no doubt that elder abuse is devastating and harmful to the victims, their family members and friends. It can take many forms. Often one form of elder abuse can be an indicator of additional mistreatment.

The FPA has drawn on the experience and expertise of our financial planner practitioner members to provide feedback to proposals and questions presented by the ALRC.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

Heather McEvoy
Policy Manager
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Mark Vincent, deals with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 170,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013, all new members of the FPA have been required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board

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Elder Abuse

FPA submission to

Australian Law Reform Commission

27 February 2017

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Introduction

Elder abuse can take many forms and is devastating and harmful to the victims, their family members and friends. With the ageing population of Australia, it is timely to give due consideration to strategies to minimise the risk of financial and non-financial abuse occurring for older people.

However, it is important to remember that the significant majority of Australians are doing the right thing by older people. Most just want to take care of their parents, loved ones, and friends as they age in a caring and respectful way.

There are also many existing estate planning and financial services structures that, in themselves provide protections for older people. Hence, it is important to consider such structures from within the financial services regulatory environment. It is also vital to remember that many financial services, particularly superannuation and banking, are used by customers of all ages, not just older people.

Unnecessary additional and restrictive regulation may just punish those doing the right thing, and be counterintuitive as it could increase costs and complexity for consumers, deterring them from using such facilities.

Our submission focuses on financial abuse and the practicalities of the ALRC proposals.

Estate planning education

Estate planning is a subject that most people don't like to think about and is often misunderstood and avoided. It is the process of anticipating and arranging, during a person's life, for the management and disposal of that person's estate during the person's life and at and after death. Estate planning can involve establishing arrangements such as enduring powers of attorney and wills in relation to assets including life insurance, superannuation and pensions, real estate, cars, personal belongings, and debts.

The key to addressing financial abuse of older people is to take a pre-emptive approach through education and awareness of all Australians, and of all professional service providers, of the benefits of estate planning. There are many estate planning structures available to individuals that can assist in preventing elder abuse, if entered into with a clear understanding by all parties involved of the obligations of the roles and most importantly, of the wishes and preferences of the principal.

Families need to have open conversations to understand the preferences and needs of loved ones should they become incapacitated in later years, and after death, prior to entering into any arrangements. Equally all parties need to be honest about their willingness and competency to take on the role and responsibilities of appointments such as an enduring power of attorney. It can be intimidating for people to talk about estate planning, but it is a necessary step in addressing financial elder abuse and to make sure older people are taken care of as they intended, requested and deserve in later years, particularly if they lose mental capacity. It also encourages principals to take ownership of their estate planning affairs in a way they are comfortable with. Education and awareness should highlight the importance of giving estate planning proper consideration for the benefit of all parties.

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Estate planning arrangements such as enduring appointments offer significant benefits to principals in ensuring their financial affairs are managed in line with their wishes, should they lose capacity. However, such arrangements are also important legal structures that come with responsibilities for appointees and risks, if misused, for principals. Professional service providers can play a key role in ensuring such arrangements cater to the unique circumstances, wishes and preferences of the principal, and identify and avoid potential risks.

Financial abuse of older people increases when principals have not discussed with family members, their wishes and preferences.

The ALRC discussion paper proposes a set of reforms that risk creating a complex and overly burdensome system for both principals and potential appointees. As a package, the reforms may be counter-intuitive and will significantly increase costs for Australians who are trying to do the right thing. It will discourage people from taking ownership of their estate planning matters, will deter people from making power of attorney arrangements and establishing their preferred superannuation, and will result in either people declining to take on POA roles or obliging attorneys to seek their own legal advice just to look after their parents in later years.

Education and empowerment will deliver far greater outcomes in addressing elder abuse than increasing red tape.

Recommendation

The ALRC focus on education to empower people to take an interest in and ownership of estate planning and financial matters, including discussions with family members of their preferences if they lose capacity, to reduce the occurrence of financial abuse of older people.

National plan and national prevalence study

The FPA supports the development of a national plan to address elder abuse, by a steering committee of COAG. A commitment from all governments at this most senior level is vital to tackle this issue as a matter of urgency in the face of an ageing population.

However, this will take time and money and should not distract from the implementation of steps to address elder abuse which must be done as a priority. Strategies to combat elder abuse must include awareness and training, not just for people working with older people in traditional care-giver roles, but for professional service providers such as financial planners, lawyers, and accountants, and all Australians. It will take the Australian community as a whole to help identify and overcome the distress and harm caused by all forms of elder abuse.

Nearly 40 per cent of Australians who currently seek financial advice are over 60 years of age. Financial planners provide advice on client's needs including superannuation, social security, and estate planning matters such as wills, powers of attorney and guardianship, and death benefit nominees. As such, financial planners may offer a unique insight into the structures and arrangements that may be inappropriately used by perpetrators of elder abuse, particularly financial abuse. This insight may be useful for both the national prevalence study and the development of a national plan.

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The FPA also supports the House of Representatives Report recommendation to promote financial literacy among older people, as detailed in the discussion paper. This should also include improving older people's understanding of how to use technology for financial transactions and in managing financial affairs. Technology can be inaccessible for some older people leaving them more exposed to financial abuse.

Recommendations

Consideration be given to the role financial planners and the Financial Planning Association could play in the national prevalence study and the development of a national plan to address elder abuse.

An awareness campaign and training to identify and respond appropriately to elder abuse must extend beyond traditional care giver roles to include professional service providers and the broader community.

Powers of investigation

The ALRC proposes that the role of state and territory public advocates/guardians be expanded to include a consent-based 'support and assist' investigative function in relation to older people who are being, or at risk of being abused or neglected.

However, the Report does not appear to consider the investigative powers of some existing Government agencies and regulators and the role they could play in addressing elder abuse, particularly those with oversight of the financial system in Australia. For example:

- section 41(f)(iii) of the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Act requires reporting entities to report a suspicious matter that *may be relevant to the investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory*[2]. As this provision is very broad and covers all Commonwealth and State/Territory laws, it could be instrumental in addressing elder abuse by leveraging the existing structure and investigative expertise of AUSTRAC. This provision obliges reporting entities to report suspicion of social security fraud (for example), which could be a sign of elder abuse.

- tax and superannuation laws have similar reporting requirements to the ATO if there is a suspicion that a contravention of the law has occurred.

- The SIS Act requires SMSF auditors to report a contravention of the Act to the ATO.

While such regulators do not fall under the perceived banner of traditional elder abuse agencies, they have existing powers, resources and significant proven expertise in investigating matters that would be categorised as elder abuse, particularly in relation to financial abuse. The FPA questions the necessity and appropriateness of expanding the powers of other bodies to replicate the role and expertise of existing regulators. Rather such bodies should be encouraged to work with financial system regulators to address the issue of elder abuse and draw on each party's expertise.

[2] http://www.austlii.edu.au/au/legis/cth/consol_act/alacfa2006522/s41.html

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When addressing financial abuse is it important to consider potential solutions from the perspective of the financial system, not from the perspective of elder abuse. Some of the elements of financial elder abuse are not restricted to the abuse of older people, rather they can occur to people of varying age. The regulation of the financial system therefore may already have the structures and provisions in place to address such abuse. The solution may be to improve awareness and training of regulators and professional service providers working within the financial system to work together with other agencies to address elder abuse.

We note that if financial abuse is occurring, the older person may likely be subjected to non-financial abuse. Therefore it is important for financial system regulators to work with the appropriate bodies who have the expertise to investigate and address non-financial abuse. Information sharing arrangements should include strong confidentiality provisions to protect the identity of the individual or entity who reported the suspected abuse (See *Alignment with whistleblower protections* section below.)

As detailed in the ALRC Report, elder abuse is not restricted to State and Territory boundaries. The current inconsistencies in State based laws, for example, exacerbate the issue of elder abuse. However, public advocates/guardians have limited jurisdiction to the State or Territory in which they operate restricting their investigations. Regulators like AUSTRAC and the ATO have the capacity to undertake investigations at a national level, across all State and Territory boarders.

Professional service providers, such as financial planners and accountants who are both required to register with the Tax Practitioners Board, have permission within the law to disclose client information to a third party if there is a legal duty to do so[3]. This requirement allows the disclosure of suspected wrongdoing without client permission. This enables such professional service providers who suspect their client is the subject of financial abuse to report to appropriate authorities without the need for client permission, putting the protection of older people at the fore.

Recommendations

I. The investigation of financial abuse should be the responsibility of the relevant regulators.

II. The ALRC must consider the existing investigative powers, resources and expertise of Commonwealth Government agencies and regulators including AUSTRAC and the ATO, particularly in relation to financial abuse.

III. The ALRC work with AUSTRAC and the ATO to identify their legal ability to investigate third parties (perpetrators of abuse) and document a clear role for such regulators in addressing elder abuse.

IV. Consider staff training needs of regulators in identifying and investigating suspected elder abuse.

V. Financial services regulators and public guardians / public advocates should work together to investigate and address suspected elder abuse, as appropriate, to ensure both non-financial and financial abuse is identified and addressed.

[3] TPB Information Sheet TPB(I) 21/2014, Code of Professional Conduct – Confidentiality of client information

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VI. Information sharing and confidentiality arrangements between regulators investigating suspected financial abuse and other bodies investigating non-financial abuse, must be appropriate and include whistleblower protections to ensure the identity of the individual or entity reporting the abuse is protected at all times.

VII. An awareness campaign on identifying and addressing elder abuse should include how and to whom elder abuse should be reported. This should include assisting professional service providers in understanding how to prevent and identify elder abuse and their reporting obligations to regulators.

1) Alignment with whistleblower protections

The FPA notes the ALRC's approach to investigations of elder abuse includes protections for those who make a complaint including third party disclosures.

The Government, through Treasury, is currently undertaking a *Review of tax and corporation whistleblower protections in Australia*. The Parliamentary Joint Committee (PJC) on Corporations and Financial Services is also conducting an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. The work of Treasury and the PJC could greatly assist in ensuring consistent and adequate protections are established and maintained for individuals and entities reporting suspected elder abuse.

As previously mentioned, many laws, such as the Anti Money Laundering and Counter Terrorism Financing (AML/CTF) Act, mandate professional service providers to report suspicious behaviour or wrongdoing relating to a Commonwealth or State or Territory law. This compels the service provider into the role of whistleblower.

The disclosure of information by whistleblowers plays a vital role in uncovering and addressing suspected misconduct or wrongdoing to protect consumers, including older people at risk of abuse.

Financial planners are required to enquire about various aspects of their client's circumstances in order to provide personal advice that meets the best interest obligations in the Corporations Act. This enables them to identify potential abuse that their clients may be unaware of.

Service providers, such as financial planners, are required by law to act as a whistleblower on clients for tax evasion, Centrelink fraud, ML/TF suspiscious matter reporting, etc. While such reporting requirements can include suspicious activity related to elder abuse, it places livelihoods at risk from reprisal as many financial planning practices and other professional service providers are small businesses reliant on a strong reputation and referral. Individuals who feel 'dobbed in' by a financial planner, or other professional service provider, may inflict damage on a business' reputation.

Individuals and service providers must be afforded protection, particularly from retaliation, to encourage them to disclose information as a whistleblower about suspected abuse. This is particularly important given that some elder abuse can include criminal elements or aggrieved family members.

While regulators and other agencies may be able to act on reported information, such organisations are not able to protect whistleblowers. Innocuous pieces of information can give rise to suspicion

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about the whistleblower's identity and can cause irreparable professional and personal damage and risk.

In our submissions to Treasury and the PJC, the FPA recommended the establishment of a separate independent Government whistleblowing agency. We note the ALRC proposal for public advocates/guardians to play a crisis case management and coordination role in elder abuse investigations. While we appreciate the sensitivity of claims of elder abuse, we suggest the ALRC work with Treasury, the PJC and regulators to determine the appropriate jurisdictions.

Extending the role of public advocates/guardians includes the proposed disclosure of information to other agencies and service providers for the purposes of collaboration and coordination. We understand the need to share information under strict confidentiality provisions to facilitate effective and timely investigation of claims of suspected elder abuse. However, information sharing arrangements and powers of investigation must be appropriate and protect the whistleblower's (individual and business) identity as a priority and at all times. We appreciate that this will create a balancing act between the vital need to protect the wellbeing of the older person from sustained abuse, and protecting the whistleblower.

Recommendation

The ALRC work with Treasury and the PJC to ensure consistent whistleblower protections are established and maintained for individuals and entities reporting suspected elder abuse.

Powers of investigation must include appropriate conditions on information sharing and staff training to protect the whistleblower's (individual or business) identity as a priority and at all times.

2) Outcome of an investigation

In responding to the suspected abuse or neglect of an older person, the ALRC propose an outcome of an investigation may include:

a) referring the older person or the perpetrator to available health care, social, legal, accommodation or other services;
b) assist the older person or perpetrator in obtaining those services;
c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or
d) decide to take no further action.

As previously stated, nearly 40 per cent of Australians who currently seek financial advice are over 60 years of age. Financial planners work with clients to identify short, medium and long term goals based on their client's needs, wishes and preferences, and develop an appropriate financial plan.

Financial abuse may involve one or more elements of an individual's financial affairs. However, each aspect of an individual's financial affairs impacts on the other financial elements. For example, superannuation impacts on social security entitlements. To assist the older person get back on track with their finances, it is important that the impact of the financial abuse is assessed in the broader context of the individual's financial situation, needs, preferences and financial plan.

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Recommendation

Where an individual has a financial plan in place, outcomes of an investigation of financial abuse should include referring the older person to a professional financial planner for review of their financial circumstances, needs and preferences, and financial plan.

Enduring power of attorney / enduring guardian

1) Registration of enduring documents

The ALRC proposes to establish a national online register for all enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, and require enduring documents to be registered in order to be validated.

Anecdotal evidence suggests financial abuse involving powers of attorney do not usually involve forgery of the enduring document or pressure to agree to an enduring arrangement. The current laws governing enduring arrangements, such as the Power of Attorney Act in NSW, have strong provisions that restrict the ability to make fraudulent documents. For example, the witnessing of the enduring power of attorney document (in NSW) requires a solicitor or other prescribed legal practitioner to ensure the principal understands the arrangement and is of sound mind.

Financial planners have experienced difficulties in tracking documents such as POAs and wills, when their client has moved states, or is based in a different state to the attorney. While a national register may assist in overcoming such obstacles, we are concerned about the additional red tape, the administration and funding of the register, and the potential increased costs to Australians wanting to make pre-emptive arrangements to protect themselves in the future.

The FPA agrees with the ALRC that "*the implementation of the proposed register should be on a low cost basis so as not to discourage the use of enduring documents*". However, there is clear evidence that the Government has a cost recovery approach to regulation and registries which must be considered when assessing the value of a national register for Australians who are trying to establish appropriate estate planning protections.

The FPA supports having the ALRC explore the feasibility, cost and technicalities of an online register for enduring documents and court and tribunal orders. The FPA's support for this feasibility analysis should not be construed as blanket support for a register.

Consideration should be placed on the *benefits and disadvantages* of such a register. The main disadvantages relate to cost and privacy, and we encourage the ALRC not to sacrifice privacy for mere convenience. A principal should have the right to keep his or her arrangements private and away from public record.

A principal may want to ensure that certain people are unaware that he or she has appointed an attorney to act on his or her behalf. While the current proposal for such a register is borne out of an elder abuse discussion paper, it would capture principals of all ages.

The proposal of a register is not new, and has been considered, and not adopted, by the final report: *Review of the Powers of Attorney Act 2003* (2009) by the NSW Department of Land.

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Recommendation

The ALRC undertake a feasibility study to explore the feasibility, cost and technicalities of an online register for enduring documents and court and tribunal orders, focusing on the benefits and disadvantages of such a register.

The ALRC clarify the administration and funding arrangements for its proposed national online register for all enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators.

2) Privacy – access to the national online register

In the event that a register is recommended, the FPA recommends access to the individual records of a principal should be determined by the principal alone, and not by a legislated list of occupation or employer class.

In the event that a register allows open access to authorised organisations and persons, this list should include financial planners registered on the ASIC Financial Adviser Register (or those who meet the requirements of "relevant advice providers" post the commencement of the new education standards for advice providers on 1 Jan 2019).

Financial planners assist clients with all aspects of estate planning including ensuring appropriate wills, powers of attorney, and guardianship (and other arrangements) that meet their needs and preferences are in place. In order to provide appropriate and quality advice about estate planning matters, a financial planner must consider their client's circumstances including any existing arrangements their client may have.

In the event that a register allows open access to authorised organisations and persons, a financial planner should be permitted to search the proposed national online register of enduring documents so they can ascertain and understand existing arrangements a client may have in place.

To protect an individual's privacy, service providers should be required to gain client consent to search the register for documents relating to their affairs.

Recommendation

Access to the individual records of a principal should be determined by the principal alone, and not by a legislated list of authorised persons.

In the event that a register allows open access to authorised organisations and persons, financial planners should be permitted to search the proposed national online register of enduring documents with their client's consent.

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3) Random checks

The ALRC has questioned whether public advocates and public guardians should be given the power to conduct random checks of enduring attorneys' management of principals' financial affairs.

We understand the intent of this idea in combatting financial elder abuse and potential self-interest of the attorney, however we raise the following concerns:

- Public advocates/guardians are state based and operate under state or territory laws. Financial products and affairs are regulated under Commonwealth laws.
- Could lead to an abuse of power by the public advocate. A family member who is appointed as an enduring attorney knows the principal and may make financial decisions on behalf of the principal that are based on lifestyle interests the principal may have previously expressed, rather than for purely financial reasons. For example, spending money on sending the principal on their "dream holiday" rather than investing in a stable asset. This human element may be absent and easily missed by a public advocate who has no history or knowledge of the principal or their relationship with the attorney.
- Would increase the regulation and burden on attorneys who are doing the right thing by their principals.
- Public advocates have limits in where they can invest funds and do not have the capacity to pay for professional assistance. Hence, there is a risk that a public advocate may recommend the unwinding of a principal's investment strategy and estate planning, to the detriment of the principal.
- Are public advocates appropriately trained to assess the adequacy of the attorney's management of the principal's financial affairs?
- What are the parameters for public advocates in determining whether the attorney is managing the principal's financial affairs appropriately? Investment decisions may not be an appropriate measure as the intent and judgement about the investment may be valid at the time the investment was made, even if it did not end up delivering positive returns.
- If greater pressure is put on the public advocate system, it may capacity constraints and potentially put the principal at the risk of more adverse outcomes.

The focus must be on education. Most attorneys just want to look after their parents. They should not be punished or thrust into a regulatory environment that obliges them to spend money on their own legal advice and be faced with audits just so they can be a dutiful daughter or son. The greater the regulatory burden on attorneys, the less likely they are to accept the role. This will lead to less enduring arrangements being established leaving older people even more exposed to abuse.

Recommendation

I. The FPA opposes giving public advocates and public guardians the power to conduct random checks of enduring attorneys' management of principals' financial affairs.

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II. The FPA supports public advocates and public guardians intervening when there is a suspicion of financial abuse or wrongdoing by an enduring attorney or enduring guardian.

III. In cases of suspected financial abuse or wrongdoing by an enduring attorney or enduring guardian where the principal has a financial planner, public advocates and public guardians should consult with the professional service provider to understand the extent and minimise the impact of the suspected financial abuse.

IV. Public advocates and public guardians should be appropriately qualified and trained in laws governing financial matters, to ensure they have the competency necessary to intervene in suspected cases of financial abuse of a principal by an enduring attorney.

V. Increased education for individuals agreeing to the appointment of an enduring attorney or enduring guardian, about their role and obligations, the principal's preferences, and penalties for breaching their obligations.

4) Enhanced witnessing

The ALRC proposes that enduring documents should be witnessed by two independent witnesses, one of whom must be either a

a) legal practitioner;
b) medical practitioner;
c) justice of the peace;
d) registrar of the Local/Magistrates Court, or
e) police officer holding the rank of sergeant or above.

The FPA notes that there is currently significant variation in the level and strength of witnessing requirements for enduring documents across the states and territories, and the importance of removing family members as eligible witnesses to minimise elder abuse is paramount.

There are also varying obligations that come with witnessing enduring documents such as explaining the legal standing of such documents and what it will mean for the principal, ensuring the principal is not establishing such arrangements under duress, and assessing mental capacity, as described in the discussion paper.

Enduring documents are testamentary documents and therefore should require the involvement of a legal practitioner (such as a solicitor, lawyer, barrister) to ensure the meaning and purpose of the arrangement is clearly explained to and understood by the principal prior to signing. Just as a legal practitioner does not have the medical expertise to assess mental capacity, a medical practitioner does not have the legal expertise to clearly explain testamentary law. This is reflected in the prescribed witness requirements in the law for enduring documents in NSW[4].

[4] For example, s19(2) of the NSW Powers of Attorney Act 2003 - http://www.austlii.edu.au/au/legis/nsw/consol_act/poaa2003240/s19.html

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A justice of the peace has no legal or medical training and therefore would not be competent to meet the requirement of ensuring the meaning and purpose of the arrangement is clearly explained to and understood by the principal prior to signing. To be eligible for appointment as a Justice of the Peace in NSW, for example, you must:

- be at least 18 years of age
- be nominated by a member of the Legislative Assembly or the Legislative Council (MP or MLC)
- be an Australian citizen or a person who is entitled to vote at a general election, unless the Attorney General exempts you from having to satisfy this criterion
- be of good character
- consent in writing to confidential inquiries being made as to your suitability for appointment, including a criminal records check
- not be an undischarged bankrupt
- establish that your appointment as a justice of the peace is required for your employment or to fulfil a community-based need for the appointment

Police officers also may have received specific education and training to do effective policing of criminal activity and anti-social behaviour, but this may not be relevant to explaining enduring arrangements to a principal.

As previously stated, financial planners assist clients with all aspects of estate planning including ensuring appropriate wills, powers of attorney, and guardianship (and other arrangements) that meet their needs and preferences are in place. Estate planning is a core subject in the curriculum of financial planning degree programs.

The FPA introduced a degree requirement for our professional financial planner members in 2013 and require our members to adhere to a Code of Professional Practice and Code of Ethics and undertake continuous professional development (CPD). In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and super for our members – years ahead of FOFA. We have more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals.

In February 2017, the Federal Parliament passed a Bill that requires all financial planners to hold a relevant degree (or degree equivalent), pass an exam, adhere to a Code of Conduct, and maintain CPD. This Bill has established a national professional standards and education framework in line with other professional service providers such as legal practitioners.

Including professional financial planners on the witnessing list will offer clients a cost effective, efficient and appropriate mechanism for witnessing enduring documents. Precedent for permitting financial planners to witness documents has been sent in the AML/CTF Rules which allows financial planners to certify documents.

Should the ALRC recommend a list of witnesses, consideration should be given to the inclusion of financial planners who are registered with the Tax Practitioners Board as a tax (financial) adviser or tax agent; and/or who meet the requirements of "relevant advice providers" post the commencement of the new education standards for advice providers on 1 Jan 2019.

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Recommendations

Should the ALRC recommend a list of witnesses, consideration should be given to the inclusion of financial planners.

5) Compensation

The ALRC proposes to give state and territory tribunals 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 FPA agrees that there is a need for a mechanism for principals to be compensated for loss caused by an attorney's or guardian's illegal activity. This issue is exacerbated following the principal's death.

However, we seek clarity around the practicalities and powers to be given to state and territory tribunals related to this proposal.

State and territory tribunals operate under the obligations set out in the relevant state or territory legislation. As discussed in the ALRC paper, there are very distinctive orders within the state and territory laws and different limitations on the role of attorneys and guardians in each jurisdiction. An attorney in one state may not have the same powers as an attorney in another state. This lack of harmonisation and disparity of laws and terminology in each state will result in expensive and inconsistent litigation in an effort to obtain compensation.

It is unclear which authority would have jurisdiction over a claim if (for example):

- The attorney is in a different state or territory to the principal
- The principal now resides in a different state or territory to where the enduring document was signed
- The principal has financial assets held/located in different state

Financial abuse may also relate to a breach of a Commonwealth law such as the SIS Act, the Corporations Act, or social security or tax law, for example. Many Commonwealth laws have existing compensation avenues for victims of financial crime. We seek clarity as to the how breaches of Commonwealth law would be handled and question the appropriateness of state and territory tribunals being given jurisdiction to award compensation for breaches of Commonwealth laws.

It is also unclear as to the 'relevant act' this proposal is referring to.

Consideration should also be given to situations where the perpetrator has exhausted their funds leaving no monies to compensate the victim.

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Recommendation

The FPA seeks clarity around the practicalities and powers to be given to state and territory tribunals 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.

6) Ineligible persons

The ALRC proposes that 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.

Recommendation

A person banned by ASIC from providing financial services under the Corporations Act 2001 should also be ineligible to be an enduring attorney.

7) Record keeping

The FPA supports the introduction of record keeping requirements for enduring attorneys and enduring guardians, including an obligation on enduring attorneys to keep their own property separate from the property of the principal. This is consistent with record keeping requirements for professional service providers in the financial sector such as tax agents, tax (financial) advisers, and for SMSF trustees.

We note that record keeping requirements in relation to enduring arrangements are typically included in state and territory legislation and suggest a national record keeping standard would provide greater consistency in the documentation and clarity for attorneys, guardians and principals. State and territory based requirements would create confusion and difficulties if a principal's affairs are held in different states, or if the attorney is based in a different state or territory to the principal, and different record keeping requirements apply.

Appropriate record keeping can assist both the principal and the attorney in effectively managing the financial affairs. The record keeping requirements in the SIS Act for SMSF trustees may provide a sound reference for establishing new national standards for attorneys.

Recommendation

The FPA supports the introduction of national standards of record keeping requirements for enduring attorneys and enduring guardians.

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8) Representative agreements

a) Nationally consistent laws

As detailed in the discussion paper, the current state or territory based laws governing enduring powers of attorney and enduring guardianships differ depending on the jurisdiction. Each state and territory has different requirements and limitations on the role of attorneys and guardians. An attorney in one state may not have the same powers in other states. This significantly increases the complexity and cost for consumers (both principals and attorneys) as they need to consult with lawyers in each state.

Nationally consistent laws are necessary to overcome the complexity and inconsistencies of the current legislative environment governing enduring arrangements. This in itself is an extremely complex task that will take time and the political will and agreement of all governments to implement. In the meantime, the government could consider whether the harmonisation of key terms in relation to enduring arrangements, at a national level, could assist in addressing the state based inconsistencies to minimise elder abuse and provide greater clarity for consumers.

Recommendation

All Commonwealth, State and Territory governments work together to introduce nationally consistent laws to govern enduring arrangements.

The ALRC to consider the benefits of harmonising key terms in relation to enduring arrangements, at a national level, to address state based inconsistencies in the laws governing enduring arrangements.

b) Terms attorney and guardian

As discussed in the Report, the term attorney is well recognised as being associated with the legal profession and individuals who have undertaken necessary legal training. In Australia, we refer to legal practitioners as lawyers or solicitors rather than attorneys which is an American-ism. However, the application of the term to an individual through an enduring power of attorney document is often seen as misleading and given merit to the argument to change the term.

However, the FPA is concerned that the proposal to change the terms attorney and guardian as used in relation to enduring documents, to the single term of ‘representative’, removes the distinctions between the two roles. That is, the function of enduring powers of attorney is to look after financial affairs and property; whereas enduring guardianships look after the lifestyle decisions of the principal.

Requiring appointees to operate under one single term could increase the risk of misrepresentation (unintentional and intentional), overstepping the limitations of appointed responsibilities (as either attorney or guardian), misunderstanding by other parties as to the role of the appointee, and fraud.

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Further, the legal term 'authorised representative' is defined in the Corporations Act 2001 as meaning an individual who is authorised to provide financial services on behalf of a licensee[5]. The term 'representative' is widely used and understood within the financial services industry to refer to an authorised representative.

Recommendation

The FPA opposes the proposal to change the terms attorney and guardian as used in relation to enduring documents, to the single term of 'representative'.

c) Representative agreement

The ALRC proposes introducing a single standard model agreement for all enduring documents, called 'Representative Agreements' (rather than enduring documents). The existence of state and territory based legislation regarding enduring arrangements means there are different requirements and limitations on the role of attorneys and guardians. An attorney in one state may not have the same powers in other states. Hence, enduring documents vary depending on the jurisdiction in which the arrangement is made.

In many states and territories an enduring power of attorney can take effect either immediately or on loss of capacity (chosen by the principal), while the enduring guardianship can only take effect on loss of capacity. This separation respects the choice of the principal who may want immediate assistance with financial matters but not non-financial matters (guardian power) at the same time.

These differences can create difficulties for attorneys to effectively manage a principal's financial affairs when assets are established or held in multiple states. For example, representatives of banks and other financial institutions in different states tend to rely on the law and documentation required in that state or territory.

The FPA understands that a national standard model agreement could provide greater clarity and assist in overcoming such issues. However, we are concerned that the usefulness of a national standard agreement in addressing these issues may be restricted due to the roles and powers of attorneys and guardians differing in each state. For example, a national standard model agreement may be limited to only the provisions in the law that are consistent in each state and territory.

Should this proposal proceed, different documentation would also be necessary to ensure there is a clear distinction between the appointees for the financial and non-financial affairs of the principal. A delineation of such roles could be achieved if two standard model agreements were developed – a standard model agreement for attorneys; and a standard model agreement for guardians. To ensure there is clear delineation of the roles, enduring documents should not be referred to as 'Representative Agreements'.

[5] http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s761a.html

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Recommendations

Should a national model representative agreement framework be introduced, there must be two separate standard enduring agreements and a clear distinction between the documentation for the financial and non-financial affairs of the principal.

This could be done by developing a standard model agreement for attorneys, and a standard model agreement for guardians.

Enduring documents should not be referred to as 'Representative Agreements'.

Self-Managed Superannuation Funds (SMSFs)

The ALRC believe SMSFs may be the target of elder financial abuse and asks whether SMSFs should be subject to greater regulation to prevent such abuse.

When examining the adequacy of the regulatory environment of SMSFs, consideration must be given to the purpose of such structures, and the characteristics of the people who use them.

A self-managed super fund is a superannuation trust structure that provides financial remuneration to its members in retirement. The main difference between SMSFs and other super funds is that SMSF members are also the trustees of the fund. This means that the SMSF trustee has the flexibility and responsibility of making their own investment decisions. SMSFs are also used for estate planning purposes.

The nature of such structures highlights the fact that the people who establish and manage their own SMSF are highly engaged with their financial affairs and decision making. They are not forced to establish an SMSF, rather they choose to. And in doing so take on the responsibility and obligations of the SMSF. The regulatory requirements of establishing and managing an SMSF can be complex, so many trustees seek professional financial advice.

As stated in the ALRC discussion paper, a key principle of the SMSF regime is freedom from regulatory intervention. The FPA strongly believes that, given SMSF trustees are highly engaged financial decision makers, education not additional costly regulation, is key to minimising the risk of elder abuse via SMSFs in the future.

1) Corporate trustee

The ALRC has questioned whether the SIS Act should be amended to require new SMSFs to have a corporate trustee.

Depending on the individual SMSF members, the corporate trustee structure may offer some benefits over and above the individual trustee structure. In fact most professional financial planners recommend a corporate structure for clients establishing an SMSF.

The ALRC consideration of mandating a corporate trustee is intended to address potential elder abuse by an attorney acting on behalf on the principal (a fund member) who has lost mental capacity. Section 17A(3)(b)(ii) permits the legal personal representative of a member of the fund to be a trustee of the fund or a director of a body corporate trustee of the fund. Therefore, the attorney acting as the

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trustee for the principal, is responsible for meeting the SMSF trustee obligations under the SIS Act, including fiduciary obligations.

We note that under an enduring POA an attorney has a duty to act in the best interest of the principal. In this situation the attorney is acting in their personal capacity and therefore are not bound by their fiduciary obligations as an attorney. However, under the SIS Act an SMSF trustee has an obligation to act in the best interest of all members, including but not solely the principal.

How a member chooses to establish and manage the SMSF should include estate planning considerations. Ensuring adequate education of the necessity to talk about estate planning with family members and potential enduring attorneys should include an honest discussion, with a professional services provider, about the willingness, ability and competency of the attorney in taking on the role of SMSF trustee and the management of the fund. This should be done at the time of establishing the SMSF and will help the principal to determine their preference for how they would like their SMSF to be managed should they lose capacity or in the case of death of one trustee. This may be included in the trust deed for the SMSF.

The trust deed is able to include the members' preference on how their fund should be managed in the case of loss of capacity or death, which may be to request the SMSF be closed and the assets transferred to an APRA fund, or a change from individual trustees to a corporate trustee, or for their appointed attorney to become a member of the fund, for example. However, this must be the trustee's choice and not mandated in regulation.

This framework has a moral basis (rights should be exercised for the benefit of the right-holder) as well as a practical one (facilitating the orderly transfer of property). It also controls regulatory costs and respects freedom of choice, which is a key reason why individuals establish a SMSF.

The FPA does not support the concept that all SMSFs have a corporate trustee. While a corporate trustee has many advantages, the government should not unnecessarily impose addition layers of cost and complexity, to the detriment of all SMSF members.

Recommendation

The FPA opposes mandating a corporate trustee structure in the law. The type of SMSF structure an individual establishes must remain a choice for that individual.

2) Prescribed arrangements when trustee loses capacity

The FPA received a diverse range of views from our members on prescribed arrangements for loss of capacity.

A requirement in the law for a succession plan to be included in the SMSF trust deed in case of incapacity or death of a trustee could address some of the risks of potential financial abuse while adhering to the principle of 'freedom from intervention'. However, requiring SMSF trustees to develop the individual rules of the succession plan may increase costs of establishing the SMSF. Developing a set of general individual succession plan rules for when a trustee or director of the corporate trustee has lost legal capacity, to be used in the event that the trustee has not themselves put in place an effective succession plan, could also result in the management of the fund that does not meet the wishes and preferences of the principal or is not in the best interest of all members of the SMSF.

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Estate planning education and awareness offers a more appropriate pre-emptive approach to encourage all parties including principals, the advisers assisting them to establish POAs and SMSF, and proposed attorneys, to have an open conversation about the role of an SMSF trustee in managing the SMSF and the competency of the proposed attorney, prior to the enduring arrangements and SMSF being established.

Recommendation

The FPA supports the ALRC to explore the appropriateness of a SIS provision that provides an avenue where an individual trustee or director of a corporate trustee loses capacity without effective enduring documentation. Any such provision should not override particular terms of the trust deed or particular terms in constitution of the corporate trustee.

(This should not be construed as FPA support for such a provision.)

3) Additional compliance obligations for non-member trustees (et.al)

The ALRC has questioned whether the SIS Act should impose additional compliance obligations on trustees and directors when they are not a member of the fund. The intent is to address potential elder abuse by an attorney acting on behalf of the principal (a fund member) who has lost mental capacity.

As discussed above, the decision on how a SMSF is managed and who its trustees are, should be a choice for SMSF members. Proper and informed estate planning will assist the SMSF members to determine the appropriate succession plan to meet their needs, wishes and preferences.

Recommendation

The FPA opposes amendments to the SIS Act to impose additional compliance obligations on trustees and directors when they are not a member of the fund.

4) Superannuation Complaints Tribunal

The FPA received a diverse range of views from our members on SMSF access to the Superannuation Complaints Tribunal (SCT).

The most common SMSF dispute when an individual member has died or lost capacity, involves the spouse of a second marriage trying to disinherit children from the first marriage, particularly where the spouse of the second marriage is a trustee and has discretion of the fund. Such disputes are outside the legal expertise of the family court and state and territory tribunals.

Currently the only redress available in SMSF disputes is via expensive court litigation. Access to the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving SMSFs could provide a more efficient and cost effective pathway for redress and protection outside of the court system.

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However, SMSF trustees sign a declaration that they understand that they do not have access to such mechanisms when first joining a SMSF, and are appropriately involved in the decision making framework of the SMSF.

The SCT is an external dispute resolution scheme funded by its members – that is, APRA regulated superannuation funds pay for the scheme so it can receive complaints from fund members.

It is unclear who would pay for the more than 500,000 SMSFs in Australia to have access to the SCT for complaints between trustees. We also question whether the SCT has the capacity to handle the addition of SMSF complaints.

Carving out one type of complaint as suggested, that is complaints involving legal personal representatives of trustees acting under an enduring power of attorney, will introduce significant complexity. It will also open the door for all disagreements between SMSF trustees to access the SCT, which is counter to the principles of the SMSF regime, and will significantly strain the resources of the SCT.

Prior to proceeding with such a recommendation, a proper inquiry into SMSF complaints should be undertaken. This must consider the principles of the SMSF regime; the type, complexity and number of SMSF complaints/disputes; the role, resourcing and capacity of the SCT; and potential costing and funding arrangements for SMSF complaints to be received by the SCT.

Recommendation

Prior to proceeding with a recommendation that SMSF complaints be given access to the Superannuation Complaints Tribunal, a proper inquiry into SMSF complaints must be undertaken.

5) SMSF advice and documentation

Self-Managed Super Funds (SMSFs) are a regulated financial product under the s763A of the Corporations Act. The provision of advice on financial products, including SMSFs, is restricted under s766B of the Corporations Act. Financial planners provide financial advice on SMSFs to retail clients under the necessary Australian Financial Services License (AFSL). Accountants must hold a minimum of a limited AFSL to provide financial advice on SMSFs, including to recommend a client establish a SMSF.

People usually establish SMSFs as it gives them the freedom to make their own investment decisions. However, SMSFs are also used for estate planning reasons. Financial planners have expertise in working with clients to develop appropriate strategies to achieve their client's retirement and estate planning goals. This extends to identifying appropriate provisions for inclusion in the trust deed to ensure it sets out what the client wants the SMSF to do.

However, there is a multi-faceted approach to establishing and documenting a SMSF that may involve a financial planner, tax agent, and/or a lawyer. Most individuals would consider a trust deed too complicated to complete without professional assistance.

Many professionals, including lawyers, use standardised trust deeds, either over the counter or developed within the law firm. These standardised trust deeds are usually then added to so as to set

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out what the client wants the SMSF to do, and must meet the SIS Act requirements for SMSF documentation.

Placing additional requirements on who may provide advice on, and prepare documentation for, the establishment of SMSFs runs counter the principle of 'freedom from regulatory intervention' for SMSFs, and ignores the current regulatory requirements for SMSFs and financial advice.

Recommendation

The FPA opposes the introduction of additional requirements on who may provide advice on, and prepare documentation for, the establishment of SMSFs, beyond the existing obligations in the Corporations Act and SIS Act.

Banks

Information Authorities (IA)

The FPA notes the important role of IA in the banking and superannuation system.

The FPA does not support increasing / introducing witnessing requirements for these information gathering documents where the information authority is provided to a registered member of the financial advice profession. Professional financial planners are already subject to numerous ASIC, ATO, AUSTRAC and TPB requirements, in addition to licensee and professional body obligations.

Adding an extra layer of administrative burden would do nothing to limit financial abuse. The FPA is not familiar with any reported abuse of such documents by advisers and they form part of important daily transactions to help educate and empower the financial literacy of advice clients, many whom are over the age of 60.

Recommendation

The FPA opposes increasing / introducing witnessing requirements for information authorities where the information authority is provided to a financial planner registered on the ASIC Financial Adviser Register.

Wills

1) Guidelines for legal practitioners

The ALRC proposes that the Law Council of Australia, together with state and territory law societies, should review the 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;

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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.

Enhanced education and awareness of professional service providers in identifying potential elder abuse, potential undue influence or possible mental incapacity, would have significant impact on addressing elder abuse and enhance the discharge of their professional duty.

The Law Society of NSW member guidance, *When a client's mental capacity is in doubt*, may offer useful information for professional service providers assisting clients with estate planning matters.

However, the guideline should consider going a step further to ensure legal practitioners have the relevant education, training and experience to provide estate planning advice. It is our understanding that estate planning is no longer taught as a core component of one's legal training. Anecdotal evidence suggests that inappropriate estate planning advice has been provided to clients by generalist lawyers who have not had the requisite training or experience.

At a minimum, estate planning training should be promoted via continued professional development.

Recommendation

The FPA supports the proposal that the Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents.

The guidelines for legal practitioners should require relevant education, training and experience for legal practitioners providing estate planning advice.

2) Death benefit nominations

a) Witnessing requirements

Fifty-three per cent of Australians who currently seek financial advice are over 50 years of age. Financial planners provide advice based on their client's needs and circumstance which commonly covers superannuation and estate planning matters including binding death benefit nominations.

Estate planning and superannuation are core subject areas in financial planning degrees and the Certified Financial Planner® Certification Program[6]. Estate planning is not a core requirement of law degrees or Continuing Professional Development programs for legal practitioners.

[6] CFP® professionals have demonstrated their commitment to excellence in financial planning by meeting initial and ongoing competency, ethics and practice standards and agreeing to abide by professional conduct rules and ongoing competency and practice requirements. The global standards and certification requirements for the CFP program are based on empirical research of the abilities, professional skills and knowledge needed to practice financial planning. The Financial Planning Standards Board Ltd. (FPSB) and its network of member organisations administer, the CFP certification program globally in 26 countries and territories, with the number of CFP professionals over 170,000 globally.

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While a person is permitted to make a binding death benefit nomination without involving a solicitor, Australians who seek financial advice usually establish binding death benefit arrangements with the assistance of their professional financial planner. Making binding death benefit nominations should not require the involvement and expense of a solicitor. This will drive up the cost and deter people from establishing such arrangements, leaving the distribution of Australians' super at the discretion of the fund trustee.

The witnessing requirements for making binding death benefit nominations are currently more stringent than those for wills as the two witnesses are not permitted to be beneficiaries of the death benefit nomination. However, a witness to a will may in certain circumstances be a beneficiary of the will. The witness requirements for wills are also set in state and territory legislation and vary in each jurisdiction. Death benefit nominations are governed by the provisions of the SIS Act.

Recommendation

The FPA opposes changing the witnessing requirements for binding death benefit nominations and replacing them with the witnessing requirements for wills.

b) Attorney witness

There is potential for significant conflicts to arise when an enduring attorney establishes or changes a binding death benefit nomination on behalf of the principal, particularly when the attorney is a family member. The FPA supports the proposal to prohibit an enduring power of attorney from making binding death benefit nomination on behalf of a member.

However, there may be circumstances that warrant this to occur. For example, if the principal had not disclosed to his children the existence of a sibling, and the family wanted to treat the newly found child equally. Exceptions to the prohibition should apply under a court order in certain circumstances.

Recommendation

The FPA supports the proposal to prohibit an enduring power of attorney from making binding death benefit nomination on behalf of a member. Exceptions to the prohibition should apply under a court order in certain circumstances.

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